



TOURO UNIVERSITY
JACOB D. FUCHSBERG LAW CENTER
Where Knowledge and Values Meet

**Digital Commons @ Touro Law
Center**

Scholarly Works

Faculty Scholarship

1999

The Day the Dogs Died: A Mad Essay on the Perils of Alien Scholarship, or an Alien Essay on the Perils of Mad Scholarship

Louise Harmon

Touro Law Center, louiseh@tourolaw.edu

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/scholarlyworks>



Part of the [Animal Law Commons](#)

Recommended Citation

23 Legal Stud. F. 1 1999

This Article is brought to you for free and open access by the Faculty Scholarship at Digital Commons @ Touro Law Center. It has been accepted for inclusion in Scholarly Works by an authorized administrator of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

THE DAY THE DOGS DIED

A MAD ESSAY ON THE PERILS OF ALIEN SCHOLARSHIP, OR AN ALIEN ESSAY ON THE PERILS OF MAD SCHOLARSHIP

LOUISE HARMON*

I told them from the outset that I was a poor choice. If your goal is to garner public opinion, then you ought to ask a member of the public, not someone like me. That's what I told them, or something like it. And the truth is: I wasn't a choice at all, but just someone they were stuck with. Research subjects, like candidates for matrimony, often come down to who is available at the time to answer the question. Who will, or can, say yes.¹

I think of myself as something of a fissure in the universal collective unconscious: A crack.² My mother always said there was something wrong with my wiring. Even as a small child, information got processed in an odd fashion. It still does, but by now everyone has come to expect it. For years though, only she and I knew how crossed some of the wires were—or missing. Then when I got older, my mental condition manifested itself more publicly, and then I was sent here, and once here, I was sent here. Double jeopardy.

* Professor of Law, Jacob D. Fuchsberg Law Center Touro College.

¹ What efforts did they make to contact any genuine members of the public? My guess is that they tried, but their insensitivity to the vast cultural (not to mention physical) differences between us resulted in unreliable results. Undoubtedly, the querents distrusted anyone from the outside who might try to probe their mental states. As one Eualeyai woman scholar writes of the culturally insensitive methodology of academics: "Outsiders need to be prepared for the suspicions of Aboriginal people about academics. Experiences with anthropologists have left many wary of people seeking information. There are also protocols and politics within the Aboriginal community that outsiders are not aware of. When establishing links, you need to find someone who is respected by the community who can guide you to appropriate people." Larissa Behrendt, *Women's Work: The Inclusion of the Voice of Aboriginal Women*, 6 Legal Educ. Rev. 169, 173-174 n.10 (1995).

² Perhaps it is ambitious to extend Jung's theory of the collective unconscious to the universe, but it is a maneuver I feel certain he would approve. Someone like me provides access to a wider range of collective representations: "There are many symbols, however (among them the most important), that are not individual but *collective* in their nature and origin. These are chiefly religious images.... [T]hey are in fact 'collective representations,' emanating from primeval dreams and creative fantasies. As such, these images are involuntary spontaneous manifestations and by no means intentional inventions." Carl G. Jung, *MAN AND HIS SYMBOLS* 41-42 (1964).

It is remarkable, really, that I should have made it as far as I did on this planet: law professor. I loved writing it down on applications, on immigration forms, in dentists' and doctors' offices on the charts for new patients, and on income taxes. Occupation: Law professor. Occupation: Professor of law. Occupation: Juris Doctorate. Cranker out of Cranks. Lunatic.

