

# ARTICLES

## THE HISTORICAL AND CONTEMPORARY PROSECUTION AND PUNISHMENT OF ANIMALS

By  
Jen Girgen\*

*This article analyzes the role of the animal “offender,” by examining the animal trials and executions of years past. The writer argues that although the formal prosecution of animals as practiced centuries ago may have ended (for the most part), we continue to punish animals for their “crimes” against human beings. She suggests that we do this primarily to achieve two ends: the restoration of order and the achievement of revenge, and concludes with a call for a renewed emphasis on “due process” for animals threatened with punishment for their offenses.*

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\* © Jen Girgen, 2003. Ms. Girgen received her J.D. from the University of Wyoming College of Law in 1996 and her M.S. in Criminology from Florida State University in 2001, and she is currently pursuing her Ph.D. in Criminology at Florida State University. The author is very grateful for the generous suggestions and critical comments she received from Professor Bruce Bullington, Bob Edwards, Rhonda Dobbs, and Roy Carr on an earlier draft of this article.

## I. INTRODUCTION

*"Once upon a time,"—and we might well begin in that manner because the story is as fantastic as a fairy tale—animals were held to be as liable as men for their criminal acts and torts.<sup>1</sup>*

In 1386, in Falaise (France), an alleged female killer mangled the face and arms of a child, thereby causing the child's death. The defendant was brought before the local tribunal, and after a formal trial she was declared guilty of the crime. True to *lex talionis*, or "eye-for-an-eye" justice, the court sentenced the infanticidal malefactor first to be maimed in her head and upper limbs and then to be hanged. A professional hangman carried out the punishment in the public square near the city hall. The executioner, officially decreed to be a "master of high works," was issued a new pair of gloves for the occasion "in order that he might come from the discharge of his duty, metaphorically at least, with clean hands, thus indicating that, as a minister of justice, he incurred no guilt in shedding blood."<sup>2</sup>

This particular trial and execution is interesting both because of the retaliatory nature of the punishment and the fact that the village commemorated the execution with a fresco painted on a wall in the south transept of the local Church of the Holy Trinity.<sup>3</sup> However, the case is especially significant because of the fact that the defendant was a pig.<sup>4</sup>

Today, it would seem peculiar for a community to prosecute and punish an animal for a criminal or other offense. We would like to believe that our present-day criminal justice system is too sophisticated to resort to holding animals accountable for the harms they sometimes cause. Not so long ago, however, animal trials and executions, such as that of the Falaise sow, were a regular part of our Western jurisprudential history.

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<sup>1</sup> Joseph P. McNamara, *Curiosities of the Law: Animal Prisoner at the Bar*, 3 *Notre Dame Law* 30, 32 (1927).

<sup>2</sup> Edward P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* 140 (Farber & Farber 1987). (As are most of the works discussing animal trials, this article is unusually indebted to Evans' book; it remains, as one writer put it, "the most complete listing of animal trials to date." Paul Schiff Berman, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 *N.Y.U. L. Rev.* 288, 298 (1994).)

<sup>3</sup> In 1820, the entire church was whitewashed, and unfortunately, the fresco painting was covered over. Evans, *supra* n. 2, at 141.

<sup>4</sup> Significantly, before her execution, some now unknown persons first dressed the sow in human clothing. *Id.* at 140. Today, we can only speculate as to what motivated the townspeople to dress the pig in human clothes before killing her. Was it to mock the transgressing animal? Or was it, instead, an effort to make the animal more humanlike (perhaps to impart a moral lesson to the people witnessing the event)? The answer, unfortunately, has been lost in history, possibly beneath a coat of whitewash.

## II. HISTORICAL ANIMAL TRIALS AND EXECUTIONS

### A. *The Two Kinds of Trials*

Medieval animal trials are most appropriately thought of as two distinct proceedings, depending upon the transgressing animal's offense and species. If the animal caused a public nuisance (typically involving the destruction of crops intended for human consumption), the transgression was addressed by church officials in an ecclesiastical court. Alternatively, when an animal caused physical injury or death to a human being, the animal was tried and punished by a judge in a secular court.<sup>5</sup> Furthermore, for reasons that will be explored more fully below, ecclesiastical courts tended to have jurisdiction over groups of untamed animals, such as swarms of insects. Secular tribunals, on the other hand, typically hosted trials involving individual domesticated animals.<sup>6</sup>

In spite of their nontraditional defendants, both the ecclesiastical and secular courts took these proceedings very seriously and strictly adhered to the legal customs and formal procedural rules that had been established for human criminal defendants. The community, at its own expense, provided the accused animals with defense counsel, and these lawyers raised complex legal arguments on behalf of the animal defendants. In criminal trials, animal defendants were sometimes detained in jail alongside human prisoners. Evidence was weighed and judgment decreed as though the defendant were human. Finally, in the secular court, when the time came to carry out the punishment (usually lethal), the court procured the services of a professional hangman, who was paid in a like manner as for the other, more traditional, executions he performed.<sup>7</sup>

Because this article is primarily concerned with the criminal prosecution and punishment of animals, it is largely devoted to an analysis of the secular proceedings. However, the older ecclesiastical proceedings may have facilitated the existence and acceptance of the criminal trials. As historian Esther Cohen notes, the medieval legists perceived the difference between the secular and ecclesiastical proceedings to be "functional, not causal."<sup>8</sup> "The operative principle underlying both

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<sup>5</sup> To be accurate, animal trials were held in royal, urban, seigneurial, and ecclesiastical courts. However, they followed only two distinct procedures, ecclesiastical and secular. Esther Cohen, *Law, Folklore and Animal Lore*, 110 *Past & Present* 10 (1986) (footnotes omitted). Legal historian Karl von Amira drew a sharp line of technical distinction between the trials and capital punishment of animals by secular tribunals (*Thierstrafen*) and the judicial proceedings by ecclesiastical courts against nondomesticated animals (*Thierprocesse*). See generally Karl Von Amira, *Thierstrafen und Thierprocesse*, 12 *Mitteilungen des Instituts für Österreichische Geschichtsforschung* 545 (1891).

<sup>6</sup> Nicholas Humphrey, *Forward*, in Edward P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* xvii (Farber & Farber 1987).

<sup>7</sup> Evans, *supra* n. 2, at 140-142.

<sup>8</sup> Cohen, *supra* n. 5, at 19.

types was identical, so that precedents could freely be drawn from one practice in support of the other."<sup>9</sup> Before beginning a detailed discussion of the secular criminal trials, then, a brief description of the ecclesiastical animal trials may be useful.

### 1. *Ecclesiastical Trials*

The earliest animal prosecution for which reliable documentation exists was an ecclesiastical proceeding dating back to the year 824, when a group of moles was excommunicated in the Valley of Aosta (Italy).<sup>10</sup> A few earlier maledictions have been recorded, such as the cursing and burning of storks in the year 666 by Saint Agricola in Avignon (France), and the expulsion of venomous reptiles from Reichenau Island (Germany) by Saint Perminius in 728.<sup>11</sup> However, because these reports come primarily from hagiologies and other legendary sources, their reliability is questionable.<sup>12</sup>

Ecclesiastical trials were first held in Switzerland and bordering areas of France, Germany, and Italy. Relying upon the international network of ecclesiastical jurisdiction, the proceedings held in the ecclesiastical courts spread much farther than the secular trials ever did.<sup>13</sup> Eventually, the church tried animals in proceedings held in locations including Ethiopia,<sup>14</sup> Scandinavia, Spain, Canada, Brazil,<sup>15</sup> Turkey, and Denmark.<sup>16</sup>

Groups of untamed offenders—typically swarms of predatory insects or destructive rodents—were prosecuted, almost always for destroying crops intended for human consumption or for some other harmful or annoying behavior. The aim of these ecclesiastical trials was more to prevent the animals from doing any further damage than it was to punish them for the harm they had already caused.<sup>17</sup> As it would have been extremely difficult (indeed, if not impossible) to seize, try, and punish the animals individually, ecclesiastical judges prosecuted these offenders in groups in absentia.<sup>18</sup>

In 1713 in Piedade no Maranhão (Brazil), a Franciscan monastery was overcome by termites. The insects reportedly devoured the friars' food, destroyed their furniture, and even threatened to topple the walls of the monastery. The friars requested an act of interdiction and excommunication from the bishop, and the termites were summoned to appear before an ecclesiastical tribunal. At the proceeding, the lawyer

<sup>9</sup> *Id.*

<sup>10</sup> Evans, *supra* n. 2, at 265.

<sup>11</sup> *Id.* at 265, n. 1.

<sup>12</sup> *Id.* at 265–286.

<sup>13</sup> Cohen, *supra* n. 5, at 13.

<sup>14</sup> *Prosecutions Against Animals*, 1 *Am. Jurist* 223, 233 (1829).

<sup>15</sup> Evans, *supra* n. 2, at 265–286.

<sup>16</sup> *Id.* at 136–137.

<sup>17</sup> Esther Cohen, *The Crossroads of Justice: Law and Culture in Late Medieval France* 121 (E.J. Brill 1993).

<sup>18</sup> Evans, *supra* n. 2, at 3.

appointed to defend the insects argued that because they were God's creatures, the termites were entitled to sustenance.<sup>19</sup> The trial ended with a compromise in which the friars promised to provide suitable habitat for the termites, who in turn were commanded to go and remain at that site.<sup>20</sup> The proceeding was typical of the ecclesiastical trials in its strict adherence to legal procedure, the types of arguments made on behalf of the animal defendants, and the proposed compromise by the people alleging harm.

Complainants named whole groups of natural pests as defendants. Moles, mice, rats, snakes, birds, snails, worms, grasshoppers, caterpillars, termites, various types of beetles and flies, and other unspecified insects and "vermin" were prosecuted by the church during the Middle Ages and later.<sup>21</sup> Even species as seemingly innocuous as eels and dolphins were prosecuted.<sup>22</sup> Because these particular defendants were not subject to human control, their destructive foraging "demanded the intervention of the Church and the exercise of its supernatural functions for the purpose of compelling them to desist from their devastations and to retire from all places devoted to the production of human sustenance."<sup>23</sup>

The typical ecclesiastical proceeding went something like this: First, the persons alleging harm presented their complaint to the ecclesiastical court. The judge receiving the complaint would then send someone to investigate the extent of the damage allegedly inflicted by the animals. The court then "invariably demanded public processions and prayers to allay heaven's anger before the trial proper began."<sup>24</sup> If prayer failed, the court would then summon all of the offending class of animals to appear in court and appoint a procurator to represent the animal defendants.<sup>25</sup>

The animal defense attorneys "took their job very seriously, devoting a great deal of time, knowledge and legal experience to the defense of their clients,"<sup>26</sup> and relied heavily upon three strategies in particular: "First, they could avoid all arguments by the use of dilatory tactics. Failing these, they could claim once the trial opened that the court had no jurisdiction over animals. If this line of defense too crumbled, they could try to vindicate their clients' actions."<sup>27</sup>

One of the most renowned of these animal public defenders was Bartholomew Chassenée, who would later become the first president of

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<sup>19</sup> The appointed counsel also praised the industry of his clients and declared them to be, at least in this respect, superior to the friars who had initiated the prosecution. *Id.* at 123-124.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 265-286.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 3.

<sup>24</sup> Cohen, *supra* n. 17, at 120.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

the Parlement de Provence (a position corresponding to Chief Justice) and a significant contributor to the evolution of sixteenth-century French legal thought.<sup>28</sup> In 1522, in a case that would help establish him as an eminent legal scholar, Chassenée was appointed to defend the rats of Autun, who had been accused of destroying the province's barley crop. In defense of his clients' failure to appear before the court in response to its formal summons, Chassenée first argued that because his clients lived in different locations in several villages, a single summons would fail to notify them all of the complaint. The court agreed, and a second citation was read in all the parishes inhabited by the rats. When the rats still did not appear after this second summons, Chassenée explained that the disobedience was now due to the length and difficulty of the journey; he argued further that it was the rats' fear of the cats they would encounter on their journey that kept them from their obligation.<sup>29</sup>

In spite of the skilled arguments attorneys made on behalf of their animal clients, the defendants usually failed to appear in court on their appointed day and therefore typically lost the case by default.<sup>30</sup> The animals were then usually "solemnly adjured to vacate the lands or vineyards they had been devastating within a given period of time, often six days."<sup>31</sup>

Nevertheless, at times, the ecclesiastical judges exercised what seemed to have been either compassion or, at a minimum, extreme deference to justice. In 1519, the commune of Stelvio (Italy) prosecuted a group of local moles who, in their burrowing, had damaged some crops.<sup>32</sup> A procurator was appointed and charged with their defense. Many witnesses testified that the animals had caused serious damage to their fields and had cost them financial hardship.<sup>33</sup> Anticipating that the judge would order the moles to evacuate the fields, counsel for the defendants requested that they at least be guaranteed a safe passage away from the vicinity, free of possible harm from dogs, cats, or other enemies. The judge granted this request and ordered that "a free safe-conduct and an additional respite of fourteen days be granted to all those which are with young and to such as are yet in their infancy."<sup>34</sup> After this fourteen day reprieve, however, the judge warned that every mole must have left, "irrespective of age or previous condition of pregnancy."<sup>35</sup>

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<sup>28</sup> Evans, *supra* n. 2, at 18, 316. Later, Chassenée wrote a collection of "consultations," which were first printed in 1531. The first of these consultations, entitled *De Excommunicatione Animalium Insectorum*, was a treatise on animal trials. *Prosecutions Against Animals*, *supra* n. 14, at 227.

