

HUMAN DRAMA, ANIMAL TRIALS: WHAT THE MEDIIEVAL ANIMAL TRIALS CAN TEACH US ABOUT JUSTICE FOR ANIMALS

By
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The legal system generally does little to protect animals, and one aspect of its inadequacy is a matter of formal structure: under United States and Canadian law, animals are not legal “persons” with an independent right to the protections of the legal system. There are calls to expand the status of animals in the law by providing them with legal standing, the right to be represented by a lawyer, and other formal protections. But, in a way, some of this has happened before. There is a long history, primarily from the medieval and early modern periods, of animals being tried for offenses such as attacking humans and destroying crops. These animals were formally prosecuted in elaborate trials that included counsel to represent their interests. The history of the animal trials demonstrates how, in a human-created legal system, legal “rights” for animals can be used for human purposes that have little to do with the interests of the animals. This history shows us that formal legal rights for animals are only tools, rather than an end in themselves, and highlights the importance not just of expanding formal protections, but of putting them to work with empathy, in a way that strives (despite the inevitable limitations of a human justice system in this respect) to incorporate the animals’ own interests and own point of view.

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The law . . . just squeezed us into the system as if we were humans.¹

I. INTRODUCTION: ANIMAL CLIENTS, HUMAN LAWYERS

In a *New Yorker* cartoon from 1999, two lab-coated researchers peer at a monkey signing to them from his cage. The caption is: “He says he wants a lawyer.”² It is funny because monkeys, as a rule, do not have lawyers. The monkey in the cartoon belongs in the legal category of property, a thing with respect to which people’s rights are exercised; legally, he is not a person and has no rights to defend,³ so there would be no point in getting him a lawyer.

This Article is about lawyers for animals, animal trials, and animal rights. It is about a historical practice that seems like far-fetched fiction, yet implicates a very contemporary debate. That debate is about the legal status of animals—whether they ought to be legally recognized as “persons,” and thus as entities that have their own legal rights, and what the implications of such reforms would be. Currently, the law treats animals as things (more or less, with some exceptions and minor caveats).⁴ Domesticated animals are property, not persons.⁵ Some argue that this legal status is the foundation of our culture’s systematic abuse of animals.⁶ Gary Francione, for example, argues that animals cannot have meaningful protection from abuse unless their

¹ Interview by Leonard Jacobs with Susan Yankowitz, playwright of *The Tragical-Comical Trial of Madame P. and Other 4-Legged and Winged Creatures* (Dec. 3, 2010) (available at <http://www.clydefitchreport.com/2010/12/5-questions-ive-never-been-asked-susan-yankowitz-and-madame-p> (accessed Apr. 3, 2011)) [hereinafter Yankowitz Interview] (Ms. Yankowitz speaking from the point of view of her play’s character Madame P., a homicidal sow on trial).

² Tom Chalkley, Cartoon, *He says he wants a lawyer*, *The New Yorker* (Feb. 2, 1999) (available at <http://www.cartoonbank.com/1999/he-says-he-wants-a-lawyer/inv/118074> (accessed Apr. 3, 2011)).

³ Taimie L. Bryant, *Animals Unmodified: Defining Animals/Defining Human Obligations to Animals*, 2006 U. Chi. Leg. Forum 137, 141 (2006).

⁴ For example, Spain has recently extended certain legal rights to great apes. Thomas Catan, *Apes Get Legal Rights in Spain, to Surprise of Bullfight Critics*, *The Times* (London) (June 27, 2008) (available at <http://www.timesonline.co.uk/tol/news/world/europe/article4220884.ece> (accessed Apr. 3, 2011)). The Spanish parliament’s environmental committee voted in 2008 to approve principles committing Spain to the Great Ape Project, an international project established by Peter Singer and Paola Cavalieri to advocate for basic rights to life, individual liberty, and freedom from torture for nonhuman great apes (chimpanzees, gorillas, orangutans, and bonobos). *Id.* In addition, some courts in the U.S. have recognized animals as named plaintiffs. See e.g. *N. Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988) (naming a species of owl as a plaintiff); *N. Spotted Owl v. Lujan*, 758 F. Supp. 621 (W.D. Wash. 1991) (naming a species of owl as a plaintiff); *Mt. Graham Red Squirrel v. Yeutter*, 930 F.2d 703 (9th Cir. 1991) (naming a species of squirrel as a plaintiff). However, scholars have noted that animals cannot usually sue in their own names. See e.g. Cass R. Sunstein, *Can Animals Sue?*, in *Animal Rights: Current Debates and New Directions* 251, 259–60 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004) (noting that animals lack standing in some courts) [hereinafter *Animal Rights: Current Debates*].

⁵ Gary L. Francione, *Animals, Property, and the Law* 11 (Temple U. Press 1995).

⁶ *Id.* at 14.

status as property is abolished.⁷ Many other philosophical and legal thinkers who address animal issues are proponents of recognizing the legal personhood of animals in one form or another.⁸

For lawyers, the very essence of personhood is being the kind of entity that is capable of being party to a legal proceeding.⁹ In a sense, the legal definition of a person is someone who can have legal standing, someone who can have a lawyer.¹⁰ It makes sense, then, that some animal rights scholars and advocates have focused on expanding legal doctrines like standing to give animals more access to the legal apparatus—the possibility for the rights of animals to be asserted in their own name through a human representative, such as a court-appointed guardian, an animal advocacy organization,¹¹ or a private citizen seeking to enforce animal-protection laws.¹² It has even been suggested that the law should treat animals as legal subjects to the point, in certain circumstances, of regulating liability for harm done by animals to other animals.¹³ On the other side of the debate, scholars argue that it would be neither realistic nor in the interest of animals to abolish their status as property¹⁴ since being owned by human beings can affect animal well-being for the better, not just for the worse.¹⁵ Those scholars argue that we should aim for incremental modification, rather than abolition, of the property status of animals,¹⁶ and that the focus

⁷ *Id.*; Gary L. Francione & Robert Garner, *The Animal Rights Debate: Abolition or Regulation* X (Colum. U. Press 2010); Gary L. Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* 25 (Colum. U. Press 2008); Gary L. Francione, *Rain without Thunder: The Ideology of the Animal Rights Movement* 169–70 (Temple U. Press 1996).

⁸ *E.g.* Steven M. Wise, *Drawing the Line: Science and the Case for Animal Rights* 8, 231–40 (Perseus Bks. 2002) (arguing that certain animals, especially other primates like chimpanzees and bonobos—the closest genetic relatives to humans—should be recognized as having legal rights and legal personhood); Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* 7, 240, 267 (Perseus Bks. 2000) (same) [hereinafter Wise, *Rattling the Cage*].

⁹ *A Dictionary of Modern Legal Usage* 654 (Bryan A. Garner ed., 2d ed., Oxford U. Press 1995) (stating “[s]o far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties . . . whether a human being or not . . .” (citing J.W. Salmond, *Jurisprudence* 299 (12th ed., 1966))).

¹⁰ Francione, *supra* n. 5, at 65 (stating that “[s]imply put, it makes no sense to say that someone has a legal right to something if that person does not possess standing to assert that right”).

¹¹ *Id.* at 67.

¹² Sunstein, *Introduction: What Are Animal Rights?*, in *Animal Rights: Current Debates*, *supra* n. 4, at 7.

¹³ Wendy A. Adams, *Human Subjects and Animal Objects: Animals as “Other” in Law*, 3 U. Pa. J. Animal L. & Ethics 29, 48 (2009).

¹⁴ See Gary L. Francione, Panel, *Legal Status of Nonhuman Animals: Panel Discussion II* (N.Y., Sept. 25, 1999) (copy of transcript in 8 *Animal L.* 1, 24 (2002)) (implying that it is unrealistic to think the court system will abolish the status of animals as property).

¹⁵ Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in *Animal Rights: Current Debates*, *supra* n. 4, at 148–49.

¹⁶ David Favre, *A New Property Status for Animals: Equitable Self-Ownership*, in *Animal Rights: Current Debates*, *supra* n. 4, at 236.

on the issue of personhood versus property is mainly an academic exercise and is thus a distraction from working on the immediate legal reforms that would improve animals' lives.¹⁷

This debate about the necessity of abolishing the property status of animals is "one of the most vigorous debates of all" in modern animal rights scholarship.¹⁸ But the idea that animals should have trials and be represented by legal advocates is not entirely new.¹⁹ There is a long history, mainly from the medieval and early modern periods, of animals being tried for offenses such as attacking human beings and eating crops.²⁰ In those trials, animal defendants were held responsible for wrongdoing, allowed most due procedural protections, provided with counsel to represent them at the expense of the (human) community, and punished—all in a manner that mimicked the treatment of human defendants.²¹ Sometimes they were even dressed up in human clothes.²² Modern animal law scholars tend to mention the animal trials in passing but pay relatively little attention to them, perhaps because (with some reason) they see them as mere historical curiosities,²³ artifacts of a superstitious and ritualistic culture with little relevance to present-day efforts to ameliorate animal suffering and exploitation.²⁴

The old animal trials merit our attention because they have something to teach us about both the promise and the limitations of using legal tools like personhood, standing, and legal rights—the machinery of the human justice system—to further the emancipation of animals. I use the phrase "animal emancipation" as shorthand to refer to the reduction of animal suffering and exploitation, the inculcation of kinder and more respectful human attitudes toward animals, and the

¹⁷ Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 *Animal L.* 133, 139 (2006).

¹⁸ Sunstein, *Introduction: What Are Animal Rights?*, in *Animal Rights: Current Debates*, *supra* n. 4, at 11.

¹⁹ E.P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* 136, 140 (2d ed., The Lawbook Exch., Ltd. 1999) (documenting trials that occurred from the ninth century up to 1906, the year the book was published) [hereinafter Evans, *Criminal Prosecution*]. The cases Evans describes are concentrated in the early modern period (the fifteenth, sixteenth, and seventeenth centuries), although, as Evans notes, court records were imperfectly kept in the Middle Ages and the ones for which records survive may be a very small percentage of the whole. The concentration of cases in the early modern period may indicate no more than that more records survived from that time. *Id.* at 137.

²⁰ *Id.* at 108–13.

²¹ *Id.* at 123, 140.

²² *Id.* at 140 (describing the execution in France of a pig convicted of having eaten a child: "As if to make the travesty of justice complete, the sow was dressed in man's clothes and executed on the public square near the city-hall . . .").

²³ Francione, *supra* n. 5, at 94 (describing the old practice of prosecuting and executing animals as "a legal anomaly").

²⁴ Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 *Animal L.* 97, 116 (2003).

development of stronger institutional protections for animals. There may be a certain temptation, especially for lawyers, to think that changing animals' legal status is the key to animal emancipation, the fundamental change from which the rest will automatically flow. The history of the old animal trials should serve as a useful reminder that things are much more complicated than that.

The old animal trials demonstrate that medieval and early modern legal culture, at once alien to our own and recognizably its precursors, could accommodate and take seriously debates about animals' capacity for thought, feeling, and responsibility,²⁵ could recognize legal responsibilities owed by humans to animals,²⁶ and could tolerate the movement of animals between the categories of "thing" and "person."²⁷ And yet the trials did not have much to do with animal emancipation; they were absurd exercises in legal formalism that often ended with very nasty things being done to animals.²⁸ The history of animal trials is a source of food for thought—both inspiration and warning—about the implications of placing animals in human roles in a human legal system.

There are many different ways to look at the animal trials, and this Article borrows from several of them. Some scholars have approached the trials primarily as a sociological or cultural phenomenon,²⁹ and this Article also looks at them from that perspective. Others use the trials as material for exploring questions of animal rights and animal oppression.³⁰ Most of our knowledge about the animal trials (at least for English-speaking scholars) comes from E.P. Evans's work,

²⁵ Walter Woodburn Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. Pa. L. Rev. 696, (1915–1916) (discussing the argument that, because humans alone were considered rational, to put an animal on trial implied that animals were thought to have rational capacities).

²⁶ See Evans, *Criminal Prosecution*, *supra* n. 19, at 123 (recognizing that animals and insects were represented by attorneys when prosecuted in the medieval ages, such as when an attorney was appointed to defend termites who were eating the food and furnishings of Franciscan friars).

²⁷ *Id.* at 108–09 (noting that although many medieval writers believed animals should be punished for their transgressions as moral beings, at least one writer recognized that animals were not legal persons, and therefore "[d]id not come within the jurisdiction of a court").

²⁸ The unfortunate sow mentioned *supra*, n. 22, for example, was sentenced "to be mangled and maimed in the head and forelegs" before being hanged. *Id.* at 140. Similarly, a mule condemned to be burned alive with a man convicted of buggery had its feet cut off because it "was vicious and inclined to kick." *Id.* at 146. Animals were condemned to be burned and buried alive and were even tortured on the rack "in order to extort confession." *Id.* at 138–39.

²⁹ See e.g. Piers Beirne, *The Law Is an Ass: Reading E. P. Evans's The Medieval Prosecution and Capital Punishment of Animals*, 2 Socy. & Animals 27, 38–41, 43–44 (1994) (on file with *Animal Law*) (analyzing animal trials from a sociological perspective); Paul Schiff Berman, Student Author, *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, 290–91, 314–16 (1994) (identifying animal trials as a way of constructing a narrative through social rituals).

³⁰ E.g. Girgen, *supra* n. 24.

