Nebraska Law Review

Volume 101 | Issue 3 Article 4

6-2023

The Wrong, the Wronged, and the Wrongfully Dead: Deodand Law as a Practice of Absolution

Trayce Hockstad
University of Alabama

Trayce Hockstad*

The Wrong, the Wronged, and the Wrongfully Dead: Deodand Law as a Practice of Absolution

TABLE OF CONTENTS

* Trayce Hockstad is an attorney at the University of Alabama. For this piece, I have to thank Dr. Matthew Lockwood, who adopted me sight unseen during a pandemic and whose insight and guidance on this unusual project has been invaluable. Professor Craig Stern, who indulged and fostered my interest in this subject years ago. And Kenny Ching, who told me to write in the first place.

I. INTRODUCTION

We call legal regimes of the world "justice systems" because they aim to provide us with just that—justice. As it turns out, a significant part of achieving justice involves finding someone or something to blame for the wrongs we endure. How successful the law is in ascertaining perpetrators and doling out just desserts is a complicated question. But on March 27, 1535, one such jury in Nottinghamshire, England was able to meet that extraordinary burden by carefully identifying the particular hay in a haystack that shifted and crushed Anthony Wylde.[1] The offending hay, having killed the deceased, was appraised, and its value was forfeited to the state to be used for charitable purposes. It was, after all, a deodand.

A statute defining deodand procedure was enacted in 1280, but evidence suggests that the practice was already well-established.[2] The word "deodand" comes from *deo dandum*, meaning "to be given to God."[3] In Medieval and Early Modern England, when an accidental death or suicide occurred by means of an animal or object, that item or its equivalent monetary value was turned over to the king. *Corpus Juris* recalls the practice as

> In English law, any personal chattel whatever, animate or inanimate, which, becoming the immediate instrument by which the death of a human creature was caused, was forfeited to the king, for sale and a distribution of the proceeds in alms to the poor by his high almoner, for the appeasing of God's wrath.[4]

Historians generally consider deodands as the Crown's attempt to confiscate private property or as a practice of primitive retributivism toward animals and inanimate objects involved in the deaths of human beings. These interpretations take the law of deodand at its confusing, uncomfortable face value and limit its societal contributions to government appropriation and misplaced vengeance. Both perspectives inherently acknowledge deodand law as a social and legal

1. *A Calendar of Nottinghamshire Coroners' Inquests*, 25 THORONTON SOC'Y 140 (R.F. Hunnisett, ed., 1969) [hereinafter *Nottinghamshire Coroners' Inquests*].
2. J. J. Finkelstein, *The Ox That Gored*, 71 TRANSACTIONS AM. PHIL. SOC'Y no. 2, 1, 68 (1981) [hereinafter *The Ox That Gored*].
3. Anna Pervukhin, *Deodands: A Study in the Creation of Common Law Rules*, 47 AM. J. LEGAL HIST. 237 (July 2005).
4. *Deodand*, 18 C.J. 489 (1919).

response to a sense of wrong that enters the community through unnatural death, but neither accurately portrays how the practice operated as a source of absolution in a pre-tort world.

For roughly 750 years, English communities conducted systematic legal proceedings for things like horses, wells, and ropes involved in accidental deaths and suicides before the nation formally abolished the practice in a solitary statute in 1846. The abruptness of the timeline does not suggest that the Crown unexpectedly came into new sources of revenue or that common law institutions suddenly grew out of an inclination for revenge. Rather, between the thirteenth and eighteenth centuries, the legal reaction to death in England changed. During this time, the concept of unnatural death (by homicide or misfortune) transformed from a mostly private to a mostly public affair.[5] As that change manifested, so did society's evolving ideas about culpability, guilt, and absolution in the law.

Over time, deodand law facilitated the evolution of the private wrongful death suit. But before the law reached that point, communities lacked a unique, formal process for resolution after accidental deaths. With no criminal to punish and no right to victim compensation, those grieving in the wake of untimely deaths had no procedural way to release responsibility, restitute loss, or reverse disorder, except through deodands. Deodand law was not the Crown's construct for appropriating private property, nor was it misguided, primitive retributivism. At least, it was not *only* those things. A careful examination of the roots of the tradition, how the law was formulated to operate, and its legal end, reveals that it was predominantly a restorative measure intended to: (1) harmonize a discordant relationship between the public and private nature of unnatural deaths, and (2) provide the affected community with what it most needed: absolution. Understanding deodands as a method of absolution not only does justice to the law and those who practiced it, but it also provides us with insight into early modern social attitudes about blame, guilt, and resolution.

5. From around the time of the Norman Conquest, the killing of human beings ceased to be viewed as a private wrong to be resolved by surviving family members of the victim and took on the characteristics of what we would today envision of a crime—something to be resolved publicly by the state in its official capacity at law. Non-felonious homicides, such as negligent but unintentional killings, as well as accidental deaths, were included in this transition alongside intentional homicide. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death, and the Western Notion of Sovereignty*, 46 TEMP. L. Q. 169, 196 (1973) [hereinafter *The Goring Ox*].

A. Definitions

At the outset of this discussion, it is imperative that we define what we mean with the use of several crucial terms that connote varying legal, religious, and commonplace ideas. First, we must explore what is meant by "absolution." Colloquially, absolution means a formal release from guilt or consequences. Modern law dictionaries follow suit in considering absolution the dismissal of a charge, declaration of innocence, or remission of penalties.[6] Bouvier's version includes in the legal history of the term, that it was commonly synonymous with criminal acquittal.[7] The entry notes a relationship between absolution and forgiveness, but argues that forgiveness is a renunciation of an *act* done that gave rise to a duty, and absolution is a renunciation of the *duty*.[8] This distinction may be helpful as we consider the kinds of "acts" the law usually punishes, and how the absence of those acts in accidental deaths creates an atmosphere of frustration for the surviving community. Finally, it is, of course, important to consider the religious aspect of the practice of absolution. During the sacrament of confession, priests administer absolution for the penitent as an ecclesiastical declaration of the forgiveness of sins.

The scope of this Article offers no comment on these variations of ideas present in the word "absolution," except to acknowledge them and, in some degree, to incorporate them all. Instead, I will rely on the combination of these sentiments to argue that the practice of deodand law fits better, both socially and legally, into a role of absolution, rather than in a retributive or appropriative one. In short, I use "absolution" to describe what I argue was a reconciliatory, restorative goal for the communal forfeiting of deodands. In the wake of a perceived sense of wrongness in unnatural deaths, an effort was made to appease wronged parties and ensure that punishments and consequences for the wrong might be remitted. Deodand forfeitures, as instruments of the law, were, primarily, neither punitive nor pilfering as they have often been described.

The second concept that must be contextualized is the scope of what we mean by "unnatural death." For the purposes of this project, we will consider accidental, premature deaths and intentional suicides. Other types of homicide other than so-called "self-homicides" are generally excluded, as are premature deaths from disease, non-induced starvation, and accidents not involving an object, animal, or environmental source (i.e., a tree) ending the life of a human being.[9]

---

6. *Absolution*, COLLINS DICTIONARY OF LAW (3rd ed. 2006).
7. *Absolve, Absolution*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY (Desk ed. 2012).
8. *Id.*
9. Deodands were, sometimes, part of legal proceedings for intentional homicides. *The Goring Ox*, *supra* note 5, at 196–97 ("In all kinds of unnatural death, includ-

The analysis, therefore, will not focus on the presence or absence of "intent" in a killing, but rather the sense of upheaval from *any* premature death involving a deodand. While there may be nuances and disputes about the causes of death in individual cases, these types of incidents are where we find the law operating as intended.

Lastly, there are a number of ways in which we could describe what I argue to be the purpose of deodand practice. This Article will sometimes call that motive "reconciliatory," "restorative," "remedial," or even "restitutionary." However, making a point about the legal use of the two final terms listed is crucial. I do not argue that deodands were a practice of "restitution" as we would understand the term today or "making whole" wronged individuals through the payment of money damages. I will argue that the eventual result of the law's metamorphosis into the wrongful death suit is evidence of similar intent and motive in deodand practice, but deodands were a steppingstone in that path. Therefore, I use these terms outside of their strict legal definitions and along the lines of their commonplace connection to acts of restoration.

B. Roots of the Deodand

Legal historians have claimed several potential sources of inspiration for deodand laws. Unsurprisingly, some suggest that the inclination to punish animals for slaying human beings springs from Judeo-Christian tradition,[10] specifically, Biblical references to the Noahic Covenant[11] and murderous oxen.[12] Proponents of this theory point to the fact that the Laws of Alfred the Great (one of the earliest written

---

ing intentional homicide, misadventure, suicide, and murder by an unapprehended felon, the Crown, until 1846, exacted – or was by law empowered to exact – a forfeiture."). Hyde traces this expanded scope to the classical era, noting that the Athenians held, in the Prytaneum, trials of murder cases in which the murderer was unknown or could not be found, an inanimate thing had caused the death, or an animal had been the cause of death. Walter W. Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696 (1916). This Article restricts its scope because, I argue, deodands can be best understood in cases without a superior culprit on whom to enact vengeance. They were not, in non-homicidal cases, incidental to a greater legal matter. Rather, they often stood alone as the prime object through which the community interacted with perceived malevolence. It is in this isolated context that we are able to observe, without interference, the scope of legal and social reaction to nonhumans associated with unnatural death, and how those nonhumans were afforded process in the legal world.

10. Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. ENVTL. AFFS. L. REV. 471, 513 (1996). Wise specifically rejects the theory that Saxon noxal surrender was a precursor to deodand practice.
11. *Genesis* 9:5–7.
12. *Exodus* 21:28–29 ("When an ox gores a man or a woman to death, the ox shall be stoned, and its flesh shall not be eaten; but the owner of the ox shall be clear. But if the ox tended to thrust with its horn in times past, and it has been made known

Anglo-Saxon codes from circa 900 A.D.) are prefaced by Exodus 21 and 22.[13] Even in the twentieth century, the Supreme Court of the United States cited these scriptures as justification for the adoption of deodand practice in American common law.[14] While it may be true that ancient Judaic tribes incorporated animals into their written legal codes, they were by no means unique in that.[15] Similar edicts can be found in the Laws of Eshnunna and the Laws of Hammurabi,[16] suggesting, perhaps, that legal regulation of human conflict with nature was a common, communal goal that transcended religion and ethnicity.[17]

In fact, one of the most prolific commenters on deodands, J. J. Finkelstein, rejected the conclusion that the practice was based entirely in Biblical tradition. Finkelstein pointed out that nowhere in the Bible was there a single instance of an inanimate object that had been the direct or indirect cause of a person's death being forfeited.[18] Furthermore, he argued that oxen that gored humans to death were not offered to God as religious sacrifices.[19] Instead, they were stoned in the manner of traitors who had committed "the gravest of capital crimes" in turning on their masters in violation of a "divinely ordained hierarchy of creation."[20] Finkelstein notes the commonality of purpose between deodands and Biblical treatment of murderous animals in that both attempt to remove a sense of "pollution of the earthly community in a religious sense," but he concludes that these ancient Near East traditions are only partially present in deodand practice, if at all.[21]

---

to his owner, and he has not kept it confide, so that it has killed a man or a woman, the ox shall be stoned and its owner shall be put to death.").

13. Wise, *supra* note 10, at 514.
14. J.W. Goldsmith, Jr.-Grant Co. v. United States, 254 U.S. 505, 511 (1921).
15. Wise, *supra* note 10 at 476–79 (noting that judicial procedures for resolving disputes may have predated writing, and the earliest written codes, including the Lipit-Ishtar Lawcode and the Laws of Ur-Nammu from approximately 2100 B.C., contain provisions addressing goats, cattle, sheep, and wool).
16. *The Ox That Gored*, *supra* note 2, at 20.
17. *See also*, Trayce Hockstad, *Rats and Trees Need Lawyers Too: Community Responsibility in Deodand Practice and Modern Environmentalism*, 18 VT. J. ENV'T. L. 105 (2016) (discussing the roots of deodand and its relationship to other legal codes for nonhumans).
18. *The Goring Ox*, *supra* note 5, at 180.
19. Other scholars argue that the fact that a goring ox was killed and not consumed by the community suggests these animals *were* religious sacrifices, and deodands are distinguished by requiring someone official to be benefiting from the value of the agent causing death. Leonard Levy, *Deodands: Origins of Civil Forfeiture*, *in* A LICENSE TO STEAL: THE FORFEITURE OF PROPERTY 1–21 (Chapel Hill: The University of North Carolina Press, 1996).
20. *The Goring Ox*, *supra* note 5, at 181. Keith Thomas reiterates the prevalence of this same hierarchical interpretation of humanity and creation in early modern England. KEITH THOMAS, MAN AND THE NATURAL WORLD: CHANGING ATTITUDES IN ENGLAND 1500–1800, 18 (1983).
21. *The Goring Ox*, *supra* note 5, at 181.

