

ARTICLES

A SHORT HISTORY OF (MOSTLY) WESTERN ANIMAL LAW:

PART I

By
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This Article, presented in two parts, travels through animal law from ancient Babylonia to the present, analyzing examples of laws from the ancient, medieval, Renaissance and Enlightenment, recent modern, and modern historical periods. In performing this analysis, particular attention is focused on the primary motives and purposes behind these laws. What is discovered is that there has been a historical progression in the primary motives underlying animal laws in these different periods. While economic and religious motives dominate the ancient and medieval periods, in the Renaissance and Enlightenment we see social engineering—efforts to change human behavior—come to the fore. In the recent modern period, we finally see protecting animals for their own sakes, animal protection, motivating animal law. In our present historical period there is a movement towards what is defined as “scientific animal welfare”—the use of modern animal welfare science as the inspiration for animal laws and regulations. Does this historical trend toward use of modern science in making animal law portend a change that may transform our relationship with animals? Modern science tells us that many animals have substantial cognitive abilities and rich emotional lives,

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and this science would seem to lead us to question the use of animals in agriculture, experimentation, and entertainment altogether. It is ultimately concluded in this Article, however, that so far only a very narrow science of animal welfare is actually being applied in modern animal protection laws and regulations, one that proceeds from a premise that present uses of animals are legally, ethically, and morally appropriate. It is only in the future that the true implications of modern science may ever be translated into legal reality.

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I. INTRODUCTION

What aspect of human culture and relationships has not changed in more than 4,000 years? Not the institution of slavery that was a convention of human culture for thousands of years. Of course, slavery can still be unearthed on our globe, but it is no longer accepted as an institution. Is it the way that women are viewed and treated that has remained static? Surely there has been a stellar change in the role of women in the world, though there is still a galaxy of room for further progress. It is not relations between cultures and races that have stood still for millennia. The tribal, the regional, and the parochial have all been infected with globalization, rapid transit, air travel, and the realization, looking at our planet from space, that there really are no boundaries on this spinning stone. The shrinking world now requires us all to reassess our perceptions of the myriad groups that populate our planet. Has communication between people remained unchanged? Hardly. Communication is virtually instantaneous and even the barriers of languages can be flattened by translation tools. And technology generally? Our power over nature and skill at manipulating the universe, sometimes for our benefit, others not, have advanced in ways that were unimaginable only a few decades ago.

So what is it that has not changed in 4,000 years? It is the human-animal relationship that has remained virtually untouched by time.¹ Humans use, abuse, and torture animals in the same way that they always have. We use animals in agriculture to satisfy our culinary tastes. It is just that the bucolic farm in the countryside has transformed into the mega-machine of factory farming. We use them in entertainment. It is just that the bloody Roman Coliseum now takes the form of a circus or aquarium or roadside attraction. Our modern entertainment is rather less ghastly than some of what we saw in the past, but it nonetheless still often involves appalling cruelty. We still use animals as tools and forms of technology. It is just that in the past they were our means of transportation, our instruments to plow fields, our power to draw water for drinking and irrigation. Today animals are still forms of technology to us; they are just slightly different technologies now. They are raised or manufactured for vivisection. They are used not primarily to transport us, but supposedly to save us from the ravages of disease, to make us more attractive, and to ensure the safety of our products.

I am sure that there are those who will challenge the idea that nothing has happened in the last 4,000 years in the human relationship with animals. I cannot deny that there are more laws now relating to animals than in the past. There is certainly more discussion of issues relating to the treatment of animals than has been the case previously. So perhaps I overstate the case and it is not entirely accurate to say that there has been no change. I do not think so; in fact, I would argue that the change that has occurred has been to the detriment of animals. One can quite easily document that the volume and intensity of the use of animals has increased exponentially over our history; so the world for animals is, in fact, much worse now than in the past. There are literally billions of animals used in agriculture every year.² Hundreds of millions of animals are used in experiments worldwide—as many as 115 million to 127 million annually.³ And in these experi-

¹ I use the terms “human” and “animal” in this Article as if they are distinct simply because it is far less clumsy than incessantly referring to “humans” and “nonhuman animals” or some similar phraseology. I am well aware that humans are animals and chose my language for the sake of simplicity.

² See Food and Agric. Assn. of the U.N., *FAOSTAT*, <http://faostat3.fao.org/home/index.html#DOWNLOAD>, *select* Production, *select* Live Animals, *select* Select All under Countries, *select* Stocks, *select* All items (using the shift key), *select* 2010, *select* View Tables or Export to CSV (updated 2010) (accessed Nov. 18, 2012) (showing that the total number of live animals in agriculture for all countries exceeds 1 billion). A discussion of worldwide agricultural animal use and further statistics on these issues can be found in Thomas G. Kelch, *Globalization and Animal Law* 5–16 (Wolters Kluwer 2011).

³ Katy Taylor et al., *Estimates for Worldwide Laboratory Animal Use in 2005*, 36 *ATLA* 327, 336 (2008); Andrew Knight, *127 Million Non-human Vertebrates Used Worldwide for Scientific Purposes in 2005*, 36 *ATLA* 494, 495 (2008); see also Kelch, *supra* n. 2, at 17–18, 118 (discussing the number of animals used for research in particular countries and worldwide). In reality, however, our information on how many animals are used in experiments is sketchy and incomplete due to the fact that, among

ments, torture, and cruelty rivaling—if not surpassing—the Roman Coliseum is commonplace. We have circuses with bedraggled and beaten tigers jumping through hoops of fire, trained killer whales splashing about to entertain us in what amounts, for them, to bathtubs, and wild animals pacing stereotypically in cages at truck stops along the interstate.

How did we get here? How is it that human culture and relationships generally have so profoundly changed through history, but the human relationship with animals seems to have remained static or actually become worse for animals? How is it that so much time has passed, but humans and animals seem to remain fixed in the same positions they were thousands of years ago? These questions have vexed me since I first began studying animal law and it is these questions that I attempt to address in this Article. I will look at this seemingly “stuck in the mud” character of the human-animal relationship from the perspective of the law relating to animals.

To accomplish this, I will follow two lines of inquiry. First, I will describe and analyze examples of laws relating to animals that have been created over the last 4,000 years. But this is not a survey of animal law from the beginning of time. That project would, I suspect, take a number of volumes. Rather, I have chosen to discuss particular laws based on my belief that they are representative of laws of the relevant historic period. Most, but not all of these laws, will be from Western culture. This is for primarily pragmatic reasons, including the lack of translations of some laws and simple limitations on how much can be discussed in an article of this kind. In performing the analysis of these example laws, I will divide human history into the following periods:

- Ancient period: Beginning of the Universe to 600 C.E.
- Medieval period: 600 to 1500 C.E.
- Renaissance and Enlightenment: 1500 to 1800 C.E.
- Recent modern period: 1800 to 1970
- Modern period (and future?): 1970—?

While some readers might quibble with how I have divided human history, the divisions I have made are based, in significant part, on how the law relating to animals has developed and, thus, form a convenient categorization scheme for discussion of the history of animal law.

Describing and analyzing example laws, however, is only a part of the project. The second strand of inquiry is to delve into the motivations for the laws that have been created relating to animals. Here the concern is not with the substance of the law, but with its purpose. Finding the true motive or purpose of a law is trickier than just describing what it says. To find motives it is sometimes necessary to consider not only the substance of what the law says, but to look at

other reasons, experimentation is not very tightly regulated in many places, including the United States. Therefore, the statistics are necessarily educated guesses.

other sources to divine the underlying intention behind the law. Here we need to look to the social, religious, and political history of the age, to the literature of the time, to the influential thinkers of the era, or to whatever authority can be found to illuminate our path.

In analyzing the purposes underlying laws relating to animals through our history, I have found the following motivations to be the most common ones encountered: (1) religious; (2) economic; (3) social engineering; (4) animal protection; and (5) scientific animal welfare. Some of these categories are self-explanatory. Others will be developed as the discussion proceeds.

Note one thing that I am not doing: I am not suggesting that there is only one motive behind any of the laws and practices analyzed. Certainly most of the laws and practices discussed are supported by more than one motivation. What I am arguing is that there are certain dominant purposes behind many of the laws analyzed. What my inquiry into these motives ultimately concludes is that there has been a historic progression through these different motivations in animal law as animal law has developed. Certain motivations appear to be dominant in different time periods. The earliest laws were predominantly religious or economic. Later animal laws were used to control and modify human behavior; to do “social engineering.” Finally, laws were made with the alleged purpose of protecting the animals themselves. Now we appear to be in a period (or to be moving into a period) where what I refer to as the “science of animal welfare” is defining the substance and direction of the regulation of human use of animals.

So while the plight of animals has not really changed throughout history and—if anything—has gotten worse, laws relating to animals have changed, as have the reasons motivating the laws. But is the historic transformation of the motives behind laws relating to animals a positive one? Are we on the cusp of some revolutionary change in the human-animal relationship due to the shifting motives behind animal law? Possibly, but not necessarily, as I will develop below.

This Article is presented in two parts. This Part will analyze the history of animal law through the Renaissance and Enlightenment, while Part II will feature a discussion of the recent modern and modern periods, as defined earlier. My final analysis and conclusions will be presented in Part II.

II. THE ANCIENT PERIOD

A. *A Bit of Ancient Thought about the Human-Animal Relationship*

There is a tendency to think that concern about the treatment of animals is of recent vintage. The ancients, we surmise, had little concern for animals or how they were treated. It is only the enlightened minds of modernity that consider how our fellow creatures fare. This is, of course, not true; there are numerous examples of our ancient ancestors who opposed the use of animals in agriculture and for other purposes. Our thoughts of Pythagoras, for instance, revolve around the

Pythagorean Theorem. But Pythagoras was a vegetarian who proselytized a vegetarian lifestyle in his school.⁴ His ideas on animals flowed in part from his belief in the transmigration of souls;⁵ eating meat could result in devouring a dead relative.

Porphyry, another Greek philosopher in the mold of Pythagoras living in the third and fourth centuries C.E., went further than Pythagoras. Porphyry thought that one should not only refrain from eating animals, but should also avoid destroying plants when eating them, as this was even closer to divinity.⁶ The views of Porphyry on this subject are detailed in *On Abstinence from Killing Animals*.⁷ This work of the philosopher was written as an open letter to his friend Firmus Castricius who had strayed from a vegetarian lifestyle.⁸ Porphyry believed that animals had rational souls, although they were less rational than humans.⁹ Since justice applies to all rational beings, according to Porphyry, it should also be applied to animals since they have a level of rationality.¹⁰ Moreover, according to Porphyry, since animals have perceptions, feel distress, and have fear, they can be injured in the same way humans can be injured.¹¹ This distinguishes animals from plants and shows why it is proper for people to eat plants, but not animals.¹² Porphyry's views, unlike those of Pythagoras, were not based on the transmigration of souls.¹³ For Porphyry, a perfect person only eats fruits and vegetables that plants do not need to reproduce, thereby doing minimal damage to the plants.¹⁴

Wedged historically between Pythagoras and Porphyry, Plutarch, who lived in the first and second centuries C.E., was also against eating meat, but again for different and less mystical reasons than those of Pythagoras. Plutarch gave a number of reasons for not eating flesh, including that there is no necessity to do so, that animals have faculties similar to humans, and that cruelty to mankind is caused by the practice of killing and eating animals.¹⁵ Plutarch, like Porphyry, also

⁴ G. Donald Allen, *Pythagoras and the Pythagoreans* 3 (1999) (available at <http://www.math.tamu.edu/~don.allen/masters/Greek/pythag.pdf> (accessed Nov. 18, 2012)); Colin Spencer, *The Heretic's Feast: A History of Vegetarianism* 33, 50 (U. Press of New England 1995); Ovid, *Metamorphoses* 515–16 (Allen Mandelbaum trans., Harcourt Brace & Co. 1993); see Kelch, *supra* n. 2, at 30–31 (describing Pythagoras' vegetarianism and reasons for endorsing it as a way of life).

⁵ Spencer, *supra* n. 4, at 50.

⁶ John Passmore, *The Treatment of Animals*, 36 *J. of History of Ideas* 195, 207 (1975).

⁷ Porphyry, *On Abstinence from Killing Animals* (Gillian Clark trans., Cornell U. Press 2000).

⁸ *Id.* at 1.

⁹ *Id.* at 2.

¹⁰ *Id.* at 90.

¹¹ *Id.* at 91.

¹² *Id.*

¹³ Porphyry, *supra* n. 7, at 9.

¹⁴ Passmore, *supra* n. 6, at 207.

¹⁵ Plutarch, *Morals: Of Eating Flesh* 5–7 (William W. Goodwin ed., Little, Brown & Co. 1905).

argued that animals are capable of reasoning.¹⁶ So his reasons, again rather like those of Porphyry, arose out of feelings of kindness and respect for animals and their faculties, not some Pythagorean concept of reincarnation.¹⁷ Plutarch makes this clear in the following:

But for the sake of some little mouthful of flesh, we deprive a soul of the sun and light, and of that proportion of life and time it had been born into the world to enjoy. And then we fancy that the voices it utters and screams forth to us are nothing else but uncertain inarticulate sounds and noises, and not the several deprecations, entreaties, and pleadings of each of them¹⁸

Plutarch further states in this vein:

And what meal is not expensive? That for which no animal is put to death. Shall we reckon a soul to be a small expense. I will not say perhaps of a mother, or a father, or of some friend, as Empedocles did; but one participating of feeling, of seeing, of hearing, of imagination, and of intellection; which each animal hath received from Nature¹⁹

This leads Plutarch to contend that humans should change their behavior toward animals in two ways: they should stop killing them for food and using them for sports involving cruelty.²⁰ Later in life, however, Plutarch apparently lost his nerve and came to excuse eating meat as a custom impossible to halt, though he still thought it best not to eat meat.²¹

So we find that concern about animals and their use in agriculture and entertainment is not a recent phenomenon, but one that seems to have existed since humans recorded their thoughts. Indeed, if anything, it is stunning to find how many ancient thinkers were concerned with and addressed issues relating to the use of animals in a way favorable to animals.