The Criminal Prosecution and Capital Punishment of Animals,³¹ in which Evans gathered information about the trials and presented it alongside generous doses of his own views on the culture, philosophy, and theology that lay behind the practice—views influenced by Evans’s strikingly “modern” pro-animal rights perspective.³² Esther Cohen’s excellent historical analyses of the trials³³ add a great deal to our understanding of their context. The animal trials have also inspired a number of works of imaginative literature and drama that bring out their parodic and subversive aspects.³⁴ This Article discusses some of those interpretations, too, because they shed light on both the cultural significance of the animal trials and the trials’ implications for debates about the legal status of animals. Such works bring out our awareness that legal ritual can be a disguised exercise of brute power, but also that the trials gave voice, in a limited way, to the voiceless. These are disparate, perhaps even disconnected, ways of looking at a single phenomenon that is hard to get an intellectual grasp on, but there are common threads between them. They are all different ways of getting at the question of what it means to treat animals as persons, or to treat animals like human beings, which is not necessarily the same thing.

The animal trials demonstrate that formally attributing legal personhood to animals is not necessarily a benefit to them. More important than the formal categories of property or personhood is the orientation of the legal system towards animals—whether the legal system is using animals as a means of dealing with human-centered concerns or is instead able to accomplish the unusual feat of dealing with animals empathetically, in a way that, at least to some extent, tries to see things from the animal’s point of view. This insight emerges from a comparison of the old animal trials to present-day legal proceedings that address similar problems, such as legal battles that arise when animals attack humans,³⁵ or when wild animals con-

³¹ Evans, *Criminal Prosecution*, *supra* n. 19; see Hyde, *supra* n. 25, at 696–98, 702–03 (1916) (reporting an account of the medieval animal trials that is based on Evans’s work); Joseph P. McNamara, *Curiosities of the Law*, 3 *Notre Dame L. Rev.* 30, 30–36 (1927) (briefly outlining many of the cases that Evans identified). Evans’s book provides the account of the trials that is most relied upon by other authors. Peter Dinzelsbacher, *Animal Trials: A Multidisciplinary Approach*, 32 *J. Interdisc. Hist.* 405, 406 (2002); Berman, *supra* n. 29, at 298. Beirne, *supra* n. 29, at 37. Joseph P. McNamara, *Curiosities of the Law*, 3 *Notre Dame L. Rev.* 30, 30–36 (1927) (brief piece heavily indebted to Evans).

³² For a discussion of Evans’s and other authors’ perspectives on the trials, consult *infra* pt. III.

³³ Esther Cohen, *The Crossroads of Justice: Law and Culture in Late Medieval France* ch. 7 (E.J. Brill 1993) [hereinafter Cohen, *Crossroads of Justice*]; Esther Cohen, *Law, Folklore and Animal Lore* 110 *Past & Present* 6, 10–37 (1986) (available at <http://past.oxfordjournals.org/content/110/1/6.full.pdf> (accessed Apr. 3, 2011)) [hereinafter Cohen, *Lore, Folklore and Animal Lore*].

³⁴ See *infra* pt. III (discussing portrayals of the animal trials in literature and drama).

³⁵ *Infra* nn. 50–58 (discussing trials resulting from animals’ attacks on humans).

sume resources humans want for themselves.³⁶ Today we hold hearings before deciding what to do with certain dogs that bite,³⁷ but we do not formally treat the dogs as defendants; nevertheless, these proceedings and the old murder trials of pigs may really be about the same underlying concern with carrying out due process before depriving an animal's human owner of something highly valued. And when it comes to coexisting with wild animals, we do not follow the medieval doctrine that acknowledged the "rights" of mice and locusts to their share of food,³⁸ but there are contemporary instances—one of which is discussed in Part V, below—where we actually do act in a somewhat disinterested way by *voluntarily* opting to share resources with animals instead of destroying them, which, practically speaking, was not an option for our less technologically endowed medieval forebears. At the same time, the formal ritual of endowing animals with the legal status of persons, even if an empty formalism, is in itself a provocative anomaly that subverts the normal human-animal hierarchy.

One of the preeminent thinkers about animal rights, Steven Wise, decries the ancient axiom that the law was created for the service of human beings—"a]ll law was established for men's sake"—as the root of the law's blindness to our moral obligations toward animals.³⁹ But it is empirically true that the law is an institution created by humans and for humans,⁴⁰ whatever one might think about whether the law does or should express underlying principles of natural justice that transcend its human origins. The history of the early animal trials should remind us, as we work toward improved legal protections for animals, to keep in mind that our legal system is alien to animals, as well as the limitations of our own ability to represent, or even understand, their interests. Wendy Adams has argued that, if animals are to be integrated into the human legal system, the process of integration "should represent recognition and respect for the interests of animals, as opposed to representing the interests of human beings in using animals for their own purposes."⁴¹ Thinking about what we used to do when we integrated animals into the legal system in the past (albeit in a limited way) can give us insight into how that could be done, or what not to do, today. The most important lesson from the history of the

³⁶ *Infra* nn. 63–94 (discussing trials resulting from animals consuming resources).

³⁷ DogLaw.HugPug.com, *Dangerous Dog Laws*, http://doglaw.hugpug.com/doglaw_090.html (accessed Apr. 3, 2011).

³⁸ See Evans, *Criminal Prosecution*, *supra* n. 19, at 50 (relating the concession in a legal proceeding that weevils were entitled to sustenance).

³⁹ Wise, *Rattling the Cage*, *supra* n. 8, at 24–25.

⁴⁰ Although one could question whether legal institutions are created by, or for, *all* humans. Proponents of animal rights have observed that animals are marginalized in ways that groups of humans were marginalized in the past. See e.g. Steven M. Wise, *An American Trilogy: Death, Slavery, and Dominion on the Banks of the Cape Fear River* (Da Capo Press 2009) (identifying ways in which the treatment of modern industrially farmed hogs is similar to the early Americans' treatment of African slaves and Native Americans).

⁴¹ Adams, *supra* n. 13, at 41.

animal trials is that animals' presence (literally or by way of representation) in human courts of law is, in the end, always derivative and always mediated, and animals are always metaphorically dressed up in clothes that do not belong to them. We can perhaps mitigate this pervasive difficulty by adopting legal institutions that are more conducive to advocating animals' interests from their own point of view, as best we can understand them. But what we really need to do is to remain sensitive to our own limitations—never forgetting that we are, as the saying goes, only human.

In Part II, this Article discusses the animals, lawyers, and communities that were involved in these ancient animal trials. It then analyzes the animal trials' potential implications for the animal rights debate in Part III. In Parts IV and V, this Article explores the ways the animal trials have been presented in literature and drama and discusses what modern animal trials reveal about the current relationship between animals and the legal system. In Part VI, this Article suggests ways in which the legal system can be improved in order to ensure that the decidedly nonhuman interests of animals are adequately represented in the animal trials of the future.

II. ANIMALS ON TRIAL

Evans describes two categories of animal trials: first, "capital punishments inflicted by secular tribunals upon pigs, cows, horses, and other domestic animals as a penalty for homicide"⁴² and also in cases of bestiality;⁴³ and second, "judicial proceedings instituted by ecclesiastical courts against rats, mice, locusts, weevils, and other vermin in order to prevent them from devouring the crops, and to expel them from orchards, vineyards, and cultivated fields by means of exorcism and excommunication."⁴⁴ These distinct types of procedures are referred to as "secular" and "ecclesiastical," respectively.⁴⁵ Professor Piers Beirne, a criminologist and animal abuse scholar,⁴⁶ considers the ecclesiastical proceedings not to be trials at all, but instead "part of an entirely different process that resulted in pronouncements of excommunication by an ecclesiastical court."⁴⁷ Yet the ecclesiastical proceed-

⁴² Evans, *Criminal Prosecution*, *supra* n. 19, at 2 (citing Karl von Amira, *Thierstrafen und Thierprocesse* (Wagner 1891)). Evans also notes that a cock was condemned to death for laying an egg. *Id.* at 10–12. Superstition had it that such an egg would hatch into a basilisk. *Id.*

⁴³ *Id.* at 147.

⁴⁴ *Id.* at 2.

⁴⁵ Cohen, *Law, Folklore and Animal Lore*, *supra* n. 33, at 10.

⁴⁶ U. of S. Me., *Criminology Department*, Piers Beirne, <http://usm.maine.edu/crm/piers-beirne> (accessed Apr. 3, 2011).

⁴⁷ Beirne, *supra* n. 29, at 32. Beirne observes that the earlier cases recounted by Evans (up to the thirteenth century) are all of the first type, the ecclesiastical. *Id.* However, Cohen describes the ecclesiastical trials as appearing much later than the secular cases. Cohen, *Crossroads of Justice*, *supra* n. 33, at 119. The difference may be explained by the fact that the early cases Beirne identifies, although all involving "vermin," had not yet developed into the elaborate rituals and stereotyped forms of

ings are recognizably similar to modern civil trial in both form and function, with pleadings submitted by both sides, procedural motions, and even settlements between the parties.⁴⁸ Evans's examples of the second, secular type of trial begin in the thirteenth century,⁴⁹ with the first being a capital trial in 1266 in which a pig was charged with eating a child.⁵⁰ Typically, the defendants in these trials were pigs (although Evans reports trials of other domestic animals, including cattle, horses, goats, sheep, mules, donkeys, dogs, and poultry).⁵¹ The frequency with which pigs got into legal trouble was probably a consequence of the medieval practice of letting them roam free in the streets, where they would take advantage of opportunities to snack on unattended children⁵²—a discomfiting reminder that a pig may be as partial to a young, tender human as many humans are to a bacon sandwich.

Unsurprisingly, the animal defendants lost in most of the cases Evans described.⁵³ Evans states that “only those cases are reported in which the accused were found guilty,”⁵⁴ although he does recount some exceptions. For example, in one case of bestiality where both a “she-ass” and her master were tried, the man was sentenced to death but the donkey was acquitted based on evidence of her good character.⁵⁵ The inhabitants of the commune Vanvres signed a certificate bearing witness that the donkey was “in word and deed and in all her habits of life a most honest creature.”⁵⁶ In another example, a sow and her six piglets were tried for killing a five-year-old boy; the sow was sentenced to death, but the piglets were acquitted due to lack of positive proof that they had participated in the crime.⁵⁷ When the master of the piglets refused to take responsibility for their future good conduct, they were “declared, as vacant property, forfeited to the noble damsel

argument that later characterized animal trials. Beirne, *supra* n. 29, at 37–38 (citing Cohen, *Law, Folklore and Animal Lore*, *supra* n. 33, at 18).

⁴⁸ Evans, *Criminal Prosecution*, *supra* n. 19, at 123–24. A dispute between some Franciscan friars in Brazil and a colony of termites that were eating their food, their furniture, and their monastery “ended in a compromise, by the terms of which the plaintiffs were obliged to provide a suitable reservation for the defendants, who were commanded to go thither and to remain henceforth within the prescribed limits.” *Id.* For a description of the attempts of the inhabitants of St. Julien to reach a settlement with weevils that were eating their vineyards, consult *infra* n. 89.

⁴⁹ Beirne, *supra* n. 29, at 32.

⁵⁰ *Id.*; Evans, *Criminal Prosecution*, *supra* n. 19, at 140.

⁵¹ Evans, *Criminal Prosecution*, *supra* n. 19, at app. F (providing a chronological list of excommunications and prosecutions of animals from the ninth century to the twentieth century and listing the type of animal involved in each proceeding).

⁵² Beirne, *supra* n. 29, at 38.

⁵³ Evans, *Criminal Prosecution*, *supra* n. 19, at 136.

⁵⁴ *Id.*

⁵⁵ *Id.* at 150–51.

⁵⁶ *Id.* (quoting the document presented by the inhabitants of the commune of Vanvres at the donkey's trial).

⁵⁷ *Id.* at 153–54.

Katherine de Barnault, Lady of Savigny.”⁵⁸ Given that the piglets were still suckling and their mother was killed, one might surmise that they probably appeared not too much later on the noble damsel’s dining table.

Much of Evans’s discussion of the conventions and rationale of the animal trials focuses on the ecclesiastical proceedings. Complex and, in some ways, surprisingly modern and relevant debates between advocates for and against the animals have come down to us from this type of trial.⁵⁹ Such open discourse was in keeping with the Church’s long tradition of internal debate over theological points.⁶⁰ It was a basic principle of canon law that a decision could not be rendered against one who had not been given a hearing, even to the point that the Church institutionalized the position of the devil’s advocate, “an officer required to advance all those arguments that Satan himself might use against prospective saints” in the process of beatification.⁶¹ Animal criminal defendants in secular proceedings, however, ordinarily were not provided with lawyers (just as human indigent defendants did not have lawyers appointed for them), although the court would listen to evidence both for and against them.⁶²

The ecclesiastical proceedings apparently followed a predetermined formula. The seventeenth-century jurist Gaspar Bailly set out a fictional example of the procedure to be followed in such proceedings,⁶³ which Evans summarizes.⁶⁴ The people would initiate proceedings complaining of the damage and suffering that the defendants (rats, weevils, locusts, field mice, or whatever they might be) were causing.⁶⁵ The defendants’ initial response would usually be an objection to the

⁵⁸ *Id.* at 154.

⁵⁹ Cohen, *Law, Folklore and Animal Lore*, *supra* n. 33, at 16–17, 28.