Another frequently cited theory for the development of deodands is the ancient Anglo-Saxon practice of "noxal surrender." Pollock and Maitland decisively wrote on the deodand's roots in this ritual, calling the original deodand the "bane," which is to say the "slayer."[22] The noxal surrender was the process in which an instrument that caused death, without any malicious intent on the part of the owner or user, was turned over to the victim's kin, not as compensation for the death, but as a ransom to prevent revenge killings and further bloodshed.[23] These customs predated the Christianization of Western Europe and were common across cultural groups. Scottish law included a similar procedure for recovery in intentional killings known as "assythment."[24] Teutonic law included a "wergild,"[25] sometimes referred to as a "man price," for those who committed manslaughter and needed to buy off the vengeance of surviving kin.[26] These laws allowing the surviving family members of the wrongfully dead to seek compensation from the offending party are usually considered to be formalized relics of the feud.[27] Rather than persist in the endless cycle of violence that the blood feud brought, the law, with respect for custom in hand, began to create new avenues for remediation of wrongs.

At first glance, it seems very likely that the deodand did develop from these existing trends in Anglo-Saxon law and custom. The trouble is, however, that noxal surrenders always occurred between the offending party and the victim's family, not the state. Deodands, conversely, were always forfeited to the Crown. Pollock and Maitland argued that in the thirteenth century, when offending objects and animals began turning over to the king instead of to the victim's family, the "claim of a soul which has been hurried out of this world outweigh[ed] the claim of the dead man's kinsfolk."[28] Although the recipient of the forfeited item changed, the practice was still noxal surrender, directed now toward punishing the item in question rather than negotiating with surviving family members. This view suggests the influence of a strong "psychical element in guilt and innocence."[29] Pollock and Maitland maintain that even the introduction of Christi-

22. FREDERICK POLLOCK, & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, 473–74 (C.J. Clay & Sons, 2nd ed. 1898). The bane (also "*bana*") would go to the kinsmen of the slain, the owner having "purchased his peace by a surrender of the noxal thing." *Id.*
23. *The Goring Ox*, *supra* note 5, at 181.
24. Donal Nolan, *The Fatal Accidents Act 1846*, *in* TORT LAW AND THE LEGISLATURE: COMMON LAW, STATUTE AND THE DYNAMICS OF LEGAL CHANGE 131–53, 134 (2013).
25. Sometimes "wergeld."
26. EDWARD PAYSON EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS 11 (William Heinemann, 1906); K.J. KESSELRING, MAKING MURDER PUBLIC: HOMICIDE IN EARLY MODERN ENGLAND, 1480–1680, at 20 (2019).
27. Nolan, *supra* note 24, at 133–34.
28. POLLOCK & MAITLAND, *supra* note 22, at 474.
29. *Id.*

anity to the law could not entirely suppress an instinct to "kick . . . the chair over which [man] has stumbled."[30]

Finkelstein disagreed, however, that deodands were simply a new take on the practice of noxal surrender. His conviction rose largely from a fact Pollock and Maitland had little trouble glossing over: that the benefitting party in each scenario was different. While Finkelstein did acknowledge that the institutions were probably related, he maintained that the change between the family of the slain and the Crown receiving the forfeited item was significance of something more.[31] Finkelstein argues that, in actuality, the state began to assume the role of vicar in transcendent concerns and values.[32] Deodands, he stated, were a way that the Crown annexed representation of divine authority to which the corporate community believed itself to be answerable. Of course, what naturally followed from this political move was the ability to profit financially. In sum, Finkelstein concluded that deodands were both a source of "religious expiation" and amercements made by the Crown "with the aim of increasing its revenues."[33]

In some ways, trying to pin down the exact roots of deodand law is a thankless task. We likely will never know precisely how the laws and customs of various cultures intermingled to form this tiny piece of English common law. However, a few points are important for us to remember as we examine the arguments that have been made about the purpose of these laws. It is undisputed that, for many years prior to the thirteenth century, Anglo-Saxon laws included procedures for turning over objects and animals involved in accidental deaths of human beings. These items were surrendered to the victim's families, not as compensation for life lost, but to ward off revenge killings. During the thirteenth century, the institution of the deodand changed this custom. Items and animals involved in accidental deaths of humans were forfeited to the Crown. This change in recipient (most would say, "beneficiary"), caused many to accept that the deodand was (1) a money grab by the Crown which occurred at the expense of those suffering the real loss—the victim's family, (2) an attempt to retributively punish criminal nonhumans, or (3) a combination of both. However, all three views ignore the most important simultaneous

30. *Id.*

31. *The Ox that Gored, supra* note 2, at 75. Tom Lambert agrees, noting that "killing someone was a very serious offence indeed in Anglo-Saxon England, but it was an offence primarily against the victim and his family rather than against the king." T.B. Lambert, *Theft Homicide, and Crime in Late Anglo-Saxon Law*, 214 PAST & PRESENT 3, 9 (2012).

32. *The Goring Ox*, *supra* note 5, at 183.

33. *Id.* Hunnisett agrees. He writes that a deodand was "originally dedicated to the Church so that its sin might be expiated, but by the early Middle Ages it was forfeited to the king and thereafter its value, as estimated by the coroner's jury." *Nottinghamshire Coroners' Inquests*, *supra* note 1, at ix.

change taking place in the legal sphere—the transition of homicide from a private to a public wrong. To understand how these changes aligned to create this awkward moment of tension in the working out of legal solutions to social problems, we must examine how early modern England understood what it meant to be "wrong."

II. THE WRONG: UNDERSTANDING GUILT AND RESPONSIBILITY IN CASES OF UNNATURAL DEATH

A. Guilty?

1. Distinguishing Deodands

While it is true that records from many early cultures confirm the inclusion of legal processes for nonhuman subjects, the nature and complexity of these customs varies extraordinarily. Ancient Near Eastern legal codes contained provisions addressing animal offenders, but most of these were brief and penal rather than procedural.[34] By the Middle Ages and continuing into the Early Modern Period, however, customs addressing nonhuman litigants had developed significantly into a range of highly technical, often expensive legal practices. A complex trial with counsel for the defense took place in 1474 in Basel, Switzerland for a rooster that laid an egg.[35] In 1522, French jurist Bartholomew Chassenée made a series of at least three appearances in court on behalf of the rats in the village of Autun, who had been summoned under threat of excommunication to answer for devouring the barley crop of the province.[36] In 1591, a Russian tribunal banished a bell to Siberia for ringing in announcement of a political assassination.[37] As recently as 1888, idols and corpses were tried and sentenced to decapitation in China.[38] In American tradition, ships at sea robbed of their cargo by pirates were condemned and sold without the owners' consent because the proceedings were "against the vessel for an offense committed by the vessel."[39]

---

34. *The Ox That Gored*, *supra* note 2, at 20.
35. Hyde, *supra* note 9, at 708. The defendant rooster had a lawyer who, after acknowledging that such eggs were commonly used in sorcerer potions and malevolent magic, argued that the laying of the egg had been unpremeditated and involuntary. The prosecutor replied that the act still implied diabolical interaction and that precedent required the animal to be punished. The rooster was condemned and burned at the stake in front of a crowd.
36. EVANS, *supra* note 26, at 18–20.
37. *Id.* at 175 ("After a long period of solitary confinement it was partially purged of its iniquity . . . and suspended in the tower of a church in the Siberian capital; but not until 1892 was it fully pardoned and restored to its original place in Uglich.")
38. *Id.* at 110. Evans writes, "the cadaver of a salt-smuggler . . . was brought before the criminal court in Shanghai and condemned to be beheaded. This sentence was carried out by the proper officers on the place of execution outside of the west gate of the city." *Id.*
39. United States v. Cargo of the Brig Malek Adhel, 43 U.S. 210, 234 (1844).

With such an array of legal proceedings, it is easy to conflate traditions and customs across time and space. In fact, there are obvious characteristics of deodand practice that enable us to distinguish it from other types of animal trials that occurred in contemporary parts of Europe. When historians consider "types" of trials for nonhuman parties, they usually separate them into secular and ecclesiastical procedures and generally focus on animal trials.[40] For purposes of this Article, it is not necessarily important whether a deodand was an animal or an object, except to note that the types of trials we find across the rest of Europe seemed not to occur very often for non-living things.[41]

In many countries across medieval Europe, when a specific, identifiable animal (very often a pig) was involved in the death of a human being, a secular trial often occurred for the beast in question.[42] These trials contained many elements similar to the modern trial. Suspected animals were often imprisoned prior to their court dates and, if they were convicted upon witness testimony or circumstantial evidence, sentenced to death.[43] The culprits were often hung and sometimes were dressed in human clothes before their deaths.[44] Ecclesiastical trials, though criminal, occurred when members of a community came together to sue usually hordes or infestations of pestilent animals before the episcopal court.[45] These proceedings often occurred in times when famine or disease was attributed to natural scourges, and the suffering community sought to have the offenders excommunicated.[46]

For this Article, we will not focus on the differences between these types of trials, but rather how they are similar to each other and whether they are distinct from deodand practice.[47] The above-

40. Esther Cohen, *Law, Folklore and Animal Lore*, 110 PAST & PRESENT 6, 10 (1986).
41. This fact is important in understanding that anthropomorphization did not play a part in deodand procedure. Rather, the process is dehumanizing in nature.
42. *The Ox that Gored*, *supra* note 2, at 67. Finkelstein notes that pigs were, by far, the largest number of reported trials of domestic animals from the earliest recorded trial date in 1266 until the end of the sixteenth century.
43. EVANS, *supra* note 26, at 138–45.
44. *Id.* at 140, 195.
45. Cohen, *supra* note 40, at 13.
46. *Id.* In 1338, a complaint was filed in the ecclesiastical court at Kaltern, Italy against a swarm of locusts that were devouring crops and laying eggs in the ground, likely to cause continuous agricultural devastation. In a rather lengthy and dramatic speech, the locusts' attorney argued that the insects were only acting as God intended them to behave, and such conduct could not be curtailed simply because it was offensive to man. Similar arguments were made in defense of weevils, moles, slugs, and a wide variety of unsavory members of the environment which were considered a public nuisance. *See also*, EVANS, *supra* note 26, at 38–49, 93–100 (describing the insects destruction and prosecution).
47. A lengthy philosophical series of disagreements occurred among Finkelstein, Evans, and Karl von Amira, a German jurist who quibbled extensively with the conflation of secular and ecclesiastical trials of animals and whether either were

described trials proceeded remarkably similar to contemporary criminal trials for human beings. Counsel for the prosecution and defense were often present, with the opportunity to question witnesses and put evidence before the judge or jury.[48] Judges and juries made findings of fact and law upon the evidence presented and then pronounced their verdicts of guilt or innocence for the offending party.[49]

Finkelstein notes what he calls the "total absence" in British records of trials or punishment of domestic animals.[50] He writes that the "line of thought which on the Continent led to the actual punishment of animals . . . expressed itself in the institution of the deodands" in England.[51] In doing so, Finkelstein does connect the two traditions by some common sentiment. However, he rightly argues that what sets deodands apart from other types of contemporary procedures is the notion of "objective liability."[52] In other words, the association of the object with the disastrous event is enough for it to become a deodand. There is no question of guilt or innocence that is answered through the legal process. The determinations of fact made by coroner's juries concerning deodands were (1) association with the unnatural death, and (2) valuation. These two elements correspond with the only legally relevant decisions, and in no way connect to the elements of scienter already present at this point in time in the common law system.

The theory of objective liability gains clarity when we understand the actual procedure for deodands. The process for declaring an animal or an object a deodand did not occur in a courtroom. Rather, it was decided as the result of an inquest commenced within a few days of the event of an unnatural death. Contrary to other European traditions, inquests in England were popular procedures rather than professional ones.[53] The inquest was supervised by a coroner and conducted by a jury of twelve men in the vicinity in which the death occurred.[54] Inquests were very public, social, and communal affairs in which the jurors went to view the body of the deceased usually where

---

ideologically "similar" to contemporary human trials. As the examination of the current exercise is largely procedural, we do not need to delve into the issue. However, the generalizations this Article makes on tangential points that are taken at face value are for the sake of brevity rather than an assumption of veracity.

48. Cohen, *supra* note 40, at 13.

49. *See* Hyde, *supra* note 9, at 729–30.