Their real problem was, like so many academics, they didn't do their homework. You've got to review the literature, I always used to tell my students, before you know if you've got anything to say.³ Their mistake was in thinking that my work here was typical scholarship. If they had just perused the periodicals, they would have seen that I was the odd duck out of water, not in the main stream all. Neither was I on any cutting edges. No tort reform, or radical critiques, no exculpatory clauses, no article 203. My work was purely historical, what a dog was due when he'd done wrong.⁴ Like the dog who belonged to a drummer in an Austrian garrison town and bit a municipal councillor in the leg. His owner was sued, but refused to accept responsibility for the dog, and as a consequence, the defendant dog spent a year in the Narrenkötterlein, an iron pillory set up in the marketplace, taking his place with the blasphemers and other wrong doers—justice done, equilibrium in the universe restored.⁵

³ There are two reasons for a literature review, one of them reader-centric and noble, the other author-centric and ignoble. The former was articulated in a scholarly book about scholarship: "The literature review section of the article is one place in which you can demonstrate to the reviewers how your work follows certain accepted lines of research yet addresses questions left unanswered by previous data, previous techniques of analysis, or previous models of conceptualization." Jennie J. Kronenfeld, *Publishing in Journals*, in Mary Frank Fox (ed.), *SCHOLARLY WRITING AND PUBLISHING* 19 (1985). The second reason for a literature review is to impress upon the members of your Promotion and Tenure Committee (who will most certainly be tan in September) that you spent the summer suffering in the darker recesses of the library. Particularly for the untenured, it is crucial that suffering be made manifest and that a chronic pallor be maintained.

⁴ Roman law did not allow for the prosecution of animals, holding to the principle of *Noxae deditio*, that the offending animal should be turned over to the injured party. The consequences were not meant to be punitive, but rather served as a form of compensation to the injured party by transferring property. Thus, animals were viewed not as sentient beings, but as chattel. Animal trials were held throughout Europe, being first mentioned in northern and eastern France during the thirteenth century, then spreading to the Low Countries, Germany, and Italy. The source of the secular procedures was custom, and this was an instance where custom and Roman law were in conflict. Esther Cohen, *Law, Folklore and Animal Lore*, 110 *Past & Present* 6, 11, 27 (1986).

⁵ See M.A. von Lilienburg, *METAMORPHOSIS TELAE JUDICIARIAE* (Nuremberg, 8th ed. 1712)(reported in E.P. Evans, *THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENTS OF ANIMALS* 175 (London, 1906).

I never meant to be aspirational. Woe be to the historian, legal or otherwise, who harbors hopes of being aspirational. It's the wrong line of work. History may mend cracks in the sidewalk; I suppose it may even build the sidewalk, giving edges to the past, a vantage point from which to exclaim, "Oh, look what they did." I always took comfort in being able to call them "they," and not me, particularly when laying blame. Now there is something history can really aspire to: blame laying, brick laying, or just laying about.

There was a time in my career when I used to think about ambition: my own, of course, always my own. It was usually the frog and pond dialectic. Once firmly planted in the legal academy, I used to wonder: Should I do something ambitious, like revamp the common law a la Bentham, bringing it consistency and coherence, extirpating those foul, nasty smelling legal fictions, those Latin phrases, ridding society of the need for lawyers at all?⁶ Or should I just focus on the irrevocability of contracts made by minors while under the influence of too much refined sugar?

The Bentham idea had its drawbacks. If successful, I might have argued myself out of a job, or made myself more of a pariah than I already was with my colleagues.⁷ Early in my law teaching career, I was actually interested in what I was doing, and wrote a brilliant little piece, aimed for the *Journal of Legal Education*, in which I argued against Christopher Columbus Langdell's idiotic idea that law school should last three years. Tapping Reeve got things done in less than two, and we could too.⁸ Truth to tell, most of our work was done in the first

⁶ Bentham was a harsh critic of the common law, and in particular, he loathed legal fictions. The common law was plagued with "[f]iction, tautology, technicality, circuitry, irregularity, inconsistency...But above all, the pestilential breath of Fiction poisons the sense of every instrument it comes near." Jeremy Bentham, *A Fragment on Government*, in 1 THE WORKS OF JEREMY BENTHAM 235 note s (J. Bowring ed. 1843). Bentham also used the metaphor of disease: "[I]n English law, fiction is a syphilis, which runs in every vein, and carries into every part of the system the principle of rottenness." Jeremy Bentham, *Elements of Packing as Applied to Juries*, in 5 THE WORKS OF JEREMY BENTHAM 92 (J. Bowring ed. 1843).

