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The Law is an Ass: Reading E.P. Evans' *The Medieval Prosecution and Capital Punishment of Animals*

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In this essay I address a little-known chapter in the lengthy history of crimes against (nonhuman) animals. My focus is not crimes committed by humans against animals, as such, but a practical outcome of the seemingly bizarre belief that animals are capable of committing crimes against humans.[2] *I refer here to the medieval practice whereby animals were prosecuted and punished for their misdeeds, aspects of which readers are likely to have encountered in the work of the historian Robert Darnton (1985).*

In his book *The Great Cat Massacre*, Darnton (chapter 2) describes the informal justice meted out to offending neighborhood cats – some of whom were owned and adored by their master's wife – by a group of young male printer's apprentices in Paris during the late 1730s. One night the boys, who felt themselves wronged by the many cats who begged for food from their workshop and who kept them awake at night with their screeching, "gathered round and staged a mock trial, complete with guards, a confessor, and a public executioner. After pronouncing the animals guilty and administering last rites, they strung them up on an improvised gallows" (p. 77). The boys were at once delirious with joy and erupted in gales of laughter – much to the dismay of the owner and his wife, who arrived only after the proceedings had ended.

How can we understand this grotesque legalism? Darnton himself is concerned less with recounting an episode of human cruelty to animals than he is with confronting the difficult interpretive problem of how a riotous cat massacre seemed to their eighteenth-century participants as an affair of great merriment. Why do we not get the joke that the apprentices so obviously did? One answer is that the apprentices suffered appalling working conditions, low pay, and poor prospects, and that the killing of her cats was a low-risk method of causing great emotional distress to Madame and to her husband.

But why *cats*? According to Darnton, cats have traditionally been invested with a cultural repertoire of deep symbolic significance. To the apprentices, they were in league with the devil. Their occult powers were to be feared by sensible folk. At carnivals, they were thrown onto bonfires in the belief that this would bring good luck. Cats, too, have long represented female genitalia, and so they have been associated with the cuckolding of men. To the apprentices the killing of her cats was thus to take exquisite revenge on Madame and on her as her husband's property. It was to defile Madame's body, even to rape her, which to the apprentices was an act of justice, and thus worthy of joyous celebration. The joke, we learn, was therefore less on her cats than on Madame herself.

Darnton's tale illustrates very well the epistemological barriers that impede our understanding of social practices in other cultures and times. His annotations help us to get the joke that was obviously funny to the apprentices. However, given the particular configuration of time, site and class relations embedded in its narrative, *The Great Cat Massacre* lacks wider empirical referent. In fact, it is only one tale within a broader cultural and social matrix of animal trials, the practice of which had existed for several centuries.

My discussion of this broader matrix is unusually dependent on one source, a remarkable book of 1906 by E.P. Evans entitled *The Criminal Prosecution and Capital Punishment of Animals* and which occupies a pivotal role in the small English-language literature devoted to the subject. As such, much of what follows is a dialogue with Evans' book, to whose thesis I now turn.

Bugs and Beasts Before the Law: E.P. Evans and Medieval Animal Trials

> If an ox gore a man or a woman that they die, then the ox shall be surely stoned, and his flesh shall not be eaten; but the owner of the ox shall be quit.
> *Exodus*, xxi, 28

From the later Middle Ages until the eighteenth century, certain peoples in Europe held the anthropomorphic notion that animals could commit crime. Indeed, those animals that were officially suspected of so doing were prosecuted for their misdeeds in secular courts and, if convicted, were subject to a variety of punishments, including public execution. It is very likely that this medieval belief in animal criminality originated in Judaeo-Christian biblical dictates deeply imbricated in both legal practice and popular culture. In medieval times, secular and

ecclesiastical authorities interpreted literally the Hebrew injunction in *Exodus* that goring oxen should be stoned to death. Additional biblical support for the prosecution of offending animals was found to lie in the prescription in *Genesis* (ix, 5) that animals are accountable for the shedding of human blood, in the cursing of the serpent in the Garden of Eden (*Genesis*, iii, 14-15), in David's cursing of the rocks and mountains of Gilboa (2 *Samuel*, i, 21), and elsewhere in the treatment of other recalcitrant inanimate objects (see Hyde 1916, p. 700, n. 17).

The overriding ontological context of animal trials in early medieval Europe stemmed from the belief that the cosmological universe was based on a rigid hierarchical chain of being. At the summit of this hierarchy was the male God of Judaeo-Christendom, followed by His earthly representatives and interpreters (Church and State), then by the multitiered social strata of feudalism, all of which in their respective positions in the human hierarchy sat atop the nonhuman animal kingdom in theirs – primates, quadrupeds, the "lower" animals and vermin, and vegetative and plant life. At the core of this religious tradition was the belief that, alone among all the animals, humans were made in the image and likeness of God, possessed free will, could be forgiven for their sins, and had the opportunity to join their Maker in the next world.