50. He questions the reliability of the one case reported by Evans of a trial of a dog in 1771. *See* EVANS, *supra* note 26, at 333.

51. *The Ox that Gored*, *supra* note 2, at 68.

52. *Id.* at 77.

53. KESSELRING, *supra* note 26, at 40.

54. Unlike with trial juries, no property qualification was required to serve on inquest juries. *Id.* at 46.

it had been found— in a bedroom, on a riverbank, or at the bottom of a well.[55]

Inquest juries were thought to serve the "public justice" in the event of a suicide or accidental death—a notion substantially distinct from the existing understanding of the king's justice or the King's Peace.[56] These juries had extraordinary power in how they reached a decision concerning the nature of a premature death. They had the power to rule a suicide the result of natural causes, misadventure, or find that the deceased was seized by a moment of insanity prior to the killing in order to preserve the family's possessions from forfeiture.[57] The jury also was responsible for deciding if any item had been involved in the death of the human. If so, the item was to be a deodand. The jury was responsible for appraising its value, and the coroner was charged with delivering the item (or its value in money) to the king.[58] After the jury reached its decision concerning the nature of death and whether any item involved in the death was a deodand, the coroner was responsible for drafting the conclusions in an "inquisition."[59]

Although inquest juries were responsible for considering factual evidence, including witness testimony,[60] the procedure was drastically different than what occurred between barristers and litigants in a courtroom. The fact-finding enterprise was a highly informal, open, and fluid process.[61] There was no recognized mechanism to challenge the men who sat on coroner's juries, unlike trial jurors.[62] Kesselring argues that "the determination that a death merited investigation depended upon the insight and initiative of family, neighbours, or bystanders," and that "[t]his public responsibility was expected not of a particular official, but shared by the community more generally."[63] This notion is contrasted sharply by the state's approach to deviants who violated the King's Peace.[64]

The ways in which the inquest procedure in England differed from secular and ecclesiastical trials across Europe has been either missed or ignored by several prominent legal historians. Walter Hyde not only assumed that secular animal trials were common in England

55. *Id.* at 50–51.
56. *Id.* at 40.
57. *Id.* at 58.
58. Edmund Burke, *Deodand: A Legal Antiquity that May Still Exist*, 8 CHI.-KENT L. REV. 15, 25 (1929).
59. *Id.*
60. Cassie Watson, *Death's Gatekeepers: The Victorian Coroner's Officer*, LEGAL HISTORY MISCELLANY (July 30, 2016), https://legalhistorymiscellany.com/2016/07/30/deaths-gatekeepers-the-victorian-coroners-officer/ [https://perma.cc/6CMV-BFES].
61. KESSELRING, *supra* note 26, at 50–52.
62. *Id.* at 57.
63. *Id.* at 52.
64. *See infra* section II.B.

based on Shakespeare,[65] but also conflated deodand proceedings with what he called the "personification" that has had "much to do with all primitive legislation."[66] Evans writes of animal trials as attempts to satisfy justice "with certain crude conceptions of retribution" and argues that deodands were forfeited to the king for the same reason.[67] The truth is that the decision to condemn a piece of property to the state for its association with the death of a human occurred in a fact-finding process more similar to a modern grand jury proceeding than a trial on the merits of a criminal charge. Deodands were not defendants. They had no right to representation and no process for sentencing. In other words, culpability had no real legal place in the procedure. The law made not even the slightest pretense of a judgement toward the deodand. What considerations and attitudes were present in the minds of the jurors, themselves, is much harder to say. There is simply no evidence that English law purported to address the wrongdoing or guilt of a deodand.

2. Interpreting the Terminology of Catastrophe

Historians who have criticized deodand practice for its tendency to anthropomorphize nonhuman things for retributive purposes often quote Early Modern legal writers on "moving to the death." Blackstone's *Commentaries* explain that deodands are those things that "have moved to the death of the party."[68] His analysis further states that when a thing not in motion is the occasion of death, only the part which is the immediate cause of death is forfeited. For example, if a man fell by climbing up the wheel of the cart, only the wheel is a deodand and not the whole cart.[69] Bracton differentiates "movable things" from stationary things, stating that the former only may provide the "occasio[n]" of death.[70] Coke explains that when "any moveable thing inanimate or beast animate do move to or cause the untimely

65. Hyde, *supra* note 9, at 709 (quoting a reference made in *The Merchant of Venice* concerning a wolf that was hanged for human slaughter). *But See The Ox that Gored*, *supra* note 2, at 68 (questioning whether any such trials ever occurred); Sara M. Butler, *Persons Under the Law? Medieval Animal Rights*, LEGAL HISTORY MISCELLANY (Feb. 19, 2018), https://legalhistorymiscellany.com/2018/02/19/persons-under-the-law-medieval-animals-rights/ [https://perma.cc/L3ZW-X3BB] ("Here, the medieval English stand out as an exception. They did not conduct animal trials. Rather, the dog who mauled a child to death was treated as *deodand* in a case of misadventure.").

66. Hyde, *supra* note 9, at 719.

67. EVANS, *supra* note 26, at 195.

68. 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, 259 (1753) (Reprint, Philadelphia: J.B. Lippincott Company, 1893).

69. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND, *300–01 (1753) (Reprint, Philadelphia: J.B. Lippincott Company, 1893).

70. 2 HENRI DE BRACTON, ON THE LAWS AND CUSTOMS OF ENGLAND 384 (Samuel Thorne trans., New York: William Hein reprt. 1997) (c. 1235), [hereinafter LAWS

death of any reasonable creature by mischance" that thing is forfeited to the king.[71]

Most of these passages have been interpreted to mean that these early legal jurists were looking for causation or an act of purpose in the event of an accidental death.[72] And indeed, some of them did at times write in terms that indicate the movement of the object could somehow be indicative of an intentional act on the part of the offending chattel. *Britton* defines deodands as those "things which caused the death."[73] Dalton also writes of things which "cause" casual deaths being forfeited.[74] But a close examination of the most philosophically fundamental of these writings proves this theory false. Bracton believed no criminal culpability could lie with insane human beings, let alone brute animals, because they lacked reason.[75] He wrote of distinguishing the "true cause [and cause in] misadventure" which involved things that lack reason.[76] Blackstone also explained that the accidental death of a child would yield no deodand, while the same scenario for a deceased adult would. This is because the child "by reason of its want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses."[77] Coke details deodand procedure as occurring in a death "by mischance . . . without the will, offence, or fault of [the deceased], or of any person."[78] Matthew Hale defined death *per infortunium* as "without the default or procurement of another."[79]

We can understand several important points from these passages. Accidental deaths were classified separately from homicides in English law. The terms chosen to label these types of death all incorporate a sense of unintentionality" "misadventure," "accident," "mischance," "*per infortunium*." While the language of deodand procedures may include references to "causation" or "action" on the part of the forfeited object, that fact suggests something other than the conclusion that English legal theorists believed nonhumans were capable

---

AND CUSTOMS]. We cannot be sure exactly what Bracton meant by "occasion," but we can be sure that he did not mean "cause" as his piece goes on to articulate.

71. EDWARD COKE, THE THIRD PART OF THE INSTITUTES OF THE LAWS OF ENGLAND INSTITUTES 57 (London, M. Flesher 1644).
72. *See* EVANS, *supra* note 26, at 109.
73. BRITTON 39, (Francis Nichols trans., 1865).
74. MICHAEL DALTON, THE COUNTRY JUSTICE 336 (London, William Rawlins and Samuel Roycroft 1690) ("The thing which is the cause of such casual death shall be forfeit to the king.").
75. 2 HENRI DE BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE 424 (Samuel E. Thorne ed. and trans., Selden Society, 1968-1976) [hereinafter DE LEGIBUS].
76. LAWS AND CUSTOMS, *supra* note 70 at 384.
77. BLACKSTONE, *supra* note 69, at *300.
78. COKE, *supra* note 71, at 57–58.
79. MATTHEW HALE, PLEAS OF THE CROWN 33 (Printed by J.N. assignee of E. Sayer 1716).

of moral, criminal, or punishable guilt. Almost all early jurists relied on Aquinas' philosophical understanding of reason as a characteristic exclusive to humanity in nature.[80] This is why deodand proceedings were so different than secular animal trials in contemporary parts of Europe. The determination made was not the moral guilt of the object in question because that precept was not present in the minds of the practitioners of English law.

Perhaps the complicated language of early legal treatises reflects a struggle to harmonize a previous Anglo-Saxon culture of custom and a developing system of recorded, common law. Deodand law seems to have been a place where the difficulties of bridging gaps in the legal system came into the spotlight. Evans never missed a chance to condemn the practices of "punishing" (or even simply incorporating) nonhumans into legal proceedings.[81] But Kimberly Ferzan has recently challenged Evans' failure to recognize the struggle to understand free will, to define insanity, and to "determine if culpability is about choice or character."[82] Early legal theorists wrestled profoundly with their justifications for forfeitures in accidental deaths and suicides. They sought to classify these types of deaths with remarkable precision—even distinguishing whether death on saltwater or freshwater could result in a deodand.[83] The attention that these events procured in legal writings indicates that they were the focus of a great deal of thought and an intentional process. But those processes, and the language in which they were described, ultimately fail to support any argument that English law ever assigned moral culpability to a nonhuman animal or object. The question, then, becomes—what was the moral condition of a deodand?

3. Tainted or Blamed?

A great deal of ink has been spilled over what procedures for nonhumans indicate about Medieval and Early Modern thought concerning moral culpability. Finkelstein rejected the notion that anthropomorphism was in play in these rituals, either in England or on the continent.[84] He argued, instead, that the law reflected an understanding of a hierarchical view of man and animals, with humans incorporating nonhumans into a system of justice as part of their

80. EVANS, *supra* note 26, at 21.

81. He is most famously quoted on this topic as, "[t]he childish disposition to punish irrational creatures and inanimate objects, which is common to the infancy of individuals and of races, has left a distinct trace of itself in that peculiar institution of English law known as deodand." *Id.* at 186.

82. Kimberly Ferzan, *Of Weevils and Witches: What Can We Learn from the Ghost of Responsibility Past?*, 101 VA. L. REV. 947, 955–56 (2015).

83. BRITTON, *supra* note 73, at 14.

84. *The Ox that Gored*, *supra* note 2, at 68–77.

responsibility at the pinnacle of nature.[85] Esther Cohen acknowledged the legitimacy of this view as it relates to secular animal trials, but she argues that it misses the point of ecclesiastical proceedings.[86] She posited that ecclesiastical trials provided a setting for "a communal ritual of self and environment purification from inimical forces."[87] This was effective, socially, she argued, because the "perception of law is closely tied with the view of man's relationship with God."[88]

While ecclesiastical trials may have been procedurally distinct from English coroner juries, the attitudes Cohen suggested were present across medieval Europe are nevertheless informative for understanding how medieval communities legally resolved "wrongness." The same sense of "purification from inimical forces" is prevalent in deodand records. R.F. Hunnissett wrote that forfeiture to the Church was originally mandated so that a deodand's "sin might be expiated."[89] *Corpus Juris* adds, "[a]t the base of the doctrine was superstition—the implication that the cart or the ox drawing it, for example, was morally affected from having caused the death."[90] Finkelstein wrote that "[t]he unnatural death of human being was, at the very least, a quasi-crime; the effect of it transcended mundane considerations, and entailed expiation in one form or another." Who or what needed expiation has been much debated.

Some modern scholars maintain that "deodand was based on the primitive idea that blame could attach to things themselves,"[91] but George Fletcher posited a more plausible theory. Fletcher focused on the social implications of killings to argue that there was a distinction between "blaming" and "tainting" in early modern law of homicide.[92] While blame was always placed on an individual who caused harm, deodand forfeitures were an expression of tainting. The distinction between blaming and tainting can be expressed by understanding the agent of death as either a responsible person or a non-responsible ob-

85. *Id.*

86. Cohen, *supra* note 40, at 37.

87. *Id.*

88. *Id.* at 36.

89. *Nottinghamshire Coroners' Inquests*, *supra* note 1, at ix.

90. 18 C.J. 489 n.27[a] (1919).