B. *The Case of the Goring Ox*

What we do not see in the ancient world is the faithful translation of the thought of men like Pythagoras, Porphyry, and Plutarch into ancient law. What we do see is a world that seems to be largely populated by oxen. Much of ancient animal law orbits oxen. Their economic value and apparent propensity to gore other oxen and people is a significant concern of ancient legislators. The first thing we learn about oxen is that they, like other animals, are considered property in the world of the ancients. This is one thing that has been consistent

¹⁶ Passmore, *supra* n. 6, at 207.

¹⁷ See Richard D. Ryder, *Animal Revolution: Changing Attitudes Toward Speciesism* 19 (Basil Blackwell Ltd. 1989) (describing Plutarch's reasoning as being based on a duty of kindness to human and nonhuman animals alike).

¹⁸ Plutarch, *supra* n. 15, at 6–7.

¹⁹ *Id.* at 13.

²⁰ Passmore, *supra* n. 6, at 206–07.

²¹ *Id.* at 207.

throughout the history of animal law and of which we have many examples.

Indeed, “[a]ll Near Eastern law, Mesopotamian and Israelite, recognized that humans could own nonhuman animals.”²² In paragraph 12 of the Edict of Ammisaduqa, a law of the ancient Babylonians of the seventeenth century B.C.E., agricultural animals are categorized as property and are designated as having a certain value.²³ Likewise, the Romans saw animals as things created for human use.²⁴ As a “thing,” an animal could be used by its owner at the complete discretion of the owner.²⁵ This Pagan view of the Romans was later incorporated into the Christian view of the world.²⁶ So where does this ubiquitous property status for animals lead?

For oxen, it led to being the subject of a considerable number of laws relating to their economic value and proclivity to cause damage. These laws are seen from Mesopotamia, to Rome, to Israel, to Britain.²⁷ From Mesopotamia we have several examples of rules relating to the problem of the goring ox. The Laws of Eshnunna (LE) were written in about 1800 B.C.E. and before the Babylonian law, the Code of Hammurabi (CH), which was written around 1700–1600 B.C.E.²⁸ The two tablets containing the LE were found near Baghdad in 1945 and 1947.²⁹

In the LE, we find that if an ox gores and kills another ox, then the owners divide the price of the dead and live oxen.³⁰ So an economic remedy is fashioned for the owners of the oxen; one that does not penalize the owner of the goring ox, but tries to provide each owner with compensation in the neighborhood of the value of their ox. Even when

²² Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* 26 (Perseus Books 2000) [hereinafter *Wise Rattling the Cage*]; Steven M. Wise, *The Legal Thinghood of Nonhuman Animals*, 23 B.C. Envtl. Aff. L. Rev. 471, 476–77 (1995) [hereinafter *Wise, The Legal Thinghood*].

²³ See *The Ancient Near East: Supplementary Text and Pictures Relating to the Old Testament* 91 (James B. Pritchard ed., Princeton U. Press 1969) (establishing the trade values of animal carcasses indicating that they are property).

²⁴ Wise, *Rattling the Cage*, *supra* n. 22, at 32–33.

²⁵ See *The Laws of the Twelve Tables*, in *The Civil Law Table VI*, Law I, 68 (S.P. Scott trans. & ed., AMS Press, Inc. 1973) (describing the ability to sell or create legal obligations relating to property); Gerald Carson, *Men, Beasts, and Gods: A History of Cruelty and Kindness to Animals* 10 (Charles Scribner’s Sons 1972) (stating that beasts were property to be used at the owner’s discretion); see also Charles Sumner Lobingier, *The Evolution of the Roman Law: From Before the Twelve Tables to the Corpus Juris* 151, 153 (2d ed., 1923) (categorizing animals as things).

²⁶ Carson, *supra* n. 25, at 10.

²⁷ Mesopotamian law on this subject is discussed *infra* notes 28–38, 44–55, and in accompanying text. Roman law is discussed *infra* notes 39–43 and in accompanying text. Israelite law is discussed *infra* notes 56–76 and in accompanying text. British law is discussed *infra* notes 146–54 and in accompanying text.

²⁸ Reuven Yaron, *The Goring Ox in Near Eastern Laws*, 1 Isr. L. Rev. 396, 397 (1966).

²⁹ Reuven Yaron, *The Laws of Eshnunna* 9 (2d rev. ed., Magnes Press 1988).

³⁰ *Id.* at 291–92; Yaron, *supra* n. 28, at 398.

an ox kills a human, the LE provides an economic remedy.³¹ For example, if an ox known to have previously gored kills a human, the owner of the ox must pay two-thirds of a mina of silver.³² Similarly, if a dog is known to be one that bites and the dog kills a person, the owner again must pay two-thirds of a mina of silver.³³ Thus, in the LE, the rules on killing a man are the same for dogs and oxen.³⁴ The killing of slaves by an ox or dog where there is knowledge of the dangerous propensities of the animal is less expensive. If an ox gores and kills a slave, then the owner of the ox is liable for fifteen shekels; the same rule is stated for the killing of a slave by a dog.³⁵ So, under the LE, liability arises when the owner of an economically valuable animal had prior knowledge of the dangerous nature of his property (dog or ox).³⁶ It is not just any knowledge that will lead to liability, however; the knowledge must be formal—the authorities must have made the danger known to the owner.³⁷ Where one has formal notice of a danger posed by an animal, one is expected to protect others from the animal, for example, by “guarding” one’s dog.³⁸

Roman law has similar rules relating to damage caused by animals. Under Roman law, if in a goring incident the surviving ox is the aggressor, then its owner is liable; if not, he is not required to provide compensation for the damage or any part of the damage.³⁹ Roman law also treats the behavior of dogs. For example, if a dog kills a person, the compensation shall be whatever appears equitable to the judge.⁴⁰ As a general proposition, under Roman law, if an animal does damage, payment is to be provided to compensate for the damage or, in the alternative, the animal itself is to be delivered in compensation.⁴¹ In another, but rather different rule relating to oxen, the Greeks and early Romans actually made it a capital offense to kill an ox.⁴² This was not, however, apparently out of kindness for oxen, but seems to have been for macroeconomic purposes—to try to establish agricultural habits among warlike people.⁴³

³¹ Yaron, *supra* n. 28, at 401.

³² *Id.* The “mina” was a measure of weight and value that apparently varied in different times and places. It has been described as being 1.18 pounds or 1.26 pounds, and equal to 50 shekels. Tom Edwards, *Biblical Weights, Measures, and Monetary Values*, <http://www.thomasedwards.com/go/go950827.txt> (Aug. 27, 1995) (accessed Nov. 18, 2012).

³³ Yaron, *supra* n. 28, at 402.

³⁴ Yaron, *supra* n. 29, at 299. Interestingly, the CH and the Law of the Israelites in Exodus do not have a rule similar to the LE on the vicious dog. *Id.*

³⁵ Yaron, *supra* n. 28, at 402.

³⁶ Yaron, *supra* n. 29, at 297.

³⁷ *Id.* at 297–98.

³⁸ *Id.*

³⁹ *Id.* at 294–95.

⁴⁰ Yaron, *supra* n. 28, at 404.

⁴¹ Oliver Wendell Holmes, Jr., *The Common Law* 8 (Little, Brown & Co. 1923).

⁴² Ryder, *supra* n. 17, at 54.

⁴³ *Id.*

The CH contains strictures very similar to those of the LE. In the CH we see another set of comprehensive rules on the regulation of oxen as property.⁴⁴ One thing that is again obvious in the CH is that animals are property; oxen, sheep, and asses are categorized along with silver, gold, and slaves.⁴⁵ Economic issues, like prices for use of animals and formulas for damages for harms caused by animals, are described in the CH in considerable detail. For instance, if you graze your sheep on another's land without agreement, you are required to pay a certain amount of grain for the use of the land.⁴⁶ There is, in addition, a regulation setting the price for the use of oxen.⁴⁷ The CH also resolves issues of who has responsibility between the owner and renter of an ox for risks like the ox being killed by lions, or being injured or killed while working.⁴⁸ Sections 268 through 271 of the CH provide further regulation of the rates for hiring oxen and asses. Even the work of veterinarians on oxen is subject to regulation in the CH; a veterinarian who operates on an ox is entitled to certain compensation, but if the ox dies, the veterinarian must pay one-quarter of its value to the owner.⁴⁹ So in the CH we see a thorough treatment of a number of issues relating the economic value of oxen.

We also see goring ox regulations in the CH.⁵⁰ These rules are similar to those we observed in the LE with liability depending on notice of the propensity of the ox to gore. For instance, if an ox gores a free man and kills him and it is "shown that . . . [the ox] is a gorer" and the owner had not screened the horns of the ox or tied it up, then the owner must pay compensation of one-half mina of silver.⁵¹ The compensation is, of course, less if the victim is a slave; here only one-third mina of silver is due.⁵² The animal-related rules of the CH deal primarily with oxen, but there are also economic regulations relating to asses, sheep, and cattle—some of the principal economic entities of this era. Provisions relating to asses, sheep, and cattle, like those relating to oxen, range from ones dealing with contracts, grazing of animals, entrusting of animals to third persons, and obligations relating to veterinary care of animals.⁵³ One thing to keep clear when considering all of these rules is that the rules relating to payment for injuries to oxen or other animals are not the result of any humane feelings or

⁴⁴ *The Code of Hammurabi King of Babylon: About 2250 B.C.* §§ 7–107 (Robert Francis Harper ed., Wm. W. Gaunt & Sons, Inc. 1994).

⁴⁵ *Id.* at § 7.

⁴⁶ *Id.* at § 57.

⁴⁷ *Id.* at §§ 242–243.

⁴⁸ *Id.* at §§ 244–249.

⁴⁹ *Id.* at §§ 224–225.

⁵⁰ *The Code of Hammurabi, supra* n. 44, at §§ 250–252.

⁵¹ *Id.* at § 251.

⁵² *Id.* at § 252.

⁵³ *See id.* at §§ 7, 8, 35, 57, 224, 225, 244, 261–265, 267 (addressing animal issues pertaining to: thefts and stolen property (§§ 7–8), purchasing animals (§ 35), sheep-trespass (§ 57), veterinary operations (§§ 224–225), hiring of oxen (§ 244), and pastoral workers (§§ 261–267)).

sentiment, but rather are for the protection of the owner's economic value in the animal.⁵⁴

What we see in the LE and CH are laws that have economics as their prime purpose and motivation. By "economic" motivations I mean those that protect, define, and regulate property rights, and provide compensation for economic losses. That the laws of the LE and the CH are of this nature can be observed from the facts that they give purely economic remedies for damages caused by animals, untinged with religious adornment or ritual, and fashion a rather elaborate system relating to property rights in animals and the value of these rights. One commentator describes rules in these early Codes in this way:

All of these codes [discussing among others, the CH, The Hindu Laws of Manu, The Twelve Tables of Rome, The Salic Code and the Laws of King Alfred the Great of England], are the philosophical foundation for the development of laws that protect animals as property. They limit liability for the owner or for the animal. They set forth rules regarding the theft of animals, the use of animals in the punishment and execution of criminals or traitors, religious sacrifice, and provide for the legal standing of animals. The predominate rationale in these codes is based on the protection of property, the protection of the owner's investment, and sanctions imposed by society for violating its notions of justice. These factors are not surprising if one considers the importance of animals to the early agricultural societies.⁵⁵

It is then apparent that the primary motivations for the LE, the CH, and Roman and Greek laws as they relate to animals were economic ones grounded in the property status of animals. We will see that these sorts of motivations are not exclusively ones that motivate laws in the ancient period; instead, these are purposes that motivate at least some animal laws in all periods of human history.

Oxen are not forgotten in the laws of the Israelites either. There are three legal codes in the Old Testament contained in Leviticus, Exodus, and Deuteronomy.⁵⁶ There is some dispute about when Exodus, the most important book of the Old Testament for present purposes, was written, but its composition probably began between 1440–1290 B.C.E.⁵⁷ Here we discover regulations relating to goring oxen similar to those of the LE and the CH, but we also detect a substantial change.

⁵⁴ *The Babylonian Laws: Volume I, Legal Commentary* 437 (G.R. Driver & John C. Miles eds., Oxford U. Press 1952).

⁵⁵ Peter Paul, *Some Origins of Laws and Legal Codes Regarding Animals, Part I*, 5 *Community Animal Control* 13, 21–22 (1986).

⁵⁶ Michael Walzer, *The Legal Codes of Ancient Israel*, 4 *Yale J. L. & Humanities* 335, 335–36 (1992).

⁵⁷ See George Anastaplo, *Law & Literature and the Bible: Explorations*, 23 *Oklahoma City U. L. Rev.* 515, 616 (1998) (discussing how some biblical scholars believe that Exodus was written soon after the events took place, "between 1290 and 1225 B.C.E., which is to say more than three thousand years ago." However, "[m]any of those scholars, evidently discounting Moses' authorship of the Torah, place the actual writing of the books of Exodus and Deuteronomy at least five centuries after the date of the events described therein.").