<sup>29</sup> Evans, *supra* n. 2, at 18–19.

<sup>30</sup> McNamara, *supra* n. 1, at 33.

<sup>31</sup> Cohen, *supra* n. 17, at 123.

<sup>32</sup> Evans, *supra* n. 2, at 111–112.

<sup>33</sup> *Id.* at 112.

<sup>34</sup> *Id.* at 112–113.

<sup>35</sup> *Id.* at 113.

If the animals failed to leave, they were then anathemized. In such a ritual, the church solemnly pronounced a curse against the offending creatures. For all practical purposes, an anathema may be thought of as a sort of "animal excommunication," in which the maleficent animals were considered damned.<sup>36</sup> As will be discussed below, these denunciations stand in sharp contrast to the physical punishments inflicted upon animals found guilty by secular courts.

In one reported instance, a group of swallows disrupted churchgoers with their chirping and earned the additional vexation of Egbert, Bishop of Trier (Germany), when they "sacrilegiously defiled his head and vestments with their droppings when he was officiating at the altar."<sup>37</sup> The bishop responded by levying a curse against the birds, forbidding them to enter the church on pain of death. According to Evans, "it is still a popular superstition at Trier, that if a swallow flies into the cathedral, it immediately falls to the ground and gives up the ghost."<sup>38</sup>

Whether the anathema was an effective method of ridding an area of pests is, of course, questionable. Thus, Evans suggests that when Saint Bernard cursed a swarm of flies that had been annoying the worshippers and church officials in Foigny (France), the fact that they were "all dead corpses" the next day had more to do with a sudden frost that had hit the area than it did with the supernatural powers of the church.<sup>39</sup> Nonetheless, church officials resorted to these maledictions because they had few other options. It was also a no-lose situation for the church. If the insects left, then the church's anathema had "worked." Alternatively, if the insects remained, then the anathema's failure could be attributed to the sins of the people. "[I]n either case the prestige of the Church was preserved and her authority left unimpaired."<sup>40</sup>

Beginning in 1545, weevils ravaged the vineyards of Saint Julien, a hamlet located on Mount Cenis (France) and renowned for its wine. The plaintiff and the two lawyers appointed as counsel for the beetle defendants presented their respective sides of the case.<sup>41</sup> As was typical, rather than issuing a sentence, the official issued a proclamation recommending public prayers "to implore pardon for our sins."<sup>42</sup> In May 1546, the public indeed offered prayers, and soon afterwards, the insects were said to have disappeared.<sup>43</sup> Thirty years later, however, the weevils returned to Saint Julien and resumed their destructive for-

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<sup>36</sup> However, it should be noted that "[p]roperly speaking, animals cannot be excommunicated, but only anathematized," because to excommunicate is to eject from membership in, or exclude from the enjoyment of the privileges of a church. Thus, the excommunication ritual "is limited in its operation to members of the ecclesiastical body, to which the lower animals do not belong." *Id.* at 51, 52.

<sup>37</sup> *Id.* at 28.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 28-29.

<sup>40</sup> *Id.* at 111.

<sup>41</sup> *Id.* at 38.

<sup>42</sup> *Id.* at 38-39.

<sup>43</sup> *Id.* at 39.

aging. This time, the case went to trial. Because the original defense lawyers had since died, the presiding court appointed new counsel on behalf of the insects. Pierre Rembaud, the beetles' newly appointed defense counsel, made a motion to dismiss the case. Rembaud argued that, according to the Book of Genesis, God had created animals before human beings and had blessed all the animals upon the earth, giving to them every green herb for food. Therefore, the weevils had a *prior* right to the vineyards, a right conferred upon them at the time of Creation.<sup>44</sup>

While the legal wrangling continued, the townspeople organized a public meeting in the town square to consider setting aside a section of land outside of the Saint Julien vineyards where the insects could obtain their needed sustenance without devouring and destroying the town's precious vineyards. They selected a site named "La Grand Feisse" and described the plot "with the exactness of a topographical survey."<sup>45</sup> To the people following the case, it must have seemed as if this prolonged feud between humans and insects might soon end. However, the weevils' attorney declared that he could not accept, on behalf of his clients, the offer made by the plaintiffs. The land, Rembaud argued, was sterile and not suitable to support the needs of the weevils. The plaintiff's attorney insisted that the land was, in fact, suitable and insisted upon adjudication in favor of the complainants. The judge decided to reserve his decision and appointed experts to examine the site and submit a written report upon the suitability of the proposed asylum.<sup>46</sup>

Unfortunately, we may never know how this story ended, as the last page of the records, upon which the final decision of the case was written, has ironically been destroyed by either rodents or insects.<sup>47</sup> Evans suggests that "[p]erhaps the prosecuted weevils, not being satisfied with the results of the trial, sent a sharp-toothed delegation into the archives to obliterate and annul the judgment of the court."<sup>48</sup>

The case of the weevils of Saint Julien illustrates the strictness with which the human participants adhered to procedural rules guiding animal trials. In this case, the court appointed counsel—at least three lawyers during the course of the dispute—to represent the defendants. These lawyers raised complex legal arguments on behalf of the insects, and "[w]hether the lawyers believed their words or merely argued for pay is irrelevant: they built a framework of ideology that firmly included animals within human justice."<sup>49</sup> The plaintiffs and defendants negotiated a possible compromise and proposed that an alternate tract of land serve as a possible reservation for the insects. Moreover, the judge appointed experts to precisely measure and ex-

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<sup>44</sup> *Id.* at 43.

<sup>45</sup> *Id.* at 46–47.

<sup>46</sup> *Id.* at 48.

<sup>47</sup> *Id.* at 49.

<sup>48</sup> *Id.*

<sup>49</sup> Cohen, *supra* n. 17, at 126–127.

amine the suitability of the proposed site. Clearly, then, the human participants of these early trials took these proceedings very seriously. In the meantime, the weevils of Saint Julien continued about their regular business, ravaging the prized vineyards, apparently unaware of the events of which they were the focus.

## 2. *Secular Trials*

While ecclesiastical courts addressed public nuisance cases involving animals, more serious harms, such as causing grave injury or death to a human being, were adjudicated by secular tribunals. These secular animal trials may have first been held in the Prytaneum, or public hall, of Ancient Athens.<sup>50</sup> It was here that three kinds of curious murder trials were held: (1) when a person had been killed, but the murderer was either unknown or could not be located; (2) when some inanimate object, such as a stone, had caused a human being's death (often by falling upon the unfortunate person); and (3) when an animal had caused a human being's death.<sup>51</sup>

We know relatively little about these ancient Greek animal trials. Indeed, Aristotle (384–322 B.C.) was the only classical writer to refer explicitly to the Athenian proceedings.<sup>52</sup> In fact, there is no direct evidence that any such trials actually occurred.<sup>53</sup> However, by most accounts, the primary purpose of the prosecution of animals would have been the same one that governed the Greeks' prosecution of inanimate objects: removal of the pollution that, because of the crime, had "contaminated" the community.<sup>54</sup> Following the trial, if the finders of fact and law declared the offending animal guilty, the animal was likely executed. Her corpse would then be "cast beyond the border" to rid the land of pollution.<sup>55</sup> Thus, according to Plato (428–348 B.C.):

If a beast of draught or other animal cause homicide, except in the case when the deed is done by a beast competing in one of the public sports, the kinsmen shall institute proceedings for homicide against the slayer; [and]

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<sup>50</sup> 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, 700 (1916).

<sup>51</sup> *Id.* at 696–700; see also Aristotle, *Constitution of Athens & Related Texts* § 57.4, 135 (Kurt von Fritz & Ernst Kapp trans., Hafner 1974).

<sup>52</sup> J.J. Finkelstein, *The Ox That Gored*, 71 Transactions of the Am. Phil. Socy. 59 (1981); Aristotle, *supra* n. 51.

<sup>53</sup> Finkelstein, *supra* n. 52, at 59.

<sup>54</sup> Marilyn A. Katz, *Ox-Slaughter and Goring Oxen: Homicide, Animal Sacrifice, and Judicial Process*, 4 Yale J.L. & Humanities 249, 270 (1992); William Ewald, *What Was it Like to Try a Rat?* 143 U. Pa. L. Rev. 1889, 1913 (1995).

<sup>55</sup> Hyde, *supra* n. 50, at 700. But see Geoffrey MacCormack, *On Thing Liability (Sachhaftung) in Early Law*, 19 Irish Jurist 322, 343–344 (1984) (preferring the possibility that the animal was banished because "[a]n animal which has once killed may do so again and needs to be removed as a danger to the community"). Although MacCormack's skepticism is certainly warranted, he himself acknowledges that "conviction of an animal probably entailed its being put to death and also cast beyond the frontiers." *Id.* at 343 (footnote omitted). With due respect to Geoffrey MacCormack, a dead animal rarely poses a threat to the community.

on conviction, the beast shall be put to death and cast out beyond the frontier.<sup>56</sup>

In holding the trials, the ancient Greeks would have also hoped to appease the Erinyes (avenging spirit of the dead person) lest misfortune fall upon the state.<sup>57</sup> The Greeks "held the general notion that the moral equilibrium of the community had been disturbed by the murder and that somebody or something must be punished or else dire misfortune, in the form of plagues, drouths, reverses in men's fortunes, would overtake the land."<sup>58</sup>

Outside of the alleged ancient Greek proceedings, the oldest surviving confirmation of the secular prosecution of an animal in Western Europe is the 1266 trial and execution of an infanticidal pig in Fontenay-aux-Roses (France).<sup>59</sup> However, it should be noted that the "matter-of-fact fashion" in which records from that time mention these trials suggests that, in fact, "the custom had long been in existence before the appearance of written records."<sup>60</sup>

By all accounts, the practice of trying and punishing animals was a common occurrence in Europe's courts. In *The Criminal Prosecution and Capital Punishment of Animals*, Evans documented more than 191 prosecutions and excommunications of animals between the ninth and twentieth centuries.<sup>61</sup> Despite its length, Evans's list is far from complete, and its usefulness is limited by the fact that, during the Middle Ages and even later, court records were often either imperfectly kept or completely destroyed.<sup>62</sup> Thus, we have been left with an incomplete history of these trials, and the existing records of these prosecutions almost certainly represent a mere fraction of those that actually took place.

Supplementing court and other historical records are the works of contemporary writers, which also suggest that the medieval and post-medieval Europeans were familiar with animal trials. Even Shakespeare, in *The Merchant of Venice*, refers to a murderous wolf's execution,<sup>63</sup> and in the latter half of the seventeenth century, the French

<sup>56</sup> Plato, *The Laws of Plato*, book IX, 263-264 (A.E. Taylor, trans., J.M. Dent & Sons Ltd. 1934).

<sup>57</sup> Hyde, *supra* n. 50, at 702.

<sup>58</sup> *Id.* at 698.

<sup>59</sup> Cohen, *supra* n. 5, at 20.

<sup>60</sup> *Id.*

<sup>61</sup> Evans, *supra* n. 2, at 265-286.

<sup>62</sup> *Id.* at 137. According to Finkelstein, "archival documents in general are relatively scarce for medieval Europe for the ages earlier than about the mid-thirteenth century." Finkelstein, *supra* n. 52, at 67. In particular, evidence of many bestiality trials were destroyed. Although the consensus of the courts in these cases was that the animals were "innocent participants," the destruction of the animal—along with the records of the legal proceedings—was done with the aim of erasing all record (and also, it was hoped, all memory) of this particularly unthinkable and horrific crime. Cohen, *supra* n. 5, at 18 n. 39.

<sup>63</sup> In the play, the character Gratiano chastises the demonized Shylock:  
Thy currish spirit

playwright Jean Racine parodied the animal trials of which his audience was evidently already familiar.<sup>64</sup> Both Racine's and Shakespeare's references suggest that the trials and executions of animals were common in Europe in the Middle Ages and later—or at least that they occurred frequently enough that the bard and other writers could allude to them, confident that their audiences would know of the phenomenon to which they were referring.<sup>65</sup>

Extant research indicates that the majority of secular prosecutions were concentrated in the southern and eastern parts of France and in adjacent parts of Germany, Italy, and Switzerland.<sup>66</sup> However, because our knowledge of animal trials is based upon existing research—which may or may not be representative, and is certainly not complete—we must wonder whether it reflects the true concentration of animal trials, or rather, simply the accessibility of documents or the initiative of local researchers.<sup>67</sup> Later, the practice of trying and punishing animals for their crimes spread throughout the world, to vil-

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Governed a wolf, who hanged for human slaughter -

Even from the gallows did his fell [i.e., "fierce"] soul fleet . . .

William Shakespeare, *The Merchant of Venice* 4.1.133–135 (M.M. Mahood ed., Cambridge U. Press 1987).

<sup>64</sup> In *Les Plaideurs*, a dog is tried for stealing and eating a chicken. After the dog is found guilty and sentenced to the galleys, his defense counsel brings in a litter of puppies and appeals to the compassion of the judge (who is also a father). Evans, *supra* n. 2, at 166–167, 312. Racine reportedly got the idea for his only comedy from Athenian poet Aristophanes' play *The Wasps*, in which a dog is prosecuted (and ultimately acquitted), with all the legal formalities, by another dog for "having devoured a Sicilian cheese by himself without accomplices." *The Wasps* by Aristophanes, Part 12 <[http://www.greece.com/library/aristophanes/wasps\\_12.html](http://www.greece.com/library/aristophanes/wasps_12.html)> (accessed Oct. 22, 2002).