91. Nolan, *supra* note 24, at 138.

92. GEORGE FLETCHER, RETHINKING CRIMINAL LAW 341, 343 (2000). Hyde entirely missed this distinction just as he failed to distinguish deodand forfeiture from animal trials across continental Europe. He argues that all are a type of personification that "has had much to do with all primitive legislation, and so influenced medieval law." Hyde, *supra* note 9, at 719. He goes on to say that personification "in a very attenuated form can be found even in recent English legal procedure. Thus, a ship is the most persistent example of the notion of attributing personality to things. 'She' is still personified not only in ordinary conversation, but before courts of justice." *Id.*

ject.[93] Humans are blamed because we assume they are responsible and accountable for harm they cause. Tainting, conversely, is a dehumanizing process which "looks solely to contamination by contact," the only response to which is avoiding further contamination by cleansing the tainted object or removing it from the community.[94]

The law of homicide is premised on the fact that everyone has a duty not to cause death. Fletcher argued that, to preserve the sacredness of life, society needed to believe that one who took a life, even accidentally, upset the natural order and became contaminated by evil. Even an accidental disruption of the natural order required a process, a "middle course between the imperative of expiation in killing and doing justice" in the event of a faultless killing.[95] In this way, the language of "acting to cause a death" was a prerequisite for tainting in English common law.[96] Contrary to the prevailing trend of relegating deodand law to a legacy of embarrassment, Fletcher stated,

> [A]t the risk of some exaggeration, we should regard the evolution of this spectrum of culpability as one of the more important jurisprudential developments in the history of the criminal law. The spectrum of culpability teaches us that culpability is not only a matter of cognitive foresight but of self control . . . we are not likely to have learned the principle of graduated culpability from any other offense.[97]

It is this very same legal principle of graduated culpability that haunted the development of common law across centuries. To hold the blind, the insane, the very young, or the very ill liable for crimes they committed was far from an easy answer. The same was true for animals and things lacking rationality. When a crime had no culprit and an act had no intentionality, society found itself not only without someone to blame, but in need of a procedure to achieve resolution. Before simple negligence developed as a distinct right of action, members of the community were repeatedly without recourse for death by misadventure. While it is tempting to interpret procedures condemning inanimate objects and animals to forfeiture as retribution based on a belief of guilt or wrongdoing on the part of that agent, such is an unfair and incorrect interpretation of the law of deodand. Instead, we find communities exercising a powerful force of social control over a situation in which chaos and tragedy have won the day. By removing from the group, either literally or in form, those constant reminders of

93. FLETCHER, *supra* note 92, at 345–46.
94. *Id.* Fletcher goes on to argue that the idea of tainted objects lives in modern law in ways we enforce civil forfeitures and exclusionary rules about evidence obtained in violation of the Fourth Amendment. *Id.* at 348.
95. *Id.* at 353–56.
96. Interestingly, Burke notes that items which were either officially blessed or impliedly so through their employment could not become deodands, as in the case of a church bell when it fell and struck the head of the ringer. Burke, *supra* note 58, at 17.
97. FLETCHER, *supra* note 92, at 353.

loss, trauma survivors regain a semblance of order in the face of disaster.

B. The Case Against Retribution

1. No Place for Punishment

If we accept, for a moment, that deodands are part of a legitimate legal process, what might they reveal about social attitudes toward retribution? First, we can be sure that the method of condemning items and animals to forfeiture was technical and sincerely conducted. Before deodands were collected, the true owner of the property had to be named and the property described.[98] Deodands were only appropriate in certain circumstances, based on age of the deceased and the location and movability of the object.[99] Appraisals for the value of items were determined by juries and recorded as part of the official inquisition. Second, the state played the essential supervisory role in the process of collecting deodands. Coroners, who first appeared in England around 1194, were responsible for the outcome of inquest proceedings adjudging deodands, as well as other offenses that were considered criminal rather than civil in nature.[100] A statute passed in 1509 mandated fines for coroners if they failed to conduct inquests into deaths by misadventure.[101] Inquisitions and coroners' files for killings without an accused perpetrator were sent to the King's Bench to be reviewed for errors.[102] Jurors could be guilty of perjury if they were judged to have falsified their findings.[103]

In short, from start to finish the process for evaluating accidental death and judging an item as deodand was a regulated, relatively detached affair. Despite Burke's characterization of deodand as the idea "that the soul of him slain would not have laid in peace until vengence was reaked upon the instrumentality,"[104] there appear to be no records of an enraged surviving family member attacking a deodand physically or demanding a violent ritual of destruction be performed on such object. There is also a lack of reliable records indicating any animal judged a deodand was ever ritually executed as the result of the legal proceeding in England. Rather, we often find that owners were permitted to pay the appraised value to the Crown, to be distributed in charitable purposes to the community. None of these methods suggest a motivation of retribution toward the object on the part of the

98. Burke, *supra* note 58, at 20.
99. BLACKSTONE, *supra* note 68, at *259.
100. KESSELRING, *supra* note 26, at 41.
101. An Acte Concerning Corners 1509, 1 Hen. 8 c. 7, *in* 3 STATUTES OF THE REALM 4 (1817).
102. KESSELRING, *supra* note 26, at 48.
103. *Id.* at 63.
104. Burke, *supra* note 58, at 17.

victim—whether that be from the surviving family members or the state.

There were certainly contemporary English laws that did accommodate such motivations as part of the justice system. For example, a victim of a crime who could name his offender might choose to bring an "appeal of felony"[105] (the traditional instrument for common law felonies),[106] guilt for which could be determined, at the defendant's discretion, in a trial by battle[107] or a trial by jury.[108] Trials by battle were decided by combat between the accused and the accuser, but trials by jury were not without risk to a victim either. By 1200, the most common sentence for convicted felons was death by hanging.[109] But if a defendant were acquitted, the "false accuser" might suffer the same death penalty the accused would have experienced or, at a minimum, be fined and sent to prison.[110] On the other hand, successful plaintiffs often participated in carrying out sentences on convicted offenders,[111] though the authorization for a capital or maiming sentence was pronounced in the king's name as part of the Crown's justice.[112]

The ever-increasing scope of the Crown's justice during this period does, at first glance, complicate the case against retributivism. As death by misadventure began to be treated more like a criminal offense, it is perhaps a natural conclusion that a thing forfeited is a

105. "Appeal" in this sense is not our present-day notion of petitioning a higher court to intervene in a lower ruling. Rather, appeals were ancient forms of lawsuits brought by victims, against wrongdoers accused of breaking the King's Peace. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 70 (3d ed. 1990).

106. Including homicide, rape, mayhem (maiming), robbery, burglary, larceny, and arson. POLLOCK & MAITLAND, *supra* note 22, at 470.

107. Also known as the "by my body" defense, this method of trial for an appeal of felony differs from the legendary writ of right, in which parties disputing land ownership could be represented by champions in trial by battle. In appeals of felony, victims and defendants themselves entered into combat. *See* BRACTON, LAWS AND CUSTOMS, *supra* note 70, at 387.

108. Also known as trial "by the country," a jury of twelve lawful men from the place where the alleged wrong had occurred. Id. at 385–86.

109. *See* POLLOCK & MAITLAND *supra* note 22, at 461. Before the thirteenth century, blinding, castration, amputation, or other forms of execution were common. After 1200, these were reserved for felony rape and high and petty treason. *See id.*; BRACTON, LAWS AND CUSTOMS, *supra* note 70, at 417.

110. David J. Seipp, *The Distinction Between Crime and Tort in the Early Common Law*, 76 B.U. L. REV. 59, 66 (1996).

111. *Id.* at 63 (describing cases from the Year Books in which a widow and the children of a slain man personally dragged a murderer to the gallows, and a victim of a rape personally castrated and blinded her assaulter). The right to avenge homicide could even pass as an inheritance to survivors and heirs of the deceased. *Id.*

112. *Id.* at 62. The idea that the "life and members" of felons belonged solely to the king had restricted many of the tribal notions of "right to avenge," etc. by this point. Kesselring still describes appeals as "suit[s] of revenge." KESSELRING, *supra* note 26, at 83.

thing punished.[113] While it may be impossible to rule out that Medieval and Early Modern communities felt impulses of vindictiveness toward nonhuman offenders, the procedure of deodand appeared to embrace none of them. Instead of the imminent destruction which would await a human slayer, the value of offending objects was surrendered to the state so that it might be repurposed to benefit the affected community.

2. The Transfer of Victimhood

Many historians have interpreted the expanding role of the Crown in investigating accidental deaths as a purely or mostly mercenary venture. To be sure, the sophistication of legal proceedings for deodands in no way excludes that possibility. The fact remains that the same procedure, with all its associated expenses, occurred for judging and appraising cart wheels as for railroad cars. The roles of the jury, the coroner, and the state did not expand and recede based on the value of the forfeited item. Instead, the position of the state became repeatedly and more extensively understood as possessing not only the *power* to enact justice, but the *right* to do so. This fact is consistently significant in the laws of England, as we have seen in the precursors to deodand practice. In noxal surrender we see the forfeiture of tainted objects to family members, not as compensation for life lost, but to appease their wrath as the ones entitled to enact revenge killings. In deodand practice, that same principle was applied to the state.

By 1200 A.D., there was still no prevailing division of private and public wrongs in legal minds of the day. Medieval English courts operated on a writ system, and writs varied in both process and judgment sought.[114] Plaintiffs between the thirteenth and fifteenth centuries might have found their injuries appropriate subjects for a number of writs available from the court, in which case the decision of how to proceed would have been based on the type of trial or particular punishment desired.[115] Not only were there procedural differences, but the risk to the victim and extent of their involvement in the affair varied drastically. The choice of how to proceed likely turned on the preeminence of either compensation or vengeance to the victim.[116]

Victims who were not motivated to participate personally in offender punishment could avoid bringing an appeal of felony and still hope for an "indictment of felony"—the king's prosecution. Instead of an individual proceeding on a writ, a local sheriff, acting as the king's

113. POLLOCK & MAITLAND, *supra* note 22, at 474.
114. Seipp, *supra* note 110, at 189–91.
115. *Id.* at 59–60.
116. 7 SELDEN SOCIETY, THE MIRROR OF JUSTICES 45, 62, 150 (William J. Whittaker ed., 1895).

representative, would assemble a jury to make presentments of felonies for all persons in the region suspected of breaching the King's Peace.[117] This "grand jury" of sorts would produce a written indictment, which summoned the suspect to court at the suit of the king, not the literal victim. Victims and other members of the community could inform the king's officials about the offense to instigate the indictment process, but they had little else to do with prosecutions.[118] Indictments were also restricted to jury trials (with no trial by battle option), and no compensation or restitution was afforded to victims.[119] Any financial penalty or stolen property recovered through the action was forfeited to the Crown.

Eventually, felony indictments completely replaced appeals of felony[120] as the main instruments of criminal justice.[121] Lawyers of the day had more confidence in trials by jury,[122] and the Crown stood to gain from the heavy fines and forfeitures imposed on felons convicted on indictments.[123] But while the new royal prosecutor may have had a pecuniary motivation as well as a vengeful one, the fact remains that there was a great expansion during this time of the state's role as caretaker of public welfare.[124] The King's Peace was the people's peace, and felons were threats to the entirety of the kingdom. While most scholars agree that it would be unfair to characterize the growing role of the state in prosecutions as explicitly for retributive or deterrence purposes, what can be clearly seen is the transition of criminal lawsuits from the control of victims to the state.[125]

The change was both social and legal. As the crime of intentional homicide transitioned from a private to a public matter, so did the

117. *See* Theodore F.T. Plucknett, *A Commentary on the Indictments*, PROCEEDINGS BEFORE THE JUSTICES OF THE PEACE IN THE FOURTEENTH AND FIFTEENTH CENTURIES: EDWARD III TO RICHARD III, at clix (Bertha H. Putnam ed., 1938).

118. Roger Simonel, *Appeal of Homicide*, Mich. 11 Hen. 4, pl. 24, fol. 11 (1409).

119. In 1529, the law changed to allow restitution of stolen goods to be returned to victims. An Acte Restitucon to be Made of the Goodes of Suche as Shalbe Robbed by Fellons 1529, 21 Hen. 8 c. 11, *in* 3 STATUTES OF THE REALM 291(1817).

120. *Supra* note 105.

121. Kesselring writes that by the early 1400's, the percentage of felonies being brought by appeal as opposed to presentments and indictments vetted by juries was as low as three to nine percent in some areas. KESSELRING, *supra* note 26, at 79.

122. Seipp, *supra* note 110, at 59, 65.

123. *See* EDWARD POWELL, KINGSHIP, LAW, AND SOCIETY: CRIMINAL JUSTICE IN THE REIGN OF HENRY V, 83–85 (1989).

124. *See* Richard M. Fraher, *The Theoretical Justification for the New Criminal Law of the High Middle Ages:* "Rei Publicae Interest, Ne Criminal Remaneant Impunita," 1984 U. ILL. L. REV. 577, 581–89. Kesselring says that the "'king's peace' increasingly became 'the public peace.'" KESSELRING, *supra* note 26, at 3.