As the medieval period progressed from its early to its later stages, attempts were made squarely to confront the issue of the moral and legal responsibility of animals for their actions, though there is no solid evidence of a general belief that the volition and intent of animals was of the same order as those of humans.[3] The first prominent medieval theologian to examine the grounds on which animals might be prosecuted and punished for their misdeeds was the Italian scholar Thomas Aquinas (1225-1274) (Evans, 1906, pp. 53-55). He reasoned that if the lower animals are God's creatures and they are employed by Him for His purposes, then it would be blasphemy to curse them. If they are regarded merely as brutes, then a malediction (or legal curse) would be odious, vain, and unlawful. The only possible justification for trying and punishing animals, Aquinas argued, was that the guilty ones must be agents of Satan. The disposition of such cases, therefore, should not be seen as ending in the punishment of animals but in the hurling of them at the Devil, who makes use of irrational creatures to our detriment. While jurists did not believe that animals could, like humans, form the necessary legal intent to kill, it was held that the principle of the goring ox entailed that the *absence* of legal intent did not absolve animals from liability for having caused a wrongful death.

Thus, in 1666 an ecclesiastical court in Berne held that "an ox is created for man's sake, and can therefore be killed for his sake; and in doing this there is no question of right or wrong as regards the ox" (quoted in Finkelstein, 1981, p. 70). Goring oxen were not to be executed because they were morally guilty but because, as lower animals who had killed higher animals, they threatened to turn upside down the divinely-ordained hierarchy of God's creation.

Knowledge of medieval animal trials was first secured for an English-language audience by the labors of the American author Edward Payson Evans (1831-1917), a member of that extinct Victorian species whose scholarly interests were seemingly encyclopedic and which, in his case, encompassed intellectual history, the study of languages, German literature, oriental studies, animal psychology and, surprisingly, animal rights, a subject which will require attention later.

In *The Criminal Prosecution and Capital Punishment of Animals*, Evans convincingly documents that the medieval belief in the criminal liability of animals was held both by secular and religious authorities, whose sometimes colliding worldviews nevertheless agreed on the need to prosecute certain animals in the medieval courtroom and, in deserving cases, to pronounce sentence upon them. Evans and we are ultimately indebted to Bartholomé Chassenée, a distinguished French jurist whose records of animal trials were published in 1531 and first popularised by Evans (1884a, 1884b, 1906; and see von Amira, 1891; Ives, 1914 pp. 247-266) in the late nineteenth century. Evans relates that Chassenée made his own reputation at the French bar as counsel for an unspecified number of rats, which were prosecuted in the ecclesiastical court of Autun for having feloniously eaten and wantonly destroyed local barley.

> On complaint formally presented by the magistracy, the official or bishop's vicar, who exercised jurisdiction in such cases, cited the culprits to appear on a certain day and appointed Chassenée to defend them. In view of the bad repute and notorious guilt of his clients, Chassenée was forced to employ all sorts of legal shifts and chicane, dilatory pleas and other technical objections, hoping thereby to find some loophole in the meshes of the law through which the accused might escape, or at least to defer and mitigate the sentence of the judge. He urged ... that inasmuch as the defendants were dispersed over a large tract of country and dwelt in numerous villages, a single summons was insufficient to notify them all;

> he succeeded, therefore, in obtaining a second citation, to be published from the pulpits of all the parishes inhabited by the said rats. (Evans, 1906, pp. 18-19)

In this case, it is no joke that neither the judge's sentence nor whether the accused were put to the rack to extort a confession were recorded, although Chassenée's legal acumen and the eloquence of his plea established his fame as a criminal lawyer.

According to Evans, the sentencing of guilty animals rigidly adhered to contemporary legal precedent and established procedures. These latter included a reprimanding knock on the head, the curse of an anathema, excommunication or even, in the case of the larger quadrupeds such as pigs and bulls, capital punishment. Evans describes in great detail certain cases of the *lex talionis* (the law of retaliation) in which capital punishment was exercised by secular and ecclesiastical courts, among which a notorious example is provided by the public execution in 1386 of an infanticidal sow in the French city of Falaise. Having been duly tried in a court of law, presided over by a judge with counsel attending, the sow was dressed in human clothes, mutilated in the head and hind legs, and executed in the public square by an official hangman ("*maître des hautes oeuvres*") on whom had been bestowed a pair of new gloves befitting the solemnity of the occasion (p. 140). Sometimes the condemned were even offered pardons or clemency. Evans (pp. 153-154; and see Westermarck, 1906, 1, p. 257) mentions how youth could be grounds for acquittal, as was so in the prosecution of a sow and her six piglets for having murdered and partly devoured a child. Here, the sow was sentenced to death, but the piglets were acquitted on account of their youth and their mother's bad example.