⁶⁰ Sadakat Kadri, *The Trial: A History, from Socrates to O.J. Simpson* 146 (Random House 2005).

⁶¹ *Id.* at 146, 157; *see generally* Malcolm Moore, *Cardinal Newman on Road to Sainthood*, *Daily Telegraph* (U.K.) (Jan. 10, 2008) (explaining that, in 1983, Pope John Paul II abolished the post of “devil’s advocate,” which was held by an attorney responsible for presenting a skeptical view of the candidate’s character). The official title was *Promotor Fidei*, or “Promoter of the Faith.” *Webster’s Third New International Dictionary* 619, 1815 (Philip Babcock Gove ed., 3d. ed., Merriam-Webster Inc. 2002).

⁶² Kadri, *supra* n. 60, at 150.

⁶³ Cohen, *Crossroads of Justice*, *supra* n. 33, at 119–20.

⁶⁴ Evans, *Criminal Prosecution*, *supra* n. 19, at 95 (stating that “[f]irst in order comes the petition of the inhabitants seeking redress (*requeste des habitans*), which is followed in regular succession by the declaration or plea of the inhabitants (*plaidoyer des habitans*), the defensive allegation or plea for the insects (*plaidoyer pour les insectes*), the replication of the inhabitants (*réplique des habitans*), the rejoinder of the defendant (*réplique du defendeur*), the conclusions of the bishop’s proctor (*conclusions du procureur episcopal*), and the sentence of the ecclesiastical judge (*sentence du juge d’eglise*), which is solemnly pronounced in Latin. The pleadings on both sides are delivered in French and richly interlarded with classical allusions and Latin quotations, being even more heavily weighted with the spoils of erudition than the set speech of a member of the British Parliament.”).

⁶⁵ Cohen, *Crossroads of Justice*, *supra* n. 33, at 119.

validity of the proceedings, as well as arguments that if the proceedings were not stopped altogether they should at least be delayed.⁶⁶

Some of the lawyers appointed to represent animal defendants were jurists of ability and renown, and they made full use of their learning and strategic acumen in the service of their clients.⁶⁷ The author of one of Evans's sources,⁶⁸ Bartholomew Chassenée, a distinguished French jurist of the sixteenth century who went on to write a treatise on the ecclesiastical judgment and punishment of animals, "made his reputation at the bar as counsel for some rats, which had been put on trial before the ecclesiastical court of Autun on the charge of having feloniously eaten up and wantonly destroyed the barley-crop of that province."⁶⁹ Lawyers like Chassenée were not above using "all sorts of legal shifts and chicane, dilatory pleas and other technical objections" on behalf of their clients.⁷⁰ Chassenée argued that because the rats "were dispersed over a large tract of country and dwelt in numerous villages" they could not all be expected to know of the proceedings and to appear in court until a summons was published from the pulpits of all the parishes in the area.⁷¹ When this was done and the rats still did not appear, "he excused the default or non-appearance of his clients on the ground of the length and difficulty of the journey and the serious perils which attended it, owing to the unwearied vigilance of their mortal enemies, the cats."⁷²

Another standard strategy was to argue that the tribunal had no jurisdiction over the defendants because they were, by their nature, incapable of committing crimes.⁷³ In Bailly's fictitious "model" proceedings, the insects' advocate argues that "the summons served on them is null and void, having been issued against beasts, which cannot and ought not to be cited before this judgment seat, inasmuch as such a procedure implies that the parties summoned are endowed with reason and volition and are therefore capable of committing crime."⁷⁴ Similarly, in the sixteenth century, an advocate arguing on behalf of some weevils on trial for ravaging the vineyards of the town of St. Julien claimed that "it [wa]s absurd and unreasonable to invoke the power of civil and canonical law against brute beasts, which are subject only to natural law and the impulses of instinct."⁷⁵ Evans observes that questioning the validity of proceedings against animals should not be taken as indicating serious skepticism about the practice of

⁶⁶ *Id.* at 120–21.

⁶⁷ *Id.* at 119–21, 128.

⁶⁸ Evans, *Criminal Prosecution*, *supra* n. 19, at 21.

⁶⁹ *Id.* at 18.

⁷⁰ *Id.*

⁷¹ *Id.* at 19.

⁷² *Id.*

⁷³ Cohen, *Crossroads of Justice*, *supra* n. 33, at 121 (articulating that "[n]o action could lie against the senseless, lacking both reason and intention. Hence, one could neither sue, summon, nor try an animal.").

⁷⁴ Evans, *Criminal Prosecution*, *supra* n. 19, at 92–99.

⁷⁵ *Id.* at 42–43.

holding ecclesiastical proceedings involving animals, because such questioning “was evidently smiled at as the trick of a pettifogger bound to use every artifice to clear his clients.”⁷⁶ However, the arguments set out by the advocates in these proceedings mirrored discussions among leading theologians such as Thomas Aquinas, who argued that animals were created by God, so the animals’ actions were in line with His wishes and cursing them would be blasphemy.⁷⁷

On the merits of these cases, a standard argument for the defense was that the animals were entitled to eat, too, as God had created the animals and had given them “every green herb for meat.”⁷⁸ Thus, in eating up the crops or vineyards, the animals were committing no crime but merely carrying out a divine mandate.⁷⁹ Evans notes that in the case of the weevils in St. Julien, “the right of the insects to adequate means of subsistence suited to their nature” was accepted as incontestable by both sides; “even the prosecution did not deny it, but only maintained that they must not trespass cultivated fields and destroy the fruits of man’s labour.”⁸⁰ Counsel for the termites in Brazil⁸¹ maintained that his clients “were justified in appropriating the fruits of the fields by the right derived from priority of possession, inasmuch as they had occupied the land long before the monks came and encroached upon their domain.”⁸²

The arguments of the defendants were given serious consideration because of the risk that an excommunication, anathema, or curse⁸³—if used incorrectly or unjustly—might miss the object against which it was invoked and return “to smite him, who hurled it.”⁸⁴ Perhaps as a way of hedging against this risk, it was noted in proceedings against something called an inger (apparently a type of beetle) that the creatures were not on Noah’s ark at the time of the flood⁸⁵ and “shall not

⁷⁶ *Id.* at 108.

⁷⁷ Cohen, *Crossroads of Justice*, *supra* n. 33, at 125 (describing the arguments of Thomas Aquinas against the practice of animal trials. Aquinas also wrote that animals were created by God and carried out their actions in accordance with God’s will, so cursing or anathematizing them for their behavior would be blasphemy. Animals could be possessed by devils, in which case the devil, rather than the animal, should be cursed or exorcised.); *see also* Evans, *Criminal Prosecution*, *supra* n. 19, at 53–55 (describing Aquinas’s condemnation of the animal trials).

⁷⁸ Evans, *Criminal Prosecution*, *supra* n. 19, at 101 (quoting *Genesis* 1:30 (King James)).

⁷⁹ *Id.*

⁸⁰ *Id.* at 50.

⁸¹ *Id.* at 123–24 (describing a dispute between Franciscan friars in Brazil and a colony of termites).

⁸² *Id.*

⁸³ Evans notes that “properly speaking, animals cannot be excommunicated,” since they are not communicants and can only be anathematized; however, the effect of being either excommunicated or anathematized (essentially, being outlawed from the community) was the same in practical terms. *Id.* at 51–52. Of course, the practical effects on weevils or locusts would be nonexistent either way.

⁸⁴ Evans, *Criminal Prosecution*, *supra* n. 19, at 105.

⁸⁵ *Id.* at 114, 120.

be called animals nor mentioned as such.”⁸⁶ By isolating the ingers from the animal kingdom, the prosecution was able to

stigmatiz[e] them as living corruption . . . or more probably creations of the devil . . . [so as] to escape the gross impropriety and glaring incongruity of having the Church of God curse the creatures which God had made and pronounced very good, and afterwards took pains to preserve from destruction by the deluge.⁸⁷

The ecclesiastical authorities were also careful to consider solutions short of (or in addition to) hurling an anathema against animal defendants, including exhorting the particular human population to be more pious and charitable (in case the pests were sent as agents of God to punish the community for their sins),⁸⁸ or ordering the defendants to go somewhere else where they could live without damaging human livelihoods.⁸⁹ Excommunication, anathema, or cursing typically followed if the defendants failed to remove themselves in the time specified.⁹⁰ These measures might have been accompanied by an urging of the local people “to be prompt and honest in the payment of tithes,” in order to make the anathema more effective.⁹¹

As Evans notes, the Church thus placed itself in a situation where it could not lose: “If the insects disappeared, she received full credit for accomplishing it; if not, the failure was due to the sins of the people; in either case the prestige of the Church was preserved and her authority left unimpaired.”⁹² Evans accepts that everyone involved firmly be-

⁸⁶ *Id.* at 118.

⁸⁷ *Id.* at 120–21.

⁸⁸ *Id.* at 39, 52–53, 101, 105–06. The initial strategy for dealing with the St. Julien weevils was a proclamation ordering public prayers, masses, and other observances to atone for sin and propitiate God’s wrath, and admonishing the people “to turn to the Lord with pure and undivided hearts . . . to repent of their sins with unfeigned contrition, and to resolve to live henceforth justly and charitably, and above all to pay tithes.” *Id.* at 38–39. Apparently this did the trick, because the insects disappeared, but thirty years later they were back and proceedings against them were recommenced. *Id.* at 39.

⁸⁹ Evans, *Criminal Prosecution*, *supra* n. 19, at 46. The weevils of St. Julien were offered “a place outside of the vineyards of St. Julien, where they might obtain sufficient sustenance without devouring and devastating the vines of the said commune,” but the population reserved the right to pasture their animals and work mines on the land, and to take refuge there in times of war and other distress, without prejudice to the rights of the weevils to feed themselves. *Id.* However, the procurator for the insects rejected the offer, “because the place was sterile and neither sufficiently nor suitably supplied with food . . .” *Id.* at 48. Some Spanish flies put on trial in the fourteenth century were granted “the use of a piece of land, to which they were permitted peaceably to retire.” *Id.* at 110–11. Counsel for some field mice prosecuted in Tyrol in 1519 asked for “some . . . suitable place of abode” for the mice and argued that “they should be provided with a safe conduct securing them against harm or annoyance from dog, cat or other foe.” *Id.* at 111–12. The judge granted the safe conduct and a respite of fourteen days for “all those which are with young and to such as are yet in their infancy; but on the expiration of this reprieve each and every must be gone, irrespective of age or previous condition of pregnancy.” *Id.* at 112–13.

⁹⁰ Evans, *Criminal Prosecution*, *supra* n. 19, at 107.

⁹¹ *Id.* at 37, 107.

⁹² *Id.* at 111.

lieved that the Church could actually get rid of the creatures by cursing them.⁹³ But the people may have believed only because they had no more effective solution to turn to:

The fact that it was customary to catch several specimens of the culprits and bring them before the seat of justice, and there solemnly put them to death while the anathema was being pronounced, proves that this summary manner of dealing would have been applied to the whole of them, had it been possible to do so. Indeed, the attempt was sometimes made to get rid of them by setting a price on their heads, as was the case with the plague of locusts at Rome in 880, when a reward was offered for their extermination, but all efforts in this direction proving futile, on account of the rapidity with which they propagated, recourse was had to exorcisms and besprinklings with holy water.⁹⁴

Evans's description of the trials is liberally interspersed with his editorial commentary. Like many who have commented on the animal trials before and since,⁹⁵ he is naturally intrigued by the question of why people bothered with all of this. For Evans, it is clear that the trials are symptomatic of a culture at an earlier stage of evolution,⁹⁶ having not yet outgrown the primitive and superstitious habits of mind that also produced trials of corpses and inanimate objects,⁹⁷ and of imaginary beings like witches,⁹⁸ vampires,⁹⁹ and werewolves.¹⁰⁰ As we have seen, the trials also served to reinforce the authority of the Church and aided its ability to keep its coffers full by emphasizing the importance of promptly paying tithes.¹⁰¹

⁹³ *Id.* at 50.

⁹⁴ *Id.* at 3.

⁹⁵ See Berman, *supra* n. 29, at 288–89 (describing some of the animal trials); Cohen, *Crossroads of Justice*, *supra* n. 33, at 110 (considering explanations for the animal trials); Francione, *supra* n. 5, at 93–94 (grappling with possible explanations for the animal trials).

⁹⁶ Evans, *Criminal Prosecution*, *supra* n. 19, at 40–41 (stating that “[t]he penal prosecution of animals, which prevailed during the Middle Ages, was by no means peculiar to that period, but has been frequently practised by primitive peoples and savage tribes . . .”).

⁹⁷ *Id.* at 9 (stating that “[t]he ancient Greeks held that a murder, whether committed by a man, a beast, or an inanimate object, unless properly expiated, would arouse the furies and bring pestilence upon the land; the mediæval Church taught the same doctrine, and only substituted the demons of Christian theology for the furies of classical mythology”).

⁹⁸ *Id.* at 12 (stating that “[t]he judicial prosecution of animals . . . had its origin in the common superstition of the age, which has left such a tragical record of itself in the incredibly absurd and atrocious annals of witchcraft”).

⁹⁹ *Id.* at 196–97.