<sup>65</sup> Later literature also refers to these prosecutions. In the classic novel *The Hunchback of Notre Dame*, Victor Hugo details the fifteenth-century trial of Esmeralda's goat. ("Nothing was more common in those times than to bring a charge of witchcraft against animals.") Victor Hugo, *The Hunchback of Notre Dame* 305 (Walter J. Cobb trans., Signet Classic 1965 (1833)). More than a century later, poet Ted Walker dedicated a 65-stanza ode to the execution of the sow of Falaise, written from the perspective of the man charged with first maiming, then hanging, the infanticidal pig:

I that threw wide the door.

I that spoke of the Law.

I that called upon God

to exact blood for blood.

Ted Walker, *Pig pig*, in *Gloves to the Hangman: Poems 1969–72* 36, 41 (Jonathan Cape Ltd. 1973).

More recently, the animal trials were resurrected in the film *The Advocate (The Hour of the Pig)* (British Broadcasting Co. 1993) (motion picture). The film remains relatively loyal to Evans' research, and the main character of the film is based upon real-life animal advocate Bartholomew Chassanéé.

<sup>66</sup> Finkelstein, *supra* n. 52, at 67.

<sup>67</sup> *Id.*

lages in Portugal, England, Scotland, Yugoslavia,<sup>68</sup> the Netherlands, Belgium, Luxembourg,<sup>69</sup> and Russia.<sup>70</sup>

The practice of punishing animals for their "participation" in criminal acts even reached across the Atlantic to the American colonies. In 1642, in Massachusetts, a mare, a cow, and other "lesser cattle," were executed along with Thomas Graunger, the teenage boy who had sexually assaulted them.<sup>71</sup> Similarly, on June 6, 1662, in New Haven, Connecticut, a man named Potter was executed along with eight animals—"a cow, two heifers, three sheep and two sows, with all of which he had committed his brutalities."<sup>72</sup> The Puritan theologian Cotton Mather reported that the man had engaged in the sexual abuse of animals for "no less than fifty years."<sup>73</sup>

This is not to suggest that the prosecution and punishment of animals who had harmed or killed people was in any way limited to European-influenced societies. Indeed, there are numerous ethnographic examples of non-Western and non-Judeo-Christian societies prosecuting or retaliating for the harms caused by animals.<sup>74</sup> Two centuries ago, for example, it was reported that among the Kookies of India

if a tiger even kills any of them, near a village, the whole tribe is up in arms, and goes in pursuit of the animal; when, if he is killed, the family of the deceased gives a feast of his flesh, in revenge of his having killed their relation. And should the tribe fail to destroy the tiger, in this first general pursuit of him, the family of the deceased must still continue the chase; for until they have killed either this, or some other tiger, and have given a feast of his flesh, they are in disgrace in the village, and not associated with by the rest of the inhabitants.<sup>75</sup>

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<sup>68</sup> Evans, *supra* n. 2, at 265-286.

<sup>69</sup> Cohen, *supra* n. 5, at 18.

<sup>70</sup> Towards the end of the seventeenth century, a Russian court sentenced a pet goat, accused of butting a child down a flight of stairs, to exile in Siberia and required the family to contribute one kopeck a day for the animal's upkeep. Finkelstein, *supra* n. 52, at 85 n. 28.

<sup>71</sup> Edwin Powers, *Crime and Punishment in Early Massachusetts, 1620-1692: A Documentary History* 303 (Beacon Press 1966).

<sup>72</sup> Evans, *supra* n. 2, at 148-149 (quoting Cotton Mather, *Magnalia Christi Americana* 6 (London 1702)).

<sup>73</sup> *Id.*

<sup>74</sup> *Contra* Finkelstein, *supra* n. 52, at 5-6; J.J. Finkelstein, *The Goring Ox*, 46 Temple L.Q. 169, 230 n. 195 (1973). "Only in Western society, or in societies based on the hierarchic classification of the phenomena of the universe that is biblical in its origins, do we see the curious practice of trying and executing animals as if they were human criminals." Finkelstein, *supra* n. 52, at 48. However, Cohen astutely notes that

Finkelstein's theory depends upon his failure to find any animal trials outside the Judaeo-Christian tradition, a failure that derives from his strictly occidental concept of the judicial process. In fact many non-literate, non-western societies prosecuted and punished offending animals, albeit less formally than the Europeans, for their entire judicial structure was conceived in a different form.

Cohen, *supra* n. 5, at 18.

<sup>75</sup> James Frazer, *The Ox That Gored*, in *Folk-Lore in the Old Testament* vol. 3, 415, 415-416 (1919) (quoting John Macrae, *Account of the Kookies of Lunctas*, in 7 Asiatic Researches 189 (London 1803)).

Also, in the early nineteenth century, the native Code of Malacca (Malaysia) required the death of a buffalo or cow who, while tied in the forest in a place where people were not in the habit of passing, gored a person to death. The human guardian of such an animal was not fined or punished in any way except for the loss of the animal.<sup>76</sup> At the same time, among the Maori of New Zealand, when a ruminating pig wandered over a sacred place, only the pig's death could rectify the trespass.<sup>77</sup> And in a small Bayaka village on the Yee River in the Congo, a dog was hung from the gallows because "he was a notorious thief, who was in the habit of making marauding expeditions among the fowls; he had, therefore, been strung up as a public example."<sup>78</sup>

Although they were just as scrupulous in their adherence to strict procedural rules, secular trials were, in fact, quite different from the proceedings held by church officials. First, charges were usually levied against an individual animal offender rather than a whole group of animals. Second, the offending animal was usually a member of a domesticated—not feral—species. Finally, the punishment inflicted upon animals declared guilty was usually corporal, not supernatural.<sup>79</sup>

Animals named as criminal defendants included pigs, cows, bulls, horses, mules, oxen, goats, sheep, and dogs. Pigs, especially, were called to defend themselves in the criminal courts of medieval humans. "The frequency with which pigs were brought to trial and adjudged to death, was owing, in a great measure, to the freedom with which they were permitted to run about the streets and to their immense number."<sup>80</sup> Their apparent penchant for committing human infanticide was also a factor.<sup>81</sup>

Upon the filing of a formal complaint alleging harm, the animal was arrested and brought before the court. There, a public prosecutor prepared a formal accusation, and the judge assigned defense counsel to assist the accused animal in responding to the charge. At trial, witnesses were examined and evidence was presented as though the defendant were a person. The decision was rendered according to common law precedents, and animal defendants in secular courts were usually found guilty and sentenced to death.<sup>82</sup>

Occasionally, however, secular judges ruled in favor of animal defendants, which strongly suggests that these animal trials were not merely for show. Evidence was sometimes introduced that led to the

<sup>76</sup> T.J. Newbold, *Political and Statistical Account of the British Settlements in the Straits of Malacca* vol. 2, 257 (Oxford U. Press 1971 (1839)).

<sup>77</sup> J.S. Polack, *Manners and Customs of the New Zealanders* vol. 1, 240 (James Maden & Co. 1840).

<sup>78</sup> E. Torday, *Camp and Tramp in African Wilds* 142 (Seeley, Service & Co. 1913).

<sup>79</sup> Evans, *supra* n. 2, at 140.

<sup>80</sup> *Id.* at 158. Until the second half of the nineteenth century, pigs also freely wandered the streets of early New York City, and there, too, they were known to have "occasionally killed children." Hendrik Hartog, *Pigs and Positivism*, 1985 Wis. L. Rev. 899, 902, 922 (1985).

<sup>81</sup> Evans, *supra* n. 2, at 160.

<sup>82</sup> Berman, *supra* n. 2, at 300.

defendant's exculpation. In 1750, a man was sentenced to death for engaging in an act of bestiality with a she-ass, but "the animal was acquitted on the ground that she was the victim of violence and had not participated in her master's [sic]<sup>83</sup> crime of her own free will."<sup>84</sup> During the trial, the defense introduced into evidence a document signed by the prior of the covenant, as well as the principal inhabitants of Vanvres (France), where the offense had been committed. The certificate stated that they had known the she-ass for four years, and that during that time she had been virtuous and well behaved, never involved in scandal, and "in word and deed and in all her habits of life a most honest creature."<sup>85</sup> This document strongly influenced the court's decision to acquit the animal, and "[a]s a piece of exculpatory evidence it may be regarded as unique in the annals of criminal prosecutions."<sup>86</sup>

Extenuating circumstances, such as youth, sometimes worked to the accused's advantage. In 1457, in Savigny-sur-Etang (France), a sow and her six piglets were caught in the act of killing a five-year-old boy. A month later, all seven pigs were imprisoned and tried for the murder before the seigneurial justice of Savigny.<sup>87</sup> Although the sow was found guilty and sentenced to be hanged by her hind legs to a gallows tree, her offspring (who had been found stained with blood) were pardoned, owing in part to their youth and the bad example set by their mother.<sup>88</sup> In the courtroom, the defendant's demeanor also might have worked for or against her:

In court, [pigs] would frequently act disrespectfully—grunting, squealing and trying to poke their noses through the bars of the prisoner's box. Disorderly conduct of this kind often told against them in sentencing. An animal that remained quiet during proceedings would, on the other hand, receive a certain measure of consideration for its [sic] demeanour.<sup>89</sup>

Lawyers for a convicted animal sometimes appealed an unfavorable verdict to a higher court. Occasionally, this would result in a change or annulment of the lower tribunal's judgment or even the defendant's acquittal.<sup>90</sup> In one case, counsel for a sow and a she-ass, each

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<sup>83</sup> Being unable to comprehend (and unwilling to accept) the notion that one sentient being may be "owned" by another, when discussing animals in this paper, I am reluctant to use the terminology of property and ownership. Thus, when quoting the archaic and injurious language of the past, I will passively protest by inserting a "[sic]" after the offending language.

<sup>84</sup> Evans, *supra* n. 2, at 150.

<sup>85</sup> *Id.* at 150–151.

<sup>86</sup> *Id.* at 151.

<sup>87</sup> Cohen, *supra* n. 5, at 10.

<sup>88</sup> Evans, *supra* n. 2, at 153–154; Hyde, *supra* n. 50, at 707. Other times, however, mitigating factors were not considered, even though it seems they existed. In 1610, for example, several rabid dogs attacked and killed a Franciscan novice; no account was taken of their insanity, and they were sentenced to death. Evans, *supra* n. 2, at 176.

<sup>89</sup> Philip Jamieson, *Animal Liability in Early Law*, 19 *Cambrian L. Rev.* 45, 49 (1988) (footnote omitted) (citing Gerald Carson, *Men, Beasts and Gods* 29 (1972); Edmund Collins, *Animals Tried in Court*, 19 *Our Animal Friends* 82, 85–86 (1891)).

<sup>90</sup> Evans, *supra* n. 2, at 139–140.

condemned to be hanged, appealed the lower court's judgment. Following a new trial, both animals were each resentenced "to be simply knocked on the head."<sup>91</sup>

The animal trial scholars are not unanimous about whether medieval jurists generally thought animals capable of forming the necessary mens rea to commit a proper crime.<sup>92</sup> However, in several documented instances actual malice, and thus, the necessary criminal intent, was imparted upon animal defendants. On September 5, 1379, near the town of Saint-Marchel-le-Jeussey (France), as two herds of pigs were feeding together, three of the animals suddenly attacked and killed the son of the swine keeper. The three sows were tried and condemned to death.<sup>93</sup> Furthermore,

as both the herds had hastened to the scene of the murder and by their cries and aggressive actions showed that they approved of the assault, and were ready and even eager to become *participles criminis*, they were arrested as accomplices and sentenced by the court to suffer the same penalty.<sup>94</sup>

Likewise, on March 27, 1567, the court of judicatory of Senlis (France) sentenced a sow to be hanged for her "cruelty and ferocity" in killing a four-month-old girl.<sup>95</sup>

It was not uncommon for an animal defendant to be imprisoned both during the trial and while awaiting execution of the punishment.<sup>96</sup> Indeed, animal and human criminals were sometimes kept in the same prisons. In 1408, in Pont de Larche (France), a pig accused of killing a child was kept in the town's prison for more than three weeks until the infanticidal animal was hanged. A receipt shows that the jailer charged two deniers tournois a day for the pig's board, "the same as for boarding a man, thus placing the porker, even in respect to its [sic] maintenance, on a footing of perfect equality with the human prisoners."<sup>97</sup>

Medieval executions, although performed in public and administered with great formality, were harsh for both human and animal offenders. As Evans notes, penal justice of that era "sought to inflict the greatest possible amount of suffering on the offender and showed a diabolical fertility of invention in devising new methods of torture even for the pettiest trespasses."<sup>98</sup> Animals were occasionally even made to

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<sup>91</sup> *Id.* at 140.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.* at 144.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 308-309 (citing Dom. Grenier, 20 *Manuscrits de la Bibliothèque Nationale de Paris* 87).

<sup>96</sup> Hyde, *supra* n. 50, at 710-711.

<sup>97</sup> Evans, *supra* n. 2, at 142-143. As will be discussed below, the practice of incarcerating animal defendants reappeared occasionally even in the twentieth and twenty-first centuries.