Evans records that in various parts of Europe between the ninth and the nineteenth centuries the prosecution of animals encompassed a great variety of major and minor crimes committed both by domestic and wild animals, and by insects and other "vermin." The original Notices of Indictment – some displayed by Evans – refer to crimes such as homicide committed by bees, bulls, horses and snakes; fraud by field-mice disguised as heretical clerics; infanticide by pigs; and theft by foxes. Moreover, Evans shows that judicial proceedings were instituted against a veritable Noah's Ark of creatures, including horseflies, Spanish flies and gadflies, beetles, grasshoppers, locusts, caterpillars, termites, weevils, bloodsuck-

ers, snails, worms, rats, mice, moles, cows, 'bitches and she-asses,' horses, mules, bulls, pigs, oxen, goats, cocks, cockchafers, dogs, wolves, snakes, eels, dolphins and turtledoves.

Evans thus provided quite straightforward and detailed information about the range of crimes committed by animals and the precise species which were formally accused of them. However, from different parts of his book one can also reconstruct information about the periodicity of animal trials and their location.

Let us turn first, to the question of periodicity. Evans lists a total of 191 animal trials, each trial in his list containing brief entries about "sources of information", "types of animal", "places" and "dates" (1906, pp. 265-286). From the last of these entries it can be deduced that animal trials were concentrated in the 15th (36), 16th (57) and 17th (56) centuries. Without exception, the earliest cases involved the excommunication or exorcism of wild animals and, indeed, until the 13th century all cases cited by Evans refer to "vermin" like moles, locusts, serpents, flies, field-mice, caterpillars and eels. The year of the first trial listed by Evans is 824, when moles were excommunicated in the Valley of Aosta. Strictly speaking, this case was not an animal trial but part of an entirely different process that resulted in pronouncements of excommunication by an ecclesiastical court.[4] This said, the earliest authentic case of an animal trial cited by Evans is that of a pig in Fontenay-aux-Roses near Paris in 1266 (Finkelstein 1981, p. 67). Until the end of the sixteenth century, moreover, when for some reason such creatures fell out of vogue, pigs vastly outnumbered all other species of animal subjected to prosecution. The last case of an animal trial cited by Evans was in 1906 when, as reported in the New York Herald, a dog was tried in Délémont in Switzerland.

It is unclear what can be inferred from Evans' data about when animals trials began and ended and why. As Evans himself knew, medieval records were often poorly kept, or not kept at all, and most have have not survived the ravages of time. To pile one complication on another, the liturgical literature documents earlier cases of excommunication than those identified by Evans, e.g., the cursing and burning of storks at Avignon by St. Agricola in 666. Moreover, Evans' last case, in 1906, completed his list only because it occurred as his book went to press. Yet 1906 was by no means the last year in which animals were prosecuted and executed for crimes – a fact which very much hinges on what, sociologically, is to count as an "animal trial".

Evans also provides useful information about the geographic location of animal trials. His list of sites indicates that the belief in animal criminality – or, at least, in the need for animal prosecutions – was concentrated in the south and the east of France and in adjacent parts of Italy, Germany and Switzerland. But does this indicate the actual concentration of animal trials or merely the initiative of local scholars who have been able to access documents that are more plentiful there (Finkelstein 1981, p. 67; pace von Amira 1891, p. 559)? In the absence of a thorough search of the records of other European nations, it is possible that Evans found animal trials to have been concentrated in France, Italy and Germany simply because his own efforts, as reflected in his otherwise impressive bibliography (pp. 314-323), were focused in those four countries. The German historian Karl von Amira, for example, reported a small concentration of animal trials in the Slavonic regions (Finkelstein 1981, p. 67) and, once again, depending on what constitutes an animal trial, perhaps they were also held in other countries. Evans himself cited the existence of animal trials, with diminishing frequency, in Belgium, Denmark, Portugal, Russia, Spain and Turkey. In addition, he found two cases in England (a dog in Chichester in 1771 and a cock in Leeds in 1861) and one each in Scotland (a dog in the first half of the 1500s), Canada (turtledoves in the late 1600s), and Yugoslavia (a pig in Pleternica in 1864).