125. *See* RICHARD M. FRAHER, *Preventing Crime in the High Middle Ages: The Medieval Lawyers' Search for Deterrence*, *in* POPES, TEACHERS, AND CANON LAW IN THE MIDDLE AGES 212 (James R. Sweeney & Stanley Chodorow eds., 1989).

concept of peace in the community. Blackstone described the king as the representative of the community for prosecuting injuries.[126] Kesselring wrote extensively on how "public retribution rather than private reconciliation (or private revenge)—became more thoroughly accepted as the ideal."[127] Because accidental deaths were also breaches of the peace, they too fell under the purview of the Crown. Though the concepts of negligence and wrongful death lacked a formalized place in the legal system, the state possessed the exclusive obligation to resolve the wrongs associated with an unnatural death.[128]

III. THE WRONGED: THE STATE AS THE PEOPLE, KING, AND GOD

A. Breaching the King's Peace

After intentional homicide became a public crime, involuntary homicides became somewhat lost in juridical categorization. Essentially, intentional homicides became public crimes, or "Crown Pleas".[129] A "public" crime in early modern England generally meant something of common concern.[130] In the twelfth century, Henry II mandated all homicides be determined in his own courts, and kings that followed perpetuated the idea that these crimes were offenses against themselves primarily and only secondarily against the victims and their kin.[131] In 1487, the "Act Against Murderers" eliminated the requirement that trials by indictment wait more than one year after the murder to allow the victim's family time to bring their own appeal.[132] According to Kesselring, this change was motivated by the state's frustration with allowing murderers to escape the law by settling outside of court with victim's families.[133]

126. 2 BLACKSTONE, *supra* note 68, at *2.
127. KESSELRING, *supra* note 26, at 84.
128. Matthew Lockwood has written extensively on how the English state's monopolization of the exercise of legitimate violence (in warfare and punishment) corresponds with the growth of modern-day governance during the late medieval and early modern centuries. MATTHEW LOCKWOOD, THE CONQUEST OF DEATH: VIOLENCE AND THE BIRTH OF THE MODERN ENGLISH STATE, 1–25 (2017). The common law history of resolving violence agrees with this timeline both in the transition of prosecuting intentional homicide and restitutionary tort measures for wrongful death. As will be discussed later in this piece, the English law's reticence to assign pecuniary value to human life may have retarded this development, but the civil prices for maiming and battery suggest that the practice was delayed for its uncomfortable social implications rather than a belief that such transactions should remain outside the purview of the legal system.
129. *The Goring Ox*, *supra* note 5, at 187.
130. *See* KESSELRING, *supra* note 26, at 6–8.
131. *Id.* at 70–71.
132. *Id.* at 81.
133. *See id.*

Blackstone explained the contemporary legal view of the differences in private and public wrongs as:

> [P]rivate wrongs, or civil injuries, are an infringement or privation of the civil rights which belong to individuals, considered merely as individuals; public wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties due to the whole community, considered as a community, in its social aggregate capacity.[134]

Understanding that homicide fell into this category in Early Modern England (as indeed it still does today), makes it easier to conceive the state's "offense" at the loss of life for a member of the community. As Fletcher stated, the focal point of homicide law is neither the act nor the intent, but the *fact* of death.[135] Killings are, in general, a by-product of interaction. In other words, a killing is a social event. And because killings revolve primarily around the occasion of death, death is also largely social in its effects. Finkelstein noted that in cases of death *per infortunium,* it was the death of the victim that caused the case to become a Crown Plea or a "criminal" case, as opposed to unintentional injuries that were "civil" matters, with the actor's liability resting on his status as trespasser, rather than felon.[136] Over time, the law and the state asserted jurisdiction over more causes of death. This included the procedural development for homicides, accidental deaths, and things in between.

Sometimes, murderers were irrevocably beyond the reach of the court and the king. Those who breached the King's Peace by committing suicide could be legally considered felons guilty of self-homicide, but they, of course, could never be punished by an earthly ruler. The intersection of the social disaster that is death and the impossibility of engaging a known responsible party created yet another vacuous social and legal gap which deodand law attempted to fill. In some ways, deaths by suicide fell, legally, somewhere between accidental death and homicide. But as Rob Houston has argued, we are sometimes mistakenly transfixed by the oddities of these events when, in fact, suicides were (at least, socially) just sudden deaths that left practical and symbolic problems for survivors to resolve.[137] Records of suicide cases provide us with a unique and multi-faceted view of the beginning of the legal resolution to processing unnatural deaths (the wrongful death suit) and the instrumentalities (tainting and forfeiture) used to reach that end.

---

134. BLACKSTONE, *supra* note 68, at *5.

135. FLETCHER, *supra* note 92, at 341.

136. *The Goring Ox*, *supra* note 5, at 190.

137. R.A. HOUSTON, PUNISHING THE DEAD?: SUICIDE, LORDSHIP, AND COMMUNITY IN BRITAIN, 1500–1830, at 2 (2010).

B. The Role of Forfeiture

1. Wandering Souls

The word suicide was not commonly used until the eighteenth century, when it could refer to either the actor or the act itself. Prior to the adoption of the term, these events were described as "self-murder," "self-slaughter," or "self-homicide."[138] These "self-murderers" were considered to have broken natural covenants that existed with their lords and, ultimately, the king. As such, it became the king's prerogative to pursue crimes of suicide in order to defend his right to define the unacceptable or criminal, and his dignity as a lord to insist on service.[139] The law was on the king's side, too, condemning suicide as an act of murder from at least the time of Bracton.[140] Coroner juries determined if a deceased had knowingly killed themself and earned the title of felon (*felo de se*), or if they succumbed to a bout of madness at the time of the incident and were, therefore, not of sound mind (*non compos mentis*).[141] These inquests were public dramas, it was not uncommon to have large groups assembled to consider the significance of words and actions of the deceased.[142] Decedents ruled *non compos mentis* were not considered felons or believed to have committed serious wrong. However, culpable suicides were felons, and their goods were seized subject to forfeiture, along with any item judged to be a deodand.

Felony verdicts often yielded forfeitures of the perpetrator's goods and chattels to the state,[143] though in England, real estate was exempt from forfeiture in suicide cases.[144] Most legal scholars today acknowledge that forfeiture was an expression of atonement for a breach of the King's Peace, but many maintain that it was also the construction of a foundation to disregard the innocence of owners by seizing goods.[145] Leonard Levy noted that, by definition, a deodand requires an official party to benefit from the value of the agent causing death.[146] By that virtue, others have characterized deodand law (perhaps validly) as a "hopelessly inadequate mechanism" for resolving incidents of wrongful death.[147] But to consider the practice of forfeiture

138. *Id.* at 23.
139. *Id.* at 28.
140. *See* BRACTON, LAWS AND CUSTOMS, *supra* note 70, at 423–24.
141. MICHAEL MACDONALD & TERRENCE R. MURPHY, SLEEPLESS SOULS: SUICIDE IN EARLY MODERN ENGLAND 15–16 (1991).
142. *Id.* at 223.
143. 2 BLACKSTONE, *supra* note 68, at *349.
144. HOUSTON, *supra* note 137, at 100.
145. *See* LEVY, *supra* note 19, at 10–11. MacDonald also describes the Crown's increasing interest in *felo de se* as deepening when it realized the potential windfalls at stake. MACDONALD & MURPHY, *supra* note 141, at 22.
146. LEVY, *supra* note 19, at 9.
147. Nolan, *supra* note 24, at 139–40.

in suicide cases as merely an expansion of *felo de se* status from absconding criminals to self-murderers (as Pollock & Maitland described)[148] is to overlook the social nature of an event of self-homicide.

In Tudor and early Stuart England, suicide was considered a terrible crime and an extraordinary sin.[149] Michael Dalton described it as a "heinous. . . [o]ffense against God, against the King, and against Nature."[150] The bodies of those who were judged culpable were denied Christian burials and were subjected to a variety of rituals of desecration.[151] Many of these rites reflect a desire to either place the body in a state of "wandering" or show that the soul was already there. For instance, remains were sometimes set adrift on rivers, or more commonly, buried without markers along roadsides.[152] These practices ritually symbolized the place of permanent irresolution that marked the act of this kind of violent,[153] unnatural death.

Arnold van Gennep explained how, for communities in Early Modern England, unbaptized people and suicide cases were considered the most threatening of the dead.[154] These homeless spirits wandered between the worlds of the living and the dead, customarily behaving hostilely in the world of the living. A sense of "pollution" can emit from these beings, as they are trapped between states of existence.[155] MacDonald expanded on the notion of pollution through suicide, and the need to ostracize the self-killer from the communities of the living and the honorably dead.[156] In particular, he noted the placement of

148. *See* POLLOCK & MAITLAND, *supra* note 22, at 488.

149. MACDONALD & MURPHY, *supra* note 141, at 15. The same is true of many cultures. MacDonald describes the act as "the quintessential bad death." *Id.* at 46. Houston agrees, contrasting suicide with the "good death" for which a person prepared by making peace with God, settling worldly affairs, and involving family in their impending demise. The public nature of this event brought the social group into readiness for the event. HOUSTON, *supra* note 137, at 34.

150. DALTON, *supra* note 74, at 234.

151. MACDONALD & MURPHY, *supra* note 141, at 15. MacDonald describes rituals as bodies thrown naked into pits without ministers present or prayers offered. *Id.*

152. *Id.* at 18–19, 47. Practices of inversion were also not uncommon. Those who may have jumped to their deaths were buried beneath mountains, while those who drowned might be buried beneath sand. *Id.* at 19.

153. Houston comments on the way social anthropologists use this term to deny the legitimacy of a deed. To say that something is "violent" is to say that it is "the opposite of natural." HOUSTON, *supra* note 137, at 84. It is interesting to note, then, how this use of terminology (not uncommon even outside of the social sciences) recognizes a sense of "illegitimacy" in premature death, whether deliberate or accidental.

154. *See* ARNOLD VAN GENNEP, THE RITES OF PASSAGE 160–61 (Monika B. Vizedom & Gabrielle l. Caffee trans., 1960).

155. *See* VICTOR TURNER, THE FOREST OF SYMBOLS: ASPECTS OF NDEMBU RITUAL 97 (1967).

156. MACDONALD & MURPHY, *supra* note 141, at 18. MacDonald argues (convincingly) that rites of desecration reflect a profound conviction of the supernatural evil associated with acts of self-harm. Records of both victims and survivors of suicide

corpses outside the geographical bounds of a community and described rites of desecration and inversion as attempts to counteract the malevolence of ghosts.[157]

2. Separation Rituals

At this point, it is impossible to examine the forfeiture of deodands involved in cases of self-killing without engaging the legal concept of tainting as a mirror to the social notions of pollution evident in the treatment of suicide corpses. Just as the body of someone who exposed the community to the restless, wandering evil of an unnatural death must be placed outside of the bounds of society, so too must those items which have been used to bring about the tragic event. Houston wrote of a woman who hanged herself and the jury's recommendation that "the value of the thing should be inquired after, for it is fitting, that the thing itself, if not of bulk, should be put into the earth with hir [sic]."[158] Here, we see clearly that separation of the object from the living was paramount. There is no thought of the apparent "double penalty" of both losing the item and paying its value (in fact, we will return later to the notion that a price was still owed to the state in the event the deodand was buried). Rather, the instinct to distance the offenders from society motivated the procedure.

Objects associated with suicides acquired a tainted status or became "accursed" according to Blackstone.[159] Houston described the process of forfeiture as a ritual of separation in response to the symbolic taint that was not about the receipt of benefit, but about what was being fined, by whom, and why.[160] The primary motivation remained the assertation of a lord's right to condemn wrongdoing, with the secondary motivation of removing a dangerous and disdained object from circulation.[161] Robert Darnton wrote of the need for disassociation more generally with things that fall outside of strict categorization.[162] The same was true for the bodily remains of suicides who endured status degradations and ritual separations from the normative, legitimate order.[163] By circumventing the English cus-

from the early modern period include proliferous references to diabolical instigation and demonic t emptation as well as natural circumstances of despair and destitution. *See id.* at 18–21.