<sup>98</sup> *Id.* at 206-07.

suffer upon the rack under the pretext of extorting confessions.<sup>99</sup> Guilty animals were usually hanged,<sup>100</sup> although they were also burned alive, especially during the latter half of the seventeenth century, and typically in cases involving bestiality.<sup>101</sup> Animals declared guilty were also buried alive,<sup>102</sup> beheaded, or—in strict compliance with the biblical mandate of Exodus 21:28—stoned to death.<sup>103</sup>

Similar to the trials themselves, in both style and substance these punishments closely mimicked those suffered by human criminals. Occasionally, small variations appeared, some of which may have been prescribed by a desire for a more “animal” form of execution.<sup>104</sup> Thus, “in some places animals were dragged and hung like human murderers, while in others the authorities resorted to strangling or a knock on the head. The use of a tree instead of the ‘human’ gallows was also occasionally apparent, though even then a proper hangman performed the job.”<sup>105</sup>

Not all punishments were lethal, however. In Austria, in 1712, a dog reportedly bit the leg of a member of the municipal council. The dog was tried and sentenced to one year in the Narrenkötterlein, which was “a sort of pillory or iron cage standing on the market-place, in which blasphemers, evil-livers, rowdies and other peace-breakers were commonly confined.”<sup>106</sup> Sometimes, economic considerations worked to the benefit of the animal. If the offending animal was particularly valuable—such as an ox or a horse—a judge might have been more receptive to the defense counsel’s plea to spare her life. In these cases, the offending animal might have been confiscated, or perhaps even pardoned, but not executed.<sup>107</sup> In 1395, for example, on the Mediterranean island of Sardinia (Italy), wild or domestic cattle caught causing damage could be lawfully killed, while donkeys accused of similar harm were treated less severely: “For the first offense of trespassing on a strange field, one ear was cut off; for the second offense, the

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<sup>99</sup> *Id.* at 139. However, according to Evans, we should not believe that in the latter cases the judge truly expected a confession proper to be made. Rather, “he wished merely to observe all forms prescribed by the law, and to set in motion the whole machinery of justice before pronouncing judgment.”

<sup>100</sup> Hyde, *supra* n. 50, at 710.

<sup>101</sup> Evans, *supra* n. 2, at 138, 147.

<sup>102</sup> *Id.* at 138.

<sup>103</sup> Finkelstein, *supra* n. 52, at 64 (citing Von Amira, *supra* n. 5, at 550).

<sup>104</sup> Cohen, *supra* n. 5, at 12 (footnotes omitted) (citing *Coutumes et Stilles de Bourgoigne* § 197, in C. Giraud, *Essai sur l’Histoire du Droit Français au moyen âge* 302 2).

<sup>105</sup> *Id.* Elsewhere, Cohen suggests that the physical differences between people and animals might have accounted for the fact that animals were sometimes hanged from a tree with thick, sturdy branches instead of the gallows that were used for human hangings. Cohen, *supra* n. 17, at 113.

<sup>106</sup> Evans, *supra* n. 2, at 175.

<sup>107</sup> *Id.* at 164.

other ear; for the third offense the criminal was confiscated to the crown."<sup>108</sup>

Following execution, the animals' bodies were usually buried, either under the gallows or in the same location that had been set aside for burying the corpses of human criminals.<sup>109</sup> They were rarely eaten, as consuming the flesh of executed animals was considered taboo. Exodus 21:28 forbade it outright: "If an ox gore a man or a woman, that they die: then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner [sic] of the ox *shall be quit*."<sup>110</sup> Also, according to Evans, consuming the flesh of the executed animal would smack of anthropophagy, because the animal had, in effect, "become the peer of man in blood-guiltiness and in judicial punishment."<sup>111</sup> Thus, in 1553, when several swine were executed after allegedly killing a child at Frankfort on the Main (Germany), their bodies were thrown into the river in spite of the fact that their carcasses were "as good pork as could be found in the shambles."<sup>112</sup>

In several known instances, this ban extended beyond the flesh of the executed animal. In 1621, the Law Faculty of the University of Leipsic (Germany) decided that a cow who had pushed a woman, thereby causing her death, should be killed and buried "unflayed," with neither her flesh eaten nor her hide made into leather.<sup>113</sup> Even a byproduct such as honey could be considered taboo. In 864, the Council of Worms announced that if a person died after being stung by bees, the bees should be suffocated in their hive before they were able to produce any more honey, "otherwise the entire contents of the hive

<sup>108</sup> *Animals as Offenders and Victims*, 21 Alb. L. J. 265 (1880) (citing 1 M. Mimaut, *Histoire de Sardaigne* 445, 446 (Paris 1825)) (however, it should be noted that there is no evidence that this particular punishment was preceded by an actual trial proper).

<sup>109</sup> Evans, *supra* n. 2, at 168–169. In what may have been an effort to erase all evidence of the act, or perhaps to emphasize its horror, the bodies of animals who had been executed for their "participation" in acts of bestiality were sometimes "thrown to dogs" or, more frequently, burned. Joyce E. Salisbury, *The Beast Within: Animals in the Middle Ages* 92 (Routledge 1994); Evans, *supra* n. 2, at 147; Cohen, *supra* n. 5, at 14 n. 18. Animals in this latter group were sometimes burned to death; other times, their bodies were burned after they had been executed by some other means. Often, the records of the proceeding were also cast into the flames, "in order to blot out the recollection of the atrocious act which had occasioned the prosecution." *Prosecutions Against Animals*, *supra* n. 14, at 234–35. Occasionally, the human defendants who had committed these acts of sexual abuse were burned alongside their animal victims. Jamieson, *supra* n. 89, at 56.

<sup>110</sup> Exodus 21:28 (King James). Stoning was a punishment "reserved for crimes of a special character," and it could "serve as the manifestation of spontaneous popular outrage beyond the bounds of judicial sanction." Finkelstein, *supra* n. 52, at 26, 27.

<sup>111</sup> Evans, *supra* n. 2, at 169. However, according to one scholar, "[t]he interdiction against eating the flesh of the goring ox has nothing to do with the reason for the ox's death. Rather, it derives from the manner of its [sic] passing. For Ex. 22:30 forbids the consumption of animal flesh torn in the field." Bernard S. Jackson, *The Goring Ox*, in *Essays in Jewish and Comparative Legal History* 116 (Leiden 1975).

<sup>112</sup> Evans, *supra* n. 2, at 169.

<sup>113</sup> *Id.* at 169–70.

would become demoniacally tainted and thus rendered unfit for use as food."<sup>114</sup>

Of course, the prohibition against consuming the flesh of the executed animal was occasionally ignored, particularly in cases not involving bestiality.<sup>115</sup> In the Low Countries (the Netherlands, Belgium, and Luxemburg), the meat of the animals was often distributed to the town's poor.<sup>116</sup> Thus, in Ghent (Belgium), in 1578, the flesh of an executed cow was sold as butcher's meat, with the proceeds of the sale split equally between the injured party and the city treasury for distribution among the poor. However, to show that she had been capitally punished for her crime, the cow's head was impaled upon a stake near the gallows.<sup>117</sup>

### B. A Third Kind of Trial?

Up to this point, the historical animal trials have been discussed as being either ecclesiastical or secular in form. Cohen, however, suggests that by the fifteenth century, in Switzerland, a third type of judicial process had emerged. It was one that combined traditions from both the ecclesiastical and secular trials, and it was based largely in response to the increased persecution of witches in Western Europe.<sup>118</sup> In other words, it was

a hybrid type of process: the trial of an individual animal by a secular court on charges of supernatural behaviour . . . . In form, they conformed to the secular animal trial tradition; the culprits were invariably individual domestic animals rather than droves of insects or shoals of fish, the trials always ending with the expected execution. In content, however, they represent a divergence from the type of virtue of the non-homicidal charges and the use of the hitherto uncommon witches' pyre for execution.<sup>119</sup>

For example, in 1474, with great solemnity and in front of a large crowd, a cock at Bâle was burned at the stake "for the heinous and unnatural crime of laying an egg" that, if hatched, would yield a basilisk, an egg useful in witchcraft.<sup>120</sup> The event was held "with as great solemnity as would have been observed in consigning a heretic to the

<sup>114</sup> *Id.* at 9.

<sup>115</sup> Cohen, *supra* n. 5, at 18.

<sup>116</sup> *Id.*

<sup>117</sup> Evans, *supra* n. 2, at 169.

<sup>118</sup> Animals were believed to have served witches as "familiaris"—spirits "which appeareth to them, sometimes in one shape and sometimes in another; as in the shape of a man, woman, boy, dog, cat, foal, hare, rat, toad, etc." John M. Taylor, *The Witchcraft Delusion in Colonial Connecticut* 43 (Corner House Publishers 1984) (quoting Dalton's *Country Justice*, a "standard authority in legal procedure in England, recognized in witchcraft prosecutions in the New England colonies").

<sup>119</sup> Cohen, *supra* n. 5, at 33-34.

<sup>120</sup> Evans, *supra* n. 2, at 162. The basilisk was, in the words of Cohen, "a fabulous beast, half cock and half serpent, [that] came out of an egg laid by an aged rooster and hatched by a toad." Exuding poison, the basilisk killed by sight, smell, and contact. Cohen, *supra* n. 5, at 34.

flames, and was witnessed by a large crowd."<sup>121</sup> Similar incidents have been recorded, including two in colonial Salem, Massachusetts, where one dog was hanged after she was "strangely afflicted," and another was killed after she was accused of afflicting others, "who fell into fits the moment it [sic] looked upon them."<sup>122</sup>

C. *Rationalizing the Existence, Continuation, and "End" of the Animal Criminal Trials*

As the above discussion indicates, the human participants in these animal trials took the proceedings seriously, carefully following the same legal norms that had been established for human defendants. The appointment of counsel to protect the interests of animal defendants, the presentation of evidence, the use of witnesses, the fact that decisions were sometimes appealed and convictions reversed, the manner of execution, and diligent attention paid to proper criminal procedure by secular court officials all illustrate that these proceedings were performed in earnest. When a community incurred the trouble and expense that it took to conduct these proceedings, it must be assumed that community expected to reap some sort of benefit.<sup>123</sup> After all, it certainly would have been less time consuming, less burdensome, and less expensive to simply kill problem animals. Surely, then, there were powerful motives encouraging medieval and post-medieval communities to prosecute errant animals.

Much of the original inspiration and justification for holding animals accountable for their transgressions came from early Hebrew law, as laid out in the Old Testament. References appear early in the Bible—as early as Genesis 3:14–15, in which God curses the serpent in the Garden of Eden.<sup>124</sup> Furthermore, later passages in the Bible encourage—indeed, if not outright demand—that animals be held accountable. As noted earlier, Exodus 21:28 specifically commands stoning the goring ox.<sup>125</sup> Genesis 9:5–6, makes clear that the general law of blood-revenge that God revealed to Noah after the Great Flood applies to both animals and humans:

And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man; at the hand of every man's brother

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<sup>121</sup> Evans, *supra* n. 2, at 162.

<sup>122</sup> Jamieson, *supra* n. 89, at 62 (quoting Thomas Wright, *Narratives of Sorcery and Magic* vol.2, 309 (R. Bentley 1851)).

<sup>123</sup> Humphrey, *supra* n. 6.

<sup>124</sup> Genesis 3:14 reads: "And the LORD God said unto the serpent, Because thou hast done this, thou art cursed above all cattle, and above every beast of the field; upon thy belly shalt thou go, and dust shalt thou eat all the days of thy life . . . ."

<sup>125</sup> Jackson notes that

[t]he stoning of the goring ox may well have been the parent, rather than the child, of the idea of divine punishment of animals . . . . [O]nce the concept of divine punishment of animals became established, it could then be transferred back to the legal sphere as a primarily penal notion.

Jackson, *supra* n. 111, at 118 (footnote omitted).

will I require the life of man. Whoso sheddeth man's blood, by man shall his blood be shed: for in the image of God made he man.<sup>126</sup>

Exodus 22:18 orders the death of animals used in, or themselves accused of, witchcraft.<sup>127</sup> Finally, Leviticus 20:15–16 requires the death of the animal victim of bestiality; the person who had assaulted her was also to be killed.<sup>128</sup> Taken together, these biblical references laid the written foundation for animal trials of the Middle Ages and later.

Most of the nineteenth and early-twentieth century animal trial scholars attempted to explain away the trials in terms of cultural positivism, dismissing the phenomena as residuals of a more primitive superstitious past.<sup>129</sup> Evans writes off the practice as merely “[t]he childish disposition to punish irrational creatures and inanimate objects, which is common to the infancy of individuals and of races.”<sup>130</sup> He concludes that the practice originated in “an extremely crude, obtuse, and barbaric sense of justice.”<sup>131</sup> In a similar vein, legal theorist Hans Kelsen linked the practice to the “animism of primitive man,” that is, the attribution of a soul and consciousness to animals, plants, and inanimate objects.<sup>132</sup>

Cultural positivism, however, fails to adequately explain the existence of animal trials in medieval and post-medieval Europe, for at least two reasons. First, it oversimplifies the phenomenon by failing to distinguish between ecclesiastical and secular trials, two very distinct proceedings.<sup>133</sup> “By failing to distinguish the two types, the positivist historians were guilty of confusing two distinct traditions, and their final explanation fails to cover either phenomenon.”<sup>134</sup> Second, explanations cloaked in cultural positivism ignore the chronology of the Middle Ages. Of the nearly two hundred trials recorded in Evans’ tables, a disproportionately large number occurred in the period spanning the last half of the fifteenth century through the last half of the seventeenth century.<sup>135</sup> Indeed, “the increasing frequency of animal trials was contemporaneous with the so-called revival and acceptance of Roman law, with the great codifications of criminal law, and altogether with an ever-increasing coherence of rational systems of law

<sup>126</sup> *Genesis* 9:5–6.