¹⁰⁰ *Id.* at 195 (describing the trial of a werewolf that was killed near Ansbach in 1685. The corpse was dressed “in a tight suit of flesh-coloured cere-cloth, resembling in tint the human skin, and adorned with a chestnut brown wig and a long whitish beard,” and the wolf’s snout was cut off and replaced with a mask of the person of whom it was supposed to be an incarnation. The dead wolf was then sentenced by the court and hanged.).

¹⁰¹ *Id.* at 37, 107.

Evans has little patience for rosier theories of what the animal trials could represent. He mentions the work of the nineteenth-century scholar Léon Ménebréa, who saw the trials as an example of fairness and the rule of law at work even for creatures at the bottom of the hierarchy:

In the Middle Ages, when disorder reigned supreme, when the weak remained without support and without redress against the strong, and property was exposed to all sorts of attacks and all forms of ravage and rapine, there was something indescribably beautiful in the thought of assimilating the insect of the field to the masterpiece of creation and putting them on an equality before the law. If man should be taught to respect the home of the worm, how much more ought he to regard that of his fellowman and learn to rule in equity.¹⁰²

Evans dismisses this view as “very fine in sentiment.”¹⁰³ The true nature of the practice of holding animal trials was, to him, quite different:

So far from originating in a delicate and sensitive sense of justice, it was . . . the outcome of an extremely crude, obtuse, and barbaric sense of justice. It was the product of a social state, in which dense ignorance was governed by brute force, and is not to be considered as a reaction and protest against club-law, which it really tended to foster by making a travesty of the administration of justice and thus turning it into ridicule. It was also in the interest of ecclesiastical dignities to keep up this parody and perversion of a sacred and fundamental institute of civil society, since it strengthened their influence and extended their authority by subjecting even the caterpillar and the canker-worm to their dominion and control.¹⁰⁴

Above all, Evans emphasizes the silliness of performing the formalities of a serious legal proceeding in a trial of weevils or rats.¹⁰⁵ Of the model arguments set out in Bailly’s treatise, with their rich decorations of classical allusions and biblical precedent, Evans remarks that “[i]t is doubtful whether one could find in the ponderous tomes of scholastic divinity anything surpassing in comical *non sequiturs* and sheer nonsense the forensic eloquence of eminent lawyers as transmitted to us in the records of legal proceedings of this kind.”¹⁰⁶ Evans is not diverted by elegant lawyerly arguments or fine theories from pointing out the fundamental absurdity of the proceedings;¹⁰⁷ he reminds us that the pig in the hangman’s noose may be dressed up but the emperor has no clothes.

¹⁰² Evans, *Criminal Prosecution*, *supra* n. 19, at 40 (quoting Ménebréa).

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 41.

¹⁰⁵ *Id.* at 32–33, 35–36, 40–41, 43.

¹⁰⁶ *Id.* at 108.

¹⁰⁷ *Id.* at 43.

III. JUSTICE AND TRAVESTIES THEREOF: ANIMAL TRIALS AND ANIMAL RIGHTS

The history of the animal trials that Evans recounts, amazing and thought-provoking though it is, is not widely known by the public, even if legal scholars who study animal rights issues generally have some acquaintance with them.¹⁰⁸ The trials seem to have a strange capacity for disappearing from cultural memory quickly after intermittently popping up in the public consciousness,¹⁰⁹ perhaps because they are difficult to assimilate with our experiences and our modern understanding of the world. As Nicholas Humphrey notes in the foreword to the 1987 edition of Evans's work:

[T]he treasure trove of real-life stories herein contained has existed in the archives for some several hundred years, has been known about by scholars, and yet—at least in recent times—has remained virtually untouched . . . My own reaction was at first one of incredulity, but second, as the truth sank in, a sense that in some way or another I must have been cheated by my teachers. Why were we never told? Why were we taught so many dreary facts of history at school, and not taught these?¹¹⁰

Reliance on Evans's account (and on scholars who themselves have taken most of their information from him) may, as Anila Srivastava notes, entail the risk of “dressing one scholar's shortcomings in the mantle of truth merely through repetition.”¹¹¹ Some comfort can be taken from the fact that, as Humphrey tells us, “[n]o one . . . has challenged any of Evans's facts relating to the trials as such,” although some very minor historical inaccuracies have been discovered.¹¹² But what is most fascinating about the animal trials is not so much the pedigree of the historical details, but what we make of them. It is less important to be able to cross-check sources on exactly how many pigs were hanged in fifteenth-century France than it is to know—as Evans gives us a solid basis for knowing—that this highly irrational practice existed and went on for many years, and for us to struggle for some insight into what the old animal trials can teach us about our relationship with animals and how they figure in human law.

There has been relatively little historical or scholarly analysis of the animal trials,¹¹³ perhaps precisely because it is so hard to know

¹⁰⁸ See e.g. Nicholas Humphrey, Foreword to E.P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* xvi (Faber & Faber Ltd. 1987) [hereinafter Humphrey, Foreword to *Criminal Prosecution*] (“The material has been discussed occasionally in learned journals. Now and again a few of the stories have filtered out. But for the most part, silence.”); Wise, *Rattling the Cage*, *supra* n. 8, at 35 (referring to Evans's historical documentation of animal trials); see generally Berman, *supra* n. 29 (referring to Evans's work).

¹⁰⁹ Humphrey, Foreword to *Criminal Prosecution*, *supra* n. 108, at xvi.

¹¹⁰ *Id.* at xv, xvi.

¹¹¹ Anila Srivastava, “Mean, Dangerous, and Uncontrollable Beasts”: *Mediaeval Animal Trials*, 40 *Mosaic* 127, 130 (2007).

¹¹² Humphrey, Foreword to *Criminal Prosecution*, *supra* n. 108, at xxix n. 1.

¹¹³ *Id.* at xvi.

what to make of them. Humphrey posits that “one reason for [historians’] reticence is the lack, at the level of theory, of anything sensible to say.”¹¹⁴ An additional reason may be that modern commentators seem more reluctant than Evans to deal frankly with the absurdity of the trials, perhaps out of a sense of scholarly propriety—although references to fairy tales¹¹⁵ and Monty Python¹¹⁶ have a way of sneaking into the scholarly discussion.

Esther Cohen has done much to elucidate the “specific cultural matrix” in which the custom of prosecuting animals was embedded.¹¹⁷ Cohen notes that the animal trials persisted in spite of their inconsistency with official Church doctrine “due mainly to indirect popular pressure voiced by hired lawyers,”¹¹⁸ evidently responding to a strong desire at the grassroots level; the trials kept going as a kind of rebellious folk practice.¹¹⁹ Cohen describes them as “rituals of inclusion” that extended the reach of human justice “by imposing its normative boundaries upon the whole world.”¹²⁰ Bringing animals to justice was an assertion of human power over them: “The right of people to try animals was not evidence of equality, or even similarity. To the contrary, it was clear proof of superiority, of the legal lordship man held over nature. Animals were subject to man, and therefore also to his judicial system.”¹²¹ At the same time, the internal logic of justice demanded that even animals, once brought within its sphere, were entitled to a measure of formal equality with human litigants: “Throughout these trials runs a strong feeling that if animals were subject to human justice, they were just as much deserving of a full measure of justice.”¹²²

Paul Schiff Berman sees these practices, like the Ancient Greeks’ punishment of inanimate objects, as a way to turn random, tragic events into part of a rational story where death is made the responsibility of a guilty party, the perpetrator is punished, and the moral order is restored.¹²³ The trials “allow[ed] the community to domesticate chaos by providing a consensus explanation of social reality to replace what would otherwise seem to be frightening and uncontrollable activity.”¹²⁴ Berman has argued that the social functions performed by the old animal trials can shed light on the role of trials in American culture today, including “the assertion of community dominion, the estab-

¹¹⁴ *Id.* at xvii.

¹¹⁵ Girgen, *supra* n. 24, at 98.

¹¹⁶ Jeffrey Kastner, *Animals on Trial*, 4 Cabinet (Fall 2001) (available at <http://www.cabinetmagazine.org/issues/4/animalsontrial.php> (accessed Apr. 3, 2011)).

¹¹⁷ Cohen, *Crossroads of Justice*, *supra* n. 33, at 100.

¹¹⁸ *Id.* at 126–27.

¹¹⁹ *Id.* at 132.

¹²⁰ *Id.* at 100.

¹²¹ *Id.* at 128.

¹²² *Id.* at 124.

¹²³ Berman, *supra* n. 29, at 294.

¹²⁴ *Id.* at 292.

ishment of a rationalizing framework, and the creation of a forum for social debate”¹²⁵

Cohen and Berman both illuminate the cultural function and situatedness of the animal trials, but their work is not concerned with the relevance that the trials might have for present-day debates over the contested, evolving place of animals in the law.¹²⁶ Analyses by scholars whose focus is on animal rights is of particular interest from this point of view, for the history of the animal trials is rich with implications for our relationship with other creatures and for current debates about the obligations humans owe to animals, their status in relation to us, and how all of this can or should be reflected in the framework of the law.

Evans himself was profoundly interested in these issues and was a proponent of animal rights. This is not fully apparent from *Criminal Prosecution*, although his indignation at the abuse of the animal defendants is clear as he “clamors against the mistreatment of animals by humans” on almost every page.¹²⁷ It is in a later work, *Evolutional Ethics and Animal Psychology*, that Evans makes the case for the rights of animals based on arguments that are strikingly similar to present-day animal rights discourse.¹²⁸ Evans describes the development of an understanding of the mind and consciousness in animals and the “remarkable . . . resemblance” of animal to human intelligence.¹²⁹ He goes through many of the attributes that have been put forward as the basis for the distinction between humans and animals (and to justify our exploitation of them) and points out that animals share many of these so-called human traits, including an awareness of time and history,¹³⁰ a sense of justice,¹³¹ and the capacity for emo-

¹²⁵ Paul S. Berman, *An Observation and a Strange but True “Tale”: What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?*, 52 *Hastings L.J.* 123, 159, 169 (2000–2001).

¹²⁶ See *id.* at 145–52, 159 (exploring the history of the animal trials and the cultural context in which the trials operated); Cohen, *Crossroads of Justice*, *supra* n. 33, at 132–33 (discussing the history and context of animal trials).

¹²⁷ Beirne, *supra* n. 29, at 41.

¹²⁸ E.P. Evans, *Evolutional Ethics and Animal Psychology* 17–18 (D. Appleton & Co. 1897) [hereinafter Evans, *Evolutional Ethics*]. The publication information in the 1987 reprint of *Criminal Prosecution* states that the book was first published in Great Britain in 1906 by William Heinemann Limited, and most discussions of the work refer to an original publication date in 1906. However, there is a reference to *Criminal Prosecution* (“published by William Heinemann in London and Henry Holt & Co. in New York”) in *Evolutional Ethics*, which was published in 1897, so there must have been an earlier edition of *Criminal Prosecution* published before 1897. *Id.* at 13.

¹²⁹ *Id.* at 17–18, 166–67.

¹³⁰ *Id.* at 225–26, 243.

¹³¹ *Id.* at 230. Evans explains,

The instances recorded of animals holding courts of justice and laying penalties upon offenders are too numerous and well authenticated to admit of any doubt. This kind of criminal procedure has been observed particularly among rooks, ravens, storks, flamingoes, martins, sparrows, and occasionally among some gregarious quadrupeds. It is as clearly established as human testimony can establish

tion.¹³² Taking on an opponent, Professor von Prantl, who seems to have had what we might now call a more Skinnerian view of animal minds, Evans says,

Not only is Prantl ignorant of the habits and aptitudes of animals, denying them capacities which they are known to possess, but he is liable to an opposite error, equally fatal to his theories, in his tendency to ascribe to the human race as a whole faculties which are characteristic of man only in a high state of civilization.¹³³

For Evans, it was an “ethical corollar[y]” to Darwin’s theory of evolution, and the kinship between humans and other animals that it demonstrated, that animals had rights and that those rights should be vindicated “by imposing judicial punishments for their violation.”¹³⁴ Evans portrayed this development as the next logical step in the expansion of the idea of rights to include all humans (or men, as he put it) “until at length all races of men are at least theoretically conceived as being united in a common bond of brotherhood and benevolent sympathy, which is now slowly expanding so as to comprise not only the higher species of animals, but also every sensitive embodiment of organic life.”¹³⁵ It is quite startling to find in a book published in 1898 arguments which anticipate, for example, the work of modern animal psychologists like Jeffrey Moussaieff Masson on the emotional lives of animals,¹³⁶ and Peter Singer’s rejection of speciesism¹³⁷ and deployment of the “argument from marginal cases.”¹³⁸ It is just regrettable

anything that these creatures have a lively sense of what is lawful or allowable in the conduct of the individual, so far as it may affect the character of the flock or herd, and are quick to resent and punish any act of a single member that may disgrace or injure the community to which he belongs.

Id.

¹³² Evans, *Evolutional Ethics*, *supra* n. 128, at 227. Evans notes,

Love, gratitude, devotion, the sense of duty, and the spirit of self-sacrifice are proverbially strong in dogs, and only a ‘hard-shell’ metaphysician, who neither knows nor cares anything about them, would venture to deny them all moral qualities, and to assert that they are governed solely by a regard for their own individual well-being.

Id. at 227.

¹³³ *Id.* at 225.

¹³⁴ *Id.* at 14.

¹³⁵ *Id.* at 4.