Moreover, Evans illustrates how the European practice of taking legal proceedings against vermin was exported to the New World by the ecclesiastical courts. In a case of 1662 originally reported by Cotton Mather, in New Haven, Connecticut, animal trials intersected with accusations of bestiality. Here a pious wretch named Potter, aged about 60, was executed for "damnable Bestialities" with a cow, two heifers, three sheep and two sows, which were killed at the gallows before his eyes (Evans 1906, pp. 148-149). In another case, in the Brazilian province of *Piedade no Maranhao*, some Franciscan friars brought an action in 1713 against the ants "of the said territory, because the said ants did feloniously burrow beneath the foundation of the monastery and undermine the cellars of the said Bretheren, thereby weakening the walls of the said monastery and threatening its total ruin" (pp. 123-124; and see Frazer 1923, p. 410-411). Counsel were named for both plaintiffs and defense and, after learned arguments were provided by both sides, the judge, in a mood of wise conciliation, ruled that the Bretheren should appoint a neighborhood field suitable for habitation by the ants and that the latter

"should shift their quarters to the new abode on pain of suffering the major excommunication" (*ibid.*). But interesting as these cases are, we still do not know how extensive animal trials were in the New World.

Clearly, Evans did not say enough about variations in the national trajectories of different European societies. Some societies must have had a greater incidence of animal trials than others. How can these differences be explained? Still others, such as England, appear to have had very few such trials at all. Why was this so? Indeed, as in many other areas of legal development so, too, in the incidence of animal trials, England seems to have differed from much of continental Europe. While animal prosecutions seem to have been virtually unknown in England, perhaps from the twelfth century and certainly from 1203 when the rule was first documented, the old Anglo-Saxon institution of *noxae deditio* (noxal surrender) was developed by the English eyre and assize courts to the effect that the owner of any instrument, animate or inanimate, that accidentally caused the death of a human, had to pay a sum of money to the sovereign. In such a case the instrument was declared *deodand* (Latin *deo dandum*: "needing to be given to God") and its assessed value had to be given in coin to the royal exchequer. While English cosmology shared with its continental counterparts the axiom that no creatures could transgress the boundaries of the divinely-mapped universe, it thus differed in its response to animals who overstepped the boundaries of their position by harming humans. Animal executions and the English *deodands*, which lasted until the middle of the nineteenth century, were thus mutually exclusive, an important fact that was left untouched by Evans.

However, as is true in so much of our understanding of animal trials, the empirical evidence here is quite inconclusive. Authors such as Finkelstein (1981, p. 74) are adamant that there were no animal trials in England, but others take the opposite view. Thus, the legal historian W.W. Hyde (1916, p. 709) has suggested that animal trials were probably common in England during the Elizabethan era. Similarly, Ives, referring to "Shakespeare, who knew everything", divines the same probability from an interesting passage in Shakespeare's *Merchant of Venice*, where Gratiano attacks Shylock (Act iv, scene 1):

> Thy currish spirit
> Govern'd a wolf, who, hanged for human slaughter
> Even from the gallows did its fell soul fleet (1914, p. 256).

Understanding the Rise and Decline of Animal Trials

Quite apart from the empirical inadequacies in his account described above, Evans' amusing and superficially uncontentious descriptions of medieval animal trials should not be accepted at face value. Indeed, by Evans and others (e.g., Frazer 1923) trial records tend to have been resurrected in the context of prior discussions about the evolutionary development and eventual decay of various irrational practices, including witchcraft accusations in seventeenth-century Europe and animism among supposedly primitive peoples.

No less interesting than Evans' descriptions of the objective reality of animal trials are the discursive ends to which his book was directed, including his acceptance of ideological assumptions about evolution. It is true that his chief objective was to chronicle and popularise Chassenée's forgotten sixteenth-century accounts of animal trials and, to this end, his exhaustive treatment appears as a simple recitation of Chassenée's materials, one animal trial grotesquely and predictably following another. Yet, at strategic moments, Evans' factual recitation of Chassenée's materials is freely spiced with interjections about the adequacy of medieval views of animal behavior and of juristic practices. At times, Evans' views are like those of a Victorian missionary smugly conveying religious truth to ignorant and unruly natives. He refers disparagingly, for example, to "the childish disposition to punish irrational creatures and inanimate objects, which is common to the infancy of individuals" (Evans 1906, p. 186).

Elsewhere, Evans claims that Chassenée's text affords "striking illustrations of the gross credulity to which the strongly conservative, precedent-mongering mind of the jurisconsult is apt to fall an easy prey" (p. 24). Scholastic divinity and medieval jurisprudence were full of comical *non sequiturs* and sheer nonsense. He thus asks us – we who failed to get the joke of Darnton's apprentices – to join him in laughing at "the subtleties and quiddities of medieval theologians, who seriously discussed such silly questions" (p. 33). Evans weaves his historical narrative around the factual description of animal trials retrospectively to indicate both the comicality and the stupidity of medieval jurisprudence and popular culture and also the awful human abuse ("intolerable tyranny") of animals. For Evans, the pivotal cognitive mistake made by medieval lawyers and clerics – their belief that animals can and do commit crime – would be occasion for endless mirth were it not for its awful practical consequences.