Exodus still has what can be characterized as economic rules relating to the goring ox. For example, the now familiar sort of rule that where an ox kills another ox the goring ox is sold and the dead ox is divided between the parties appears again in Exodus.⁵⁸ If the ox is a known gorer, then the owner must give up his own ox, but gets the dead ox.⁵⁹ In the case of oxen killing humans, however, we see a variation from Mesopotamian law. In Mesopotamian law the killing of a person by an ox is considered a civil matter settled with money, while in Israelite law it is viewed as a murder and is punished by the death of the ox and potentially the owner.⁶⁰ These goring ox rules are expressed in Exodus 21:28-32 as follows:

28 If an ox gores a man or a woman to death, the ox is to be stoned and its flesh not eaten, but the owner of the ox will have no further liability. 29 However, if the ox was in the habit of goring in the past, and the owner was warned but did not confine it, so that it ended up killing a man or a woman; then the ox is to be stoned, and its owner too is to be put to death. 30 However, a ransom may be imposed on him; and the death penalty will be commuted if he pays the amount imposed. 31 If the ox gores a son or daughter, the same rule applies. 32 If the ox gores a male or female slave, its owner must give their master twelve ounces of silver; and the ox is to be stoned to death.

While one can see similarities with the LE and CH in these rules, Exodus introduces the stoning of the ox to death. So why this change? The reason is religious. By a “religious” regulation I mean one defined or ordained by transcendent and/or supernatural authorities or forces (like God).

So how is it then that this is a religious rule? There is considerable evidence of a religious source for these rules both in the nature of the rules themselves and in the analyses of numerous commentators.⁶¹ First, notice that stoning was reserved in Israelite law for the most serious of crimes.⁶² Here, the animal is treated as though it were a human. Capital punishment is provided for humans who kill another human.⁶³ The same rule applies to oxen.⁶⁴ Second, we can see an ox

⁵⁸ J.J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 Temp. L. Rev. 169, 261 (1973).

⁵⁹ *Id.* at 261.

⁶⁰ *The Babylonian Laws*, *supra* n. 54, at 444.

⁶¹ See e.g. Wise, *Rattling the Cage*, *supra* n. 22, at 46–47 (noting that “[t]he law of the goring ox, the deodand, and the bar on recovery for the wrongful death of humans” would only make sense in a world that “accepted divinely placed borders and serious punishments for border crossings. Nonhuman animals had no hope for legal rights in that world, for the rights of a being will not be recognized by a society that assumes that the Creator of the universe has designated it as inferior.”).

⁶² Finkelstein, *supra* n. 58, at 180.

⁶³ *Exodus* 21:12–14.

⁶⁴ See *id.* at 21:28 (stating “[i]f a bull gores a man or a woman to death, the bull must be stoned to death, and its meat must not be eaten. But the owner of the bull will not be held responsible”).

killing a human as an offense against the “divinely ordained order” that amounts to “high treason against God.”⁶⁵ Such an act by an animal is an affront to the hierarchy ordained by God.⁶⁶ The killing of a human by an ox has also been referred to as an insurrection against the cosmic order.⁶⁷ This divinely ordained hierarchy is revealed in the temporal order of creation in Genesis: Man was created last after everything else was created and, thus, is atop the hierarchy.⁶⁸ The universe of the laws of the Israelites is centered on man and man is to rule over all of nature.⁶⁹ Thus, an ox goring a human is overturning the most fundamental aspects of the ordered universe created by the one true God. In furtherance of this idea, God stated to Noah that he will hold animals responsible for the shedding of human blood as humans are held responsible.⁷⁰ Guilt or innocence is not of importance in such circumstances because such an act by an animal offends the larger community.⁷¹

Third, the goring ox rules of Exodus are founded in vengeance; yet it is a vengeance dictated by the tongue of God. The goring ox regulations of Exodus have been described as a “blood-revenge” revealed by God to Noah.⁷² This idea is reflected in Genesis 9:5–6, which states:

And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man; at the hand of every man’s brother will I require the life of man. Whoso sheddeth man’s blood, by man shall his blood be shed: for in the image of God he made man.⁷³

Killing offending animals can be seen as a “symbolic ransom to appease the injured parties as well as God.”⁷⁴

Fourth, there are other rules of Exodus that confirm the religious foundation of these rules. For instance, Exodus also orders the death of animals used in or accused of witchcraft.⁷⁵ Witchcraft is—of course—contrary to the will of God. In addition, animals involved in bestiality must also be put to death.⁷⁶ Like an ox killing a human, this is an affront to God’s hierarchy. The language of the goring ox rules, their relationship to the law of murder by humans, the hierarchical world view reflected in these rules, the primitive concepts of vengeance that

⁶⁵ Finkelstein, *supra* n. 58, at 180.

⁶⁶ *Id.* at 180–81.

⁶⁷ J.J. Finkelstein, *The Ox That Gored*, 71 Transactions Am. Phil. Socy. 5, 28 (1981).

⁶⁸ *See id.* at 8 (stating that the universe of the Bible is “man-centered” and it is for man alone to dominate; only God is above man in the hierarchy).

⁶⁹ *Id.*

⁷⁰ *Id.* at 28.

⁷¹ *Id.*

⁷² Jen Girgen, *The Historical and Contemporary Prosecution and Punishment of Animals*, 9 Animal L. 97, 115–16 (2003).

⁷³ *Genesis* 9:5–6 (King James).

⁷⁴ Todd Barnet, *Legal Fiction and Forfeiture: A Historical Analysis of the Civil Asset Forfeiture Reform Act*, 40 Duq. L. Rev. 77, 88 (2001) (quoting Leonard W. Levy, *A License to Steal: The Forfeiture of Property* 11 (U. N.C. Press 1996)).

⁷⁵ *Exodus* 22:18; Girgen, *supra* n. 72, at 116.

⁷⁶ *Leviticus* 20:15–16 (King James); Girgen, *supra* n. 72, at 116.

underlie the rules, and the existence of related religiously founded rules all indicate that the Exodus goring ox strictures—at least insofar as they relate to oxen killing humans—were primarily based on religious notions. It is this religious foundation and content that underlies the punishment aspects of the Exodus goring ox rules that we do not see in the regulations of the LE and the CH.

It was not only the Israelites that founded rules of conduct on religious underpinnings. There were regulations of the ancient Egyptians that had religious groundwork. In the period 644–332 B.C.E. in Egypt, all animals in which the power of a God was revealed were protected, and the killing of these animals could result in penalties as great as death.⁷⁷ It may, in addition, have been for religious reasons that the killing of any wild animal could result in some sort of penalty.⁷⁸ Killing of cats may have actually been a capital offense in ancient Egypt based on their sacred nature.⁷⁹ These religiously based rules did not affect the treatment of food animals, however. They were not subject to the same protections as animals invested with a sacred nature.⁸⁰ One thing that does seem to be true is that Egyptian culture was more favorable to animals than Greek and Roman cultures.⁸¹

C. A Side Trip to the East

It is not, however, just Western law and religious rules that deal with animal issues in the ancient period. There are laws relating to animals from points further east. For example, there are the Edicts of Asoka, the Indian Emperor of the third century B.C.E.⁸² Asoka ruled over an empire larger than that of British India, stretching from the Bay of Bengal to the frontiers of Persia:⁸³ “In his day no other area of the world enjoyed the same material prosperity, had such spirituality and a government so well-organized, benevolent and efficient.”⁸⁴ One particularly important fact for our purposes is that Asoka became a Buddhist and a vegetarian.⁸⁵ He took numerous actions relating to the treatment of animals in his wide empire. He “suppressed royal hunts

⁷⁷ Ryder, *supra* n. 17, at 20.

⁷⁸ *See id.* (Herodotus claiming in later years that all wild animals were held to be sacred; deliberate killing would result in death and the punishment for accidental killing was decided by priests); *but see* Wise, *The Legal Thinghood*, *supra* n. 22, at 482 (explaining contradictions in the writing of Herodotus).

⁷⁹ Ryder, *supra* n. 17, at 20; George A. Feldhamer et al., *Mammalogy: Adaptation, Diversity, and Ecology* 524 (3d ed., Johns Hopkins U. Press 2007); *Egyptian Cat*, <http://www.king-tut.org.uk/ancient-egyptians/egyptian-cat.htm> (accessed Nov. 18, 2012).

⁸⁰ *See* Ryder, *supra* n. 17, at 21 (explaining that there is no indication that food animals were regarded as sacred—meat was an important part of the Egyptian diet).

⁸¹ *Id.*

⁸² *Id.* at 25.

⁸³ *Edicts of As'oka (Priyadars'in)* xxxiv (G. Srinvasa Murti ed. & trans., A.N. Krishna Aiyangar trans., The Adyar Lib. 1951).

⁸⁴ *Id.* at xxxix.

⁸⁵ Ryder, *supra* n. 17, at 25; *see generally* The Edicts of King Asoka (Ven. S. Dhammika ed. & trans., Buddhist Pub. Socy. 1993) (available at <http://accessstoinight.org/lib/>)

and curtailed the slaughter of animals.”⁸⁶ He followed the concept of Ahisma, or non-violence towards other creatures, a concept central to yet another religion: Jainism.⁸⁷

Asoka was a man quite involved in his Buddhist religion, but not in all aspects of it. Asoka “was obsessed by the spiritual and ethical rather than the ritualistic side of Buddhism,”⁸⁸ and was zealous in the promotion of his religion.⁸⁹ One concept of currency in the India of Asoka’s time was that of “Dharma.” According to Indian thought, it was not the King who rules, but Dharma that does.⁹⁰ What is Dharma? In one of the Pillar Edicts of Asoka, it is described in this way: “It is the avoiding of sin, performance of many meritorious actions, compassion, liberality, truthfulness and purity.”⁹¹ Another definition states that “Dharma” is a “social custom regarded as one’s duty.”⁹² Whatever the precise meaning of Dharma, we know one thing about it: the rules of the King cannot run against or change Dharma. In his Edicts then, Asoka did not ask for submission to the King, but to Dharma—essentially certain ancient moral rules.⁹³

The Edicts of Asoka were carved on stones and pillars, and placed around Asoka’s empire in the third century B.C.E.⁹⁴ There are about thirty surviving Edicts,⁹⁵ the general purpose of which were more to promote ethical behavior than to act as administrative directives.⁹⁶ Asoka felt that “[t]he best way of ensuring the good conduct of peoples beyond the frontier was to make them fully conversant with the Emperor’s policy of peace and amity with all living beings and his earnest desire that they should share his convictions.”⁹⁷ These rules were not only intended for the present generation of subjects of the Emperor, but they were also to serve as instruction for future generations.⁹⁸

The rules set forth in the Edicts relating to animals are many and varied. For example, Rock Edict I states: “Here no animal shall be killed or sacrificed.”⁹⁹ While this seems to be a broad statement that

authors/dhammika/wheel386.html#intro (accessed Nov. 18, 2012)) (explaining that Asoka encouraged Buddhist principles such as nonviolence towards all life).

⁸⁶ Ryder, *supra* n. 17, at 25.

⁸⁷ *Id.* at 25–26.

⁸⁸ *Edicts of As’oka*, *supra* n. 83, at xvi.

⁸⁹ *Id.* at xxxvii.

⁹⁰ *Id.* at xxxv.

⁹¹ *Id.* at Pillar Edict II(1), 93.

⁹² *Webster’s Third New International Dictionary* 621 (Philip Babcock Gove ed., Merriam-Webster, Inc. 2002).

⁹³ *Edicts of As’oka*, *supra* n. 83, at xxxv–xxxvi.

⁹⁴ See The Edicts of King Asoka, *supra* n. 85, at Introduction (explaining that there is “little doubt” that Asoka wrote the edicts, and that the stones and pillars were distributed across Asoka’s empire).

⁹⁵ *Edicts of As’oka*, *supra* n. 83, at xvi.

⁹⁶ *Id.* at xi.

⁹⁷ *Id.* at xiv.

⁹⁸ See generally *id.* at xi, xiv (explaining the primary purpose of the Edicts was to guide future generations).

⁹⁹ *Id.* at xxi.

ends the killing or sacrifice of animals, it is not so far-reaching. Instead, it is thought to refer only to slaughter in the palace or in the palace for the gods.¹⁰⁰ Evidently, one of Asoka's reasons for such an Edict was that cruelty to animals and slaughter of animals had been on the rise in his time, and Asoka sought to discourage slaughter and sacrifice.¹⁰¹ Thus, it would appear that Asoka did not condemn the slaughter of animals generally, but did not want large numbers sacrificed for religious reasons.¹⁰²

The Edicts do, indeed, deal expansively with the issue of animal slaughter. Rock Edict III(4) states: "Meritorious is abstention from slaughter of animals."¹⁰³ Yet another Edict states that it is proper to abstain from the slaughter of animals.¹⁰⁴ Pillar Edict V(2) states that "[o]ne living being shall not be nourished by sacrificing another living being." As noted previously, these Edicts are stated as moral rules, not as commands. Note that even Buddhist monks were not entirely prohibited from eating meat; they could eat meat in certain circumstances, like where the slaughter was not performed within their sight or the slaughter was thought to have been for the benefit of the monk.¹⁰⁵

There are also specific rules relating to the slaughter of particular animals. Pillar Edict V(1) prohibits the slaughter of a group of animals, including parrots, partridges, ruddy geese, queen ants, and boneless fish; under this Edict, pregnant goats or pigs are also prohibited from being slaughtered.¹⁰⁶ There is a prohibition of slaughter of "young ones under six months"; "cocks shall not be caponed [castrated]," "husks with living creatures . . . are not to be burnt," and "forest fires shall not be lit with a view to kill living beings."¹⁰⁷ The killing of fish on certain days is prohibited, as is the killing of animals in certain preserves on these days.¹⁰⁸ Similarly, on certain days, bulls, goats, rams, boars, and other animals that are typically castrated shall not be castrated.¹⁰⁹ On certain other days, horses and bullocks shall not be branded.¹¹⁰

Sometimes the Edicts are self-congratulatory concerning their salutary effects. For instance, Rock Edict I(3) states that while formerly there were thousands of animals slaughtered for soups, now there are only three animal lives killed, and in the future "even these three lives shall not be slaughtered." So Asoka's Edicts on animal sacrifice and

¹⁰⁰ *Edicts of As'oka*, *supra* n. 83, at xxi.