¹³⁶ See generally Jeffrey Moussaieff Masson, *The Pig Who Sang to the Moon: The Emotional World of Farm Animals* (Ballantine Bks. 2003) (specifically exploring the emotional capacity of domestic livestock); Jeffrey Moussaieff Masson & Susan McCarthy, *When Elephants Weep: The Emotional Lives of Animals* (Dell Publg. 1995) (exploring the emotional capacity of animals generally).

¹³⁷ See Peter Singer, *Animal Liberation* 7 (Avon Bks. 1975) (defining “speciesism” as “a prejudice or attitude of bias toward the interests of members of one’s own species and against those of members of other species”).

¹³⁸ The “argument from marginal cases” is the proposition that if one believes that so-called “marginal” human beings who lack purportedly definitive human capacities like rationality and language, or have them only in a rudimentary form (e.g., the severely mentally disabled) have basic moral rights, one must grant the same rights to

that the slow expansion Evans predicted has proceeded so much more slowly than he probably expected.

Evans, as an animal rights proponent, considered the animal trials to be a form of ritualized animal abuse,¹³⁹ and with good reason. He did recognize that carrying out animal abuse in this particular form has implications for how we think about animals' legal status: "[I]f animals may be rendered liable to judicial punishment for injuries done to man, one would naturally infer that they should also enjoy legal protection against human cruelty."¹⁴⁰ But generally, his highly skeptical stance in *Criminal Prosecution* and his rejection of Ménabréa's positive view of their implications rather underplays the seriousness with which the ecclesiastical trials treated questions of how to coexist with other creatures on the basis of fairness. Modern animal law scholars have also tended to take one-sided views of what the trials stand for—either treating the trials as a benign extension of human justice to animals or a brutal example of the assertion of human domination over them¹⁴¹—rather like the mirror-image interpretations of Ménabréa and Evans.

Steven Wise comes down firmly on Evans's side of that debate.¹⁴² For Wise, the development of universal concepts of human rights and equality made it intellectually possible—and, indeed, logically necessary—to conceive of the eventual inclusion of at least certain animals in the community of beings with legally recognized rights.¹⁴³ In the pre-Enlightenment world, which was organized according to a divinely ordained hierarchy, the border between human and nonhuman was non-traversable.¹⁴⁴ Animals were on the wrong side of that divide, meaning that they "had no hope for any legal rights" and could only be mere things.¹⁴⁵ This hierarchical model did not begin to change until the separation of law from theology after the Enlightenment, when "a door cracked open to the *possibility* that at least some animals might

nonhumans that possess those capacities at least to the same degree as those "marginal" humans. *See id.* at 16–17 (noting that "[s]o far as this argument is concerned non-human animals and infants and retarded humans are in the same category; and if we use this argument to justify experiments on nonhuman animals we have to ask ourselves whether we are also prepared to allow experiments on human infants and retarded adults; and if we make a distinction between animals and these humans, on what basis can we do it, other than a bare-faced—and morally indefensible—preference for members of our own species?").

¹³⁹ *See generally id.* (providing an analysis and discussion of ancient animal trials, and Evans's opinion regarding them).

¹⁴⁰ *Id.* at 13.

¹⁴¹ *See e.g.* Dinzelbacher, *supra* n. 31 (opining that ancient animal trials were merely a form of the human justice system that was extended to include animals); Wise, *Rattling the Cage*, *supra* n. 8 (asserting that ancient animal trials were a form of humans' domination over animals).

¹⁴² Compare Evans, *Evolutional Ethics*, *supra* n. 128, at 4, with Wise, *Rattling the Cage*, *supra* n. 8, at 46–48.

¹⁴³ Wise, *Rattling the Cage*, *supra* n. 8, at 46–48.

¹⁴⁴ *Id.* at 36–37.

¹⁴⁵ *Id.* at 46.

logically transcend their legal thinghood.”¹⁴⁶ Before that development, the killing of a human being by an animal, or sex between a human and an animal, “reversed the ordained hierarchy and breached divine boundaries.”¹⁴⁷ Wise sees the old animal trials and the judicial punishment of animal transgressions as a ceremonial way of reinforcing those boundaries.¹⁴⁸

But Wise’s interpretation is an incomplete explanation of the strange facts of the animal trials. One might ask why the punishment of an animal for transgressing boundaries—for stepping out of its ordained place as a thing—required a trial, which at least formally placed the animal in the position of a person. Would it not have been sufficient, and indeed more consistent with human domination over animals, to hold a public execution of an animal without a trial? Cohen reminds us that public rituals involving the torture and killing of animals were part of medieval culture, echoing ancient practices of scapegoating and cleansing through animal sacrifice.¹⁴⁹ For example, the town of Ypres held an annual “cat feast” in which one or three cats were thrown from a tower, and Paris, Metz, and Saint Chamand all held cat-burning ceremonies.¹⁵⁰ So why did reinforcement of animals’ thingness sometimes require trials—much less the “extremely thorough debates concerning the roles and interchanging relationships of God, man, animals and the vegetable world that fed all of God’s creatures” and the express recognition of animals’ “rights” to coexist peacefully with humans that characterized the ecclesiastical animal trials, in particular?¹⁵¹ When an act of bestiality between man and donkey had taken place, why should the donkey be acquitted on evidence of her good character? The boundary had been crossed, and if the donkey was a mere thing, then her character should not come into it. In short, Wise is undoubtedly correct that medieval and early modern theologians, jurists, and philosophers viewed animals as entirely subjugated to humans, and that animal trials were a public assertion of human domination of animals. But his account does not address the strange paradoxes of animal trials: although they subjugated animals, they also created a place for arguments on their behalf to be heard, gave them the same formal guarantees of due process and equal treatment that humans had, and simultaneously reinforced and confounded human-animal boundaries.

Jen Girgen provides a view that is directly contrary to Wise’s. Girgen argues that the comparatively fair historical treatment of ani-

¹⁴⁶ *Id.* at 46–47 (emphases in original).

¹⁴⁷ *Id.* at 37–38. Wise also notes that animals who killed humans were sometimes hung upside down, a punishment that was also imposed on Jews who killed Christians. Both crimes and punishments represented a transgression of hierarchy (corrected by inversion) committed by a “beast” or a “beastly human.” *Id.*

¹⁴⁸ See Wise, *Rattling the Cage*, *supra* n. 8, at ch. 4.

¹⁴⁹ Cohen, *Crossroads of Justice*, *supra* n. 33, at 106–07.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 119.

mals that harmed humans should be a model for us today.¹⁵² She notes that we still punish animals that harm humans, often putting them to death,¹⁵³ and although there are contemporary instances where legal formalities and a hearing are required before the execution (notably, proceedings to determine whether a dog is vicious and should be controlled in some way, or destroyed),¹⁵⁴ justice today is “much more typically summary justice.”¹⁵⁵ For example, Girgen describes several incidents where dogs that had bitten or mauled humans were summarily killed (in one case with a hammer),¹⁵⁶ and she describes another incident where a circus tiger who bit a trainer was shot in his cage by the injured trainer’s brother.¹⁵⁷ She observes, no doubt correctly, that such killings are probably commonplace, although there is no way to track their numbers with precision.¹⁵⁸ Girgen also claims, more surprisingly, that killing an animal without judicial process would not have been tolerated in the Middle Ages: “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.”¹⁵⁹ Girgen proposes that the medieval animal trials should serve as models for reforming the treatment of animals today:

¹⁵² Girgen, *supra* n. 24, at 133.

¹⁵³ See *e.g. id.* at 126–27 (relating an example when a great dane was euthanized for allegedly biting a 4-year-old child in the face).

¹⁵⁴ See *id.* at 123–24 (discussing procedures for “vicious” dog” hearings).

¹⁵⁵ *Id.* at 127.

¹⁵⁶ *Id.* at 128.

¹⁵⁷ *Id.* at 129. Such anecdotes are common, and they express a desire for retribution from which few of us are immune, especially when the triggering events are really tragic. See also Hal Herzog, *Some We Love, Some We Hate, Some We Eat: Why It’s so Hard to Think Straight about Animals* 50–51 (HarperCollins Publishers 2010) (relating the author’s reaction to the death of a child and a crocodile). In 1977, a crocodile named Cookie at the Miami Serpantarium killed a 6-year-old boy who fell into the crocodile’s enclosure. *Id.* The owner of the park went into the enclosure that night and shot the crocodile, who took an hour to die. *Id.* Herzog notes,

When I heard about the deaths of David [the child] and Cookie, the logical part of me thought that the execution made no sense. While he weighed nearly a ton, Cookie’s brain was the size of my thumb. It is safe to say that a crocodile is not what philosophers refer to as a “moral agent.” After her husband shot Cookie, Haast’s wife said, “The crocodile was just doing what comes naturally to him.” She was right. . . . Still, another part of me, a more primitive part, understood the need for retribution.

Id.

¹⁵⁸ Girgen, *supra* n. 24, at 128.

¹⁵⁹ *Id.* at 129; but see Adams, *supra* n. 13, at 44 (stating that “[i]n [the] present day, animals are routinely destroyed if they harm a human being, but the difference is that such animals, unlike their medieval counterparts, are often not afforded the benefit of a trial or any other kind of due process”); see also Jane Nosworthy, *The Koko Dilemma: A Challenge to Legal Personality*, 2 S. Cross U. L. Rev. 1, 5 (1998) (making a similar argument) (available at http://www.scu.edu.au/schools/law/law_review/V2_full_text.htm (accessed Apr. 3, 2011)).

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. Perhaps it is time for a return of some form of the animal trials of years past.¹⁶⁰

This overstates the case, to say the least. It strains credulity to think that summary killing of aggressive dogs (or other domestic animals that attacked people) never happened in the Middle Ages. Evans's evidence of a couple of hundred trials over a period of a thousand years is no proof that 'extrajudicial' animal executions did not take place, or even that they were frowned upon—a proposition that would no doubt have come as a surprise to the cats of Ypres and Paris. One piece of evidence Girgen cites for the proposition that such things were not tolerated is the case, described by Evans, of a hangman who hanged a sow brought into custody after biting the ear off a carpenter's child.¹⁶¹ The hangman, named Jack Ketch, killed the pig "without legal authority," before justice had run its course and the pig had been duly tried and sentenced.¹⁶² For this offense, he was driven out of town.¹⁶³ It is obvious enough that Jack Ketch's transgression was not that he deprived the sow of her rights to due process, but that he stepped outside his place in the human hierarchy, undermining the authority of the judicial process and its functionaries.¹⁶⁴ And, more to the point, animals were certainly killed without due process in the Middle Ages, routinely and in large numbers. The whole point of keeping the pigs who wandered the village was to kill them and eat them, and only the ones who made an attempt to eat a human first had any chance of a judicial proceeding before the inevitable.

Anila Srivastava also sees the animal trials as a model of recognizing the rights of animals, at least to some degree. In an analysis combining legal and anthropological insights, she argues that the medieval trials illustrate and open up the possibility of thinking of animals as having a form of partial legal personhood, granting them a status that would not necessarily give them "full human rights."¹⁶⁵ Instead, this new way of thinking would move animals out of the fixed category of property that has been seen as "the insurmountable obstacle" to "those interested in developing legal mechanisms to improve the lives and deaths of animals."¹⁶⁶ Srivastava argues that by "looking back" to historical practices that express a different way of thinking

¹⁶⁰ Girgen, *supra* n. 24, at 133.

¹⁶¹ *Id.* at 98; Evans, *Criminal Prosecution*, *supra* n. 19, at 146–47.

¹⁶² Evans, *Criminal Prosecution*, *supra* n. 19, at 147.

¹⁶³ *Id.*

¹⁶⁴ See *id.* (stating that "[i]t 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").

¹⁶⁵ Srivastava, *supra* n. 111, at 128, 141.

¹⁶⁶ *Id.* at 140.

about animals—still property, but persons enough to be tried in court, be represented by their own lawyers, and so on—we regain the possibility of “ways of thinking about animals that are not merely imaginable, but were actually thought.”¹⁶⁷ Further, “[w]ithout losing their status as property, animals were imbued with sufficient legal personhood to permit the law to act upon them as it would upon similarly-situated humans. Considering those ways may help us to develop novel and constructive perspectives on how our own law acts upon animals.”¹⁶⁸

While for Wise the animal trials support his thesis that it was impossible for animals to escape legal thinghood before the Enlightenment, the opposite is true for Srivastava. She finds the animal trials to be evidence of a more flexible way of thinking, and a way to endow animals with at least partial personhood that could be a model for present-day reforms. But from the point of view of animal emancipation there are good reasons to be suspicious of the medieval framework as any kind of model. After all, animals on trial were put in the position of persons only to the extent that this made them subject to human justice and the same punishments suffered by humans. There is, of course, no suggestion in the record that concepts of “personhood” were applied to medieval animals in a positive sense—for instance, that locusts should be able to hire a lawyer and sue the townspeople for taking their land, or that people should be criminally punished for biting pigs.