<sup>127</sup> According to Exodus 22:18, “Thou shalt not suffer a witch to live.” It was generally accepted in the Middle Ages that animals could exist as “satellites of Satan” and were, therefore, appropriate candidates for execution. Evans, *supra* n. 2, at 54–55.

<sup>128</sup> Specifically, Leviticus 20:15–16 reads: “And if a man lie with a beast, he shall surely be put to death: and ye shall slay the beast. And if a woman approach unto any beast, and lie down thereto, thou shalt kill the woman, and the beast: they shall surely be put to death; their blood *shall be* upon them.”

<sup>129</sup> Cohen, *supra* n. 5, at 16.

<sup>130</sup> Evans, *supra* n. 2, at 186.

<sup>131</sup> *Id.* at 41.

<sup>132</sup> Hans Kelsen, *General Theory of Law and State* 4 (Anders Wedberg trans., Russell & Russell 1945).

<sup>133</sup> Jamieson, *supra* n. 89, at 59.

<sup>134</sup> Cohen, *supra* n. 5, at 17 (footnote omitted).

<sup>135</sup> Evans, *supra* n. 2, at 265–286.

and thought."<sup>136</sup> The phenomenon reached its climatic point—with both the ecclesiastical and secular trials reaching their point of frequency and greatest geographic spread—in the early 1600s, an age of relative enlightenment.<sup>137</sup> According to Cohen, these facts are “difficult to square with the picture of humanity advancing in linear progression from the superstitious middle ages to the rational nineteenth century.”<sup>138</sup>

The argument that the predominant aim of these trials was the *rehabilitation* of the offending animal is not a very helpful one, simply because these proceedings usually ended with the execution of the animal. Clearly, this makes the rehabilitation and reintroduction of the animal back into society impossible. It has also been suggested that, generally speaking, people in that era did not consider animals to be rational creatures capable of being aware, let alone rehabilitated.<sup>139</sup>

Nor is it likely that the proceedings were based on *economic grounds*, designed to increase the king's coffers. As Cohen points out, “Lords stood to gain only under a system by which a homicidal beast was impounded to the profit of the judicial authority. The execution of an animal was just as expensive as that of a man.”<sup>140</sup> Thus, with the possible exception of those cases where defendant animals were spared the death penalty, forfeited as *deodand* (“to be given to God”), and sold for the benefit of the king or church, this explanation also fails to adequately explain animal trials and executions.

The twelfth-century Italian canonist Gratian asserted that animals were tried and executed not necessarily *because of* their crimes, but rather, so that the hateful act might be *forgotten*.<sup>141</sup> However, this explanation is also less than satisfactory, as it raises the question of why, if the purpose of punishing the animal was to *forget* the crime, the offending animal was not quickly and unobtrusively dispatched and forgotten.<sup>142</sup> Why keep the memory of the crime fresh by conducting a prolonged and elaborate trial?<sup>143</sup>

More helpful to us in our quest to explain the animal trials and executions are some of the other proffered explanations, including the

<sup>136</sup> *Id.* at 15.

<sup>137</sup> *Id.* at 265–268; Cohen, *supra* n. 5, at 17.

<sup>138</sup> Cohen, *supra* n. 5, at 17.

<sup>139</sup> Ewald, *supra* n. 54, at 1909.

<sup>140</sup> Cohen, *supra* n. 17, at 115.

<sup>141</sup> Hyde, *supra* n. 50, at 718 (citing 2 *Decretum Gratiani* 15:1, 4, in 187 *Patrologiae Cursus* (Migne ed., 1855), 15, 1, 4) (1150) (emphasis added). Likewise, in the sixteenth century, Jean Duret proposed that the animals were “condemned to be hung and strangled as if they had reason, *in order to destroy the recollection of the enormity of the act.*” *Prosecutions Against Animals*, *supra* n. 14, at 234 (emphasis added).

<sup>142</sup> Ewald, *supra* n. 54, at 1906.

<sup>143</sup> Nevertheless, similar reasoning may be found today in our justification of the capital punishment of those people who have committed particularly heinous crimes. Via the ceremony and ritual of the trial and the execution of the offender, some proponents of the death penalty have argued that we gain final closure, peace, and the ability to move on.

notion that the proceedings functioned for the purpose of *incapacitation*, or the elimination of a social danger. The idea behind this is that having already caused injury, the animal had already proven herself to be dangerous. In other words, “[a] pig who has killed once may do so again. . . . [B]y sentencing the pig to death the court made life safer for everybody else.”<sup>144</sup>

Other trials may have been spurred by the goal of *deterrence*, that is, to dissuade would-be criminals—both animal and human—from engaging in similar offensive acts.<sup>145</sup> In the first instance, the subsequent punishments inflicted upon animal defendants might have served as a sort of general warning to other *animals*. For, “if word got around about what happened to the last pig that ate a human child, might not other pigs have been persuaded to think twice?”<sup>146</sup> Thus, in Africa, lions were sometimes crucified to drive away other lions, in Germany, wolves were hanged for the same reason, and in various localities, peasants nailed birds of prey to the doors of their houses, presumably to keep away other such birds.<sup>147</sup> Alternatively, some of the trials and executions may have been aimed at deterring *human beings* from committing similar offenses, by inspiring in their minds the horror of the crime. Dressing the sow of Falaise in human clothes before executing her gave the proceeding the semblance of a human trial, perhaps thereby impressing upon the people witnessing the execution the appropriate moral lesson, and perhaps serving to remind them “that *even pigs* must pay the penalty for law-breaking.”<sup>148</sup>

It has also been suggested that perhaps those conducting animal trials intended to intimidate the animals’ guardians. The trials may have served to import to the guardians a *warning* to better monitor their charges—both human and animal.<sup>149</sup> According to the contemporary Laurent Bouchel,

If we still see a swine hung and strangled on the gibbet, for having devoured an infant in the cradle, (a punishment with which we are familiar), it is to admonish us, fathers, mothers, nurses, domestics, not to leave in-

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<sup>144</sup> Humphrey, *supra* n. 6, at xxi.

<sup>145</sup> Hyde, *supra* n. 50, at 718.

<sup>146</sup> Humphrey, *supra* n. 6, at xxii.

<sup>147</sup> Ewald, *supra* n. 54 at 1906. The practice of killing nuisance animals and publicly displaying their bodies in an attempt to keep other animals away continues today. This writer recalls that, in the spring of 1998, after some students living on campus at Central Wyoming College in Riverton, Wyoming, complained about the noise the crows in the campus trees were making at night, groundskeepers killed several of the offending birds. The employees then hung the birds in the trees in a macabre attempt to discourage the surviving crows from loitering there.

<sup>148</sup> *Id.* (citing Gottfried Wilhelm Leibnitz, *Essais de Theodicée Sur La Bonté De Dieu, La Liberté De L’Homme, Et L’Origine Du Mal* (I. Troyel 1710)); Humphrey, *supra* n. 6, at xxiii.

<sup>149</sup> Piers Beirne, *The Law is an Ass: Reading E.P. Evans’ The Medieval Prosecution and Capital Punishment of Animals*, 2 Soc. & Animals 27, 38 (1994).

fants entirely alone: or to keep these animals so carefully shut up, that they shall not have it in their power to do any mischief.<sup>150</sup>

On March 27, 1567, when the court of the judicatory of Senlis sentenced a sow to be “exterminated to death” for killing a human infant, the tribunal also cautioned the area’s inhabitants to better watch their own animals, lest they suffer a fine and possibly physical punishment.<sup>151</sup>

Those theories focusing on order and control are particularly helpful to an understanding of the motives behind the trials. Greeks and medieval Europeans, it is suggested, originally held these trials *to establish cognitive control* over a disorderly world.

What the Greeks and mediaeval Europeans had in common was a deep fear of lawlessness: not so much fear of laws being contravened, as the much worse fear that the world they lived in might not be a lawful place at all. A statue fell on a man out of the blue; a pig killed a baby while its [sic] mother was at Mass; swarms of locusts appeared from nowhere and devastated the crops. . . . To an extent that we today cannot find easy to conceive, these people of the pre-scientific era lived every day at the edge of explanatory darkness.<sup>152</sup>

In other words, the animal trials were derived from a search for *order*. People needed to believe that the natural universe was lawful, even when certain events, such as a pig killing a human child, seemed to defy all reasonable explanation. So they turned to the courts. “Just as today, when things are unexplained, we expect the institutions of *science* to put the facts on trial . . . the whole purpose of the legal actions was to establish cognitive control.”<sup>153</sup> Thus, medieval courts made sense of these otherwise unexplainable events by “redefining them as *crimes* and placing them within the rational discourse of the trial.”<sup>154</sup>

Other writers also argue that these trials were a search for order, but in a stratified sense. They suggest that the offending animal’s primary offense was that she had dared to violate the hierarchic order established by God.<sup>155</sup> According to Genesis, God made humans in God’s own image and gave them “dominion over the fish of the sea, and over the fowl of the air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth.”<sup>156</sup> Based largely upon this mandate, the great chain of being placed God at the uppermost level, the church and state beneath God, followed by

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<sup>150</sup> *Prosecutions Against Animals*, *supra* n. 14, at 234 (quoting Laurent Bouchel, *La Bibliothèque ou Thresor du Droiet Francois. Art. Bestail. Paris* (1615)).

<sup>151</sup> Evans, *supra* n. 2, at 160, 308–309.

<sup>152</sup> Humphrey, *supra* n. 6, at xxv.

<sup>153</sup> *Id.* at xxvi.

<sup>154</sup> Berman, *supra* n. 2, at 318–319 (emphasis added).

<sup>155</sup> Finkelstein, *supra* n. 52, at 160.

<sup>156</sup> *Genesis* 1:26, 28.

humans, and then, at the lowest levels, animals and plant life.<sup>157</sup> By injuring or killing a human being, the animal had violated the position imposed upon her by God.

[T]he "crime" of the ox that gored a person to death is not just to be found in the fact that it [sic] had "committed homicide." . . . The real crime of the ox is that by killing a human being—whether out of viciousness or by an involuntary motion, it [sic] has objectively committed a *de facto* insurrection against the hierarchic order established by Creation.<sup>158</sup>

In effect, the animal had become "a living rebuttal of the divinely ordained hierarchy of creation."<sup>159</sup> Indeed, if the insurrection was not quickly, publicly, and adequately addressed, it "could be interpreted as a successful refutation of that order."<sup>160</sup> For this reason, medieval and post-medieval jurists believed an animal that had killed a human being had to be killed. The animal was tried and punished "not so much with the aim of individual retribution against the particular animal, but far more as a gesture restoring the cosmic equilibrium."<sup>161</sup> Thus, during the maiming and hanging of the infamous sow of Falaise, her screams "were an audible representation of the reimposition of order on the world."<sup>162</sup>

Finally, many of the trials were based upon simple *retribution*, or revenge. According to Justice Holmes, "the early forms of legal procedure were grounded in vengeance."<sup>163</sup> Indeed, for evidence of revenge as a primary motive, we need only turn to the history of the legal concept of *noxal surrender*. Under this principle, the guardian of an animal accused of harming a person was required to surrender the animal to the injured party, purportedly so that the injured party could exact vengeance and do his or her will upon the animal offender.<sup>164</sup> *Lex talionis* is "the law of retaliation," the principle of "an

<sup>157</sup> Gary L. Francione, *Animals, Property, and the Law* 36 (Temple U. Press 1995); Beirne, *supra* n. 149, at 29.

<sup>158</sup> Finkelstein, *supra* n. 52, at 28.

<sup>159</sup> *Id.* at 70.

<sup>160</sup> *Id.* at 47. It was not just the *killing* of a human being that amounted to an usurpation of order and that demanded the violent removal of the offending animal. In 1394, for instance, a pig was hanged at Mortaign after the unfortunate animal sacrilegiously ate a consecrated communion wafer. Evans, *supra* n. 2, at 156.

<sup>161</sup> Cohen, *supra* n. 17, at 110; Jamieson, *supra* n. 89, at 57 (footnote omitted).

<sup>162</sup> Keith Tester, *Animals and Society: The Humanity of Animal Rights* 91 (Routledge 1991).

<sup>163</sup> Oliver W. Holmes, *The Common Law* 2 (Little, Brown & Co. 1963). See also E.W. Westmarck, *The Origin and Development of the Moral Ideas* 251–264 (2d ed., MacMillan & Co. 1912).

<sup>164</sup> Holmes, *supra* n. 163, at 9, 10, 15. *Contra* MacCormack, *supra* n. 55, at 340–342 (arguing that the forfeiture of the animals to the deceased's family should be understood in terms of *compensation*, not revenge). Such forfeiture laws originally provided that the animal who caused the death was to be surrendered to the family of the deceased. Eventually, payment by the animal's guardian was introduced as an alternative to surrendering the offending animal. Of course, after that, it was only a matter of time before the king and church supplanted the family in its claim to the guilty animal: "The instrument which served as the agent of an accidental death, whether it was an animal or an

eye for an eye; a tooth for a tooth" justice, which "requires the infliction upon a wrongdoer of the same injury which he has caused to another."<sup>165</sup> Thus, the tribunal of Falaise sentenced the notorious infanticidal sow to be hanged, but only after she was first maimed in the head and forelegs. It was no coincidence that these were the same areas where she had inflicted mortal injury upon the human child.