¹⁰¹ *Id.* at xxi.

¹⁰² See *Edicts of As'oka*, *supra* n. 83, at xxi-xxii (explaining that this prohibition of slaughter is in line with ancient tenets of Dharmasastra and Brahmanical rules).

¹⁰³ *Id.* at 9.

¹⁰⁴ *Id.* at Rock Edict XII, 33.

¹⁰⁵ *Id.* at xxii.

¹⁰⁶ *Id.* at Pillar Edict V(1), 103, 105.

¹⁰⁷ *Id.* at Pillar Edict V(2), 105.

¹⁰⁸ *Edicts of As'oka*, *supra* n. 83, at Pillar Edict V(2-3), 105, 107.

¹⁰⁹ *Id.* at Pillar Edict V(3), 107.

¹¹⁰ *Id.* at Pillar Edict V(4), 107-08.

slaughter apparently had an effect.¹¹¹ While one might be taken aback at the breadth, clarity, and impact of these rules relating to the use of animals in Asoka's empire, the rules on slaughtering animals, prohibiting the slaughter of pregnant animals, and other activities relating to animals are said to come from earlier Brahmanical religious rules; they are not radical splits with the past.¹¹²

We have seen that Asoka seemed to be satisfied with the results of some of his Edicts. But some of his Edicts point to other beneficial practices that developed during his reign. Pillar Edict VII states that some of the regulations provided in the Edicts are intended to increase Dharma, but Dharma itself has benefited from other human practices, like meditation:

These indeed are regulations of Dharma that have been promulgated by me *e.g.* such and such lives shall not be slaughtered; and there are also many other regulations of Dharma made by me; but, it is by meditation that there is increase of devotion to Dharma among the people resulting in the abstention from injury to living beings and abstention from killing of living beings.¹¹³

So it is not just the Edicts that benefited Dharma and reduced injuries to animals; the practice of meditation is said to have contributed to these ends as well.

In the Edicts of Asoka we have rules that from their language and apparent purposes seem, unlike rules previously analyzed, to have a purpose of protecting at least certain types of animals for their own sake. We have prohibitions of slaughter and killing, at least at certain times and places, and rules relating to certain cruel procedures performed on animals. But on closer observation, it emerges that the foundation of these regulations is the zealous religious convictions of Asoka and the goal of avoidance of sin consistent with the religious concept of Dharma. Asoka was focused on encouraging people to follow moral rules in harmony with his religious beliefs and tried to engender adherence to these sacred rules by the admonitions of the Edicts. Moreover, note that these rules were not necessarily original with Asoka. Some of the rules are apparently merely restatements of earlier Brahmanical religious rules. So like the rules of Exodus, the Edicts of Asoka have as their primary motivation the grand religious vision of Emperor Asoka, which included, it seems, a heady blend of religious ideas current in his India, including Buddhist, Brahmin, and Jain concepts.

These religious rules are, however, far different from those of the Israelites. The religious rules we see here in India are not ensconced in a hierarchical view of the world as described in Exodus and related

¹¹¹ See *also id.* at Rock Edict IV(1-3) (stating that for hundreds of years in the past there had been an increase in cruelty to animals but now the people are, under Asoka's proclamation of Dharma, abstaining from cruelty to and slaughter of animals).

¹¹² See *id.* at xxii-xxiii (stating that the practice of not slaughtering certain animals promotes Dharma).

¹¹³ *Id.* at Pillar Edict VII, 123.

texts, with humans atop that hierarchy. Instead, we have religious views steeped in calm waters of non-violence that, unfortunately, did not reach their mark of abstinence from animal food, but did ostensibly have the impact of reducing the slaughter and killing of animals. And it is this misty foundation of non-violence that may lead us to think that what we are observing are rules fashioned for the sake of animals. But the truth is that these rules are primarily religious, with the goal of changing human behavior to conform to a certain spiritually dictated standard of avoidance of sin. It is just that the main religious concept utilized here is not one particularly common in Western religious thought; that is, the sacred nature of non-violence.

In the world of the ancient period, laws relating to animals were primarily motivated by economic and religious concerns. The economic rules are easily explained by the fact that animals are property. Given this circumstance, it was necessary to have rules concerning the protection of the value of that property and rules relating to resolving disputes involving this property, including regulations relating to deaths caused by animals. In the case of Mesopotamian law, the rules relating to the goring ox and other animals are examples of this kind of economically based law. Religiously grounded rules also have primacy in certain ancient laws, like the law of the Israelites and the Edicts of Asoka. It is not difficult to fathom this either. It was in this ancient period that many religions were developing and refining their doctrines and worldviews, and it was natural to have regulations on all aspects of life—including the human relationship to animals—based on religiosity. The next question then becomes—how did the world change in the medieval period?

III. THE MEDIEVAL PERIOD

A. *Economics Again*

It has been said with, I imagine, considerable veracity, that there is not a very good historical record on the relationship between animals and humans during the medieval period.¹¹⁴ This was the “Dark Ages,” riddled with pestilence, plague, and a profound ignorance resulting from a lack of advances in knowledge, at least in the Western world.¹¹⁵ So it is not surprising to find that much of what we saw relating to animals in the ancient period continues in the medieval period: the laws relating to animals have as primary motivations economics and religion. The economic rules can be seen as simply continuations and refinements of the rules of the ancients that we saw earlier.

¹¹⁴ Ryder, *supra* n. 17, at 38.

¹¹⁵ See e.g. Thomas H. Brohman, *Matter, Force, and Christianity in the Enlightenment*, in David C. Lindberg & Ronald L. Numbers, *When Science & Christianity Meet* 85, 87 (U. of Chi. Press 2003) (noting that the period following the “Dark Ages” is called the Enlightenment because of its movement away from the superstition and political repression of the medieval period).

Consider the laws of the Salian Franks, which I believe provide an excellent example of medieval period legal provisions on economic issues. Franks were Germans who crossed the Roman frontier in the third century,¹¹⁶ living in parts of modern Belgium, the Netherlands, northern France, and portions of the Rhineland.¹¹⁷ Frank leader Clovis codified what were previously presumably unwritten Frankish laws in what is known as the *Pactus Legis Salicae*.¹¹⁸ This oldest version of the Frankish Laws dates from 507–511.¹¹⁹ There was also a later version, the *Lex Salica Karolina*, a corrected and reissued eighth century rendering created by Charlemagne.¹²⁰ The *Lex Salica Karolina* has rules similar to the *Pactus Legis Salicae* on issues relevant to the present inquiry, so I will here focus on the latter version of the law.¹²¹

That both animals and some humans are property in Salian Law is made evident in provisions that treat the theft of slaves and horses together.¹²² Indeed, the *Pactus Legis Salicae* contains a number of economic rules concerning the theft of animals.¹²³ Animals covered by the theft regulations include horses, pigs, cows, oxen, sheep, goats, birds, dogs, and bees.¹²⁴ These provisions set amounts that must be paid as a penalty for theft, and in addition, require the return of the animal or its value and payment for loss of use of the animal for the time it was appropriated.¹²⁵ As we will see, this is a general formula applied for theft and other sorts of losses of animals in Salian Law, and has the interesting aspect of not only providing a penalty, but also effectively requiring the payment of rental value for the property during its absence.

Pigs, oxen, and cows were apparently the most common and most valuable agricultural animals to the Franks.¹²⁶ There are a number of different rules in the *Pactus Legis Salicae* about various situations involving the theft of pigs and distinct penalties for stealing different

¹¹⁶ *The Laws of the Salian Franks* 3 (Katherine Fischer Drew trans., U. of Penn. Press 1991).

¹¹⁷ Eupedia, *A Brief History of the Franks: Measuring the Influence of the Frankish People, Language, and Culture on the Rest of Europe*, http://www.eupedia.com/europe/frankish_influence_modern_europe.shtml#Origin (accessed Nov. 18, 2012); Intl. World History Project, *The Franks: A History of the Franks*, <http://history-world.org/franks.htm> (2001) (accessed Nov. 18, 2012).

¹¹⁸ *The Laws of the Salian Franks*, supra n. 116, at 8.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 53.

¹²¹ Compare e.g. *Pactus Legis Salicae* in *The Laws of the Salian Franks*, supra n. 116, at §§ II–VI, 65–70 with *Lex Salica Karolina* in *The Laws of the Salian Franks*, supra n. 116, at §§ XLVII–LII, 207–213 (including provisions pertaining to the theft of animals).

¹²² *Pactus Legis Salicae* in *The Laws of the Salian Franks*, supra n. 116, at § X, 74–75.

¹²³ *Id.* at §§ II–VIII, X, 65–72.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *The Laws of the Salian Franks*, supra n. 116, at 49.

ages and numbers of pigs.¹²⁷ Rules are also provided relating to injuries done to pigs. For example, a person striking a sow in a way that causes it to lose its young is liable for 200 denarii and must pay the value of the animals lost and compensate for the time of use that was lost as well.¹²⁸ The penalty amounts required to be paid for the theft of various animals depends on their use; the values are set by the economic value of the animals.¹²⁹ This is made evident in the provisions that provide differing monetary penalties for stealing different sorts of dogs; the penalties for stealing hunting dogs, tracking dogs, and herd dogs vary.¹³⁰ Similarly, rules are provided for the penalties for the theft of different sorts of horses.¹³¹ Stealing of wild game that has been captured by use of dogs or that has been domesticated is also dealt with in the same way as other animals—with a penalty, return of the animal or its value, and payment for loss of use.¹³²

Not to allow the ancients to outdo them, the Salian Franks had rules covering the goring ox situation. The Franks had rules relating to the killing of humans by four legged animals.¹³³ The compensation required is set forth in these rules and provides compensation of half the “composition” (meaning a “penalty” set forth by law that varied from one individual to the next)¹³⁴ plus the animal itself as the other half composition if the owner had not properly cared for the beast (meaning, presumably, by restraining the animal).¹³⁵ Thus, though the penalties are somewhat different, the concept of economic compensation for what are effectively torts caused through the agency of animals that we saw in the Laws of Eshunna and the Code of Hammurabi is continued in the laws of the Salian Franks.

B. Religion and Animal Law in the Medieval Period

When most people think of the medieval period, only negatives come to mind. It was a time of violence, disease, serfdom, piety, and religious meddling with, if not control of, government.¹³⁶ We do not see anything like the glory of the Greeks or the pragmatic advances of the

¹²⁷ *Pactus Legis Salicae* in *The Laws of the Salian Franks*, *supra* n. 116, at § II, 65–67.

¹²⁸ *Id.* at § II(5), 66. Note that the formula for damages here is similar to that used relating to theft of animals.

¹²⁹ *See id.* at §§ III–VI, 65–71 (providing the factors considered—such as age and use—when determining penalties for the theft of an animal).

¹³⁰ *Id.* at § VI, 70–71.

¹³¹ *Id.* at § XXXVIII, 99–101.

¹³² *Id.* at § XXXIII, 95–96.

¹³³ *Pactus Legis Salicae* in *The Laws of the Salian Franks*, *supra* n. 116, at § XXXVI, 98.

¹³⁴ *The Laws of the Salian Franks*, *supra* n. 116, at 35.

¹³⁵ *Pactus Legis Salicae* in *The Laws of the Salian Franks*, *supra* n. 116, at § XXXVI, 98.

¹³⁶ *See e.g.* The History Channel, *Black Death*, <http://www.history.com/topics/black-death> (accessed Nov. 18, 2012) (discussing the widespread death and disease caused by the Black Plague during this time); Robert B. Ekelund, Jr., et al., *An Economic Analysis*

Romans in the Western world. Given all of this, one would not expect the lot of animals to be a good one; why should it be, it was miserable for most everyone else. Nonetheless, there were those who had tender thoughts about animals in the Middle Ages, often arising from fervent religious faith. The most prominent of these was Saint Francis of Assisi, the Catholic patron saint of animals. Among other things, he is said to have mollified a man-eating wolf, spoken to birds, and abandoned his room for the benefit of a donkey.¹³⁷ Whatever the truth of these stories, the traditional Catholic blessing of the animals is held on or near the feast day of Saint Francis.¹³⁸

But St. Francis was not alone in this epoch in having reverence and concern for animals. For instance,

Of St. James of Venice—an obscure saint of the thirteenth century—it is told that he was accustomed to buy and release the birds with which Italian boys used to play by attaching them to strings, saying that “he pitied the little birds of the Lord,” and that his “tender charity recoiled from all cruelty, even to the most diminutive of animals.”¹³⁹

The reasons given for concern about animals among the religious were not, however, typically focused on the animals, but rather on duties to God. For example, Catherine of Siena, of the fourteenth century, stated, “[w]e love God’s creatures because we see that God loves them supremely. It is the very nature of love to love everyone and everything that our beloved loves.”¹⁴⁰ This same idea is seen in a quote from St. Bridget of Sweden, another pious woman of the fourteenth century:

Besides, sometimes animals also suffer because of their own natural immoderation or as a curb to their ferocity, or as a cleansing of nature itself, or sometimes because of human sins in order that human beings, who have a greater use of reason, might consider how much punishment they deserve, when the creatures they love are plagued and taken away. But if human sins did not demand it, animals, which are under human charge, would not suffer in so singular a manner.