> Medieval jurists and judges did not stop to solve intricate problems of psycho-pathology ... The puzzling knots, which we seek painfully to untie and often succeed only in hopelessly tangling, they boldly cut with executioner's sword. (Evans 1884b, p. 302).

The anthropologist Sir James Frazer, too, in his gargantuan tome of 1923 *Folk-Lore in the Old Testament*, derided those "primitive legislators" who ensured that the barbarous system of animal prosecutions was cloaked with the solemnity of law and justice. Like Evans, he posited animal trials in a very crude evolutionary way in order to cast the juristic sagacity of our ancestors in a proper light. Thus:

> In the infancy of the race the natural tendency to personify external objects, whether animate or inanimate, in other words, to invest them with the attributes of human beings, was either not corrected at all, or corrected only in a very imperfect degree, by reflection on the distinctions which more advanced thought draws, first, between the animate and the inanimate creation, and second, between man and the brutes. In that hazy state of the human mind it was easy and almost inevitable to confound the motives which actuate a rational man with the impulses which direct a beast, and even with the forces which propel a stone or a tree in falling. (Frazer 1923, pp. 416-417)

Perhaps because it offers too easy a target, Frazer's preachy evolutionism has commanded less criticism than Evans' more focused text. Though Evans did not seriously intend to explain the existence of animal trials, either for not doing so or else for implicitly misapprehending their nature he has been brought harshly to task. For example, a specialist in the ancient Near East has chided him for failing to appreciate the true significance and complexity of animal trials (Finkelstein 1981; and see Cohen 1986). After the most thorough reading of ancient texts, such of those of Mesopotamia and Hammurapi, and of biblico-legal and cosmological concepts, Finkelstein complains that so far from being an invention of "primitives," animal trials are unknown outside the occident. He reports that the Human Relations Area Files offer only meagre evidence about the existence of non-occidental animal trials, with all the specific examples illustrating not the trial and punishment of animals but, like the English *deodands*, owner responsibility for damage and death caused by their animals (Finkelstein 1981, p. 62). For Finkelstein, there can thus be no question of animal trials being an atavistic relic since they are a product of our

cosmological and legal universe, and he concludes that:

> [s]ocieties of non-Western derivation and primitive peoples *did not and do not* attribute "human" will or "human" personality to animals or things, and *never* have tried them or punished them as they did human offenders. The notion that trials and punishments of irrational creatures and of inanimate things are a valid legal procedure occurs *uniquely* in Western society. (p. 64, emphasis in original)

A related problem is whether animal trials existed in the occident *before* the medieval period posited by Evans and Frazer as the date of their origin. Though it is known that the ancient Persians, for example, considered animals as responsible beings, and punished them for their misdeeds, according to Hyde (1916, p. 700), only in classical Athens is there reliable evidence that animal trials occurred in the ancient world. We know of their existence there from descriptions of relevant legal procedures in texts such as Aristotle's *Constitution of Athens* and Plato's *Laws*. In the Athenian Prytaneum, in the common hearth of the city, a special court was convened to try unknown murderers, inanimate objects such as stones and beams, and animals that had caused human death. In cases of wrongful death it was necessary formally to try these three categories of malefactor because, in reasoning similar to that underlying the *lex talionis*, an unavenged murder would disturb the moral equilibrium and the physical health of the community, the wrath of the Furies would be aroused, and the soul of the deceased would be unable to find rest.

To Hyde's controversial discovery of animal trials in classical Athens, Finkelstein (1981, pp. 58-64) replies that there are no surviving records of actual animal trials there, and that the surviving accounts of trial procedures reveal that they were ceremonial or magical in nature rather than legal. But the very terms of this interesting dispute have been strenuously challenged in an erudite essay by Esther Cohen (1986). To Evans, to Hyde and to Finkelstein, she retorts that one cannot settle in purely empirical terms the question of whether animal trials existed either outside the occident or in pre-medieval Europe – to a large extent this hinges on what counts as an animal trial. Adroitly wielding some of the sensitive anthropological analyses of law produced in the 1960s and 1970s, she argues that to deny the extra-occidental existence of animal trials is to view the conflict and dispute resolution mechanisms of other, perhaps technologically less developed, societies through our own cultural and legal prisms. Simply because, when

resolving the harms caused by animals, they do not apply the institutional arsenal of western law, does not not mean that by their standards non-occidental societies do not prosecute animals for their misdeeds. "In fact many nonliterate, nonwestern societies prosecuted and punished offending animals," writes Cohen, "albeit less formally than the Europeans, for their entire judicial structure was conceived in a different form" (1986, p. 18).