Perhaps at this point a word of caution is warranted. A problem with existing theories of the animal trials is that each seeks "global status" and seems to ignore the possibility that motivations would have varied from community to community, and that more than one purpose may have existed for any given animal trial.<sup>166</sup> However, some themes do recur throughout the history of the animal trials. Notions of control, order, and revenge permeate their history. In the end, a combination of the human needs to establish cognitive and hierarchical control and to exact revenge seems to offer the best explanation for the animal trials and executions.

Over time, the frequency of ecclesiastical and secular animal trials waned. "Although it is impossible to set a clear *terminus ad quem* for either the ecclesiastical or secular animal trials, during the eighteenth century the practice of prosecuting animals became increasingly rare and informal, often taking on the form of village justice."<sup>167</sup> One writer suggests that the decline was due to a rise in humanitarianism, in which "claims for a moral treatment of animals began to be expressed in something greater than a purely speculative way."<sup>168</sup> Another attributes it to increased urbanization, whereby humans became more removed from regular encounters with animals.<sup>169</sup> According to the latter theory, this geographic and social distancing permitted people to consider animal offenses more objectively.<sup>170</sup> Most often, however, theories attempting to explain the decline and end of animal trials and executions focus on an emerging human rationality. For Finkelstein, the execution of homicidal animals in Europe represented the literal implementation of Biblical mandates. For that reason, he argues that animal execution, "reached a dead end with the coming of age of learning and enlightenment," notwithstanding occasional "odd survivals into even contemporary times."<sup>171</sup> Others have questioned this conclusion, however. Beirne asks,

if the pivotal fact in explaining the disappearance of animal trials was the rise of science and the secularization of religion, then why did the trials peak . . . at the very moment when the movement in science was at its

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inanimate object, was declared *deodand* ('to be given to God'), and its value became forfeit to the king as a sum of money." Finkelstein, *supra* n. 52, at 6.

<sup>165</sup> *Black's Law Dictionary* 913 (6th ed., West 1990).

<sup>166</sup> Berman, *supra* n. 2, at 290.

<sup>167</sup> Cohen, *supra* n. 5, at 15.

<sup>168</sup> Tester, *supra* n. 162, at 75.

<sup>169</sup> *Id.* at 75-76.

<sup>170</sup> *Id.*

<sup>171</sup> Finkelstein, *supra* n. 52, at 81.

height, and why did they continue, albeit sporadically, well into the nineteenth century?<sup>172</sup>

Perhaps this questioning should be taken a little further, and we should ask *why the prosecution and punishment of animals has continued into the twentieth and twenty-first centuries*. The remainder of this paper will address that question.

### III. THE PROSECUTION AND PUNISHMENT OF ANIMALS IN MODERN TIMES

The last animal prosecution that Evans cites in *The Criminal Prosecution and Capital Punishment of Animals* occurred on May 4, 1906, the same year the book was published. In Délémont (Switzerland), a man named Mager was robbed and killed by a father-son team, "with the fierce and effective co-operation of their dog."<sup>173</sup> All three actors—the two men as well as the dog—were tried for the crime. The court sentenced the two men to life in prison. The dog, however, "as the chief culprit, without whose complicity the crime could not have been committed," was given a death sentence.<sup>174</sup>

The aforementioned case was not the last time that an animal would be prosecuted and punished for an alleged transgression, however. As recently as 1916, animals were reportedly still being tried and punished by the mountaineers of Kentucky and Tennessee.<sup>175</sup> Likewise, in 1924, Pep, a Labrador retriever, was accused of killing Pennsylvania Governor Gifford Pinchot's cat. The dog was tried (without the assistance of counsel) in a proceeding led by the Governor himself. Governor Pinchot found Pep responsible for the cat's death and sentenced the dog to life imprisonment in the Philadelphia State Penitentiary. Pep died of old age, still incarcerated, six years later.<sup>176</sup> Around the same time, in Indiana, local authorities arrested a chimpanzee for smoking a cigarette in public, in violation of state law. The justice of the peace who presided over the case found the chimp guilty and levied a five-dollar fine against the animal.<sup>177</sup> And in 1927, a dog was reportedly tried and incarcerated by a Connecticut justice of the peace for "worrying the cat of a neighbor lady."<sup>178</sup>

Nevertheless, the skeptic might insist these anecdotes are simply interesting oddities from the early part of the twentieth century, and

<sup>172</sup> Beirne, *supra* n. 149, at 41 (emphasis added).

<sup>173</sup> Evans, *supra* n. 2, at 286 n. 1.

<sup>174</sup> *Id.*

<sup>175</sup> Hyde, *supra* n. 50, at 713 n. 49.

<sup>176</sup> Brian McConnell, *They Shoot Horses*, 42 *New L.J.* 806, 806 (1992). In all likelihood, Pep's stay at the prison was a relatively easy one. He was allowed to change cellmates at will, and he reportedly boarded the prisoners' work bus enthusiastically every morning when his inmate number—No. C2559—was called. *Id.*

<sup>177</sup> McNamara, *supra* n. 1, at 31. Of course, the chimpanzee did not smoke on her own initiative; she was forced to perform in a local animal act, and as a part of the routine, a showman made the animal smoke tobacco. *Id.*

<sup>178</sup> *Id.*

that we would no longer prosecute and punish a nonhuman animal. To the contrary, evidence shows that despite the skeptic's protests, our modern criminal justice system still regularly holds animals responsible for their "offenses."<sup>179</sup> Dogs, especially, frequently still find themselves in the position of defendant in modern American legal proceedings.<sup>180</sup> Consider, for example, the laws mandating the execution of "vicious" dogs,<sup>181</sup> which can set the stage for modern animal trials.<sup>182</sup>

A. *Vestiges of the Old Trials: "Death Row" Dogs (Vicious Dog Proceedings)*

Under the typical vicious dog law, the process of having a dog declared "dangerous" begins when a formal complaint is filed, either by the person injured or threatened by the dog, or by an animal control officer. A hearing is then held, at which time evidence is presented and a judge or public health official makes the declaration of whether or not the accused dog meets the applicable statutory definition of "vicious" or "dangerous."<sup>183</sup> If the judge determines the dog to be "dangerous," he or she will then order the dog's guardian to take certain precautionary measures aimed at preventing the dog from harming anyone in the future. Generally, at a minimum, the guardian will be

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<sup>179</sup> Sometimes, as in the examples just cited, these animals have caused physical harm to a human being. More often than not, however, the greatest harm committed by most of them is the "crime" of simply being born in a world where they are not wanted by human beings. Beirne astutely notes that "far from declining, there has been a dramatic rise in the number of animals 'tried' and lawfully executed." He asks:

Has not the medieval courtroom been displaced by the animal shelter? . . . Have not the rack and the gibbet been displaced by the clinically painless euthanasia dispensed by lethal injections and vacuum chambers? Nowadays, instead of being executed for crimes committed against humans, animals are far more likely to be executed—silently, invisibly and without advocates—for such "crimes" as "homelessness" and "aggression."

Beirne, *supra* n. 149, at 43–44.

<sup>180</sup> However, cats have also been held liable for the harms they have caused. In Hayward, California, in 1983, an 11 pound white male tomcat attacked an 80 year-old woman in her backyard. The bizarre attack resulted in injuries so severe that the woman required 54 stitches. In spite of a local veterinarian's offer to pay \$1,000 to the Hayward Police Department for a chance to take the cat (and more than five hundred inquiries from other would-be reformers of the animal), the cat was killed by shelter officials. David Berreby, *There's No Such Thing As a Bad Kitten*, 5 Natl. L.J. 43 (Apr. 18, 1983).

<sup>181</sup> Or even individual dogs who, although they themselves are not vicious, are the unfortunate members of a breed declared to be de facto "vicious." See e.g. Ariana Huemer, *Scapegoats and Underdogs: The Pit Bull Dilemma*, 20 *The Animals' Agenda* 30 (July/Aug. 2000).

<sup>182</sup> Public outcry against "vicious dogs" has led towns in at least 37 states to enact breed-specific legislation (BSL). *Id.* at 31.

<sup>183</sup> In a Texas case, the canine defendant was actually selected from a dog lineup by the alleged dog bite victim and her mother. At the hearing that followed, the City of Humble Municipal Court ordered the dog to be killed. *Timmons v. Pecorino*, 977 S.W.2d 603, 604 (Tex. Crim. App. 1998).

ordered to keep the dog securely confined. However, if the judge determines that society will still not be protected from the dog, he or she may order the animal killed or, alternatively, removed from the jurisdiction. Likewise, if a guardian violates the court's order, he or she may be fined or jailed, especially if the dog injures someone. In such a scenario, the dog will probably be impounded and most likely killed.<sup>184</sup>

In the mid-1980s, Bootsie, a champion Old English Sheepdog once rated tops in his breed by the American Kennel Club, killed his guardian's 87-year-old mother. The 110-pound dog had bitten the elderly woman one time on her neck after she suffered a heart attack and fell on top of the dog. Bootsie's guardian witnessed the entire event. In spite of the circumstances surrounding the "attack," a judge ruled that Bootsie was "vicious," and his guardians were given the choice of having the dog put to death or, after having him neutered and defanged, confining him at home for the rest of his life. They chose the latter option.<sup>185</sup>

The most famous of all "death row" dog cases involved a 110-pound, three-year-old Japanese Akita named Taro who was condemned to die under New Jersey's vicious dog law. In 1991, Taro was seized and quarantined by Bergen County officials after allegedly biting his guardian's ten-year-old niece.<sup>186</sup> On February 11, 1991, the judge ordered that Taro be killed.<sup>187</sup> Taro's guardian appealed the death sentence, and the county health department ordered that Taro be held in jail until judges decided whether he would, in fact, be killed.<sup>188</sup> The press quickly dubbed him New Jersey's "death row dog," and the nation spent the next three years following the case.<sup>189</sup> From March 1991 until February 10, 1994, Taro was kept along with the

<sup>184</sup> Mary Randolph, *Dog Law 12/2* (3d ed., Nolo 1997).

<sup>185</sup> *Dogs in the Slammer: Canines get Tough Sentences*, 71 A.B.A. J. 36 (May 1985).

<sup>186</sup> Robert Hanley, *Taro Leaves Death Row, Jail, and New Jersey for Good*, N.Y. Times B4 (Feb. 11, 1994) [hereinafter Hanley, *Taro Leaves*]; Kate S. Lombardi, *Pardoned in Jersey, Taro Incognito*, N.Y. Times § 13, 1 (Mar. 20, 1994); *Dog's Death Sentence Upheld by a Trenton Court*, N.Y. Times B5 (Oct. 20, 1993). Although Haworth authorities claimed that Taro had bitten the girl, family members said the dog had swiped at her with his paw, causing her lip to bleed—and only after the girl had provoked the dog with a drumstick. Robert Hanley, *Ruling Gives Reprieve to Dog on Death Row*, N.Y. Times B6 (Jan. 27, 1994) [Hereinafter Hanley, *Ruling Gives Reprieve*]. The plastic surgeon who had treated the child after the attack testified at the hearing to determine whether the animal was vicious. He testified that 15 to 20% of the child's lip was removed, and that such a wound had to have been caused by a bite. Lombardi, *supra*, at 4.

<sup>187</sup> Jerry Gray, *Dog's Death Sentence is Reduced to Exile*, N.Y. Times 1 (Jan. 29, 1994). Taro, it seems, had a sort of prior record. He reportedly had attacked three other dogs, killing one of them, a terrier who had been tied in her backyard at the time of the attack. Lombardi, *supra* n. 187, at 1. Because of Taro's earlier fights with other animals, he had been neutered. Robert Hanley, *For New Jersey Dog, 1,000 Days on Death Row: Is Taro Vicious? Who Cares? By Now, Most of the State's Judicial System*, N.Y. Times B1 (Oct. 14, 1993).

<sup>188</sup> Hanley, *Taro Leaves*, *supra* n. 186, at B6.

<sup>189</sup> Lombardi, *supra* n. 186, at § 13, 1.

German shepherds in the Bergen County Sheriff's K-9 Unit at a cost of \$18 a day.<sup>190</sup> Ultimately, local and state courts upheld the town's decision to execute the dog.<sup>191</sup> But on January 29, 1994, Taro's case and photo made the front page of *The New York Times*. Fulfilling a campaign promise, newly-elected New Jersey Governor Christine Todd Whitman issued her seventh executive order since taking office, lifting the forfeiture order that had allowed Taro's seizure.<sup>192</sup> The reprieve provided by Executive Order No. 7 was tempered by three conditions, however: (1) Taro would have to spend the remainder of his life outside of New Jersey, (2) Taro's original guardian would have to transfer custody of the animal to a new guardian, and (3) both his old and new guardians would be required to assume all financial liability that might result from Taro's future behavior.<sup>193</sup> By the time it was finally over, the case was as expensive as it was time consuming. Taro had spent more than one thousand days as Bergen County's prisoner No.