But not even they suffer without great justice. Their suffering occurs either to put a quicker end to their lives and lessen their wretched toils that con-

of the Protestant Reformation, 110 *J. of Pol. Econ.* 646, 668 (2002) (asserting that the Medieval Church exerted significant economic and political control).

¹³⁷ Jacob Dagger, *Blessing all Creatures, Great and Small*, 92 *Duke Mag.* 25–26 (Nov.–Dec. 2006). John Tolan, *Saint Francis and the Sultan: The Curious History of a Christian–Muslim Encounter* 3 (Oxford U. Press 2009); Kevin E. Mackin, *Blessing of Animals*, <http://www.americancatholic.org/features/francis/blessing.asp> (accessed Nov. 18, 2012).

¹³⁸ *Id.*

¹³⁹ William Edward Hartpole Lecky, *History of European Morals from Augustus to Charlemagne* vol. 2, 182–83 (D. Appleton & Co. 1870) (translating *Acta Sanctorum Maii* vol. 7, 456 (Bollandists ed., Victorem Palmé 1866); Catholic Online, *Catholic Encyclopedia: The Bollandists*, <http://www.catholic.org/encyclopedia/view.php?id=1986> (accessed Nov. 18, 2012) (the Bollandists are “[a]n association of ecclesiastical scholars engaged in editing the *Acta Sanctorum*”).

¹⁴⁰ Rod Preece, *Awe for the Tiger, Love for the Lamb: A Chronicle of Sensibility to Animals* 89 (U. B.C. Press 2002).

sume their strength or on account of a change in seasons or out of human carelessness during the process of work. People should therefore fear me, their God, above all things, and treat my creatures and animals more mildly, having mercy on them for the sake of me, their Creator. I, God, accordingly decreed the Sabbath rest, because I care for all my creation.¹⁴¹

Since so much in the medieval period turned on the religious, it should not be remarkable to see attitudes towards and treatment of animals reduced to an aspect of religious practice. This we will also see carried out in the law to a significant extent.

While in this section the spotlight is placed on laws of decidedly Christian nations, the impact of the religious rules of the Israelites did not vanish. The laws of Alfred the Great of England are an example of religious rules in line with those in Exodus that we have seen previously. We find in the laws of Alfred the Great a combination of the “Mosaic Code [the law God gave the Israelites through Moses] with the Christian principles of Celto-Brythonic Law and old Germanic customs.”¹⁴² This is revealed even before looking at specific laws since Alfred’s Law Code is preceded by a long introduction that contains the Ten Commandments and many passages from the Book of Exodus.¹⁴³ Further, there are also provisions in this Code that are extraordinarily similar to, for instance, Exodus 20:3–17, which includes the Ten Commandments.¹⁴⁴

Intermingled with these religious rules in the Laws of Alfred the Great are regulations with economic purposes as we saw in the ancient period and in the laws of the Salian Franks. We see yet more rules on the goring ox and observe that these rules reflect a mixture of the economic concerns reflected in Mesopotamian law and the religious fervor of Exodus.¹⁴⁵ For example, the Laws of Alfred the Great contain a rule very similar to that of Mesopotamian law: If an ox kills another ox, the owners are to share the value of the live ox after it is sold and share the meat of the dead ox.¹⁴⁶ But if the owner knew the ox was a danger to gore, the owner must give another ox for the dead ox.¹⁴⁷ Rules are also created to award damages for stealing animals. Stealing oxen or sheep results in a penalty of two oxen for each stolen, and four sheep for each stolen.¹⁴⁸ Worse yet awaits the impecunious thief, for a thief with nothing to give is to be sold for the transgression.¹⁴⁹ There is also

¹⁴¹ *The Prophecies and Revelations of Saint Bridget of Sweden* bk. 5, interrogation 14, 413–14 (available at <http://www.catholic-saints.net/saints/st-bridget/st-bridget-of-sweden.pdf> (accessed Nov. 18, 2012)).

¹⁴² F. N. Lee, *King Alfred the Great and Our Common Law* 1 (Aug. 2000) (available at <http://www.dr-fnlee.org/docs6/alfred/alfred.pdf> (accessed Nov. 18, 2012)).

¹⁴³ *Id.* at 6.

¹⁴⁴ *Id.* at 9–10; *Exodus* 20:3–17 (King James).

¹⁴⁵ *Exodus* 20:1–23:33 (King James) (detailing God’s commandments, including punishment for failure to abide by such commandments).

¹⁴⁶ Lee, *supra* n. 142, at 11.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* at 12.

¹⁴⁹ *Id.*

a rule for those entrusted with the care of animals who violate the commandment not to steal. If an owner entrusts livestock to another and the person to whom they are entrusted steals the livestock, the penalty is twofold what is lost.¹⁵⁰ The bailee need not pay, however, if he has a witness proving that the livestock died on their own or were taken by an army.¹⁵¹

In addition to these economic rules, we also see other rules that are based, at least in part, on the strictures of Exodus. The Laws of Alfred the Great, like Exodus, dictate the stoning of oxen taking the lives of humans. His Code provides that if an ox gores a man or woman to death, “let the ox be stoned to death; but do not let its flesh be eaten!”¹⁵² We also see a variation on the rule relating to notice of the violent nature of an ox. If the owner knew that the ox had gored two or three days earlier, the ox is stoned and there is also monetary recompense in the amount a council determines.¹⁵³ For a specific penalty we observe that if a bondsman or bondsmen are gored, thirty shillings is to be paid to the overlord.¹⁵⁴ Persons having intercourse with cattle shall suffer death,¹⁵⁵ a rule similar to that of Leviticus.¹⁵⁶

So here are rules reminiscent of both the economic and religious rules that we earlier saw in the ancient period reflected in the economic rules of the Mesopotamians and the religious decrees of the law of the Israelites. But in the medieval period we also see a new twist in the animal-human relationship come to prominence: the trial of animals for crimes committed against humans.

C. Medieval Animal Trials

One of the most bizarre and fascinating aspects of the law relating to animals in the medieval period is the conduct of judicial trials of animals in Europe. These trials, though concentrated primarily in the medieval period, occurred as late as the twentieth century.¹⁵⁷ The practice of trying animals may, however, actually date back to the an-

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² Lee, *supra* n. 142, at 11.

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 12.

¹⁵⁶ *Leviticus* 20:15–16 (King James) (“And if a man lie with a beast, he shall surely be put to death: and ye shall slay the beast. And if a woman approach unto any beast, and lie down thereto, thou shall kill the woman, and the beast.”).

¹⁵⁷ Girgen, *supra* n. 72, at 122. Girgen analogizes modern proceedings relating to destroying “vicious” animals to medieval animal trials, but notes that the procedural protections afforded animals in medieval trials, like formal charges, counsel, or a public hearing, are no longer provided. *Id.* at 127. In short, ironically, justice for animals is now “summary”: lacking in procedural protections provided in the medieval period. *Id.* at 127–28.

cient Greeks. While there is apparently no direct evidence of these Greek animal trials, Aristotle and Plato spoke of such trials.¹⁵⁸

Whatever the history of proceedings of this kind, it has been argued that the reason for the ancient Greek legal proceedings against animals that killed humans was the same as for trials of inanimate objects (yes, there were apparently trials of inanimate objects too): to remove “the pollution that, because of the crime, had ‘contaminated’ the community.”¹⁵⁹ Excising this blight from the community had a religious element to it: “In holding the trials, the ancient Greeks would have also hoped to appease the Erinys (avenging spirit of the dead person) lest misfortune fall upon the state.”¹⁶⁰ The Greeks “held the general notion that the moral equilibrium of the community had been disturbed by the murder and that somebody or something must be punished or else dire misfortune, in the form of plagues, drouths, reverses in men’s fortunes, would overtake the land.”¹⁶¹

Medieval animal trials in Europe are perhaps best conceived of as two distinct sorts of proceedings.¹⁶² Where animals caused some sort of public nuisance, like damaging crops, this was dealt with by church officials in an ecclesiastical court.¹⁶³ These courts dealt with groups of untamed animals, like swarms, that caused damage.¹⁶⁴ The ecclesiastical courts were there to bring to divine justice animals that could not be captured and brought to trial, and needed “the intervention of the Church and the exercise of its supernatural functions for the purpose of compelling [the animals] to desist from their devastations and to retire from all places devoted to the production of human sustenance.”¹⁶⁵ It was customary to have several specimens of the offending creatures present in court and to put them to death while the anathema was pronounced.¹⁶⁶ In cases of physical injury or death to humans, on the other hand, animals were tried and punished by a secular court.¹⁶⁷ It is these courts that also generally conducted trials

¹⁵⁸ *Id.* at 105–06; see also William Ewald, *Comparative Jurisprudence (I): What Was It Like to Try a Rat?* 143 U. Pa. L. Rev. 1889, 1912–13 (1995) (noting that the Athenians put three different classes of objects on trial, including animals, and that such proceedings were recorded by both Aristotle and Plato).

¹⁵⁹ Girgen, *supra* n. 72, at 105.

¹⁶⁰ *Id.* at 106.

¹⁶¹ 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, 698 (1916).

¹⁶² Girgen, *supra* n. 72, at 99.

¹⁶³ *Id.*; see also Ewald, *supra* n. 158, at 1903–04 (“As a general rule, the wild animals came within the jurisdiction of the ecclesiastical courts . . . whereas domestic animals came within the jurisdiction of the ordinary criminal courts.”).

¹⁶⁴ Girgen, *supra* n. 72, at 99.

¹⁶⁵ E. P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* 3 (Lawbook Exch. Ltd. 1998); see also Ewald, *supra* n. 158, at 1904 (“[T]he primary purpose of the trial was to rid the region of infestation by the threat of anathema or excommunication.”).

¹⁶⁶ Evans, *supra* n. 165, at 3.

¹⁶⁷ Girgen, *supra* n. 72, at 99.

concerning individual domestic animals.¹⁶⁸ Thus, in the secular courts you essentially had animals that were domesticated and could be arrested, held, and individually punished.¹⁶⁹

These trials took place in a number of countries including Switzerland, Italy, Germany, and France.¹⁷⁰ The church also tried animals in Ethiopia, Scandinavia, Spain, Canada, Turkey, Denmark, and Brazil.¹⁷¹ All of these courts followed with grave sincerity their procedural rules in these trials, just as they would in the case of proceedings against humans.¹⁷² Defense counsel was provided by the community at its expense, and these counsel raised all available arguments on behalf of their clients.¹⁷³ In the famous case of the rats of Lucenay, who were accused of eating the local barley crop, the rats were represented by a young lawyer named Bartholomé Chassenée who won considerable fame for his defense of the rats. The story of Chassenée and the rats is told by Gerald Carson:

The rats of the ancient canton of Lucenay . . . were accused of having feloniously eaten up and wantonly destroyed the barley harvest and were ordered brought before the bishop's vicar, who exercised jurisdiction in such cases. The vicar appointed Bartholomé Chassenée as counsel to represent the rodents. Chassenée, then a young lawyer, won professional renown by his ingenious defense of the rats and was elevated to the high position of president of the Parlement de Provence, a judicial post corresponding to that of chief justice. Chassenée also subsequently wrote a learned treatise on the application of the law to animals and insect offenders

At Autun, when Chassenée's client rats failed to appear, their attorney attacked the summons as being defective on the ground that it had been too local and individual in character and called for the appearance of some but not all of the rats. Many, he insisted, had not heard of the accusation. The curates of every parish, therefore, were given the task of notifying all the rats in their ecclesiastical care. Once again, after due notice, the rats failed to appear. The lawyer then pointed out that the rats were widely scattered and required more time, since great preparations would have to be made for such an extraordinary assemblage. The judge granted the plea.

Again on court day there were no rats on hand. The attorney then assured the court that his clients were most anxious to comply but were entitled to

¹⁶⁸ *Id.*

¹⁶⁹ See Evans, *supra* n. 165, at 2–3 (“Animals, which were in the service of man, could be arrested, tried, convicted and executed, like any other members of his household; it was, therefore, not necessary to summon them to appear in court at a specified time to answer for their conduct, and thus make them, in the strict sense of the term, a party to the prosecution, for the sheriff had already taken them in charge and consigned them to the custody of the jailer.”).

¹⁷⁰ Girgen, *supra* n. 72, at 100.

¹⁷¹ *Id.*

¹⁷² *Id.* at 99; see also Carson, *supra* n. 25, at 27 (describing some of the procedures followed for animals being tried, including the service of papers by an officer of the court, the appointment of counsel, and, upon failure to show cause, an order to appear in court).