⁷ The pariah is the "yellow vagabond dog of low breed which frequents towns and villages in India and the East." OXFORD ENGLISH DICTIONARY 477 (1989). Originally the word came from a very extensive low caste in Southern India, especially numerous in Madras "where its members supply most of the domestics in European service." *Id.*

⁸ The first law school in the United States was the Litchfield Law School started in 1784 by Tapping Reeve in Litchfield, Connecticut. Its course of instruction was originally designed to run for fourteen months, including two vacations of one month in the spring and fall. Tapping Reeve had a good plan for keeping students awake during his lectures: he kept them cold. "The small frame building had no fireplace and no trace of a flue for a chimney has been found. Apparently there was no heat in winter, except perhaps from

year, and I even conceded that we could morally justify keeping them in their chairs for another round of seasons, honing skills, teaching them evidence and trust and estates and tax and the Legal System of the Gururumba, but for three years? What could we possibly have to do with their minds after two years of this stuff?⁹ But of course, when I shared a draft of the article with a member of the Promotion and Tenure Committee, he started huffing and puffing about how such a proposal would force law schools to lay off one third of their faculties. Then his eyes moved over to his bulletin board where the Contact Sheet was thumbtacked at eye level, and he started to mentally fire colleagues right and left, and I felt my own name drop from the list of keepers, being the boy who yelled out that the emperor was naked at the parade. That's when I decided to withdraw the article and focus on something more trivial, less risky.¹⁰

There was another version of the frog and pond dialectic. Should I struggle to get an entry level position at an important school on the East Coast with well-maintained grounds, or effortlessly achieve tenure at a school located on the windswept plains where one's students wear baseball caps backwards or have finger nails like bloody talons? I opted for the small to medium-sized pond, with a small lily pad from which to lead my froggie life. My legs were neat and tidy, even when extended, soft pink on the underside, with diaphanous green skin stretched tautly between my toes—not lanky, loose legs, but short ones, capable of finding happiness in a wee bit of water.

How does one find a research project? Some scholars are struck by passion, a desire to right a wrong, or a desire to know where something derived from, or how it came to be this way or that. And some scholars,

foot stoves. Students had to write their notes with fingers numbed by the cold, perhaps encumbered by gloves or mittens, while bundled up in mufflers and overcoats." Marian C. McKenna, *TAPPING REEVE AND THE LITCHFIELD LAW SCHOOL* 63, 65 (1986).

⁹ Anthony Chase, *The Birth of the Modern Law School*, 23 *Amer. J. Legal Hist.* 329, 332 (1979). Here is the pattern as it is ideally imagined: "The tradition has been that first-year law teachers (whose courses...are required) tend to probe, question, and criticize more than to lecture; that second-year courses (which are usually elective but basic) tend more to the informational; and that third year courses tend to be specialized and discursive." Thomas L. Shaffer and Robert S. Redmount, *Legal Education: The Classroom Experience*, 52 *Notre Dame Law.* 190, 197 (1976).

¹⁰ There is plenty of advice available for how to tailor one's writing ambitions in order to succeed in academia. Here is a sample to warn the young Bentham: "If you are academically ambitious, regardless of the genre in which you write, choose your subject matter carefully. Unless you have strong support from someone well accepted in the field, be wary of attempting anything too original." Jessie Bernard, *Reflections on Style, Structure, and Subject*, in *SCHOLARLY WRITING AND PUBLISHING*, *supra* note 3, at 142.

particularly young ones, actually believe that research will yield truth—or in an even more foundational folly—that truth is yieldable.¹¹ I was never young that way—in other ways, yes, in love and in worry, but not in matters of truth. Perhaps that too was a function of defective wiring, that I was able to operate simultaneously on the dual premises that there is no truth and that there are multiple truths. Both liberated me from the tyranny of a single, absolute truth that needed my attention—or fidelity. Of course operating on both premises also meant that I would never get anything much done in the world. The radical contingency of my existence rendered most effort pointless.