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<sup>190</sup> Hanley, *Taro Leaves*, *supra* n. 186, at B4; Hanley, *Ruling Gives Reprieve*, *supra* n. 186, at B1, B7.

<sup>191</sup> *Dog's Death Sentence Upheld by a Trenton Court*, *supra* n. 186, at B5; Hanley, *Ruling Gives Reprieve*, *supra* n. 186, at B6; Hanley, *Taro Leaves*, *supra* n. 186, at B4; Lombardi, *supra* note 186, at 4. Although the state Supreme Court refused to review the case, the state legislature did consider granting Taro clemency. Lombardi, *supra* n. 186, at 4; Jerry Gray, *Trenton's Matter of State: Legislators and a Dog: Passion Pet? Killer Canine? Issue for Courts?*, N.Y. Times B5 (Dec. 3, 1993). The Assembly debated a bill that would direct officials to release Taro to his guardians, provided they consented to transferring guardianship of the dog to a person living out of state. During the hour-long debate, both sides made impassioned speeches in support of their positions. The sponsor of the clemency bill, Republican Joseph Azzolina—who had been a sponsor of the New Jersey vicious dog law—argued that the law was being misapplied in this case. Anti-Taro Assemblyman John E. Rooney countered, "This dog is not a good animal . . . This dog is vicious. It [sic] is a scourge on society." After it became obvious that the Assembly was deadlocked on the vote, Azzolina requested that his request for clemency be withdrawn. *Id.*

<sup>192</sup> Gray, *supra* n. 187. "While I can't pardon the dog," Governor Christine Todd Whitman said, "I can forgive the forfeiture taking and under that scenario, Taro can go free." *Id.* Taro's life had been spared, not because he was "pardoned," but rather, because of the governor's ability to remit a forfeiture of personal property. N.J. Exec. Or. No. 7 (1994) (available at <<http://www.state.nj.us/infobank/circular/eow7.htm>>). "The reason for this distinction is that only a person can be pardoned; where property is concerned, the correct gubernatorial remedy is to remit the forfeiture of the *property*." Francione, *supra* n. 157, at 94. Ironically, Taro's life was spared because our legal system classifies him as personal property. It has long been recognized that overcoming the status of animals as property in the eyes of the law has been one of the greatest hurdles to recognition of their legal rights. *See generally id.* Usually a hurdle, in Taro's case his "property" status was a rare benefit.

<sup>193</sup> N.J. Exec. Or. No. 7, *supra* n. 192. However, even after receiving his pardon, the controversy surrounding Taro continued. Following his release from jail, a newspaper reported that Taro's new home was in Pleasantville, New York. In response, the town passed a resolution asking then-Governor Mario M. Cuomo "to convey to Governor Whitman the village's strenuous objection to the terms of the 'pardon' granted to the owners [sic] of the dog Taro." Lombardi, *supra* n. 186, at 4.

914095, and protracted appeals and Taro's incarceration costs ended up bringing the total cost of the case to more than \$100,000.<sup>194</sup>

In a similar case, a five-year-old black Labrador mix named Prince also made national news after he was sentenced to death. Several months earlier, Prince had escaped from his yard and killed a rooster. Because of the attack, the dog was declared "vicious."<sup>195</sup> Under Portsmouth, New Hampshire's vicious dog law, "vicious" dogs are supposed to be kept restrained at all times. After escaping two more times, Prince was condemned under the town's "three-strikes-and-you're-out" ordinance for dogs deemed vicious.<sup>196</sup> Fortunately for Prince, however, the man expected to carry out the death sentence (a veterinarian at the animal hospital where Prince had been kept incarcerated before his hearing) refused to carry it out.<sup>197</sup> As in Taro's case, the town police department and the mayor's office were flooded with phone calls protesting Prince's sentence.<sup>198</sup> In February 1997, the city agreed not to execute the dog if his guardian agreed to find a new home for the dog outside of Portsmouth.<sup>199</sup>

In Oregon, around the same time, the Jackson County Board of Commissioners ordered that Nadas, a malamute-collie mix, be killed after a neighbor girl claimed that he had chased her horse. The publicity and notoriety associated with this case soon approached that of the New Jersey case.<sup>200</sup> This case also ended with the commutation of the lucky dog's death sentence in exchange for an agreement by Nadas's guardian to send the dog out of state, in this case, to spend the rest of his life at Best Friends Animal Sanctuary in Utah.<sup>201</sup>

Of course, not every dog is so fortunate. Beethoven, a 145-pound Great Dane, was sentenced to death by Pinellas County, Florida offi-

<sup>194</sup> Jeff Stryker, *The Dog Walks*, N.Y. Times A21 (Feb. 3, 1994); Hanley, *Taro Leaves*, *supra* n. 186, at B4. One Haworth resident expressed her displeasure at the length of time the case had spanned, stating "It's all so absurd . . . . You've got hardened criminals getting out on rape and robbery in less time than the dog's been in jail." Hanley, *Ruling Gives Reprieve*, *supra* n. 186, at B1, B7. In early May 1999, Taro's final appeal ran out when the ten-year-old dog, still in exile somewhere in New York State, died in his sleep of a sudden illness. Don Stancavish, *The Record Online, Pardoned "Death-Row" Dog Dies in Exile* <<http://www.bergen.com/news/dogds199905156.htm>> (accessed Mar. 24, 2001) (site no longer available).

<sup>195</sup> CNN Interactive, *'Death Row' Dog Gets New Leash on Life* <<http://cgi.cnn.com/US/9702/11/briefs/dog.html>> (accessed Oct. 22, 2002).

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> J.M. Hirsch, *The News-Times, New Hampshire City's Three-Strikes Law* <<http://www.newstimes.com/archive97/feb0497/nab.htm>> (accessed Mar. 24, 2001).

<sup>199</sup> The Detroit News, *Canine Escapes Death Sentence for Killing Rooster* <<http://detnews.com/1997/nation/9702/12/02120073.htm>> (accessed Mar. 24, 2001) (site no longer available).

<sup>200</sup> In press statements, county officials went so far as to alter the spelling of "Nadas" (who was named after a champion skateboarder), misspelling it as "Natas" and claiming that it spelled "Satan" backwards. Kit Paraventi, *Death Row Pardon*, 18 *The Animal's Agenda* 38 (May/June 1998).

<sup>201</sup> Christopher C. Eck & Robert E. Bovett, *Oregon Dog Control Laws and Due Process: A Case Study*, 4 *Animal L.* 95, 98 (1998). See also Paraventi, *supra* n. 200, at 38.

cially after allegedly biting the face of a four-year-old child.<sup>202</sup> Six years later, his case had still not been settled, and Beethoven's guardian consented to euthanizing the then eleven-year-old dog when his health deteriorated.<sup>203</sup> And, of course, many, many dogs are declared "vicious" and are subsequently executed.

### B. *Animal Justice Today: Summary Justice*

The cases of Taro, Prince, Nadas, and Beethoven—although interesting examples of the last vestiges of the old formal animal trials of years long since past—truly are anomalies. Formal animal "trials" are now rare (indeed, it is for this very reason that they are newsworthy). To be certain, the dogs' lives were spared only because their cases were made known to the public via television news and newspapers. The offending animals received some form of due process and were permitted to live *only because* their cases received so much attention by the media and public.

Cohen notes that it was the strict observance of proper judicial procedure that exonerated the old formal animal trials from any appearance of lynching; as she puts it, "[t]he animals got their just due."<sup>204</sup> Unfortunately, the same cannot be said about animal justice today. Animal justice today is much more typically *summary justice*. No formal charge is levied, no legal counsel is provided, and no public hearing is held to ensure that at least some basic form of due process is followed.

"Justice" today comes much more quickly and surreptitiously than it did during the era of the animal trials, or even in the few contemporary vicious dog "trials." While Taro, Prince, Nadas, and Beethoven each had the benefit of legal counsel procured by their guardians, many animals accused of harming humans or human interests receive no such protection. All too often, an animal who causes harm to a human being is unceremoniously declared guilty by a private person (often the animal's guardian) and executed hastily—very often brutally—in private, without any of the formalities or protections of the law.

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<sup>202</sup> The child, evidently, had wandered into the garage where the Great Dane was chained. The dog's lawyers argued that Beethoven did not attack the girl, but rather, probably bit down on her head instinctively after she grabbed his ear. Edie Gross, *St. Petersburg Times Online*, *Lawyers Ask Bush to Save Dog from Death Penalty*, <[http://www.sptimes.com/News/011201/TampaBay/Lawyers\\_ask\\_Bush\\_to\\_s.shtml](http://www.sptimes.com/News/011201/TampaBay/Lawyers_ask_Bush_to_s.shtml)> (accessed Apr. 6, 2003).

<sup>203</sup> Robert Farley, *St. Petersburg Times Online*, *"Death Row" Dog Dies As Appeals Linger* <[http://www.sptimes.com/News/102601/NorthPinellas/\\_Death\\_row\\_dog\\_dies\\_.shtml](http://www.sptimes.com/News/102601/NorthPinellas/_Death_row_dog_dies_.shtml)> (accessed Apr. 6, 2003). Several months earlier, Beethoven had been denied clemency by Florida Governor Jeb Bush. Although lawyers for Beethoven had filed an appeal, Beethoven was euthanized before the appeal was decided. *St. Petersburg Times Online*, *Governor Denies Dog's Appeal* <[http://www.sptimes.com/News/021301/State/Governor\\_denies\\_dog\\_s.shtml](http://www.sptimes.com/News/021301/State/Governor_denies_dog_s.shtml)> (accessed Apr. 6, 2003).

<sup>204</sup> Cohen, *supra* n. 5, at 36.

Such was the case a few years ago in Middleburg, Florida after a 21-month-old girl wandered into a neighbor's yard where six pit bulls were kept chained. One of the dogs attacked and critically injured the toddler. Following the incident, the dog's guardian brutally killed the animal with a hammer.<sup>205</sup> In a similar occurrence a few months later, a three-year-old girl in Tyler, Texas was mauled to death after she wandered into the back yard where her family kept thirteen pit bulls chained up. After the attack, a family member shot and killed the dog responsible for the mauling, and the remaining twelve dogs were taken to a veterinarian to be killed.<sup>206</sup>

Because no database of these private killings exists, and no law requires them to be reported to authorities, there is no way of knowing with any certainty how many occur each year. Still, accounts of private killings appear daily in brief articles in our nation's newspapers and nightly on local television news broadcasts. The number and frequency of these newspaper and television news anecdotes enable us to draw the following three conclusions. First, although the formal prosecution of animals has for the most part ended, animals nevertheless continue to be punished for their "crimes" against human beings. Second, the public executions of the past have been replaced by out-of-sight animal shelter and veterinarian office euthanizations and hasty backyard executions. Finally, it is extremely rare for a person who summarily executes an animal to be charged with, and convicted of, cruelty to animals.

This last claim warrants an example. A few years ago in Gainesville, Georgia, an off-duty police officer killed a dog who, eleven days earlier, had mauled his ten-year-old daughter.<sup>207</sup> The dog's guardian

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<sup>205</sup> *Girl Mauled by Dog Is in Critical Condition*, Tallahassee Democrat 8A (Mar. 1, 2000).

<sup>206</sup> *Pit Bull Kills 3-Year-Old Girl*, Austin American-Statesman B2 (Sept. 20, 2000). In no way have these private retaliations been limited to dogs—or even domesticated animals. Perhaps the most famous was the execution of an elephant named Topsy. On January 4, 1903, Topsy was executed at Luna Park on Coney Island after killing three keepers in three years, the last of whom was intoxicated and is believed to have fed her a lighted cigarette. In carrying out Topsy's execution, park authorities first attempted to poison the elephant by feeding her two carrots laced with 400 grams of potassium cyanide. When that effort failed, Frederic Thompson and Elmer "Skip" Dundy, the men who (with the help of Topsy) had built the Coney Island amusement park, saw a chance for publicity and announced that she would be hanged. When the American Society for the Prevention of Cruelty to Animals protested, the partners came up with a new plan, deciding that Topsy would be electrocuted by Thomas Edison, who had been perfecting his direct current electricity. When the switch was finally thrown, the electrocution lasted 10 seconds. *The American Experience*, "Coney Island" (Pub. Broad. Serv.) (tv broadcast) (transcript available at <<http://www.pbs.org/wgbh/amex/coney/filmmore/transcript>>). At least 1,500 people—many of whom, in the past, had fed peanuts to Topsy—witnessed the execution. *The Commercial Advertiser*, *Bad Elephant Killed: Topsy Meets Quick and Painless Death at Coney Island* (Jan. 5, 1903) (available at <<http://www.railwaybridge.co.uk/topsy.html>>).