¹⁷³ Girgen, *supra* n. 72, at 99.

have all the safeguards of justice thrown around them in responding to the summons. Under existing circumstances, they were detained by the fear of certain “evil-disposed cats kept by the plaintiffs.” Chassenée demanded that before the rats could obey the writ, the accusers should be required to post bonds guaranteeing the good behavior of their pets. At this point the complainants gave up and the proceedings were adjourned¹⁷⁴

Thus, Chassenée cleverly frustrated the prosecution of the offending rats by alleging the failure to provide proper notice of the summons and the justifiable failure of the rats to appear due to fear of being attacked by local cats.¹⁷⁵

These trials effectively treated animals as if they were human offenders capable of formulating the *mens rea* necessary to be culpable in a crime. Sometimes the suits were settled with some compromise, like allowing offending swarms of animals to reside in some particular area.¹⁷⁶ One example of this phenomenon was a proceeding against termites at the Maranhão Monastery in Brazil, where the culpable termites, who were judicially determined to be entitled to sustenance, were ordered to be provided with a suitable habitat by the friars of the Monastery and were ordered by the tribunal to go to that habitat.¹⁷⁷ Animals were also sometimes tortured in connection with these proceedings, but not because it was thought there was going to be a confession by the defendant animal; it was rather to assure that “all forms prescribed by the law” were followed.¹⁷⁸ In addition, animals were not infrequently kept in prison along with human defendants.¹⁷⁹

Perhaps even more strange is that animals were sometimes dressed in human clothes for their executions, and there is at least one instance where a pig was, in addition, mutilated before being executed due to the horrific nature of the “crime” committed by the pig.¹⁸⁰ Animals could even be witnesses in Switzerland—if a person killed a burglar and the issue was the justifiability of the killing of the burglar, the accused could produce a cat, dog, or cockerel that witnessed the killing and if, after stating his innocence, the animal did not contradict him, he would be cleared.¹⁸¹ The theory at the bottom of this is that Heaven (God) would intervene to allow the animal to speak rather than allow a

¹⁷⁴ Carson, *supra* n. 25, at 31–32.

¹⁷⁵ *Id.*

¹⁷⁶ See Evans, *supra* n. 165, at 124 (stating that termites were justified in appropriating fruits of fields).

¹⁷⁷ Girgen, *supra* n. 72, at 100–01.

¹⁷⁸ Evans, *supra* n. 165, at 139.

¹⁷⁹ Girgen, *supra* n. 72, at 99; see also Evans, *supra* n. 175, at 142 (stating that “brutes” and human criminals were confined in the same prison).

¹⁸⁰ Peter Dinzelsbacher, *Animal Trials: A Multidisciplinary Approach*, 32 *J. of Interdisc. History* 405, 408 (2002); see also Girgen, *supra* n. 72, at 98 n. 4 (noting an instance in which a sow was dressed in human clothing before being executed).

¹⁸¹ Carson, *supra* n. 25, at 30.

murderer to escape.¹⁸² In line with all of this procedural pageantry, professional hangmen were utilized to kill convicted animals.¹⁸³

Punishment was also typically of a kind imposed on humans. For instance, penalties for animals were sometimes stoning to death in accord with the Biblical mandate or other punishments that were also used on humans, such as beheading or being buried alive.¹⁸⁴ Not surprisingly, the penalty for killing a human was typically death.¹⁸⁵ Even appeals sometimes occurred, and sentences could be changed and acquittals granted.¹⁸⁶ And do not think that the animals were always convicted; sometimes animals were found not guilty.¹⁸⁷

Very often the trials of individual animals involved the killing of a human by an animal.¹⁸⁸ But acts of sodomy on animals also came before the courts and animals involved in these sex crimes were typically tried and killed.¹⁸⁹ This result derived from the religious idea that animals involved in bestiality must also be put to death, as would the human.¹⁹⁰ Even the United States (U.S.) saw trials of animals sodomized by humans in the 1600s.¹⁹¹

So what were these trials about; what was the motivation for trying pigs, convicting them, and then dressing them in human clothes for their execution? As can probably be gleaned from the description of these trials where they were conducted, and the matters therein resolved, the purposes were primarily religious. Nonetheless, many possible reasons for these trials have been advanced. It is not infrequently said, for instance, that the ultimate motivating force underlying these trials is the Old Testament. Indeed, “[m]uch of the original inspiration and justification for holding animals accountable for their transgressions came from early Hebrew law, as laid out in the Old Testament.”¹⁹² It has also been argued, however, that the trials got rid of social dangers,¹⁹³ like vicious animals. Deterrence may also have been a rationale,¹⁹⁴ although it is hard to see how executing one animal will deter others; but then the Medieval mind saw the world quite differently than modern people do. It has also been said that these trials

¹⁸² *Id.*

¹⁸³ Girgen, *supra* n. 72, at 99.

¹⁸⁴ *Id.* at 111–12.

¹⁸⁵ *Id.* at 105.

¹⁸⁶ Evans, *supra* n. 165, at 139–40.

¹⁸⁷ Girgen, *supra* n. 72, at 109–10; *see also* Evans, *supra* n. 165, at 139–40 (noting that judges occasionally ruled in favor of the animal).

¹⁸⁸ *See* Wise, *Rattling the Cage*, *supra* n. 22, at 37 (outlining several situations in which animals killed humans and were punished by death).

¹⁸⁹ *Id.* at 38.

¹⁹⁰ *Leviticus* 20:15-18 (King James); *see also* Girgen, *supra* n. 72, at 116 (citing *Leviticus* and its requirement that the animal involved in bestiality also be killed); *see also* Evans, *supra* n. 165, at 147–49 (stating that “buggery” was uniformly punished by burning both parties alive).

¹⁹¹ Girgen, *supra* n. 72, at 108.

¹⁹² *Id.* at 115.

¹⁹³ *Id.* at 118.

¹⁹⁴ *Id.*

may have been conducted to establish a sense of order; people needed to think that the seemingly random natural world was subject to law.¹⁹⁵

A number of commentators have also argued that these trials were held to uphold the hierarchical order ordained by God.¹⁹⁶ Through the punishment of offending animals the sacred cosmic equilibrium is restored.¹⁹⁷ But as we saw with the goring ox rules of Exodus, there may be a retributive element in conducting these trials and carrying out punishment.¹⁹⁸ This may be the same concept as involved in *noxal surrender*, where an animal or other object is given up to the person offended as retribution.¹⁹⁹ Of course, as previously discussed, more than one motive may be behind a particular trial and the motives for the trials may have varied from place to place.²⁰⁰

After having gone through a litany of possible reasons for Medieval animal trials, one commentator, Jen Girgen, concludes that the upholding of the divine hierarchy and retribution theories are the best explanations.²⁰¹ This view is consistent with mine. I believe that the primary purposes of Medieval animal trials were religious. That they were designed to protect the divinely ordained hierarchy of God has been noted by a number of authors in addition to Girgen, including Steven Wise.²⁰² J.J. Finkelstein, discussing the goring ox rules, is of a similar mind, and states that instances of animals killing humans were traditionally viewed as offenses against the “divinely ordained order,” and amounted to “‘high treason’ against God.”²⁰³ Similarly, William Ewald has stated that Medieval animal trials may have been intended to eradicate a religious taint.²⁰⁴ Retribution is a motive that religion also partakes in; the Old Testament is rife with retributive justice.²⁰⁵

That these trials had predominantly religious purposes finds further support in that they were ultimately derived from Biblical rules, like the rules relating to the goring ox.²⁰⁶ Their religious spirit is also evidenced by the fact that penalties imposed in the trials were not in-

¹⁹⁵ *Id.* at 119.

¹⁹⁶ *Id.*; see also Wise, *Rattling the Cage*, *supra* n. 22, at 39 (referencing punishments of animals for serious trespasses against the divine hierarchy).

¹⁹⁷ Girgen, *supra* n. 72, at 120.

¹⁹⁸ See *id.* (stating that according to Justice Holmes, “the early forms of legal procedures were grounded in vengeance”).

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 121.

²⁰¹ *Id.*

²⁰² Wise, *Rattling the Cage*, *supra* n. 22, at 39; see also Carson, *supra* n. 25, at 28 (stating that the reasons for the trials were that God was the author of canon law and all creatures are subject to God).

²⁰³ Finkelstein, *supra* n. 58, at 180.

²⁰⁴ Ewald, *supra* n. 158, at 1913–14.

²⁰⁵ See Morris J. Fish, *An Eye for an Eye: Proportionality as a Moral Principle of Punishment*, 28 Oxford J. Leg. Stud. 57, 57–58 (stating that the Old Testament references *lex talionis*, an eye for an eye, in three sections).

²⁰⁶ Finkelstein 1973, *supra* n. 58, at 229.

frequently in line with Biblical penalties, like stoning the animal to death.²⁰⁷ Some of the penalties chosen in the ecclesiastical court cases were themselves explicitly religious: excommunication or anathematization.²⁰⁸ But it was not just the penalties in these trials that carried religious shadings. The trials themselves, as quasi-religious spectacles (if not explicitly religious as in the case of the ecclesiastical court proceedings), were rituals carrying an unmistakably religious flavor. The pageantry and ritual of the trials, the color and verve with which they were conducted, the solemnity and seriousness of their processes, like religious ceremonies, were themselves important as we can infer from this passage from Paul Schiff Berman:

The Biblical treatment of the ox indicates that at least as far back as the *Book of Exodus*, crimes of animals against human beings were viewed as a threat to the moral and religious fibers of the community. Punishment was an insufficient remedy for such a transgression; some ritual was needed to reassert a sense of order.²⁰⁹

So the ritual of the trials acted as a sacrament which safeguarded justice,²¹⁰ a justice that derived ultimately from the words of God.

Moreover, Finkelstein notes that animal trials have never occurred except in Western societies that adhere to a hierarchical classification of the phenomena of the universe.²¹¹ One of his general theses is that the trials of animals and inanimate objects in legal proceedings are a purely Western phenomenon that did not occur in other cultures, including other ancient cultures.²¹² He points out, for example, that a belief in continuity between animals and humans, not hierarchy, is reflected in certain ancient cultures, including the Mesopotamian and Native American cultures.²¹³ The absence of animal trials in these cultures and their existence in Western culture suggests that Western religious views of the hierarchical relationship between humans and animals are motivating forces underlying Medieval animal trials.

Like Girgen and Wise, Finkelstein views animal trials as a response to attacks by animals on accepted religious orthodoxy. These trials were performed for the same reason as that constituting the foundation of the goring ox rules in the Old Testament—to reverse damage done to the divinely ordered hierarchy by errant acts of animals.²¹⁴ The destruction of the offending animal obliterated the taint of a degradation of all humanity caused by the animal's act.²¹⁵ Such

²⁰⁷ Girgen, *supra* n. 72, at 112.

²⁰⁸ Evans, *supra* n. 165, at 54–55.

²⁰⁹ Paul Schiff Berman, *Rats, Pigs and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. Rev. 288, 322 (1994) (emphasis added).

²¹⁰ *Id.* at 322–23.

²¹¹ Finkelstein, *supra* n. 67, at 48.

²¹² *Id.* at 64.

²¹³ *Id.* at 52.

²¹⁴ *Id.* at 70.

²¹⁵ *Id.* at 71.

acts could not be tolerated and the evidence of the violation of the hierarchical order had to be removed.²¹⁶

Although the Church itself was not entirely consistent in explaining the phenomena that came before the tribunals undertaking these trials, the explanations given were nonetheless supernatural in flavor.²¹⁷ The pestilent swarms and the like were alternatively described as agents of the Devil or agents of God punishing humans for their sins.²¹⁸ Demonic possession of animals is one explanation that has been given for the necessity of the trials and their importance.²¹⁹ The Catholic Church promoted the idea that animals are possessed by demons.²²⁰ Protestants have also propounded such views.²²¹ Some went so far as to maintain that all animals were possessed by demons.²²² The existence of demons in animals can be used to explain how animals can appear to have feelings and intellect—it is the demons in them that have these characteristics.²²³ Indeed, given this sort of explanation of the intellect and feelings of animals, Jesuit Priest Père Bougeant was surprised that animals did not act in a more sophisticated way than they do.²²⁴

The existence of these demons possessing animals is a way of reconciling the cruel treatment of animals with an all-powerful and all-good God.²²⁵ The famous defender of animals in animal trials, Chassenée, said that the prosecutions were not brought against the animals, but against the Devil in them—the animals were the earthly tools of Satan.²²⁶ So we can see the trials as “not intended to punish bad animals, but to punish badness within animals.”²²⁷ Animals were essentially tried as agents of an outside demonic power: “The idea that

²¹⁶ *Id.* at 73.

²¹⁷ Evans, *supra* n. 165, at 4–5.

²¹⁸ *Id.*

²¹⁹ Ewald, *supra* n. 158, at 1907; *see also* Evans, *supra* n. 165, at 5–6 (“It was also as a protection against evil spirits that the penalty of death was inflicted upon domestic animals. A homicidal pig or bull was not necessarily assumed to be the incarnation of a demon . . . but the homicide, if it were permitted to go unpunished, was supposed to furnish occasion for the intervention of devils, who were thereby enabled to take possession of person and places.”).

²²⁰ Evans, *supra* n. 165, at 75. Promoting this view was “good for business” for the Church since it was the authority that addressed demons. *See id.* at 13 (“Every untoward event furnished an occasion for their intervention, which could be averted or repelled only by their benedictions, exorcisms or anathemas of the Church. The ecclesiastical authorities were therefore directly interested in encouraging this superstitious belief as one of their chief sources of power . . .”); *but see* Ewald, *supra* n. 158, at 1908 (arguing that the “theory that animals are in fact demons seems to have been regarded by the Church as highly questionable, if not actually heretical”).

²²¹ Evans, *supra* n. 165, at 76.

²²² *Id.* at 6.

²²³ *Id.* at 67.

²²⁴ *Id.* at 81.

²²⁵ *Id.* at 82.

²²⁶ Bradley C. Bobertz, *Book Review: Of Nature and Nazis*, 22 Colum. J. Envtl. L. 353, 364 (1997).