Although some modern writers (like Ménabréa before them) may be tempted to exaggerate the extent of medieval respect for the rights of pigs and weevils, they are right to point out that the trials illustrate the contingency of the seemingly fixed and natural categories in which we think of animals and the possibility of changing those categories. Today, the notion of an animal being entitled to a lawyer and a trial is fodder for derision and cartoon punch lines. In the days of the animal trials, however, such entitlement was a fairly frequent occurrence and something that the human community considered legitimate enough to justify spending considerable community resources. This may reflect the state of mind of people who lived lives that were much more intimately intertwined with the lives of animals than the lives of typical urbanites in the twenty-first century. The medieval authorities busied themselves with policing the boundary between human and animal, but in practice this was a narrower and more permeable division than it is for us. As Cohen notes, “[a] society in which animals were omnipresent naturally had many views of animals.”¹⁶⁹

It may be in the nature of lawyers to use evidence unambiguously to support an argument one way or the other. The “many views of animals” wrapped up in the practice of putting them on trial, the paradox-

¹⁶⁷ *Id.* at 141.

¹⁶⁸ *Id.* at 128.

¹⁶⁹ Cohen, *Crossroads of Justice*, *supra* n. 33, at 100.

ical and competing meanings of the trials, may not be easily teased out in legal forms of argument. Perhaps it is the imagination of the artist that is best suited to exploring these double meanings, and the surreal quality of the trials—for it is probably this, more than anything else, that makes the stories of pig and insect trials such attractive material for the creative mind. Part IV discusses literary and dramatic works inspired by the animal trials and the themes they explore of parody, power, and subversiveness.

IV. THE OUTCAST'S LAUGH: THE ANIMAL TRIALS IN LITERATURE AND DRAMA

Julian Barnes's 1989 novel *A History of the World in 10 1/2 Chapters*¹⁷⁰ includes a chapter based quite closely on the pleadings, counterpleadings, and rulings of the ecclesiastical trials Evans described, with the flowery language of the original documents played up to delightful effect.¹⁷¹ The fictional proceedings are initiated by the people of Mamirolle in the diocese of Besançon against little insects ("bestioles") that have been living in the village church.¹⁷² The *bestioles* are woodworms.¹⁷³ The lawyer for the woodworms is one Bartholomé Chassenée.¹⁷⁴ Each year, Hugo, the Bishop of Besançon, makes a pilgrimage to the village. A special throne for the Bishop is kept in the church rafters "lest any child or stranger might by chance sit on it and thereby profane it," and lowered to be placed before the altar for the Bishop's visit.¹⁷⁵ On the unfortunate occasion that leads to the trial, the throne collapses as soon as the Bishop sits on it because the woodworms have eaten away the inside of one of its legs.¹⁷⁶ The Bishop falls and hits his head—falling, as the villagers' petition ornately puts it, "like mighty Daedalus from the heavens of light into the darkness of imbecility."¹⁷⁷

The advocate for the woodworms makes familiar arguments: the *bestioles* do not have reason or volition so they are incapable of committing a crime; the summons has not been properly delivered to the woodworms and in any event they cannot travel to the court without being threatened by predators; the summons does not identify the specific woodworm that ate the chair leg; it is contrary to God's law to curse the woodworm that He made; and the *bestioles* cannot be excommunicated because they are not communicants.¹⁷⁸ In their reply, the villagers point out that there is no mention in the Bible of woodworms on Noah's ark, suggesting that the woodworm "is an unnatural and

¹⁷⁰ Julian Barnes, *A History of the World in 10 1/2 Chapters* (Alfred A. Knoff 1989).

¹⁷¹ *Id.* at Author's Note.

¹⁷² *Id.* at 62.

¹⁷³ *Id.* at 64.

¹⁷⁴ *Id.* at 61.

¹⁷⁵ *Id.* at 63.

¹⁷⁶ Barnes, *supra* n. 170, at 64.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 65–69.

imperfect creature which did not exist at the time of the great bane and ruin of the Deluge,” and probably a creation of the devil (just like our friends the inger).¹⁷⁹

In an earlier chapter in the novel, the story of the ark’s voyage is told from the highly irreverent point of view of the woodworms, so we already know that they survived the deluge by illicitly stowing away on the ark, evading detection at the end of the voyage by hiding themselves in the hollowed tip of a ram’s horn.¹⁸⁰ “I could occasionally find the situation funny, and give vent to the outcast’s laugh,” says the woodworm of the predicament of the animals on the ark, tyrannized by Noah and his family, in constant danger of being eaten, and artificially divided against themselves into “clean” and “unclean” species.¹⁸¹ Predictably, the judge commands the woodworms to leave the church within seven days, on pain of malediction, anathema, and excommunication, and instructs the villagers to be good and pay their tithes.¹⁸² The manuscript breaks off before the end of the judge’s sentence; “it appears from the condition of the parchment that in the course of the last four and half centuries it has been attacked, perhaps on more than one occasion, by some species of termite.”¹⁸³

Barnes uses the tale of the woodworm to explore how different received histories can look when they are retold from the point of view of the marginalized, and to lampoon the self-importance of lawyers and the legal system. Playing up the silliness of a woodworm trial subverts the claims of legal officialdom to authority and to control over the truth. Gregory J. Rubinson notes that the absurdity of the trial is “critical . . . for it demonstrates the extremes to which interpretations of theological and legal texts can vary. Such texts, Barnes implies, are often invoked to legitimate institutional acts of control.”¹⁸⁴

Director Lesley Megahey made a film based on Evans’s stories, *The Advocate*, that came out only five years after *The History of the World in 10 1/2 Chapters* was published.¹⁸⁵ Megahey describes that he was initially astonished to learn that the trials had taken place, not having heard of them until a friend gave him Evans’s *Criminal Prose-*

¹⁷⁹ *Id.* at 72.

¹⁸⁰ *Id.* at 28.

¹⁸¹ *Id.* at 11.

¹⁸² Barnes, *supra* n. 170, at 79.

¹⁸³ *Id.* at 79–80. Evans notes that in the case of the weevils of St. Julien,

The final decision of the case, after such careful deliberation and so long delay, is rendered doubtful by the unfortunate circumstance that the last page of the records has been destroyed by rats or bugs of some sort. Perhaps the prosecuted weevils, not being satisfied with the results of the trial, sent a sharp-toothed delegation into the archives to annul the judgment of the court.

Evans, *Criminal Prosecution*, *supra* n. 19, at 49. These things happen; while I was writing this Article, my pug ate a substantial portion of my printout of Esther Cohen’s article *Law, Folklore and Animal Lore*, *supra* n. 33.

¹⁸⁴ Gregory J. Rubinson, *The Fiction of Rushdie, Barnes, Winterson, and Carter* 96 (McFarland & Co., Inc. 2005).

¹⁸⁵ *The Advocate*, Motion Picture (Alliance Atlantis 1994).

cution.¹⁸⁶ The opening titles of the film tell the audience that “unbelievable as it may seem, all cases shown in this film are based on historical fact.”¹⁸⁷ The film is set in France in the 1450s. Colin Firth plays an educated lawyer from Paris named Richard Courtois (a character based on Chassenée) who comes to work in a small village and finds himself defending a pig that belongs to despised gypsy outsiders and is accused of murdering and eating a young boy. As it turns out, the pig is a “fall pig” and her trial is used to cover up the nefarious activities of powerful local humans. Megahey saw parallels between the animal trials and present-day injustices against excluded groups: “In fact, I don’t think much has changed. We still have racist feelings. We still have the hierarchy of nature in which some people are more important than others. We still have superstition and ignorance.”¹⁸⁸ In a twist of fate, Miramax, the U.S. distributor of the film, hired its own advocate to fight the NC-17 rating it was originally given.¹⁸⁹ They hired the late, great radical lawyer William Kunstler, who became an advocate for animal rights late in his career (something of a latter-day Bartholomé Chassenée, perhaps) and wrote the foreword to Gary Francione’s *Animals, Property and the Law*.¹⁹⁰

In 2010, a new work based on the animal trials was performed off-off-Broadway. Susan Yankowitz’s multimedia production *The Mind-Boggling, Tragical-Comical Trial of Madame P and Other 4-Legged and Winged Creatures* centers around the sixteenth century trial of a sow, the eponymous Madame P, for the murder of an infant.¹⁹¹ Like Megahey, Yankowitz was inspired by a book she had read on the medieval animal trials—almost certainly Evans’s.¹⁹² Yankowitz’s response

¹⁸⁶ Jeffrey Staggs, *Medieval Tale of Good, Evil and the Film Ratings System*, Wash. Times C14 (Sept. 2, 1994).

¹⁸⁷ *The Advocate*, *supra* n. 185.

¹⁸⁸ Mal Vincent, “*Advocate*” is Medieval Parallel to Modern Issues, Va. Pilot & Ledger-Star E3 (Feb. 4, 1995).

¹⁸⁹ Jonathan Mandell, *The Client’s a Pig*, Newsday B7 (Aug. 24, 1994).

¹⁹⁰ *Id.*; Francione, *supra* n. 5, at ix.

¹⁹¹ I have not seen the piece, which has been performed only twice (on November 29 and 30, 2010) in New York City. This description is based on media accounts and correspondence with the author. John Jay College, *Event Details*, http://74.205.89.34/acalendar/EventList.aspx?eventidn=2671&view=EventDetails&information_id=8614 (accessed Apr. 3, 2011); E-mail from Susan Yankowitz to Katie Sykes, *Animal Trials* (Dec. 8, 2010) (on file with *Animal Law*).

¹⁹² Yankowitz said:

I don’t remember exactly where, when or how, but a while back I read in one book or another that in the Middle Ages animals were put on trial for various crimes against humanity. They were considered responsible for their actions and afforded the same rights as humans: provided with defense attorneys, held in the same jails and given the same meals as other prisoners, sometimes tortured in order to extort confessions, and entitled to appeal if the sentence, usually death, was deemed too harsh.

Susan Yankowitz, *The Mind-Boggling Trial of Madame P and Other 4-Legged and Winged Creatures*, <http://cultureid.com/content/the-mind-boggling-trial-of-madame-p-and-other-4-le> (Nov. 22, 2010) (accessed Apr. 3, 2011).

to the tales of animal trials echoes that of Megahey both in her initial astonishment at discovering the existence of the practice (“My first reaction was, like most people’s, a dropped jaw and an incredulous laugh”)¹⁹³ and in her perception of a thematic connection to present-day themes of justice and injustice, exclusion and prejudice:

[T]he animals serve also as metaphors for groups that are viewed—like the beasts in the medieval world—as lesser creatures, a legendary cohort that includes religious heretics, women, witches, Jews, Blacks, Muslims, homosexuals, even actors—the list is, unfortunately, as long as history . . . [the trials connect] to the broadest questions of justice—who receives it and who doesn’t, and what forms it takes—which have concerned me throughout my life and work.¹⁹⁴

The play’s “heroine,” Madame P, speaks through the words of the playwright in an online interview of the compromised justice of her trial:

I honestly believe that my trial was unjust at its core. The law had absolutely no flexibility or understanding when it came to pigs or other animals; it just squeezed us into the system as if we were humans. Well, of course you’d prosecute a woman who killed a baby! But me? What did I do wrong? Everyone knows that a pig will eat anything. I was just obeying my God-given nature. I didn’t know it was a child; I didn’t even know that eating it would cause its death! In fact, I don’t even know what death is! But that’s the word that kept cropping up in my trial. My lawyer did his best for me but, face it, a sow can’t compete for sympathy with a mother who’s mourning her infant.¹⁹⁵

Ted Walker’s extraordinarily vivid poem “Pig pig” is an account of the 1386 trial and execution of a sow in Falaise, based on Evans’s book.¹⁹⁶ This sow is the same sow who was sentenced to be mangled in the head and forelegs, and dressed up in human clothes.¹⁹⁷ The narrator of the poem is the owner of the sow, a prosperous horse-dealer who esteems his horses but says, “Pigs are things.”¹⁹⁸ When his meat-loving pig attacks a young local girl, “gnaw[s] / her face from her ringlets,” and leaves her with “stump arms,” the community starts showing signs of thinking about revenge.¹⁹⁹ “Not that it was my fault, / mind,” says the narrator, “Peasants worth their salt / know better than allow / kids inside with a sow.”²⁰⁰ But the men of the village brood silently and threateningly:

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ Yankowitz Interview, *supra* n. 1 (Yankowitz, the playwright and interview subject, speaking throughout this interview both as herself and as the character Madame P).

¹⁹⁶ Ted Walker, *Pig pig*, in *Gloves to the Hangman: Poems 1969–72* 36 (Jonathan Cape Ltd.1973).

¹⁹⁷ Evans, *Criminal Prosecution*, *supra* n. 19, at 140.

¹⁹⁸ Walker, *supra* n. 196, at 37.

¹⁹⁹ *Id.* at 38.

²⁰⁰ *Id.* at 39.