Besides these specific difficulties with understanding the trials, it is unclear why the prosecution and punishment of animals originated in the later medieval period and why they declined when they did. Numerous purposes have been allotted animal trials, quite apart from the use of biblical precepts as justifications for them. Thus, it is said that animal trials were conducted in order to deter other animals from committing similar crimes. This is unlikely, however, since there is no evidence that medieval folk paraded their animals in front of the gibbet on which executed pigs were left by the hangman for public display – surely a condition of deterrence. It has also been said that animal trials were designed to inspire horror for the crime in the minds of humans, an intention which to us can only seem, at best, mistaken.

More plausibly, it has been suggested that animal trials were devised to intimidate those who were responsible for an offending animal's dangerous actions. If so, animal trials served as vehicles to convey to animal owners a moral message to oversee their charges. In a case of 1567 where a pig was executed for having killed an infant in Senlis in France, therefore, the judge warned the inhabitants of the village "not to permit the like to go unguarded on pain of an arbitrary fine and of corporal chastisement in default of payment" (Westermarck, 1906, 1, p. 160). It is thus no accident that pigs were executed more often than other animals, for in medieval villages they were allowed to run free, and their sheer size and weight (up to 800 lbs.) must sometimes have caused considerable harm, especially to infants and children. Similarly, bulls, horses, and oxen reaped more than their fair share of prosecutions (pp. 161-164). Moreover, because animals were apparently regarded as having the same sort of responsibility for their actions as humans, justice and fairness demanded that animals should be treated in the same way as humans (1906, 1, pp. 256-257). Likewise, and implicitly against Evans, Graeme Newman (1978) has been most keen to dismiss the notion that animal trials and punishment were but another example of cruelty to animals:

The animals were indeed fortunate, since they received due process of law

> every bit as good as that provided for humans. They were certainly not executed summarily, as would be the case today of an animal that ate a baby. In fact, the prosecutors were so careful to apply the law equally to animals, that they even placed them on the rack and tortured them for a confession. There was even the case of a hangman who summarily executed a sow for infanticide, without a trial. He was hounded out of town. Animals were clearly not persecuted during the middle ages. They were only treated cruelly by the criminal law to the same extent that humans were. (p. 93)

Whether the practice of animal prosecutions was cruel or law-abiding, or both, and if so by what criteria, is an interesting question which cannot be pursued here. On its own, none of the alleged explanations of animal trials above is satisfactory. Each, seeking global status, ignores the fact that the purpose of any given animal trial – if, indeed, there was one – would no doubt be subject to a variable configuration of temporal, national, gender, class, religious, and other factors. Even if we can identify a range of purposes that underlay the existence of animal trials, we still would not have explained why these trials arose in the medieval era.

Let us now turn to a line of reasoning also pursued by Newman (1978, pp. 89-94). Newman enters the issue in the context of his desire to catalogue the institutional, and to a lesser extent the doctrinal, influence of religion on forms of punishment during the medieval period. He rightly stresses that animal trials were only one facet of a broad network of social control constructed by religious authorities in their attempt to dominate and to stabilise the social and the natural worlds. To bodies such as the Holy Inquisition, then, animals were a form of life that presented a challenge no less threatening than that of other marginal beings like women and Jews. Newman's stress on the links between animal trials and religion is very important. This is so not only because the *ratio decidendi* of a medieval court was ultimately of the sort "we sentence this animal to death because it has killed a human and because *Exodus* states 'if an ox gore a man or a woman that they die, then the ox shall be surely stoned.'" It is also important because two other situations in which an animal could be prosecuted and punished – as an accessory to a crime – were also articulated in profoundly religious terms, namely, accusations of bestiality and of witchcraft.

Evans himself stressed the defining influence of religion on the medieval understanding of bestiality and witchcraft. According to Evans (1906, pp. 12-14),

the biblical laws about the goring ox and the condemnation of witches (*Exodus* xxii, 19; *Leviticus* xx, 27; and *Deuteronomy*, xviii, 10-11) were often used in concert as justificatory mechanisms for prosecution in the medieval courts. The categorical proximity of bestiality and witchcraft accusations is evident in one case of unknown date, when a certain Françoise Sécretain was burned alive because she had had carnal knowledge of domestic animals - a dog, a cat and a cock - and because, she admitted, she was a witch and her animals were actually earthly forms of the devil (Dubois-Desaulle 1933, p. 58). Another case of theriomorphism occurred in 1474, when Basle magistrates sentenced a cock to be burned at the stake "for the heinous and unnatural crime of laying an egg" (Evans 1906, p. 162; Hyde 1916, p. 720). In this case, and in others like it, it was widely believed that the *oeuf coquatri* was the main ingredient in witch ointment and, when hatched by a snake or a toad, monsters such as basilisks would hide in a house and destroy all its inhabitants with their death-darting eyes.