²²⁷ *Id.* at 365 (emphasis omitted).

animals were punished as instrumentalities of evil receives indirect support from the fact that many were tortured before being put to death. Such violence on the body of the accused can be seen as a way of attacking the evil residing within the body itself—another way to punish the devil.”²²⁸ Moreover, the penalties sometimes used—excommunication or anathematization—would be utterly futile acts if carried out against animals having no understanding or reason. Therefore, these penalties were not aimed at the animals, but at the Devil possessing the animal.²²⁹ In line with the idea of demonic possession of animals and the destruction of those demons as an explanation for animal trials, Exodus orders the death of animals used in or accused of witchcraft,²³⁰ another apparatus of Beelzebub. And all of this judicial pursuit of animals is consistent with Medieval Christian beliefs in retribution against inanimate objects involved in crimes because they were possessed by demons.²³¹

There is, however, another way to look at the animals involved in these trials. Rather than agents of the Devil, the animals tormenting humans are “Messengers of God” sent by the Almighty as punishment for the sins of the community. The swarms of insects, rats, and other animal offenders are agents of God carrying out divine punishment of people for their sins; but ironically, if this is so, to punish them would be to take up arms against God.²³² In any event, whether agents of the Devil or of God, the trials of animals were effectively a part of the religious superstition of the age and were founded on ancient religious law.²³³ Evans sums this up in some rather strong and controversial language:

The same ancient code that condemned a homicidal ox to be stoned, declared that a witch should not be suffered to live, and although the Jewish lawgiver may have regarded the former enactment chiefly as a police regulation designed to protect persons against unruly cattle, it was, like the decree of death against witches, genetically connected with the Hebrew cult and had therefore an essentially religious character.²³⁴

And the Church increased its power by promoting these trials,²³⁵ which “strengthened their influence and extended their authority by subjecting even the caterpillar and the canker-worm to their dominion and control.”²³⁶

So we can see many reasons to believe that Medieval trials of animals were in substantial part a result of religious convictions and beliefs. There are a number of conceptual strands that lead to this

²²⁸ *Id.*

²²⁹ Evans, *supra* n. 165, at 54–55.

²³⁰ *Exodus* 22:18 (King James); Girgen, *supra*, n. 72, at 116.

²³¹ Barnet, *supra* n. 74, at 88.

²³² Evans, *supra* n. 165, at 101.

²³³ *Id.* at 12.

²³⁴ *Id.*

²³⁵ *Id.* at 13.

²³⁶ *Id.* at 41.

conclusion. First, the tribunals that hosted these trials were frequently ecclesiastical courts. Second, the trials sought to remedy the overturning of the hierarchy ordained by God. Third, the penalties imposed on the convicted animals were of a religious nature. Fourth, animal trials can be viewed as Biblical retribution for violations of God's edicts. Fifth, the animal transgressors were regularly seen as having a demonic nature. Sixth, the animal transgressors were sometimes alternatively perceived as "Messengers of God" sent to punish humans for sin.

Given this evidence, the animal trials of the medieval period can be regarded as having primarily religious motivations. And these religious motivations lead to rather dramatic results: hundreds of years of trials of animals. So overall, what we see in the medieval period is the continuation of economic and religious concepts as predominant motives for animal law as we observed in the ancient period. We just see these motivations, particularly the religious motivations, reflected in some new legal arenas like intricate and formal judicial proceedings aimed at animals.

IV. RENAISSANCE AND ENLIGHTENMENT

A. *Brutal Entertainment*

Although the medieval period cannot be said to have been a happy one for animals, the treatment of animals during the Renaissance and Enlightenment may have actually been worse than in the medieval period.²³⁷ This Section reviews some laws of the Renaissance and the Enlightenment period, primarily from England, that I believe exemplify the tenor and aims of Western animal law of this epoch. But before doing that, it is worthwhile to consider some examples of activities and thought of the Renaissance and Enlightenment regarding animals.

One popular activity of the time was being entertained by battles of animals, including bull and bear baiting.²³⁸ Queen Elizabeth I was herself a fan²³⁹ and she personally engaged in rather atrocious behavior toward animals.²⁴⁰ She killed deer that were rounded up and brought to her, and is said to have cut off the ear of a hart as "ransom" before allowing it to return to its herd.²⁴¹ Elizabeth was further bothered by the trend of people preferring theater to animal baiting and prohibited the performance of plays on Thursdays in London—this day was to be reserved for animal baiting.²⁴² It was not just the Virgin Queen who enjoyed these barbaric activities; kings were involved as

²³⁷ Ryder, *supra* n. 17, at 43.

²³⁸ *Elizabethan Bull & Bear Baiting*, <http://www.elizabethan-era.org.uk/elizabethan-bear-bull-baiting.htm> (accessed Nov. 18, 2012).

²³⁹ *Id.*

²⁴⁰ Ryder, *supra* n. 17, at 43–44.

²⁴¹ *Id.*

²⁴² *Id.* at 45.

well. In a letter from Philip Henslowe and Edward Alleyn, the Masters of Game of King Philip I who arranged animals for baiting events for the King, they complained that they were not paid enough and should not be prohibited from engaging in bear baiting on Sundays.²⁴³ They also complained of others participating in bear baiting events without a license and referred to them as vagrants and persons of “loose and idle life.”²⁴⁴ What these Masters of Game did to obtain animals to use in the King’s animal baiting activates hardly won them popularity with the general population.²⁴⁵ Masters of Game would go into the countryside and take animals from commoners to be used in bear baiting, a method abhorred by the populace who lost their dogs and other animals to the practice.²⁴⁶

This is not to say that commoners did not enjoy animal fighting and baiting. Cockfights were sometimes staged in church yards.²⁴⁷ “Cock throwing,” which involved throwing weighted sticks at a tied chicken until it was dead, was also a popular pastime.²⁴⁸ A similar barbaric sport of throwing stones at live rabbits continues today in Spain.²⁴⁹ These activities were sometimes justified by peculiar arguments. For instance, bull baiting was sometimes justified by the macabre idea that it made the bull’s flesh wholesome to eat.²⁵⁰

As during the medieval period, however, the Western world was not entirely devoid of compassionate voices. Leonardo Da Vinci is thought to have become vegetarian and spoke out about the treatment of animals.²⁵¹ Thomas More in *Utopia* at least implicitly advocated mercy toward animals.²⁵² Michael de Montaigne has been said to be the first person since Roman times to condemn cruelty to animals as a wrong in itself.²⁵³ Montaigne is also said to have seen animals and humans on the same level morally.²⁵⁴ Note that these voices are generally of a secular nature; they are not tethered to religious foundations as we frequently saw in the medieval period.

²⁴³ Daniel Lysons, *The Environs of London: County of Surrey* vol. 1, 68–121 (1792) (available at <http://www.british-history.ac.uk/report.aspx?compid=45373> (accessed Nov. 18, 2012)).

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.*

²⁴⁷ Ryder, *supra* n. 17, at 44.

²⁴⁸ *Id.*

²⁴⁹ *Id.* at 45.

²⁵⁰ *Id.* at 42.

²⁵¹ *Id.* at 46–47.

²⁵² *Id.* at 47.

²⁵³ Ryder, *supra* n. 17, at 49.

²⁵⁴ *Id.* at 50.

B. *The Response of the Law*

1. *Early Laws on Animal Fighting*

As we have seen, there were those who opposed these communal acts of barbarism, and as a result, there were some laws and other rules relating to animal baiting and fighting passed during this time period. There were a number of laws and rules enacted in England that dealt with animal baiting, although none of the laws in this period banned the practice entirely.

As an example from academia, there was apparently considerable debate and a number of rules relating to animal fighting and baiting at Cambridge University between the thirteenth and seventeenth centuries. In 1270, for example, there was a prohibition on “tournaments, tiltings, justings or other warlike games” at Cambridge.²⁵⁵ But the concern here seemed to be with wicked or rebellious scholars or laymen; it was not an issue of concern about cruelty to animals.²⁵⁶ The issue of bear baiting at Cambridge was a long running one, as can be seen in a discussion of the issue in 1581.²⁵⁷ We see the Charter of Cambridge prohibiting bear baiting in 1605.²⁵⁸

But it was not only at Cambridge where there were rules created relating to animal fighting. In 1363, King Edward III issued a proclamation encouraging archery as a substitute for other activities, including cockfighting.²⁵⁹ Bull jousting—that is, lancing bulls from horseback—was prohibited by papal edict in the sixteenth century, not because of cruelty to animals, but because this sport was allegedly decimating the ranks of courageous warriors.²⁶⁰ Bear baiting was prohibited in 1546 on one side of the London Bridge after Easter.²⁶¹ Again, this was not to protect animals, but for the purpose of suppressing certain “dissolute and miserable persons.”²⁶² In 1625, the British parlia-

²⁵⁵ Charles Henry Cooper, *Annals of Cambridge* vol. I, 52–53 (Warwick & Co. 1842).

²⁵⁶ *Id.* at 52.

²⁵⁷ See Charles Henry Cooper, *Annals of Cambridge* vol. II, 383–86 (Warwick & Co. 1843) (describing the efforts of the University of Cambridge to put a stop to bear baiting and the resistance that ensued).

²⁵⁸ British History Online, *Calendar of State Papers Domestic: James I, 1603–1610*, vol. 13, 201 (Mary Anne Everett Green ed., 1857) (available at <http://www.british-history.ac.uk/report.aspx?compid=14998> (accessed Nov. 18, 2012)).

²⁵⁹ British History Online, *Calendar of Letter-Books of the City of London: G: 1352–1374*, Folio cxi b (Reginald R. Sharpe ed., 1905) (available at <http://www.british-history.ac.uk/report.aspx?compid=33502#s2> (accessed Nov. 18, 2012)).

²⁶⁰ Rod Preece & Lorna Chamberlain, *Animal Welfare & Human Values* 19–20 (Wilfrid Laurier U. Press 1993).

²⁶¹ British History Online, *Letters and Papers, Foreign and Domestic, Henry VIII* vol. 21, pt. 1, 592 (James Gairdner & R.H. Brodie eds., 1908) (available at <http://www.british-history.ac.uk/report.aspx?compid=80832> (accessed Nov. 18, 2012)).

²⁶² *Id.*

ment prohibited bear and bull baiting on Sundays.²⁶³ The reason for this? It profaned the Lord's Day.²⁶⁴

2. Cromwell and the Puritans

Oliver Cromwell was a Puritan. He was also the Lord Protector of Britain for the period 1653 to 1658.²⁶⁵ During the period of the Protectorate there were a number of laws passed in England aimed at some of the more brutal practices involving animals. In 1654, there was an English Protectorate Ordinance that prohibited cock throwing and cockfighting.²⁶⁶ According to Kathleen Kete, the laws of the Protectorate relating to animals were based on two assumptions: first, that "traditional behaviors toward animals were socially disruptive"; and, second, that "humans have a duty to be kind to animals," or at least to not cause them unnecessary pain.²⁶⁷ The specific arguments relating to cock throwing, cockfighting, and other blood sports during this period were as follows:²⁶⁸ these activities were associated with drunkenness and idleness; animal fighting profaned the Sabbath; participation in these events took people from their duties to God; "Godly society" was disrupted by animal fighting; there is a religious duty not to increase the suffering of animals; and humans had divinely ordained stewardship over animals and had duties not to be cruel to animals.²⁶⁹

Whatever the reasons for the law on cock throwing and fighting, it did not long survive the Protectorate and was overturned in the Restoration.²⁷⁰ Later, the Gaming Act of 1664 prohibited betting on certain activities involving the use of animals, including cockfights, horse races, and dog "matches,"²⁷¹ but did not prohibit the fights themselves.

Thus, the reasons for these laws and rules were not, as one might expect from a modern and compassionate perspective, for the protection of animals. Rather the laws were meant to protect humans from their own demons and to change human behavior. These laws, which I

²⁶³ *Sunday Observance Act 1625*, in *The Statutes at Large, of England and of Great Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland* vol. IV, 779, 779–80 (Thomas Edlyne Tomlins ed., George Eyre & Andrew Strahan 1811) (available at <http://www.animalrightshistory.org/animal-rights-law/renaissance-legislation/1625-uk-act-sunday-abuses.htm> (accessed Nov. 18, 2012)).

²⁶⁴ *Id.* I find it hard to understand why it did not profane other days as well.

²⁶⁵ David Plant, *British Civil Wars: Cromwell's Protectorate 1653–58*, <http://www.british-civil-wars.co.uk/timelines/protectorate.htm> (updated July 8, 2007) (accessed Nov. 18, 2012).

²⁶⁶ Kathleen Kete, *Animals and Ideology: The Politics of Animal Protection in Europe*, in *Representing Animals* 20 (Nigel Rothfels ed., Ind. U. Press 2002).

²⁶⁷ *Id.*

²⁶⁸ *Id.* at 21.

²⁶⁹ *Id.*

²⁷⁰ *Id.* at 22.