157. *See id.* at 42.
158. HOUSTON, *supra* note 137, at 158 n.390.
159. BLACKSTONE, *supra* note 69, at *301.
160. HOUSTON, *supra* note 137, at 158–59.
161. *Id.* at 159.
162. *See* ROBERT DARNTON, THE GREAT CAT MASSACRE 193 (1984) (examples of "wild things" [rats, squirrels, etc.] that try to come inside homes, as well as parts of the body we cut away [hair, fingernails, spit]; the social need to construct and police boundaries drive this kind of disassociation).
163. HOUSTON, *supra* note 137, at 224.

toms of repentance and forgiveness that were supposed to precede natural death, suicide cases forfeited their entitlement to peaceful transition.[164]

Houston wrote that bad death left social gaps that had to be repaired by survivors through either self-help or the law.[165] Where suicide destabilized both the family and the community, the need for formal resolution arose. Upsetting the natural order by taking human life demanded both social and legal answers. This played out across the spectrum of legal scienter, from intentional homicides, to *felo de se* and *non compos mentis* suicides, to accidental deaths. The consistent factor is neither the intent, nor the actor, but the fact of death. Death was inherently social and belonged to the community. The absolution needed was not forgiveness of an act, but renunciation of the duty to resolve the death. When killers were known, communities could seize them, try them, and punish them. In cases of suicide, they could place their hands on the deceased's corpse, dig a hole for it, stake it, or send it to sea, but the law could not reach the guilty party. Instead, as in accidental deaths, the enforcers of justice—the king and his men on the coroner's jury[166]—would inquire, judge, and seize the remaining thing associated with that sense of wrongness. That thing in itself (or its monetary value) was offered for the sins of the past and the future safety of the community. It was this process—these rituals and rites of reinstituting order—that best ensured atonement and safety were achieved.

C. The Case Against Appropriation

1. Procedural Profits

Procedure is one of the most pervasive and unyielding aspects of the Western legal system. By that I mean we have a process for everything that happens in resolving legal disputes. There are no shortcuts through the minefield of pleading and litigation requirements that parties must observe in their quests for justice, and more than a few meritorious claims have been lost irrevocably on procedural defects. In other words, process is essential. The steps taken to achieve resolution matter as much as the end result—at times, maybe more. It is impossible to elaborate on the gravity of this principle in the common law system without digressing egregiously on the rule of law. However, it is equally impossible to properly understand the role of deodand forfeiture without accepting that method and procedure guide the law as much as individual motivations.

164. *See* MACDONALD & MURPHY, *supra* note 141, at 45.
165. HOUSTON, *supra* note 137, at 34.
166. *See* BLACKSTONE, *supra* note 69, at *301 ("for it is no deodand unless it be presented as such by a jury of twelve men").

When we consider who stands to gain from forfeitures, the obvious answer is the state. But, as is often the case, the obvious answer is not the best or only answer. We must begin with deodand law's stated purpose for requiring forfeitures. Blackstone explained that deodands forfeited to the king were "to be applied to pious uses, and distributed in alms by his high almoner."[167] Dalton laid out the process as, "[t]he thing which is the Cause of such casual Death, shall be forfeit to the king, praised, and taken for a *Deodand*, and the Price of the Thing shall be distributed in Alms to the poor by the Kings Almoner."[168] Writing for the Tennessee Supreme Court, Justice Samuel Cole Williams held that "historians record that the 'pious uses' under the control of the king and his almoner became a scandal which moderns would describe as being graft."[169] Praising American jurisprudence, Justice Williams continued: "from the outset [deodand] doctrine was deemed to be so repugnant to our ideas of justice as not to be included as a part of the common law of this country."[170] Incidentally, he was wrong on that score.[171]

Nevertheless, Justice Williams is one of many who have maintained that deodands and forfeitures were money grabs on the part of the king. In the context of suicide, historians view the king's assertion of his regulatory power as mostly punitive. In fact, forfeitures were also a means of reinforcing trust and community among survivors by emphasizing the order of lordship.[172] It was not uncommon that those who died unexpectedly (particularly those who ended their own lives) left behind financial debts to be settled. Almoners, through seizure and forfeiture, could take temporary control of the assets of the estate to ensure that creditors were properly paid out and family members protected from greedy profiteers.[173] Dalton wrote that "the Almoner hath no Interest in such Goods, but hath only the Disposition of the

167. *Id.* at *300. Almoners were generally highly placed lords who helped stabilize community relations by assuming responsibility for collecting goods forfeited by acts of suicide and deodands. They could sue in the Court of Star Chamber to recover withheld forfeitures, but they also sometimes knowingly took less than what was due in forfeiture in acts of charity. *See* MACDONALD & MURPHY, *supra* note 141, at 82. The main concern for almoners was balancing the needs of communities against the wider universe of interested parties in the event of a death. Almoners were ultimately responsible for ensuring that all creditors of a deceased's estate be treated fairly. *See generally* HOUSTON, *supra*note 137, at 82–120.

168. DALTON, *supra* note 74, at 336.

169. Parker-Harris Co. v. Tate, 188 S.W. 54, 55 (Tenn. 1916).

170. *Id.*

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

172. HOUSTON, *supra* note 137, at 2.

173. *Id.* at 98. Forfeiture to the Crown dissolved existing title to goods and allowed distribution to begin fresh, with interested parties presenting their claims orderly before the court. 2 BLACKSTONE, *supra* note 68, at *408–09.

King's Alms, *Durante beneplacito*, so that the King may grant them to any other."[174]

Houston concluded that, in the case of suicide forfeitures, it is a mistake to believe that the almoner channeled money to his monarch. Rather, the Crown's aim was not to acquire money through the almoner, but to spend it through him and to make him fiscally neutral.[175] Pollock and Maitland agreed with this conclusion, arguing that the pecuniary profit in the eyes of lords was a small matter in comparison to the power secured to them by their ability to summon people to account.[176] Of course, this occurred through procedure.

It is worth noting that procedure costs money.[177] Often, deodands were appraised at inconsiderable, nominal sums that hardly justified the expense of assembling the coroner's jury, writing up an inquest, and involving court officials to oversee proper distribution of the estate. Beyond illogical financials and the fact that forfeitures were, by law and tradition, to be distributed for the benefit of the poor,[178] one of the most severe setbacks for forfeitures in self-murder came at the hands of the state itself. The Statute of 4 & 5 William and Mary, chapter 22 established a method for surviving family members to record their rights of survivorship with the court.[179] This allowed items that would otherwise be deodands and forfeitures to be inherited through the processes of intestacy by the deceased's heirs at law.

In sum, neither legal texts of the day, actions on the part of the state, nor financial records indicate that the Crown's motivation for profit centered on receipt of pecuniary gain from forfeitures of deodands. Rather, the king's ability to command the process for resolving estate affairs and to require accounting from individuals in the community provided social enrichment. Establishing a way to restore order after the event of an untimely death was attractive for both the Crown and victims of the tragic event. As Burke stated, deodand cases "show us that the same degree of strictness and the same defenses apply to them as to all pleadings requiring the utmost accuracy or certainty, and they give insight into the proper procedure where a death of a human is caused by accident."[180] This method of resolution resulted in a, perhaps, surprising balance of power between the king and his people.

---

174. DALTON, *supra* note 74, at 336.
175. HOUSTON, *supra* note 137, at 120.
176. POLLOCK & MAITLAND, *supra* note 22, at 581.
177. *See generally* Watson, *supra* note 60 (explanation of costs associated with various procedures).
178. HOUSTON, *supra* note 137, at 120.
179. An Act for Regulating Proceedings in the Crown Office in the Court of King's Bench at Westminster 1692, 2 W. & M. c. 22, *in* 3 PUB. GEN. ACTS 1215–1761, at 528 (Eng.).
180. Burke, *supra* note 58, at 22.

2. Mitigating Money

If the state began to expand its power by regulating the process for determining causes of death and distribution of private property from forfeitures, whatever remained was assumed by individuals in local communities. From the outset of coroner proceedings, juries possessed several ways to mitigate the amount of money that would end up forfeited to the king. In the case of suicides, they often declared purposeful deaths accidents or the perpetrators not of sound mind.[181] MacDonald argued that it "would not . . . be going too far to say that the law of self-murder was only enforced when it was unavoidable to do so."[182] He wrote that even when juries returned *felo de se* verdicts, they often colluded to avoid forfeitures. Sometimes, after a self-murder had been declared, mysterious gangs of "bandits" would arrive on the scene of the deceased's home and carry away all valuable goods.[183] Other times, goods would be distributed to family members in advance of an impending death that would be ruled a self-murder.[184]

Juries could also determine the amount of money forfeited to the state because they were responsible for appraising the value of deodands. MacDonald explained that by the time of Queen Anne, juries stood firmly on the side of victims, "openly declaring that there were no goods to forfeit, flagrantly undervaluing those they did report, and brazenly ignoring their duty to inventory and confiscate property."[185] Burke recounted a case from Gloucestershire in which a man was killed by his own cart, and the value of the cart was given to the man's children, not because they were his heirs but because they were needy and such was a pious use of the funds.[186] Blackstone confirmed that, in his time, "juries have of late very frequently taken upon themselves to mitigate these forfeitures, by finding only some trifling thing, or part of an entire thing, to have been the occasion of the death."[187] For example, to return to our introduction, a jury might select a specific clump of hay responsible for crushing a victim rather than appraise the entire stack, or undervalue a vat of boiling ale in which a man drowned because they deemed the ale weak.[188]

However, it would be unfair to claim that deodands were always appraised lowly. Certain cases did yield large sums to be forfeited to the Crown. The characteristics of these cases are somewhat remarka-

181. R.F. HUNNISETT, THE MEDIEVAL CORONER, 118–33 (H. A. Hollond ed., 1961).
182. MACDONALD & MURPHY, *supra* note 141, at 23.
183. *Id.* at 78.
184. MACDONALD & MURPHY, *supra* note 141, at 78.
185. *Id.* at 116.
186. Burke, *supra* note 58, at 16.
187. BLACKSTONE, *supra* note 69, at *302.
188. Teresa Sutton, *The Deodand and Responsibility for Death*, 18 J. LEGAL HIST. 44, 45 (1997).

ble in light of the nature of deodand law as discussed in this Article so far. For instance, a large number of cases involving highly-valued deodands dealt with multiple deaths.[189] This is especially true concerning deodands which came as a result of railroad accidents.[190] Teresa Sutton's work also assigned high-priced forfeitures to cases where it was possible to identify an element of foolishness or carelessness in regard to danger and risk.[191] Sutton aligns cases in which humans were kicked to death by horses, noting that lower appraisals followed a jury's finding of good-temperedness on behalf of the horses, while evidence of "vicious" beasts yielded higher deodands.[192]

The conclusion to be drawn from this examination of appraisal must be that the Crown was, at most, ambivalent toward the financial prospects it might enjoy in deodand forfeitures. While it can hardly be claimed that there were no exceptions to disinterestedness on the part of almoners and lords, it hardly stands to reason that an entire system of condemnation of private property would have left the power of valuation in the hands of those most likely to suffer through its abuse. Blackstone and others openly recognized the jury's power to manipulate the financial outcomes of such decisions through a multitude of both legally valid and duplicitous methods. Yet, the sanctity of a jury's finding was rarely challenged or overruled by the presiding court. Moreover, the state itself created ways in which surviving family members might more effectively avoid enduring loss of goods after unnatural death. This fact, in turn, takes us to our final question before we visit the grave of the deodand: if tainted objects could be separated from the community and valuations due to the king could be manipulated, what purpose did the payment of such nominal sums to the state serve?

IV. THE WRONGFULLY DEAD: ABSOLUTION FROM BEYOND THE GRAVE

A. Peace Offerings

1. The Cost of Expiation

By now, we have considered all justifications offered for the forfeiture of deodands to the state except perhaps the most difficult one. By difficult, I mean, the one most likely to leave the modern historian

189. *See id.* at 50. Sutton examines the case of two collapsed houses on Houghton Street in June of 1796. The disaster resulted in seven deaths and two deodand judgments of ten pounds each (remarkably high) for the two owners of the houses. It was found by the coroners' jury that a ruined state of materials in the house had led to the collapse.

190. *See id.* at 46. *See also* Burke, *supra* note 58, at 28 (citing an occasion where a £1500 deodand was imposed for a steam engine).