<sup>207</sup> Randy Wyles, *Cop Faces Trial for Killing Dog: Shot Animal 11 Days After it [sic] Mauled His Daughter* <[http://www.apbnews.com/cjprofessionals/behi.../dogshot0511\\_01.html?s=syn.emil\\_dogshot0511](http://www.apbnews.com/cjprofessionals/behi.../dogshot0511_01.html?s=syn.emil_dogshot0511)> (accessed May 12, 2000) (site no longer available).

had warned the girl to stay away from the dog, and she was bitten when she approached him while he was chained to a tree.<sup>208</sup> Although the dog's guardian had planned to have Bud, a mixed-breed German shepherd, euthanized the next day, Officer Kenneth Cannon shot the dog twice with an AR-15 assault rifle while Bud was chained to the tree. Prosecutors charged Cannon with animal cruelty, but a Georgia jury declined to find him guilty.<sup>209</sup>

The official response to these acts of summary justice almost certainly would have been different had they occurred during the era of the animal trials. Chassané and his contemporaries would have looked upon each of these incidents with great disdain, for although animal offenders were certainly killed during the age of the animal trials, it was generally only after having first received the benefit of legal due process. Killing an animal without such due process was generally condemned.<sup>210</sup> Thus, in 1576, in Schweinfurt (Germany), when a hangman—lacking legal authority to do so—took matters into his own hands and hanged a sow who had been brought into custody after attacking a child, he was permanently banished from the community. “It was not the mere killing of the sow, but the execution without a judicial decision, the insult and contempt of the magistracy and the judicatory by arrogating their functions, that excited the public wrath and official indignation.”<sup>211</sup>

### C. *Keeping Animals in Their Place: Restoring Order and Achieving Vengeance*

Why today, do we still hold animals accountable for the harms they commit against human beings? Certainly, sometimes we kill animals under the pretext of assuring human safety. However, often no reason is specified, particularly when animals are executed at the “scene of the crime.”

In at least some of these cases, particularly those involving the summary killing of an animal who has caused harm, the motive appears to be based, at least in part, upon a simple primal desire for *revenge*. In 1997, a 350-pound tiger named Arnie bit and seriously injured circus trainer Richard Chipperfield during a publicity photo shoot for Ringling Bros. and Barnum & Bailey Circus. Nearby trainers were able to come to the man's aid and returned the tiger to his cage. Nevertheless, in an act of vengeance after the attack, Graham Chipperfield, the trainer's brother, fired a shotgun multiple times into the tiger's cage, killing Arnie.<sup>212</sup> Prosecutors declined to pursue animal

<sup>208</sup> Court TV Online, *Owner [sic] Admits Beloved Dog Was Danger to Kids* <[http://www.courtstv.com/trials/cannon/091900\\_ctv.html](http://www.courtstv.com/trials/cannon/091900_ctv.html)> (accessed Sept. 28, 2000).

<sup>209</sup> *Id.*; Wyles, *supra* n. 207; Court TV Online, *Georgia Jury Acquits Cop in Dog Killing* <[http://www.courtstv.com/trials/cannon/verdict\\_ctv.html](http://www.courtstv.com/trials/cannon/verdict_ctv.html)> (accessed Oct. 22, 2002).

<sup>210</sup> Evans, *supra* n. 2, at 146–147.

<sup>211</sup> *Id.*

<sup>212</sup> *Bulletin Board*, 18 *The Animals' Agenda* 12 (Jan./Feb. 1998).

cruelty charges against Graham Chipperfield, deciding that he had been justified in killing the animal, notwithstanding the fact that the animal was secured in a cage and no longer posed a threat.<sup>213</sup>

In other cases where an animal has seriously injured or killed a person, it seems that the motive behind killing the offending animal is to restore the hierarchical order that the animal, by her actions, has upset. Like the goring ox or infanticidal pig, today's animal offenders pose a real threat to the hierarchical order set out in the Book of Genesis, which places human beings above all other forms of life. It is not too far a stretch to suggest that when animals are killed for their offenses, the executions are motivated, either in whole or in part, because the transgressing animals have "forgotten their place" in the scheme of things. Animals are *not supposed* to injure or kill human beings. We are, after all, their "masters" and "owners." We have been told that we have "dominion" over them. When animals cause harm—especially physical injury—to people, they violate the strict hierarchy and "natural" order of things.<sup>214</sup> Thus, for perhaps one of the same reasons the medieval Europeans punished animals who failed to observe this separation of the species, so we, too, *restore order* by punishing transgressing animals.<sup>215</sup>

In short, by killing and permitting the killing of animals who have harmed human beings, we achieve two ends: vengeance on behalf of the injured person, and restoration of the hierarchical order. Prosecutors, in refusing to press animal cruelty charges, and judges and juries, in refusing to convict, further affirm the notion that we have an innate right to achieve these ends.

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<sup>213</sup> *Bulletin Board*, 18 *The Animals' Agenda* 12 (Mar./Apr. 1998).

<sup>214</sup> See generally Jim Mason, *An Unnatural Order: Uncovering the Roots of Our Domination of Nature and Each Other* (Simon & Schuster 1993).

<sup>215</sup> Sometimes, the restoration of this hierarchical order occurs symbolically, for example, by the consumption of the flesh of the offending animal. It happened in the late-eighteenth century among the Kookies of India, who believed that the relatives of a person killed by a tiger lived in disgrace until they had killed a tiger and given a feast of her flesh. Frazer, *supra* n. 75, at 415–416 (quoting John Macrae, *Account of the Kookies of Lunctas*, in 7 *Asiatic Researches* 189 (London 1803)). Two hundred years later, still it happens. In 1999, while swimming in a creek, a boy from Tedina Township, Ohio, was attacked by a large snapping turtle. The boy, whose left big toe was completely severed by the turtle, was taken to the hospital with substantial blood loss and shock trauma. Order was restored a few days after the attack, when neighbors reportedly had a turtle soup cook-off to help pay the boy's medical expenses. Pablo Caxion, *Snapping Turtle Takes Toe of Child* <[http://www.igorilla.com/gorilla/animal/1999/snapping\\_turtle\\_attack\\_in\\_ohio.html](http://www.igorilla.com/gorilla/animal/1999/snapping_turtle_attack_in_ohio.html)> (accessed Oct. 22, 2002). The message imparted by the examples just cited is clear: order is restored when people eat the body of the animal who attacked (or, if she's not available, other members of the offending animal's species). People are *supposed* to eat or use animals; animals are not supposed to attack or kill people. As long as these two rules are followed, order is maintained.

## IV. CONCLUSION

Although today's trials and executions of animal offenders are rarely the formal occasions they once were, the practice of prosecuting and punishing animals for their offenses continues into the twenty-first century. Indeed, only the *manner* by which we hold animals accountable for their transgressions has changed. Where once we afforded animals who allegedly caused harm due process and a trial, today we seldom guarantee them even the most basic of legal protections before killing them.

Both theoretically and pragmatically, we *should* be concerned with what happens to animals accused of causing harm. It is suggested that, for the following reasons, the time has come to not only scrutinize, but also change, our current policies toward animals alleged to have injured or killed human beings.

(1) *Executing an animal "offender" is fundamentally unfair to the animal.* Whenever an animal is killed (whether summarily or not), it is *always* the *animal*—and not necessarily the guardian of the animal—who is being punished. This is the case whether we are talking about the hasty backyard executions or the government-mandated killing of errant animals. As Dr. Randall Lockwood explains, "existing laws tend to ignore the needs of the animals and place the burden of punishment on the animals, rather than on the irresponsible owners [sic] who are ultimately responsible for the problems caused by their pets."<sup>216</sup> In the case of vicious dog prosecutions, although an animal's guardian may be held civilly—and sometimes, criminally—responsible for the animal's conduct,<sup>217</sup> the animal continues to bear the *physical* consequences of her actions. Although the message behind the guilty verdicts in the case involving the tragic dog-mauling death of Dianne Whipple in San Francisco in 2001 was, according to many accounts, that "you can't blame your dog,"<sup>218</sup> it must be noted that both dogs implicated in the mauling were, in fact, killed.<sup>219</sup> Equity demands a different result, particularly in the many cases—such as the San Francisco case—where the animal's antisocial behavior can be traced back to the irresponsibility (whether intentional or negligent in origin) of the animal's guardian.

(2) *The execution of an animal defendant provides little, if any, punishment of the human offender.* Closely related to the above argument is the notion that primary responsibility more properly lies with the animal's human guardian who, ultimately, is responsible for the

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<sup>216</sup> Randall Lockwood, *Humane Concerns About Dangerous-Dog Laws*, 13 U. Dayton L. Rev. 269, 276–277 (1988).

<sup>217</sup> For a detailed analysis of the general development of tortious liability for animals, see Glanville L. Williams, *Liability for Animals* (Cambridge U. Press 1939).

<sup>218</sup> Karen Breslau, *A Deadly Weapon*, Newsweek 57 (Apr. 1, 2002).

<sup>219</sup> Jaxon Van Derbeken, *San Francisco Chronicle, Time Runs Out For Dog in S.F. Mauling Death: Presa Canario Given a Lethal Injection* <<http://sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2002/01/31/MN87204.DTL>> (accessed Oct. 22, 2002).

problems caused by the animal in his or her care. The killing of an animal "offender" does little to *punish* the animal's guardian, who may be primarily responsible for the harm, and therefore, the proper target of public censure.

(3) *Executing animals does little to deter future attacks.* Laws that provide for the execution of an offending animal, yet require only minimal fines for their human guardians, do little to prevent similar attacks in the future. Granted, the execution of an animal offender prevents that particular animal from causing harm again.<sup>220</sup> However—perhaps more importantly in the grand scheme of things—it does very little by way of affecting future *human* conduct.<sup>221</sup> Irresponsible guardians can easily replace executed animals with new ones. There is no guarantee that these new animals will not assume their predecessors' role, learning aggression rather than proper socialization.<sup>222</sup>

(4) *Executing animals without providing them at least minimal due process provides little incentive to extend minimal protections to other neglected members of society.* The special needs of children, the mentally ill, the mentally disabled, and the indigent have each, at times, been ignored by our criminal justice system. In theory, at least, a judicial process that protects the rights of animals—arguably the weakest members of society—will also protect the rights of members of these other marginalized groups. By providing a voice to the most voiceless group of society, we just might amplify the voices of these other groups.

(5) *When we tolerate "backyard executions," we tolerate animal cruelty and violence in general.* If we are serious about ending violence, we cannot tolerate violence in any form or at any level. If we are truly dedicated to ending violence, then animal cruelty must be moved from the regrettable to the intolerable. This includes cruelty in the form of summary backyard executions. Furthermore, a growing number of studies demonstrate a connection between cruelty to animals and violence against people.<sup>223</sup> As the cliché goes, where there is smoke there is often also found fire. Likewise, where there is animal abuse, there is

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<sup>220</sup> However, as noted above, nonlethal alternatives that achieve the same purpose exist, such as relocating the offending animal to an animal sanctuary.

<sup>221</sup> Paula L. Wilson, *Am. Sub. H.B. 352: An Overview—Dogs Under Control*, 13 U. Dayton L. Rev. 297, 308 (1988) (citing Humane Socy. of the U. S., *Guidelines for Regulating Dangerous or Vicious Dogs* (1987)).

<sup>222</sup> For this reason alone, it makes sense for those negligent or intentionally inadequate guardians of animals who have caused harm to be barred from keeping animals in the future.

<sup>223</sup> See generally *Cruelty to Animals and Interpersonal Violence: Readings in Research and Application* (Randall Lockwood & Frank R. Ascione eds., 1998).

often accompanying domestic partner<sup>224</sup> or child<sup>225</sup> abuse. Hence, not only should backyard executioners be prosecuted for cruelty to animals, but investigations should also be made into their relationships with the other (human) members of their households.

Of course, none of the above is intended to suggest that we do nothing with animals who harm human beings. Society certainly does have a need to protect itself against dangerous threats, whether they are human or nonhuman in form. However, alternatives to the brute execution of animals exist and should be considered. The cases of Taro, Prince, and Nadas show that real alternatives to capital punishment are available.

In short, more attention must be given to both the needs of the animals and the culpability of the human actors. Prosecutors and judges must lift responsibility from the shoulders of the animals, and place it where it more properly belongs—with the human guardians of the offending animals. They must zealously enforce anti-cruelty laws when private citizens take the law into their own hands and kill animals suspected of harming human beings. Notions of humanity, justice, and equity require that we revisit the idea of giving animals some measure of due process before taking their lives. Perhaps it is time that we seriously consider re-extending to alleged animal offenders at least basic judicial due process protections before killing them.<sup>226</sup> Perhaps it is time for a return of some form of the animal trials of years past.<sup>227</sup>

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<sup>224</sup> See e.g. Frank R. Ascione, *Battered Women's Reports of Their Partners' and Their Children's Cruelty to Animals*, 1 J. of Emotional Abuse 119, 119 (1998) (of 38 women seeking shelter at a safehouse for battered partners, 71% of those reporting current or past companion animal guardianship reported that their partner had threatened and/or actually hurt or killed one or more of their companion animals).

<sup>225</sup> See e.g. Elizabeth DeViney, et al., *The Care of Pets Within Child Abusing Families*, 4 Intl. J. for the Study of Animal Problems 321, 325 (1983) (in a survey of 53 families in which child abuse had occurred, abuse of pets had taken place in 60% of the families).

<sup>226</sup> Perhaps some form of an animal "guardian ad litem" program would serve this purpose. In such a program, the animal and her interests would be represented in legal proceedings by a human advocate.

<sup>227</sup> At the risk of "stirring things up" in the last footnote of a long article, perhaps there is an invidious reason why we do not want animal offenders in the courthouse; letting them in would require us to entertain the notion that animals are something more than just mere property. "[I]f the mediaeval jurists could treat animals essentially as persons with a very limited capacity (limited to the ability to perform legally punishable acts), is there any reason why we cannot treat them as legal persons?" asks one writer. Jane Nosworthy, *The Koko Dilemma: A Challenge to Legal Personality*, 2 S. Cross U. L. Rev. 1, 9 (1998) (footnotes omitted).