²⁷¹ *Gaming Act 1664*, in *British Statutes in Force in Maryland* vol. II, 643, 643–46 (Julian J. Alexander & Ward Baldwin Coe eds., 2d ed., M. Curlander 1912) (available at <http://www.animalrightshistory.org/animal-rights-law/enlightenment-legislation/1664-uk-act-gaming.htm> (accessed Nov. 18, 2012)).

refer to as “social engineering” laws, are legal rules that relate to animals having the primary purpose of bettering humans and changing human behavior. That this is what these laws were really designed for can be observed in arguments made at the time. One author in a publication of the time, *The Gentleman’s Magazine*, states that cockfighting, cock throwing, and bull baiting should be prohibited as cruel to the animals and further states that the worst thing that this activity does is that it promotes savagery in children and the young.²⁷² It is argued as well that people get injured throwing the weapons used in these events and this justifies banning the practice.²⁷³ Others criticized cruelty to animals because it was accompanied by other vices, like swearing, whoring, and drinking.²⁷⁴ This was, for example, the thinking of Puritan theologian Phillip Stubbs.²⁷⁵ And although in the early seventeenth century Puritan thought may have been flirting with the idea that animals had souls, it seems that generally the Puritans were more concerned with ending the pleasure of the crowds than ending the pain of animals used in baiting.²⁷⁶

That these laws were for the purpose of changing human behavior and not protecting animals can also be seen from the classist nature of the laws. The laws aimed at cock throwing, bull and bear baiting, and the like were aimed at the activities of the lower classes, not those of the aristocratic elite.²⁷⁷ Hunting was reserved for the landed elite in the Middle Ages and even into the late 1700s—for example, in France, the hunting privileges of the noble elite lasted until August 4, 1789, during the French revolution.²⁷⁸ In England, the hunting practices of the elites, including fox hunting, were not the subject of bans or movements to ban hunting. Rather, laws relating to animal fighting and baiting were aimed at the behavior of lower social classes and were created for the purpose of maintaining what was thought to be the proper order of society. These laws had little or nothing to do with the animals themselves or their interests. The social order promoted is one opposed to the practices of the poor, leaving the privileged to their privileges.²⁷⁹ What we see here is animal law reflecting the social stratifications of a very class-conscious society. So, between the seventeenth to the nineteenth centuries, English laws relating to animals

²⁷² *Letter on Cock-throwing*, in *The Gentleman’s Magazine and Historical Chronicle* vol. VII, 6, 7–8 (Sylvanus Urban, ed., Edw. Cave 1737).

²⁷³ *Id.* at 8.

²⁷⁴ Ryder, *supra* n. 17, at 50–51.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 52; see also Harriet Ritvo, *The Animal Estate: The English and Other Creatures in the Victorian Age* 133 (Harvard U. Press 1987) (discussing the Puritan and Evangelical concern for “social order” in connection with the humane movement).

²⁷⁷ Kete, *supra* n. 266, at 22–23.

²⁷⁸ *Id.*

²⁷⁹ See Ritvo, *supra* n. 276, at 132–35 (discussing the classism of animal protection organizations and reformers among English Puritans and in Victorian England).

were used in significant part to change the behavior of humans; animal laws were used as a form of social control.²⁸⁰

3. *Other Laws of the Renaissance and Enlightenment*

Laws relating to animals in the Renaissance and Enlightenment were not limited to animals fighting issues. But the other laws that we do encounter support the argument that the laws of this period were much concerned with social engineering. The 1488 Slaughter of Beasts Act of the British Parliament prohibited the slaughter of animals within the walls of the city of London and other walled towns of England.²⁸¹ This was not a law on how to “humanely slaughter” animals. Instead, it was to exile the smell and pestilent filth of waters surrounding slaughter operations to places outside of cities.²⁸² It may also have been thought that the law, by keeping violence in England sequestered outside the city, would have a salutary effect on humans, since violence against animals was thought (as it generally is today) to engender violence against humans.²⁸³ A law nearly 150 years later, The Sunday Observance Act of 1627, prohibited the driving of animals or the butchering of animals on Sunday.²⁸⁴ These activities were thought to be a reproach to religion and its peaceful observance on Sunday.

A number of laws of this era, as has been noted before, were aimed at the lower classes and activities their betters found objectionable. One of these laws is the 1654 Ordinance for Prohibiting Horse-Races.²⁸⁵ This law was designed to prevent “mischievous plots and designs” occurring at horse races that disturbed the public peace.²⁸⁶ We are left to guess at precisely what these mischievous plots and designs were, but our imaginations suggest gambling, thievery, prostitution, and other alleged pastimes of the lowborn. This law does not put an end to horse racing; rather, it prevents horse races for a period of six months with the penalty for violation being the seizure of all horses at

²⁸⁰ Kete, *supra* n. 266, at 27.

²⁸¹ *Slaughter of Beasts Act 1488*, in *The Statutes at Large, of England and of Great Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland* vol. II, 742, 742–43 (Thomas Edlyne Tomlins ed., George Eyre & Andrew Strahan 1811) (available at <http://www.animalrightshistory.org/animal-rights-law/renaissance-legislation/1488-uk-act-slaughter-of-beasts.htm> (accessed Nov. 18, 2012)).

²⁸² *Id.*

²⁸³ Kete, *supra* n. 266, at 27.

²⁸⁴ *Sunday Observance Act 1627*, in *The Statutes at Large, of England and of Great Britain: From Magna Carta to the Union of the Kingdoms of Great Britain and Ireland* vol. IV, 788, 788–89 (Thomas Edlyne Tomlins ed., George Eyre & Andrew Strahan 1811) (available at <http://www.animalrightshistory.org/animal-rights-law/renaissance-legislation/1627-uk-act-sunday-abuses.htm> (accessed Nov. 18, 2012)).

²⁸⁵ *July 1654: An Ordinance Prohibiting Horse-Races for Six Moneths*, in *Acts and Ordinances of the Interregnum, 1642–1660* 941, 941–42 (C.H. Firth & R.S. Rait eds., 1911) (available at <http://www.british-history.ac.uk/report.aspx?compid=56570> (accessed Nov. 18, 2012)).

²⁸⁶ *Id.*

such events.²⁸⁷ Another law of this type concerns slaughterhouses. It was apparently not uncommon in the eighteenth century for people to steal the horses and cattle of others and slaughter them for food. It should not be hard to picture that the perpetrators of such acts were poor. Is it likely an aristocrat is going to feel compelled to steal and slaughter a horse for food? To address this problem, British Parliament passed the Knackers Act in 1786.²⁸⁸ This law was explicitly aimed at the increase in thievery of horses and cattle that were then slaughtered by people of “low condition,” and attacked the problem by requiring all slaughterhouses to be licensed.²⁸⁹

What we see in this epoch of English history are numerous laws regulating the treatment and use of animals that have as their underpinning the modification of human behavior—social engineering. These laws are aimed at gambling, swearing, prostitution, disrespectful behavior on the Sabbath, cursing, and other objectionable behavior of the lower classes. These laws are not motivated by feelings towards the animals involved in the activities regulated. One might argue, however, that at least the legal rules motivated by Puritan thought were intended to protect animals, as kindness to animals was, in the Puritan view, behavior consistent with God’s desire. But observe that even this seemingly salutary motive has as its vital purpose the conformance of human behavior to a certain religious standard. It is not because the animals *deserve in themselves* to be treated with dignity that we protect them; rather, it is humility before God and molding human behavior to the strictures of God’s will that motivate Puritan laws on animals. So even these laws were not really to protect animals, but rather to bend human behavior to the will of God.

While it appears that the bulk of relevant English laws of the period were of this social engineering type, this is not to say that there were no laws in the period that could be characterized differently. In 1621, for instance, there was a law in Bermuda that protected Cahow birds that were threatened with extinction due to stoning and other killing.²⁹⁰ This law can be viewed as a regulation intended to protect a species—the Cahow species—rather than individual animals. Unfortunately, this law was to no avail; the Cahow bird became extinct nonetheless.²⁹¹ In 1635, the Parliament of Ireland passed a law that could be seen as a precursor to what we now generally refer to as “animal cruelty laws.”²⁹² This law, calling some of the practices prohibited

²⁸⁷ *Id.*

²⁸⁸ *Knackers Act 1786*, in *The Statutes: Revised Edition* vol. III, 257, 257–64 (George Edward Eyre & William Spottiswoode 1872) (available at <http://www.animalrightshistory.org/animal-rights-law/romantic-legislation/1786-uk-act-knackers.htm> (accessed Nov. 18, 2012)).

²⁸⁹ *Id.*

²⁹⁰ Preece & Chamberlain, *supra* n. 260, at 28.

²⁹¹ *Id.*

²⁹² *Act Against Cruelty to Horses-Sheep 1635*, in *The Statutes at Large, Passed in the Parliaments Held in Ireland 168*, 168–69 (2d ed., 1786) (available at <http://www.animal>

“barbarous,” outlawed plowing with the plow attached to a horse’s tail and banned the “pulling” of wool off of living sheep.²⁹³ One reason given for this law was the cruelty inflicted on the beasts.²⁹⁴ This may be the earliest legal reference to cruelty as a motivating factor in passing legislation relating to animals.²⁹⁵ Similarly, the Puritan “Body of Liberties” of 1641 in the U.S., to be discussed in Part II of this Article, prevents tyranny and cruelty toward animals and can be seen as having some motivation to protect animals for their own sakes, although it does also come from the Puritan religious perspective.²⁹⁶

We see, in the later part of the 1700s, the emergence of laws that we can begin to characterize as having a significant motivation of protecting animals. The Metropolis Act of 1774 made the ill treatment of cattle while they were being driven through London a crime punishable by payment of a fine or, if the offender could not pay a fine, imprisonment for not more than a month or a public whipping.²⁹⁷ This law was intended to address the improper and cruel manner in which cattle were evidently driven through the city of London, endangering the lives of people in the city and offending the sensibilities of the public.²⁹⁸ While this could again be seen as a law with a primary purpose of protection of humans, not animals, there does seem to be some aim of animal protection involved.

The Metropolis Act of 1781 is a similar law which made negligent or improper driving or treatment of cattle a crime punishable by a fine from five to twenty shillings; or, if the convict could not pay, he could be sent to prison at hard labor for not more than one month.²⁹⁹ Persons pelting cattle with stones are also in violation of this law, as are those who set dogs on oxen, cows, steers, or other cattle, and these offenses carry the same penalty described above.³⁰⁰ Again, while these laws can be viewed as having substantial motivations aimed at pro-

rightshistory.org/animal-rights-c1450-1660/renaissance-w/wen-thomas-wentworth/1635-act-cruelty-horses-sheep.htmhttp://www.animalrightshistory.org/animal-rights-timeline/animal-rights-w/wen-thomas-wentworth/1635-act-cruelty-horses-sheep.htm (accessed Nov. 18, 2012)).

²⁹³ *Id.*

²⁹⁴ Ryder, *supra* n. 17, at 53.

²⁹⁵ *Id.*

²⁹⁶ *Id.* at 54; Carson, *supra* n. 25, 71–72.

²⁹⁷ *Driving of Cattle, Metropolis Act 1774*, in *Statutes at Large, from Magna Carta to the End of the Thirteenth Parliament of Great Britain* vol. XXX, 565, 565–71 (Danby Pickering ed., John Archdeacon 1773) (available at <http://www.animalrightshistory.org/animal-rights-law/enlightenment-legislation/1774-uk-act-driving-cattle.htm> (accessed Nov. 18, 2012)).

²⁹⁸ *Id.*

²⁹⁹ *Driving of Cattle, Metropolis Act 1781*, in *The Statutes at Large, from the Nineteenth Year of the Reign of King George the Third, to the Twenty-fifth Year of the Reign of King George the Third, Inclusive* vol. IX, 205, 205–08 (Charles Eyre, Andrew Strahan & William Woodfall 1786) (available at <http://www.animalrightshistory.org/animal-rights-law/enlightenment-legislation/1781-uk-act-driving-cattle.htm> (accessed Nov. 18, 2012)).

³⁰⁰ *Id.*

protecting humans from witnessing violence and controlling the behavior of the lower classes, there does seem to be another purpose emerging in these laws—that of protecting animals for their own sakes.

In general, what we see in the animal laws of the Renaissance and Enlightenment are laws aimed at affecting change in human behavior; typically to change the behavior of the lower classes. This social engineering seemed to have the goal of creating a new national citizen—one conforming to the ideal of the legislators. This change in motivation for animal-related regulations in this period of history seems to be part of an evolutionary process. While it cannot be denied that economic and religious motives still exist in laws of this historic period, it is evident that the human-animal relationship is now becoming intertwined in new ways in the law. It can be argued that the behavior of humans with respect to animals is now being taken more seriously than in earlier epochs. There is concern that human use and abuse of animals damages human society in some circumstances and that activities involving animals must be regulated for the betterment of human society. Animals now appear to be spoken of in the same breath as humans; animals are not just economic objects or objects that must conform to a particular religious vision. Because the human-animal relationship in this era is being viewed from a social behavioral perspective, the conduct of humans toward animals is being more closely scrutinized. An attack on human vices associated with certain uses of animals is coming to the fore in the law.

It seems only a short step from close scrutiny of human treatment of animals and of the social ramifications of the use of animals to beginning to consider the interests of the animals themselves. Indeed there were various authors in the 1700s, not the least of which was Jeremy Bentham, asking that there be legislation or other steps taken to protect animals for their own sakes.³⁰¹ So toward the end of the Renaissance and Enlightenment, we see the slow development of new attitudes that will lead to some major changes in animal law and its purposes in the 1800s and beyond.

V. CONCLUSION TO PART I

The ancient and medieval periods saw economics and religion as the principal underpinnings of animal law. But in the Renaissance and Enlightenment we observe a shift in the motivations for and the foundation of animal law—a shift toward changing human behavior or social engineering. Part II of this Article considers the recent modern and modern periods that reflect further movement in the grounding of animal law.

³⁰¹ Etienne Dumont, *Theory of Legislation* 428 (Jeremy Bentham ed., R. Hildreth trans., 2d ed., Trübner & Co. 1871).