My research was also remarkable for its pointlessness. To my credit, I demonstrated little hypocrisy in my intellectual stance. I did not pretend that my articles were anything more than revelations of some arcane, dusty corner of European legal history.¹² I was attracted to the bizarre and sought to amuse. When they first approached me, I thought they had the same motivation in choosing this arcane, dusty corner of scholarship—and in choosing me to provide the revelation. I thought they were merely studying the mad man and his rantings. It never occurred to me that they were seeking to be instrumental, to make a difference. If I had known, I would never have agreed to share my thoughts with them, despite our affinity.

¹¹ Here is one example of a scholar's view about the nature of scholarship: "The defining characteristic of scholarship is its preoccupation with the discovery of truth. The end of scholarship is the discovery of truth and the promotion of knowledge." Anthony T. Kronman, *Foreword: Legal Scholarship and Moral Education*, 90 Yale L. J. 955, 967 (1981). Kronman would cringe at my commitment to multiple truths; he would probably label it as "cynical." "Cynicism of the sort I am describing is destructive because the truth—whatever it is, and whether it is something ultimately attainable or merely a regulative ideal—represents the idea of a convergence in our independent personal experiences of the world. The truth is a common meeting ground. It is necessarily the same for all of us, and the affirmation of its value is, in an important sense, an affirmation of the ideal of community." *Id.* at 966.

¹² There were two distinct procedures in European legal history between the thirteenth and eighteenth centuries for the prosecution of animals: secular and ecclesiastical. The secular procedures were used to penalize domestic animals that had mortally wounded a human being, and the ecclesiastical procedures were used to penalize natural pests who could not be individually punished. Cohen, *supra*, note 4, at 10. With respect to the domestic animals, the most common defendants were the pigs who were responsible for the deaths of many infants and small children, although there were also many trials of homicidal oxen, cows, horses, and dogs. These proceedings were painstakingly insistent "upon the observance of legal custom and proper judicial procedure. This was neither a vindictive lynching nor the extermination of a dangerous beast." *Id.* at 11.

One of the issues that never has been resolved is whether the dog has the capacity for *mens rea*,¹³ and indeed, my scholarship begged that question in one of those finessing footnotes where the author nods in the direction of some major philosophical issue, and then flicks it aside with appropriately dressed noises about it being outside the scope of the paper. I believe that I dumped it all into one big, brown paper bag—the kind that you can still get at the grocery store when you opt for killing trees over plugging the rivers with plastic¹⁴—and labeled it: Does the dog have a soul? Then I was able to cite Descartes, who said no, he was a machine,¹⁵ and Voltaire who disagreed with him, and Darwin too,¹⁶

¹³ Before 1600, judges often declared conduct to be criminal that did not include a bad state of mind. There is evidence, however, that the Anglo-Saxon laws recognized distinctions in mental state to determine culpability. From the *Laws of Alfred* (871), we learn that the distinctions were recognized: "Let the man who slayeth another wilfully perish by death. Let him who slayeth another...unwillingly or unartfully, as God may have sent him unto his hands, and for whom he has not lain in wait, be worthy of his life, and of lawful 'bot' if he seek asylum. If, however, anyone presumptuously and wilfully slay his neighbor through guile, pluck thou him from my altar, to the end that he may perish by death." Quoted in Paul H. Robinson, *A Brief History of Distinctions in Criminal Culpability*, 31 *Hastings L. J.* 815, 826 (1980).

¹⁴ Both types of bags cause environmental harm. Plastic bags are made from polyethylene and other compounds that require large expenditures of energy for manufacture and transportation. Paper bags are made from trees and chemicals. Because plastic is very thin, plastic bags take up less space in a landfill, but paper bags are usually made in large sizes; thus fewer bags are needed to haul groceries. The conventional wisdom is that we should all reuse our bags. See *Better Homes and Gardens*, August 1997, at 56.