Ugly-mouthed and quiet
 the men-folk stood about,
 grim with clubs. I saw they
 wished an eye for an eye.²⁰¹

So the narrator comes up with a solution: put the murderous pig on trial. He enlists his “boozing companion” to prosecute her; “Some sense- / less lush got the defence,” and the judge is “Judge Rouge, swigging my wine,” who appoints the narrator to be the hangman.²⁰² The trial is carried out with all the proper formalities: “It was farce, right enough. / But we played it serious . . . We wanted no mistakes.”²⁰³ The judge orders the pig to be mangled and hanged, a sentence that the hangman thoroughly enjoys carrying out. The sow is dressed up at his request.²⁰⁴ The hangman gets to eat her (“hangman’s perks”) and is provided with gloves to do the job:

We had some fun. I got
 some good gloves out of it.
 It was the parish paid
 the profits my cronies made.²⁰⁵

In the end, the narrator says that he can die a happy man, “knowing how justice was seen / through me to have been done.”²⁰⁶

There are common themes in these artistic interpretations of the animal trials: the way legal rituals both reinforce the oppression of the marginalized and provide an outlet for their stories to be told; the way the ridiculousness of the trials undermines the dignity to which the justice system pretends; the slipperiness of the truth and its susceptibility to manipulation by the powerful, which casts doubt on the very notion of objective truth and certainly on the ability of a legal trial to discover it; and above all that when humans put animals on trial they are driven by human desires, human grief, human greed, and human power struggles—certainly not by concern for procedural protection for the animals. There are useful insights here into the inherent limitations of human justice (in which, as lawyers, we might be inclined to have excessive faith). And although in some ways we have left the practices of the Middle Ages far behind, those themes are not entirely absent from the present-day legal proceedings that deal with the coexistence of animals and humans.

²⁰¹ *Id.* at 40.

²⁰² *Id.* at 42.

²⁰³ *Id.* at 42.

²⁰⁴ Walker, *supra* n. 196, at 42.

²⁰⁵ *Id.* at 44.

²⁰⁶ *Id.*

V. MODERN TRIALS: DANGEROUS DOGS AND SALMON-LOVING SEA LIONS

We no longer have animal trials as such, but we do still have to deal with versions of the same issues that the medieval trials addressed: what to do with aggressive domestic animals and how to live alongside wild animals that eat things we would prefer for them not to eat. Still today, the forum for dealing with these issues is sometimes a legal trial. And when it is, the proceedings echo one of the themes of the old animal trials: The human justice system (as might be expected) reflects the concerns and the wishes of humans and has little room to accommodate animals' interests in their own right. These realities may lead us to treat claims that what animals need is more legal due process and fuller participation in the legal system with some caution. At the same time, themes from the old animal trials indicate that legal institutions may indeed be capable of contributing to animal emancipation, if they can be structured in a way that allows for animals to figure in their own right (to the extent possible in a human justice system). There is a need for some counterweight to the inevitable tendency for animal trials to be all about humans.

A. Dog "Trials"

Girgen has pointed out the parallel between dangerous dog proceedings and the old criminal trials of domestic animals.²⁰⁷ Famous cases of "death row" dogs, like the New Jersey Akita named Taro who became a media sensation in the 1990s and was eventually pardoned by then-Governor Christine Todd Whitman, do have echoes of the old trials of pigs and donkeys.²⁰⁸ There is an attack by an animal on (usually) a human being (sometimes another animal), and a legal ritual of hearing arguments for and against killing the offender, although the focus today is on preventing further injury rather than punishing a transgression. In many ways, too, dogs occupy a place in our lives that is similar to the place pigs occupied in the medieval village. Nowadays, pigs are confined out of sight under conditions we prefer not to think about, but dogs live with us and they are with us all the time, as pigs used to be. There is an intimacy between dogs and humans based on the intertwining of day-to-day lives, and, inevitably, there are situations where dogs can and do harm humans. And while a pig was a crucial economic asset for a family in a peasant economy, the loss of which could be disastrous, today it is dogs that are animals of great value to us—value that can be economic in part but is primarily emotional.²⁰⁹

There is an important formal difference between modern legal processes and the old animal trials: The modern legal process is not

²⁰⁷ Girgen, *supra* n. 24, at 122–27.

²⁰⁸ *Id.* at 125.

²⁰⁹ Cohen, *Crossroads of Justice*, *supra* n. 33, at 116.

(even ostensibly) for the benefit of the animal, who is not a party to the proceedings at all, but for the owner. Modern “dog trials” do not involve the confounding of categories of animal as a thing / property or as a subject / person that arose in the old trials. Modern proceedings take place precisely because a dog is someone’s property; an aggressive dog that did not belong to anyone would, of course, be destroyed without any kind of hearing. The issues in cases of “dangerous” dogs are often very difficult and sad, setting the deep emotional attachment between people and their pets against the need to protect the community. It is not always clear whether the best interests of the dogs are really served by the procedural protections that are provided for (and designed to serve the interests of) their human owners.

Take, for example, the case of Brindi, a German shepherd mix who became a cause célèbre after getting into trouble with Halifax Regional Municipality animal control. The following summary of the facts of Brindi’s case is taken from the 2009 decision of the Nova Scotia Supreme Court that struck down a portion of Halifax’s animal by-law.²¹⁰ Brindi, although friendly to humans, repeatedly attacked other dogs.²¹¹ Between August 21, 2007 and July 20, 2008, there were three incidents in which she attacked dogs walking past the property of her owner, Francesca Rogier.²¹² On another occasion, Rogier was issued a warning for allowing Brindi to run at large.²¹³ In May 2008, animal services officers issued a notice to Rogier requiring her to muzzle Brindi to prevent further incidents.²¹⁴ Then, that July, Brindi, running free off-leash and unmuzzled, attacked two dogs, one of them a guide dog for a deaf person, as they were being walked near Rogier’s property.²¹⁵ Brindi was seized and kept at an animal shelter in Dartmouth.²¹⁶ The municipality notified Rogier that, as Brindi had demonstrated a propensity to attack other animals without provocation, she was scheduled to be euthanized.²¹⁷

A drawn-out legal battle ensued. Rogier went to court to challenge the validity of the municipality’s decision, and, in 2009, the Nova Scotia Supreme Court agreed with her. First, the court held that the portion of the animal by-law pursuant to which the municipality had acted was *ultra vires*.²¹⁸ Section 8(2)(d) of By-Law No. A-300 empowered an animal control officer, where he or she had “reason to believe that a dog ha[d] attacked a person or another animal,” to “destroy the dog without permitting the owner to claim it and issue the owner a

²¹⁰ *Rogier v. Halifax (Regional Municipality)* (2009), 304 D.L.R. (4th) 108.

²¹¹ *Id.* at ¶¶ 11, 14.

²¹² *Id.* at ¶ 11.

²¹³ *Id.* at ¶ 14.

²¹⁴ *Id.* at ¶¶ 21–23.

²¹⁵ *Id.* at ¶¶ 25–27.

²¹⁶ *Rogier*, 304 D.L.R. 108 at ¶ 32.

²¹⁷ *Id.* at ¶ 33.

²¹⁸ *Id.* at ¶ 88.

notice informing that the dog has been destroyed.”²¹⁹ The court held that the power that this provision purported to give animal control officers—to destroy a dog summarily and in a non-emergency situation, on the basis of no more than reasonable grounds to believe the dog had attacked a person or animal, without notice to the owner or any opportunity for the owner to be heard on the issue—was beyond the powers conferred by Nova Scotia’s *Municipal Government Act*.²²⁰

Secondly, the court found that the animal control officer’s decision was a breach of procedural fairness. Justice Beveridge noted that the questions of whether a duty of procedural fairness was owed by a statutory decision-maker and of the nature and extent of that duty depend on contextual factors, including the nature of the decision to be made and its impact on the applicant. In this case, the decision “was a significant one with an important impact on the applicant. It purported to take away her property. The common law has long recognized the principle that no man is to be deprived of his property without having an opportunity to be heard.”²²¹ Rogier was owed a duty of procedural fairness, including the right to attempt to influence the decision by giving testimony.²²² Because the municipality did not provide this to her, the municipal officials’ decision to euthanize Brindi was invalidated.

It is clear from Justice Beveridge’s reasoning that he was concerned about Brindi’s fate and wanted to ensure that the dog would not be killed arbitrarily without consideration of any facts and arguments that could be put forward in her defense. And yet the issue is framed legally in terms of the right of Brindi’s human owner not to be deprived of her property without procedural safeguards. There is no room (because the legal framework does not have room) for consideration of Brindi’s own interests, independent of her status as a belonging of Rogier.

And if that raises doubts about whether the outcome was favorable from Brindi’s point of view, those doubts are only exacerbated by subsequent events. Brindi, who had been held at the Dartmouth Society for the Prevention of Cruelty to Animals since she was seized in July 2008, was not released after the Nova Scotia Supreme Court decision because the petition did not request her release—the relief sought was the quashing of the by-law.²²³ Brindi’s fate was eventually decided in April 2010 by the Dartmouth Provincial Court as part of Rogier’s sentencing for offenses stemming from Brindi’s attacks, which included violations of the animal by-law and failure to comply with the muzzle order. Provincial Court Justice Murphy identified three options: order Brindi to be euthanized, order that Brindi be returned to Rogier unconditionally, or order that Brindi be

²¹⁹ *Id.* at ¶ 42.

²²⁰ *Id.* at ¶ 76.

²²¹ *Id.* at ¶ 100.

²²² *Rogier*, 304 D.L.R. 108 at ¶¶ 107–10.

²²³ *Id.* at ¶ 2.

returned to Rogier but with conditions.²²⁴ Justice Murphy chose the third option, directing the municipality to retain Brindi until Rogier had completed a course on dog training and obedience and then return Brindi to Rogier on condition that Brindi be kept securely restrained and always muzzled and leashed when outdoors.²²⁵ Justice Murphy also gave a warning about what would probably happen if Rogier did not comply with the conditions:

I do not think that I am overstating the likely outcome to suggest that Brindi likely would be destroyed if there was a further incident. A [c]ourt could very likely conclude that Ms. Rogier is not able to control the behaviour of her pet to the standard that she ought, and a court could, and I suspect would, conclude that all reasonable chances have been given to both dog owner and dog and they have been unsuccessful. At that stage a [c]ourt could find itself with no other choice than to order to have Brindi put down.²²⁶

In September 2010, Brindi was again seized when she attacked a neighbor's beagle-labrador mix as it was being walked near Rogier's property.²²⁷ At the time of writing, it is not clear what will happen to Brindi, but her history makes it very likely that she will be euthanized in the end after all. Brindi was confined at an animal shelter for almost two years during the legal battle over the original euthanasia order. This lengthy imprisonment is itself a cruel punishment for a dog, especially one who was adopted from an animal shelter and had been confined there for a long period before her adoption.

There is a troubling ambiguity as to whether the legal protections and procedural safeguards that the owners of "death row" dogs like Brindi invoke really do anything positive for the dogs—or, indeed, whether they might actually operate to the dogs' detriment. The British Columbia Supreme Court applied a procedural fairness analysis similar to that which underpinned the Nova Scotia Supreme Court's decision in a recent animal cruelty case.²²⁸ The British Columbia Society for the Prevention of Cruelty to Animals (BC SPCA) seized twenty-six dogs and six cats from a home where they had been living in conditions typical of animal hoarding and intensive breeding situations.²²⁹

²²⁴ Francesca Rogier, Free Brindi, *Her Majesty the Queen v. Rogier*, <http://freebrindi.blogspot.com/2010/05/sentencing-statement-by-judge-alanna.html>, at 9 (N. Sco., Apr. 30, 2010) (accessed Apr. 3, 2011) (providing a transcript of Justice Murphy's oral sentencing statement).

²²⁵ *Id.* at 17–18.

²²⁶ *Id.* at 16.

²²⁷ CBC News, *Brindi the Dog Is Back at the Pound*, <http://www.cbc.ca/canada/nova-scotia/story/2010/09/28/ns-brindi-dog-seized.html> (Sept. 28, 2010) (accessed Apr. 3, 2011).

²²⁸ *Haughton v. Brit. Colum. Socy. for the Prevention of Cruelty to Animals* (2009), 100 Admin. L.R. (4th) 155 at ¶¶ 64–93.

²²⁹ BC SPCA, *Knutsford Great Dane Breeder Faces Further Legal Trouble*, <http://www.sPCA.bc.ca/news-and-events/news/knutsford-great-dane-breeder.html> (July 23, 2010) (accessed Apr. 3, 2011). The court's decision summarizes the report that the vet from the BC SPCA prepared concerning the conditions in the home. The conditions in-

The court overturned the BC SPCA's decision to euthanize the seized animals for failure to accord natural justice and procedural fairness to the owner.²³⁰ A hearing was ordered so that the owner could present evidence to influence the decision regarding the dogs, and the court ordered that the cats be returned to the owner.²³¹ The dogs were later returned to the owner subject to conditions, including that the owner stop all breeding pending her trial on animal cruelty charges.²³² In July 2010, the owner was arrested for violating those conditions.²³³

When these present-day court fights are considered alongside the old trials of domestic animals, it appears that there is one more reason, aside from those that have been suggested by scholars, why people used to take the trouble to hold elaborate trials of homicidal pigs, donkeys, and bulls. Although the old trials were formally framed as the provision of procedural fairness to the animal defendants, at least part of the underlying motivation may have been a reluctance to deprive human members of the community of something of great value to them without following the rudimentary requirements of natural justice—an opportunity to be heard, to put forward evidence and arguments to try to influence the decision. As may be the case in at least some modern “dog trials,” the legal proceedings have probably only created additional stress and confusion for the animals, who were going to be killed in any event, although they do give human owners at least a sense that they have not been deprived of their property arbitrarily. Evans provides a glimpse of this underlying concern in the story of two herds of pigs who were all sentenced as accomplices when three sows killed the swineherd's son.²³⁴ Eating the flesh of executed animals was generally forbidden,²³⁵ so the destruction of animals would have been an outright economic loss to the owners and the community. One of the herds belonged communally to the village, and the other to the nearby priory.²³⁶ The prior successfully petitioned the Duke of Burgundy for a pardon for all the pigs except the three perpetrators.²³⁷ It is easy to imagine the economic catastrophe that would have befallen the whole community if this request had not been granted.²³⁸

cluded floors covered with feces, rotting garbage, and odor so intense that BC SPCA employees had to wear face masks. *Haughton*, 100 Admin. L.R. at ¶ 31.