191. Sutton, *supra* note 188, at 50.

192. *Id.* at 50–52.

with a disposition in favor of reverting to that old, dismissive sigh we have been wonted to heave at the deodand. Edmund Burke reminded us that deodands were "sold . . . to appease God's wrath, in pious uses, so the soul of the individual slain might rest in peace and his sins be atoned for."[193] Hyde stated, "the real object of such legislation was . . . the atoning for manslaughter in such cases [which] was in full accord with the elementary concepts of justice prevailing in Europe during the Middle Ages under the domination of the church."[194] In the case of suicides, Hyde noted that there were no thoughts of punishing the family by enacting forfeitures, but only to provide suitable atonement for the crime and avert calamity by appeasing the wrath of God.[195]

Today, we do not engage with any lingering need for atonement after accidental deaths. Although we may share a sense of restless frustration when we experience faultless tragedy, we rarely express the need to offer up a sacrifice to ward off impending doom as the result of loss of life. At least, such instincts do not play a formal part in the legal process of resolving wrongful deaths. The same could not be said of early common law participants. Finkelstein noted that the unnatural death of a human being was, at a minimum, a quasi-crime that entailed expiation in some form.[196] Expiation was naturally directed toward God and, by extension, the king, God's human magistrate on the earth. Blackstone also credited this motivation to atone for the development of deodand. Blackstone's analysis is enlightening as to how the law endeavored to meet social needs.[197]

> It seems to have been originally designed, in the blind days of popery, as an expiation for the souls of such as were snatched away by sudden death; and for that purpose ought properly to have been given to holy church: in the same manner as the apparel of a stranger, who was found dead, was applied to purchase masses for the good of his soul . . . [E]very adult, who died in actual sin, stood in need of such atonement, according to the humane superstition of the founders of the English law.[198]

Coke similarly united the distribution of funds for charitable acts with the purpose of expiation, "being found by lawful inquisition of 12 men being *precium sanguinis*, the price of blood, are forfeited to God, that

193. Burke, *supra* note 58, at 21.
194. Hyde, *supra* note 9, at 728–29.
195. *Id.*
196. *The Goring Ox*, *supra* note 5, at 197.
197. The brief interaction this Article has with the religious aspect of the changing legal attitudes of early modern England is dissatisfying, but purposeful. The cataclysmic event that was the Reformation in England may have been nothing short of terraforming for the common law system's response to unnatural death; it may also have been largely inconsequential. Either reality is drastically beyond the author's present capacity to discuss properly in this work, and nothing can be an excuse for the absolute neglect of the subject except the author's unwillingness to knowingly do the job poorly.
198. BLACKSTONE, *supra* note 69, at *300.

is to the king, God's lieutenant on earth, to be distributed in works of charity for the appealing of God's wrath."[199]

This expiation language confirms that the price due to the king was not related to the deodand itself being tainted, for there could be no sin on the part of an irrational thing.[200] Instead, the expiation was offered for the benefit of the deceased, who had not had the opportunity to set their affairs in order before the hour of reckoning. Houston acknowledged that forfeitures for suicides were amercements—tokens of blame and apology that were distinct from punishments inflicted on the bodies of self-slayers.[201] In characteristic form, Evans charged that:

> Under hierarchical governments the prominent idea was to appease the wrath of God, who otherwise might visit mankind with famine and pestilence and divers retaliatory scourges. For the same reason the property of a suicide was deodand. Thus the wife and children of the deceased, who may be supposed to have already suffered most from the fatal act, were subjected to additional punishment for it by being robbed of their rightful inheritance. Yet this was by no means the intention of the lawmakers, who simply wished to prescribe an adequate atonement for a grievous offence, and in seeking to accomplish this main purpose, ignored the effect of their action upon the fortunes of the heirs or deemed it a matter of minor consideration.[202]

Evans' point resonates with later legal scholars' reflections on the superstitious and abusive nature of deodand practice. Setting aside the validity of his argument concerning its practical effects, it remains true that the expiatory sentiment in deodand practice shows us yet another way in which the law was aimed at absolution. Drawing on the common urgency to absolve a family member's unrepented-for sins was far from a gimmick. Clarity is gleaned not only through texts that confirm this rationale, but also from those that limit it.

2. An Age of Discretion

One of the most intriguing and sometimes frustrating aspects of the law is the ways lines are drawn. Somewhere in the middle of a mess of very specific factual circumstances, a threshold is established of what is innocence or guilt, immunity or liability. This is especially true in the world of tort law. In the modern world of tort law (one might also say, the world of civil, private damage suits), there is a catch-all cause of action known as "negligence." To bring a suit for negligence, a plaintiff must allege that a duty was owed by the defendant, the duty was breached, and the breach caused the plaintiff's harm. Nearly every private cause of action brought in courts today involves some aspect of negligence, including wrongful death suits.

199. COKE, *supra* note 71, at 57–58.
200. DE LEGIBUS, *supra* note 75, at 424.
201. HOUSTON, *supra* note 137, at 2.
202. EVANS, *supra* note 26, at 190.

The law is willing to recognize that we, as humans, owe each other a world of duties when we engage in certain activities (i.e., the duty to drive your car responsibly; to maintain your property to prevent hazards; to control your animals and livestock).

One thing has always been true about the broad spectrum of negligence in common law—it does not apply to children. There is a higher standard for establishing negligence for children between the ages of seven and fourteen (known as a "presumption against negligence"), and an absolute preclusion against a finding of negligence for children under the age of seven.[203] Why the ages of fourteen and seven? The law is slow to change, and these ages' significance long predates the *Second Restatement of Torts*. Holly Brewer's work on the treatment of children in Anglo-American law explored the role of age in legal consent and responsibility. Brewer's writing focused on how children were the only group in society, including women, racial minorities, and underprivileged classes who were completely excluded from equality under the law.[204] She argued that precluding children from legal participation based on age relates to consent. Meaningful consent depends on what legal (and religious) scholars deem the "age of reason," usually somewhere around the fifteenth year.[205]

Generally, children fourteen years and under were thought incapable of feloniously committing suicide. Those in this age range who died by drowning were, without exception, acquitted of any finding of feloniously drowning themselves.[206] As early as 1581, legal commenters addressed pre-teenage children's lack of capacity to form the requisite intent for felony status under the law.[207] The presumption of lack of intent was, however, rebuttable.

> [If] a childe tht apparantly hath no knowledge of good nor evil, do kil a man, this is no felonious acte, not any thing forfeited by it. For they cannot be said to have any understanding wil. But if upon examination it fal out, tht they knew what they did, and tht it was ill, then seemeth it to be otherwise.[208]

---

203. For a thorough discussion on American development of child negligence standards, *see* Oscar S. Gray, *The Standard of Care for Children Revisited*, 45 MO. L. REV. 597 (1980).

204. HOLLY BREWER, BY BIRTH OR CONSENT: CHILDREN, LAW, AND THE ANGLO-AMERICAN REVOLUTION IN AUTHORITY 7 (2005).

205. *Id.* at 8.

206. *Id.* at 187, n.8.

207. In fact, the notion of an age-determined threshold of accountability is Aristotelian. Classical psychology had long distinguished the notion of "voluntariness" and "choice" in human behavior. While children and animals, who are not responsible beings, may act voluntarily, they do not act from choice. Only rational adults act by choice, which is more closely associated with virtue and is a more accurate basis by which to determine character than by analyzing the actions on their face. Moshe Shalgi, *Aristotle's Concept of Responsibility and its Reflection in Roman Jurisprudence*, 6 ISR. L. REV. 39, 43 (1971).

208. WILLIAM LAMBARD, EIRENARCHA 218 (Thomas Wight & Bonham Norton 1599).

Dalton noted that children as young as eight-years-old could be hanged for homicide, but those under seven were presumed incapable along with lunatics, the deaf, and the mute.[209]

However, children could "cause" their own deaths by misadventure, insomuch as the adults who negligently caused the accident through inattention were immunized.[210] In this sense, we see causation, again, not implicating a sense of moral culpability, but a simple proximate relationship between a series of events. In one case, a six-month-old girl, Susan Neve, was left on a chair beside a fire by a servant who went to milk cows. The child "by misadventure and from lack of prudence, mov[ed] the chair, turned it over and she fell into the fire."[211] Susan's absent nurse was held blameless for the event; the accident was attributed only to the girl's infancy and her "lack of prudence." There is no indication that anyone held an expectation of prudence on Susan's part, and the mention of her age negates any contrary conclusions about her blameworthiness.

Although records of convicted of criminals often neglect to mention the age of the guilty party, it was common for coroners to include ages of the very young in order to support their verdicts of misadventure and avoid forfeitures and profane burials.[212] Blackstone confirmed that the law generally held no deodand was due when an infant under the age of discretion was killed through misadventure.[213] He specifically rejects Hale's contention that an infant's lack of ability to care for itself excused owners of would-be deodands, and argued instead that "[t]he true ground of this rule seems rather to have been, that the child, by reason of its want of discretion, was presumed incapable of actual sin, and therefore needed no deodand to purchase propitiatory masses."[214] Coke also noted that "it is to be observed that there is a diberlity as concerning the deodand when the party slain is within the age of discretion."[215] Dalton also excluded deaths of those under fourteen from yielding deodands.[216]

It can hardly be argued that, in practice, no deodands were forfeited when children under the age of fourteen were slain. In fact, in the case mentioned above, Susan's chair was ruled a deodand. The same is true in other cases Hunnisett recorded.[217] But the fact remains that deodand law, on its face, purported to require forfeitures at

209. DALTON, *supra* note 74, at 215.
210. BREWER, *supra* note 204, at 187–88.
211. SUSSEX CORONERS' INQUESTS, 1558–1603, no. 177 (R.F. Hunnisett ed., 1996) [hereinafter SUSSEX INQUESTS].
212. BREWER, *supra* note 204, at 190.
213. BLACKSTONE, *supra* note 69, at *300.
214. *Id.*
215. COKE, *supra* note 71, at 58.
216. DALTON, *supra* note 74, at 353.
217. SUSSEX INQUESTS, *supra* note 211, at no. 100, 131, 169, 447, 461.

least in part as the price of expiation for the sins of the dead who had not been allowed time to make atonement. This piece of deodand practice was usually carried out to its logical ends, exempting those whom society accepted were generally incapable of committing sins. For those who had not attained the age of discretion, no amercement was needed, and no forfeiture due to the king.

As to why deodands were sometimes collected in the event of juvenile deaths, there are a number of possible explanations. Brewer specifically noted that, at times, jurors failed to distinguish between misadventure and murder in the way they addressed forfeitures.[218] Furthermore, naming an item a deodand and either symbolically or literally turning it over to the state to be repurposed for the good of the community had a two-fold purpose. Even if no propitiatory masses were required for the deceased, the item itself might still be tainted and need to be separated from the community to stop its dispersion of harm. It is important to remember that guilt could be contracted like sickness, through contamination unwittingly, without fault, and even against precautions to prevent its spread.[219]

The exemption of deceased children, under the age of fourteen, from cases requiring deodands exhibits merely another way in which these forfeitures functioned as peace offerings for surviving family members, deceased victims, and morally affected parties. Those capable of sin who died unexpectedly could hope to have their guilt expunged by the price of forfeitures, while the sinless could rest in peace without such expense. The same lines of culpability for age that the law drew and danced between relating to deodands continue today in the standards for negligence. While those whom the law holds responsible for their actions has not changed, compensation in the event of unnatural death has evolved drastically. That change began at the death of the deodand.

B. Death of the Deodand

1. The Price of Progress

In many situations, social events that spur movement of a sluggish beast such as the law remain undetectable. We may never understand the origination and cessation of seisin, or why such changes occurred. But for deodands, we are spared such uncertainty. Analysis of deodand proceedings in the ten years leading to its statutory execution leaves little doubt that the motivations for abolishing the law were industrial, economic, and social. The age of industry brought heightened exposure to sudden and extreme accidental violence. When public methods of transportation started relying on steam engines,

218. BREWER, *supra* note 204, at 191 n.16.
219. *The Goring Ox*, *supra* note 5, at 197.

equipment malfunctions and wrecks produced higher body counts. Between 1800 and 1840, cases of accidental deaths increased threefold.[220]

Trials resulting from industrial accidents changed the way coroners presented evidence. To determine whether a death was an accident, expert witnesses were brought in to discuss mechanical failures that caused breakdowns and explosions.[221] The development of this kind of testimony prompted inquiry into the responsibilities of owners and operators in maintaining equipment and supervising workplace behaviors. In 1840, a man was charged with manslaughter by steamboat; the boat was appraised at £800 and judged a deodand.[222] The coroner's jury's finding of a deodand was overturned because the death had been ruled a manslaughter, not misadventure; the verdict was still an alarming precedent for forfeitures.[223] On Christmas Eve, 1841, a train traveling through Sonning derailed, killing nine people instantly and hospitalizing sixteen more. The engine was judged a deodand and appraised at £1,000. All deaths were ruled accidents and the jury specifically noted that the Great Western Railway played a role in the accident through its fault and negligence.[224]

Why accidental deaths suddenly became the object of increasing attention in the law was, as several historians have argued, largely a social, rather than legal, matter.[225] Finkelstein stated that, while the primary victims of death by misadventure in the pre-industrial ages were members of the poorest classes, this was no longer true by the beginning of the nineteenth century.[226] As road traffic increased and means of public transport proliferated, persons of all classes became both potential and actual victims of injury and death. Both rich and poor surviving family members became increasingly frustrated with the law's inability to provide closure and compensation in the wake of unexpected deaths. The life insurance industry, which today shoulders a considerable amount of the economic toll of accidental loss of life, was only a grassroots trade, and private recovery was unavailable at law. Only deodand practice offered the chance of a legal "remedy."[227]

But incidents like the Sonning railway disaster produced two serious concerns for the continued application of deodand law: (1) enormous forfeiture values, and (2) jury considerations of blameworthy

220. Nolan, *supra* note 24, at 135.
221. *Id.* at 139.
222. Queen v. Polwart (1841) 113 Eng. Rep., 818 (KB).
223. Burke, *supra* note 58, at 22–23.
224. Sutton, *supra* note 188, at 46.
225. Nolan, *supra* note 24, at 135.
226. *The Goring Ox*, *supra* note 5, at 171–72.
227. *Id.* at 172.

conduct of the owners of the forfeited property.[228] Neither of these concerns were, characteristically, a part of deodand law, and the latter, inherently contrary to its principles. Yet, the language of jury findings from these cases reflects an inherent need to associate some wrongdoing on the part of owners with the heavy forfeitures levied against them. While some cases reveal the court's legal maneuvers to overturn egregious awards,[229] the potential for economic ruin of the nation's transportation industry could not be ignored.[230] Coroner jury findings could not be perpetually altered to protect railway and steamboat companies from bankruptcy. The threat of deodand forfeitures had to be neutralized in order for the nation's engineering economy to thrive.