The sinful dangers of bestiality were also viewed through the powerful imagery of Judaeo-Christianity, and the act was categorised as a form of buggery ("*offensa cujus nominatio crimen est*"). Like animals that harmed humans or were involved in witchcraft, animals in bestiality cases were seen as rupturing the divine order of the universe. Thus, *Exodus* (xxii, 19) declared that "Whosoever lieth with a beast shall surely be put to death", the "whosoever" here referring to both men (*Leviticus*, xx, 15) and women (*Leviticus*, xx, 16). Evans himself (buggery: "[t]his disgusting crime", 1906, p. 148) referred to a string of cases in which men were convicted of having sexual intercourse with a variety of animals. These included mules, cows, sows, a mare, heifers, and sheep (pp. 146-152), although numerous other cases recorded by Dubois-Desaulle (1933) suggest that, especially for accusations of bestiality combined with witchcraft, goats were often the animal of choice. In cases of bestiality both human and animal were executed, usually by fire but sometimes by beheading or hanging, and their bodies, with all legal documents and pieces of evidence, were then buried together.

Finally, I must note some thorny questions about the claim that the prosecution of animals for crime halted after 1800. Evans implicitly suggested that this was due to the emergence of a generalised scientific *Weltanschauung* and, especially, to the creation of rational legal thought. Similarly, Finkelstein (1981, p. 81) reasons that because the execution of homicidal animals in Europe represented the literal implementation of biblical dictates, the trials inevitably declined with the rise of

learning and of scientific enlightenment. Yet if the pivotal fact in explaining the disappearance of animal trials was the rise of science and the secularization of religion, then why did the trials peak between 1600 and 1700, at the very moment when the movement in science was at its height, and why did they continue, albeit sporadically, well into the nineteenth century? Why did other similarly irrational legal practices, such as judicial torture, disappear far earlier than animal trials? Moreover, there are alternative explanatory candidates for the decline of animal trials and of animal executions. Just as plausibly, for example, they can be traced to the growth of urban environments and to the development of a moral sensibility towards animals (Tester, 1991, pp. 73-75).

Evans on Animal Rights and on Criminal Anthropology

Once one has pierced the facade of Evans's grinding sarcasm and his Darwinian evolutionism, it is apparent that the complexity of his concerns have not properly been recognised.[5] Indeed, his discourse on animal trials was structured by two concerns, neither of which had very much to do with the learned stupidity of medieval clerics and jurists.

The first of these concerns is so glaringly obvious that it is easily missed. It consists in the fact that on every page of *The Criminal Prosecution and Capital Punishment of Animals* Evans clamors against the mistreatment of animals by humans. For this intervention he must thus be accorded a place in the vanguard of the animal rights movement of his era. Later, in *Evolutionary Ethics and Animal Psychology*, Evans (1898) referred explicitly to what is commonly regarded as the founding text of the modern movement, namely, Henry Salt's (1892) *Animals' Rights*. Thus: "if animals may be rendered liable to judicial punishment for injuries done to man, one would naturally infer that they should also enjoy legal protection against human cruelty" (Evans, 1898, p. 13). Here, too, he was keen to quote Jeremy Bentham's famous objection to animal suffering where he had predicted that "Why should the law refuse its protection to any sensitive being? The time will come ... when humanity will extend its mantle over everything which breathes" (1789, p. 282). To this utterance Evans added:

> The ethical corollaries to Darwin's doctrine of the origin of species and to his theory of development through descent under the modifying influences of environment and natural selection have already passed these bounds of

> beneficence not only by demanding the mitigation of cruelty to slaves, but also by the abolition of slavery, and not only by inculcating the kind treatment of animals by individuals, but also by asserting the principle of animals' rights and the necessity of vindicating them by imposing judicial punishments for their violation. (Evans, 1898, p. 14)

When *The Criminal Prosecution and Capital Punishment of Animals* is situated in the context of the intellectual currents of its era, one can see that, besides his incipient support of animal rights, Evans adhered to a second and less ostentatious concern. This is evident from the mannner of the book's presentation, which comprises only two chapters. These are "Bugs and Beasts Before the Law" (Chapter 1) and "Medieval and Modern Penology" (Chapter 2), which are expanded but discursively identical and similarly entitled versions, respectively, of two essays that Evans (1884a, 1884b) had published twenty-two years earlier. About Evans' focus on medieval animal prosecutions this revised chronology tells us that, like most good history, his book was directed as much to the present and future as to the past. The first chapter, written by Evans the animal rights activist, must thus be seen as a quizzical attack on the medieval mistreatment of animals.