²³⁰ *Haughton*, 100 Admin. L.R. at ¶ 93.

²³¹ *Id.* at ¶ 96.

²³² BC SPCA, *supra* n. 229.

²³³ *Id.*

²³⁴ Evans, *Criminal Prosecution*, *supra* n. 19, at 144. According to Evans, the rest of the herd were accomplices because they “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 *participes criminis*.” *Id.*

²³⁵ See also *id.* at 168–69 (providing examples of times when the flesh of executed animals was not consumed).

²³⁶ *Id.* at 144.

²³⁷ *Id.* at 144–45.

²³⁸ In *The Advocate*, the owners of the pig beg Richard Courtois to take on the defense of the pig even though he finds the proceedings ridiculous, because “the pig is all we

B. Environmental Conflicts

Another concern that we still share with our medieval forebears (albeit in an altered form) is the question of how to deal with wild animals that compete with us for resources. What makes our situation so different from that of medieval villagers is that we have far more technological control over the environment. For the most part, it is up to us whether we simply destroy animals that eat things we want, or try to coexist and share with them.

The U.S. Court of Appeals for the Ninth Circuit recently addressed the choice between those options in a judgment that vacated a decision of the U.S. National Marine Fisheries Service (NMFS).²³⁹ The NMFS had authorized the killing of California sea lions in the Bonneville Dam area.²⁴⁰ The U.S. Marine Mammal Protection Act authorizes the “intentional lethal taking” of pinnipeds if they “are having a significant negative impact on the decline or recovery” of endangered or threatened salmonid fishery stocks.²⁴¹ The Bonneville Dam area is part of a migration path for a number of salmonid populations that are listed as endangered or threatened.²⁴² From 2002 to 2007, the U.S. Army Corps of Engineers recorded observations of sea lions feeding on the fish and estimated that they were killing between 0.4% and 4.2% of migrating salmonids.²⁴³ The NMFS approved the “lethal taking” of a list of specific individual sea lions that had been observed eating the fish.²⁴⁴ The number of sea lions that could be killed was limited to the lesser of either eighty-five per year or a number sufficient to bring sea lion predation below 1% of the salmonid run at the Bonneville Dam.²⁴⁵

The Ninth Circuit found that the decision by the NMFS was an abuse of its discretion.²⁴⁶ Key to the court’s decision was the fact that the NMFS had come to contradictory conclusions about the impact of fishing by humans and of predation by the sea lions without adequately explaining the contradiction.²⁴⁷ Under NMFS management plans, commercial and tribal fisheries were permitted to take between 5.5% and 17% of listed salmonids, and it had been determined that a catch at these levels would not appreciably reduce the likelihood that

have . . . in winter, food till the spring. If they kill the pig we have nothing.” *The Advocate*, *supra* n. 185, at 43:11–18.

²³⁹ *Humane Socy. of U.S. v. Locke*, 626 F.3d 1040, 1059 (9th Cir. 2010).

²⁴⁰ *Id.* The Bonneville Dam is on the Columbia River between the states of Oregon and Washington. U.S. History, *Bonneville Dam, General Interest, Built 1943*, <http://www.u-s-history.com/pages/h1792.html> (accessed Apr. 3, 2011).

²⁴¹ 16 U.S.C. § 1389(b)(1) (2006). A pinniped is “a mammal of the family Pinnipedia”; “Pinnipedia” is “a suborder of aquatic carnivorous mammals including all the seals and the walruses.” *Webster’s Third New International Dictionary* at 1720.

²⁴² *Locke*, 626 F.3d at 1044.

²⁴³ *Id.* at 1044–45.

²⁴⁴ *Id.* at 1046.

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 1053.

²⁴⁷ *Id.*

the fish would survive and their populations would recover.²⁴⁸ The decision about the commercial and tribal fisheries undermined the NMFS's determination that predation by sea lions of as little as 1% would have a significant negative impact on the fish stocks.²⁴⁹ The court vacated the decision and remanded to the agency "to reconsider the action or provide a fuller explanation."²⁵⁰

There are both similarities and differences between this decision and the ecclesiastical trials of weevils and locusts. Like the ecclesiastical courts of former days, the Ninth Circuit gives consideration to the competing interests that other species have in the natural resources that humans consume. In this case, the opening for such considerations is a very narrow one: it is just a matter of chance, a lucky break for the sea lions, that the NMFS had made a determination about human use of the fish that directly contradicted its findings on sea lion predation. The framework of the Ninth Circuit's analysis does not have room for any discussion of whether the sea lions have a "right" to eat their portion of the fish, as the ecclesiastics used to discuss the rights of insects to eat the green herbs God provided for them.²⁵¹ If the NMFS had determined that 1% was too much of the salmonid population for the sea lions to take without a determination that fishermen could take a greater percentage of the same population, there might not have been any basis to challenge the decision.

On the other hand, whatever they might have said on paper about God and green herbs, the people and church officials of St. Julien would no doubt have killed every last one of those troublesome weevils if they had had access to effective pesticides. In that sense, the decision of the Ninth Circuit, while giving more limited scope to the interests of nonhuman animals, is at least more genuine. Here, again, a consideration of modern proceeding suggests a possible underlying motivation for the old animal trials. Perhaps the intricate philosophical and theological discussions in the ecclesiastical animal trials provided cover for the inefficacy of anathemas and curses—the only pest-control method that was available in medieval times. If the *bestioles* did not go away, it could have been because of a procedural irregularity, because God had sent them, or because the people were remiss in their religious duties; there was still hope that the ritual would work if it was done properly.

VI. A PROPOSAL BY WAY OF CONCLUSION

Were the animal trials crude, obtuse, and barbaric, as well as a "parody and perversion of a sacred and fundamental institute of civil

²⁴⁸ *Locke*, 626 F.3d at 1045.

²⁴⁹ *Id.* at 1049.

²⁵⁰ *Id.* at 1048.

²⁵¹ See Evans, *Criminal Prosecution*, *supra* n. 19, at 50 (relating the concession in a legal proceeding that weevils were entitled to sustenance).

society,” as Evans says?²⁵² Or were they instead examples of “humanity, justice, and equity” at work, embodying recognition that basic obligations of fairness are owed to animals too, as Girgen argues?²⁵³ The answer is probably that both views are at least somewhat true, and they are also somewhat true of proceedings involving animals today. But we could do a lot better.

One option is to emulate the example of the Swiss canton of Zurich. From 1992 to 2011, the canton had a unique legal institution: a publicly paid lawyer whose role was to represent animals.²⁵⁴ Switzerland, like several other European countries, has strong animal protection laws.²⁵⁵ But, when it comes to animals, legal protections on paper are only part of the battle. Because animals cannot fight for their own rights as humans can, animal protections may be unenforced and thus significantly weakened in practice.²⁵⁶ The animal welfare group Swiss Animal Protection argues that this is the case with the Swiss laws: Officials rarely prosecute animal cruelty cases and penalties that judges impose are too mild to be an effective deterrent.²⁵⁷

Zurich addressed this issue by adopting a statute providing that, in every case involving animal cruelty, the animals must be represented by an attorney.²⁵⁸ The animal attorney’s role in all such cases was to present precedents and arguments to the court from the point of view of the animals and to “[represent] the animals’ interests as if the animal was a human being.”²⁵⁹ Starting in 2007, Zurich’s animal attorney was Antoine Goetschel, the third person to hold the job.²⁶⁰ Mr. Goetschel had no authority to file complaints directly, but “he [was] charged with making sure judges, often unfamiliar with animal law, take the cases seriously by explaining the animal protection code, reviewing files and suggesting fines based on precedent.”²⁶¹ Importantly,

²⁵² *Id.* at 41.

²⁵³ Girgen, *supra* n. 24, at 133.

²⁵⁴ Deborah Ball, *Scales of Justice: In Zurich, Even Fish Have a Lawyer*, Wall St. J. A1 (Mar. 6–7, 2010).

²⁵⁵ *See e.g. id.* at A12 (stating that “[p]rospective dog owners here must take a four-hour course before buying a pet. Social species including birds, fish and yaks must have companionship. Bird cages and aquariums must have at least one opaque side to make the occupants feel safe.”).

²⁵⁶ Sunstein, *Introduction: What Are Animal Rights?*, in *Animal Rights: Current Debates*, *supra* n. 4, at 255 (“there is a question whether statutory law is not largely expressive and symbolic, a statement of good intentions, delivering far more on paper than in the world”).

²⁵⁷ Ball, *supra* n. 254, at A12. “‘We do have very, very tough laws,’ says Mark Rissi, spokesman for [Swiss Animal Protection]. ‘But in some cantons, judges aren’t applying the law to the fullest.’” *Id.*

²⁵⁸ Voiceless: The Animal Protec. Inst., *Our Interview with Antoine Goetschel*, http://www.voiceless.org.au/Law/IntevIEWS/Our_Interview_with_Antoine_Goetschel.html (accessed Apr. 3, 2011).

²⁵⁹ *Id.*

²⁶⁰ Ball, *supra* n. 254, at A12.

²⁶¹ *Id.*

Goetschel also had the power to appeal verdicts.²⁶² In 2008, Zurich had 224 animal cruelty cases, a third of the nationwide total.²⁶³

The attorney for the animals of Zurich may evoke a faint echo of Bartholomé Chassenée, the lawyer for the rats of Autun. But the historical parallel also serves to emphasize the contrast between Goetschel's and Chassenée's jobs. The statutory position of an animal attorney was a legal institution designed to give expression to animals' interests in a direct way, through the intermediation of a legal official charged with ascertaining and promoting those interests "as if the animal was a human being."²⁶⁴ This is the kind of legal institution that has the potential to make animal trials reflect the interests of animals and not just the interests of humans. It should be noted that having an animal attorney does not require an answer to the question of whether animals are property or persons. Animals have relatively strong legal protections in Switzerland, but they are still raised on farms and eaten, which does not happen to persons.

It is hard to resist the urge to indulge in speculation about how the cases reviewed in Part V might have proceeded if there had been a similar official appointed to represent the animals' interests. Neither case concerned animal cruelty, but in theory any legal decision that affects animals could include a role for a direct representative of the animals. If Brindi had had an attorney representing her, perhaps Justice Murphy would have considered options for Brindi's future beyond the three to which she limited herself (euthanasia, return to Rogier, or return to Rogier with conditions). For example, additional options such as finding a place for Brindi in a new home or a sanctuary where she could be more effectively kept under control could have been considered. Such options were not on the table because there was no route through which they could be put forward. And in *Locke*, an animal attorney could have presented arguments and precedents supporting some kind of independent claim of the sea lions to their share of fish that otherwise would not have been put to the court. This is not to suggest that having an animal attorney would solve all the problems involved in deciding animals' fates through human justice, nor that human litigants could not voluntarily step up to make the same arguments in some cases (like the human plaintiffs in the *Locke* case, including the Humane Society of the U.S.). But the institutional entrenchment of an official channel for the legal representation of animals in their own right would be an incremental but powerful shift in the very structure of the legal system toward dealing with animals in a fairer and more rational way.

Earlier this year, Switzerland voted in a referendum on whether all the cantons should have animal lawyers.²⁶⁵ The proposal was de-

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ Voiceless: The Animal Protec. Inst., *supra* n. 258.

²⁶⁵ Ball, *supra* n. 254, at A1.

feated by a large majority, due in part to concerns about the costs of funding those positions in difficult economic times.²⁶⁶ Through a quirk of the interaction of Swiss cantonal and federal law, because the referendum was defeated, the Zurich position was also eliminated in 2011.²⁶⁷ It may be quixotic to propose that other jurisdictions should consider such a step when its innovators, the Swiss, are turning away from it. But legal proceedings involving animals can be deeply problematic when there is no mechanism for sincere consideration of the issues from the standpoint of the animals. Indeed, as the medieval animal trials show, they can be farcical. We are not immune from falling into similar errors. Creating a new legal institution designed purely to provide a channel for the representation of animals' interests is one way that we could move toward making trials involving animals somewhat less about human concerns and somewhat more genuinely just.

²⁶⁶ Alexandra Williams, *The Telegraph*, *Swiss Voters Reject Lawyers for Animals in Referendum*, <http://www.telegraph.co.uk/news/worldnews/europe/switzerland/7394698/Swiss-voters-reject-lawyers-for-animals-in-referendum.html> (Mar. 8, 2010) (accessed Apr. 3, 2011).

²⁶⁷ Thomas Stephens & Swissinfo.ch, *Animal Lawyer "Accidentally" Sacked*, http://www.swissinfo.ch/eng/swiss_news/Animal_lawyer_accidentally_sacked.html?cid=15329028 (July 2, 2010) (accessed Apr. 3, 2011). In April, Zurich's cantonal parliament voted to harmonize cantonal law with federal legislation. An unintended consequence was that the rejection of the animal attorney position at the federal level resulted in elimination of the position at the cantonal level. *Id.*