2. A Statutory Solution

Prior to the abolition of deodand, the common law position on wrongful death was embodied in two rules: (1) tort actions generally did not survive the death of either party to the litigation (so no claims for assault, battery etc. could be brought by the surviving family members of the deceased, and (2) a person's death did not give rise to a claim on behalf of those detrimentally affected by the death.[231] This rule was articulated in *Baker v. Bolton*, "in a civil court, the death of a human being cannot be complained of as an injury."[232] The legal ratio-

228. *See also* Queen v. West (1841) 113 Eng. Rep. 826 (KB); Queen v. Brownlow (1839) 113 Eng. Rep. 119 (KB); Queen v. Midland Railway Company (1846) 115 Eng. Rep. 587 (KB).

229. *See* Queen v. The Great Western Railway Company (1842) 114 Eng. Rep. 333 (finding an inquisition void on the face of the proceedings for a want on the part of the coroner).

230. Sometimes, courts took the opportunity to exact higher forfeitures than had been assessed by juries. In Regina v. Eastern Counties Railway Company, an engine boiler exploded after the train derailed, resulting in four fatalities and more serious injuries. The jury, in true deodand fashion, undervalued the price of the engine that was deodand at £125 instead of its proper £500. The Crown sought to collect £125 for each of the four deceased victims. When an attorney for the railway company protested, the court ruled that the defendants had either the option of paying the £500 by giving up the engine itself or by doing equity in their payments to the victims. Regina v. Eastern Countries Railway Company (1845) 152 Eng. Rep. 56 (Exch. of Pleas.).

231. Nolan, *supra* note 24, at 133.

232. Baker v. Bolton (1808) 170 Eng. Rep. 1033. Finkelstein engages in a thorough, insightful analysis of the historical criticisms that have been levied against *Baker* and Lord Ellenborough for his part as the opinion's sole author. *See The Goring Ox*, *supra* note 5, at 174–80. *Baker's* language has been consistently attacked as an inarticulate and inaccurate statement of contemporary English law and Lord Ellenborough as the victim of confused ideas. *See* W.S. Holdsworth, *The Origin of the Rule in Baker v. Bolton*, 32 L.Q. REV. 431, 435 (1916). But as Finkelstein argues, Lord Ellenborough was in fact,

> Stating nothing which was not already the established law in England for hundreds of years: the instance of wrongful death was never, in the

nale for this holding was, as has been thoroughly discussed throughout this Article, that the right of prosecuting killings had become the king's alone. The responsibility of the state to resolve cases of unnatural death was immutable, and private parties were consequently estopped from instigating their own suits in civil courts on the basis of wrongful death.

But as the rule of deodand began to unsatisfactorily and expensively complicate cases of accidental deaths, legal reform became inevitable. On August 18, 1846, deodand forfeitures were expressly outlawed in all circumstances of death.

> [T]here shall be no forfeiture of any chattel for or in respect of the same having moved to or caused the death of man; and no coroner's jury sworn to inquiry, upon the site of any dead body, how the deceased came by his death, shall find any forfeiture of any chattel which may have moved to or caused the death of the deceased, or any deodand whatsoever; and it shall not be necessary in any inquisition for homicide to allege the value of the instrument which caused the death of the deceased, or to allege that the same was of no value.[233]

Eight days later, on August 26, 1846, the English Parliament passed an "Act for Compensating the Families of Persons Killed by Accidents," sometimes known as "Lord Campbell's Act."[234] Lord Campbell, who had also originally proposed the Deodands Abolition measure, insisted that the bills be passed together because, "objectionable as the system of deodands was, he would not abolish it, having regard to public safety, unless the right action was given, in order to make railroad directors and stage coach proprietors cautious of the lives and limbs of Her Majesty's subjects."[235] Lord Campbell's Act gave relatives of persons wrongfully killed a right to seek compensation from the wrongdoer for the first time—not as a ward against vengeance, but as a price for the lost life.[236]

In short, the death of the deodand and the birth of the wrongful death suit occurred as a single political and social act. The same people who praised the end of an ineffective and "absurd" remedy for accidental death in the same breath constructed a more "rational" system for dealing with similar contingencies.[237] In turn, the state relinquished its right to exact forfeitures for accidental deaths, as well as

---

> preceding four or five centuries, considered as the basis for recovery of private damages strictly on the grounds that the death itself constituted an injury to the interests of surviving kin.

The Goring Ox, *supra* note 5, at 178. Like Finkelstein, I have come across no case which disproves this point of the law.

233. Deodands abolition 1846, 9 & 10 Vict. c. 62.

234. Fatal Accidents Act 1846, 9 & 10 Vict. c. 93.

235. HL Deb. (24 Feb. 1845) (77) col. 1031.

236. Nolan, *supra* note 24, at 131.

237. *The Goring Ox*, *supra* note 5, at 171.

its status as an "injured" party in the matter.[238] Instead, the right to sue a party who negligently (not feloniously) caused death returned to its Anglo-Saxon home—in the hands of surviving family members. This time, the law assessed the value not of a forfeited item, but of a human life, something English law refused to do for centuries prior.

C. Finding a Way to Cope

Why was the legal system so slow in allowing surviving family members to recover damages for their wrongfully dead? Historians have presented a range of theories. Even in the last recorded cases of deodands, there is an absolute failure to address the loss of human life in pecuniary terms.[239] Finkelstein argued that the idea of assigning monetary value to human life was so socially repugnant that the law held no place for the concept. As much was stated in *Hyatt v. Adams*, a case applying the *Baker* doctrine.[240] There, the judge wrote:

> I think . . . that the reason of the rule is to be found in that natural and almost universal repugnance among enlightened nations, to setting a price upon human life, or any attempt to estimate its value by a pecuniary standard, a repugnance which seems to have been strong and prevalent among nations . . . where human life has been held most sacred. Among barbarous and half-civilized nations, it has been common to find a fixed and prescribed standard of value or compensation for human life, which is often found to be carefully graduated by the relative importance of the position in the social scale which the deceased may have occupied . . . .
>
> To the cultivated and enlightened mind, looking at human life in the light of the Christian religion as sacred, the idea of compensating its loss in money is revolting.[241]

If *Hyatt's* philosophical position can be accepted as true sentiment of English law, we might better understand why Anglo-Saxon custom put a price on vengeance and deodand practice assessed items without compensation for the loss of a human life. In an overabundance of reverence, the legal system created a vacuous deficiency that left surviving kin of the dead without redress. Unsurprisingly, the law and the state have long since abandoned their reticence to assign pecuniary

238. *Id.* at 198.
239. *Id.* at 173–74.
240. Hyatt v. Adams, 16 Mich. 180 (1868).
241. *Id.* at 191–92.

worth to human life.[242] In fact, an entire field of economics exists to consider the value of a statistical life.[243]

Houston also pointed to an economic source of change in the laws of deodand; the decline of forfeiture in the seventeenth century speaks not about the victory of family, community, or private property, but about new mechanisms that developed to deal with issues of debt and credit in early modern society.[244] Nolan argued that the law's misapplication of a strict causal responsibility created situations in which penalties bore no relation to culpability, and that such was a fundamentally flawed system doomed to collapse or evolve.[245] Evans credited the law with deserting some of its primitive and infantile customs.[246]

Perhaps the answer is that the law, through centuries of deodand forfeitures, struggled over the construction of the legal and social answer to unnatural death. The legal system sought to answer questions about responsibility and who could be wrong in the event of accidental death. It sought to identify the true victim of the quasi-criminal loss of human life, and who could be wronged by that loss. It also tried to answer for those beyond our reach by providing procedures for the wrongfully dead who had had no chance to prepare for that moment of reckoning. The law tried to balance all of these questions while absorbing the religious and political shockwaves of the Medieval and Early Modern periods. Deodand law was socially imperfect, economically nonsensical, and legally doomed. But it provided the motions of process in the absence of satisfactory resolution. It was a way to cope.

V. CONCLUSION

It is unlikely that deodand practice will ever rid its reputation for absurdity in the minds of legal historians. Those who engage the subject only in passing can hardly be expected to feel much more than Evans about such a bizarre, irrational custom which we should all be thankful does not exist today. But on closer examination, it is clear that English law never engaged in the ignorant, retributive primitivism that has been assigned to deodand practice. Early modern com-

242. *See Mortality Risk Valuation*, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/environmental-economics/mortality-risk-valuation#whatvalue [https://perma.cc/K3Z9-8APP] (last visited Nov. 12, 2021). These types of calculations have, since their modern development and acceptance, been used routinely in accidental death cases. They have also become a significant part of the transportation industry's methodology for justifying infrastructure modifications.

243. *See, e.g.*, GREGORY MANKIW, PRINCIPLES OF ECONOMICS (South-Western Cengage Learning 6th ed. 2012).

244. HOUSTON, *supra* note 137, at 2.

245. Nolan, *supra* note 24, at 142.

246. EVANS, *supra* note 26, at 40–41.

munities did not believe that pots and pans were murderers, and they did not dress horses as humans and hang them. By the same token, forfeitures for accidental deaths were not a centuries-long scam constructed by the Crown to misappropriate private property. Financial records of the forfeitures that did occur plainly contradict the supposition that the state waxed fat off deodands, as does the political cessation of the practice in its most lucrative days.

If we insist on interpreting deodands through these lenses that are familiar and comfortable in their limited scope of patronizing condemnation, we lose what this piece of legal history says about the development of common law notions of guilt, responsibility, and absolution. As Sutton argued, deodands were a concept which adapted to meet society's changing needs, until further adaptation was impossible.[247] As such, deodand is not an oddity of legal history, but simply a method of trying to deal with the trauma of sudden accidental death and a reminder of the fragility of human life. There is certainly nothing odd about that sentiment to us today.

Ferzan wrote, rather eloquently, comparing our modern legal system with those that conducted full trials for nonhumans:

> I do not see a difference; I see the same quest for understanding about when the state can justly punish. I do not see the caterpillars as having criminal responsibility. I see that our best moral theories about what is required for responsibility, rationality, and volitional capacities yield the conclusion that the criminal justice system was being used for misguided ends. What criminal punishment did was to function as a form of social control, quelling the masses by excommunicating insects.[248]

Although we know that deodands were never considered criminally liable or morally culpable, the testament is the same. Deodands were the law's attempt to right a wrong that was profoundly abnormal. There was no one to punish, no way to compensate, and no way to undo the loss the community suffered. But there was a thing there, a real and tangible and maybe literally blood-stained thing that had, in some capacity, played a part in a tragedy the survivors were attempting to process. Safety required it to be distanced from the group to avoid contamination and pollution. Its value was to be given it to the State, as the proprietor, avenger of its citizens, and the representative of God, for the good of the living and the dead. This awkward and imperfect procedure of seeking resolution remains, for the law, a candid snapshot of its journey toward providing social and legal absolution for the irrevocable wrong in unnatural death. And while we should take comfort in the eventual result of that process, we should not undervalue those disquieting steps along the way and the stories of lost life woven into them.

---

247. Sutton, *supra* note *188, at 53*
248. Ferzan, *supra* note *82, at 955–56.*