Evans was doubtless happy to record the decline of animal trials. At the same time, he feared the popularity of a newly-formed movement in law and in the universities, namely, the biological reductionism that was then championed by the school of criminal anthropology and which was led by the Italian army doctor Cesare Lombroso. It is no accident that Evans' (1884b) second essay of 1884 was composed just before the stormy meetings of the first International Congress of Criminal Anthropology held in Rome in 1885 – it was written as a direct polemical contribution to the mounting campaign against Lombrosianism (Beirne, 1993, pp. 152-162). Evans' sole explicit aim in this essay – Chapter 2 of *The Criminal Prosecution and Capital Punishment of Animals* – was to oppose and to ridicule the penal implications of criminal anthropology. In it he therefore scoffed at leading contemporary criminal anthropologists, including Lombroso, Garofalo and Benedikt. In the same way that he had ridiculed the medieval clerics who refused to examine the putative responsibility of animals for their actions, Evans now lambasted criminal anthropology because to him its biologism denied the responsibility, and hence the accountability, of criminals for their actions. Thus, inspired by the anti-Lombrosian criminology of the French sociologist Gabriel Tarde, Evans (1906, p.

193) bemoaned that a:

> striking and significant indication of the remarkable change that has come over the spirit of legislation, and more especially of criminal jurisprudence, in comparatively recent times, is the fact that whereas, a few generations ago, law givers and courts of justice still continued to treat brutes as men responsible for their misdeeds, and to punish them capitally as malefactors, the tendency nowadays is to regard men as brutes, acting automatically or under an insane and irresistible impulse to evil, and to lead this innate and constitutional proclivity, in prosecution for murder, as an extenuating or even wholly exculpating circumstance.

Conclusion

Whatever the merits of Evans' and others' views on the matter, the subject of medieval and early modern animal trials compels thought about some important questions of epistemology and method. Can we understand how people in medieval societies perceived the criminal intent of animals, for example? Or are we precluded from understanding the social practices of another period or culture whose standards of rationality and criteria of proof differ fundamentally from our own? In trying to understand them, is it inevitable that we, like Evans, see their beliefs as mistaken and their practices as absurd?

How we understand the practice of animal trials partly depends on the differential social construction of concepts like "animal trials" and "punishment." As such, whether animal trials have really declined is a moot point. No one today seriously believes that animals are capable of intending to commit crime, and it is true that animals are not *formally* prosecuted for crime in courts of law. Nor are they subject to the penalties of criminal law. Nevertheless, the practical outcome of the trials exposed and derided by Evans – the execution of nonhuman animals – did not wither away with his last recorded case of 1906. So far from declining, there has been a dramatic rise in the number of animals "tried" and lawfully executed since that time. Has not the medieval courtroom been displaced by the animal shelter? Have not the awesome powers of medieval criminal law to punish animals simply been usurped by the bureaucratic regulations attached to the circumstances in which animal shelters and animal control officers are allowed to put animals to

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

Notes

1. Correspondence should be sent to Piers Beirne, Department of Sociology and Criminology, University of Southern Maine, 120 Bedford St., Portland, ME 04103. For their helpful criticisms, I wish to thank two anonymous reviewers.
2. Space does not allow me to discuss the closely related claim in nineteenth-century criminal anthropology that animals are capable of committing crimes against other animals (e.g. Ellis, 1890, pp. 249-250; Ferrero 1895; Lombroso 1895, 1, pp. 28-34; Hall 1902, pp. 24-25).
3. In ancient times, however, it seems to have been believed that, in respect to their commission of crimes, animals exercised intent in the same rational way as did humans. Some of the texts of the Salic law, for example, describe an offending animal as an *auctor criminis* (Westermarck 1906, 1, p. 257). However, in terms of the attribution of a criminal "intent" to animals, what such designations mean is unclear (pace Ives 1914, p.256).
4. Throughout, Evans tended to conflate the respective jurisdictions and functions of the secular courts and the ecclesiastical courts, for which he has been severely castigated (Finkelstein 1981, pp.62-68; Cohen 1986, p.17). The secular courts alone were responsible for the prosecution and punishment of domestic animals, while the ecclesiastical courts issued maledictions against harmful, or potentially harmful, wild animals, plagues and pests. While domestic animals felt the full weight of judicial repression, there is no evidence that wild animals were even aware of ecclesiastical curses.
5. Thus, while offering a sociological critique of the modern notion of animal rights, Tester (1991) lambasts Evans' "crude cultural positivism" precisely because it can only view animal trials as absurd. "The whole tone of Evans's book," he writes:

> is that of a confident, early twentieth-century scholar looking back incredulously at the absurd behavior of earlier times... But the analysis contradicted the positivism: to be sure, animal trials are absurd and abominable from a twentieth-century perspective, but they were saturated

with cultural meaning when they were carried out. The fascinating part of Evans's account is the failure of his positivism. (Tester, 1991, p.74; and see Cohen, 1986, pp. 16-17)

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