¹⁵ In Descartes' view, animals are merely automata, or "machines." They are not really conscious and do not have any thoughts. The first test Descartes used to determine why animals are not "real men" is that they "could never use speech or other signs as we do when placing our thoughts on record for the benefit of others," and second, that they do not "act from knowledge, but only from the disposition of their organs." René Descartes, *Discourse on Method* in 1 *PHILOSOPHICAL WORKS OF DESCARTES* 115-18, reprinted in Tom Regan and Peter Singer (eds.), *ANIMAL RIGHTS AND HUMAN OBLIGATIONS* 61 (1976). Part of Descartes' problem with animals was theological. If animals were conscious, then they would have minds or souls, and if they have souls, then those souls might be immortal—contrary to official Church doctrine. Descartes wrote: "[I]f they thought as we do, they would have an immortal soul like us. This is unlikely, because there is no reason to believe it of some animals without believing it of all, and many of them such as oysters and sponges are too imperfect for this to be credible." From a letter by Descartes, to the Marquess of Newcastle (November 23, 1646), reprinted in *ANIMAL RIGHTS AND HUMAN OBLIGATIONS*, at 64. Why Descartes would have isolated oysters and sponges as imperfect is a puzzlement to me, since clearly slugs and cockroaches would be better candidates. Slugs, like oysters, are not only slimy and dumb, but they also foul the insides of trash cans, something the oyster (not to mention the sponge) never does. Cockroaches suffer from moral imperfections, however, particularly those in New York City. Wily urban cockroaches are what Peter Singer calls "speciesists," or those who allow "the interests

just to get closer to this century, and of course, Peter Singer, who ruined forever my love of pork, except for bacon of course,¹⁷ because even though I am a strict vegetarian, I must make an exception for BLTs. A BLT without bacon really lacks something—I suppose one could say something elemental. They don't make BLTs here, but when Agnes comes on weekends, sometimes, we go to Friendly's and get one, along with a butterscotch sundae with rainbow sprinkles. Now why are they called sundaes and not fridays? The dictionary says "Origin unknown" next to the word "sundae" which always drives me mad. If I were going to name them, I would have opted to call something with ice cream and a lovely melting hot sauce a friday since Friday is a day of vast horizons and endless potential, and Sunday is a day of, well, if not shattered dreams, or undone tasks, a day where dread builds with each hour. Let's face it: Sunday is the day before Monday, and no one would name something delicious a monday.

Anyway, I always left it for the reader to lean this way or that on the issue of canine *mens rea*, figuring that nothing I could say would make much difference; it all depended on the nature of the reader's dog,

of his own species to override the greater interests of members of other species." Peter Singer, "All Animals Are Equal," reprinted in ANIMAL RIGHTS AND HUMAN OBLIGATIONS, at 154.

¹⁶ Darwin believed that "the difference in mind between man and the higher animals, great as it is, certainly is one of degree and not of kind." Charles Darwin, THE DESCENT OF MAN, reprinted in ANIMAL RIGHTS AND HUMAN OBLIGATIONS, *supra* note 15, at 80. He had this to say about the higher mammals' capacity for embarrassment, shame, or other complex emotions:

Most of the more complex emotions are common to the higher animals and ourselves. Everyone has seen how jealous a dog is of his master's affection, if lavished on any other creature; and I have observed the same fact with monkeys. This shows that animals not only love, but have desire to be loved. Animals manifestly feel emulation. They love approbation or praise; and a dog carrying a basket for his master exhibits in a high degree self-complacency or pride. There can, I think, be no doubt that a dog feels shame, as distinct from fear, and something very like modesty when begging too often for food.

Id. at 73-74. Darwin must have had a dog and not a cat. I have never known a cat to exhibit anything akin to modesty over begging too often for food.

¹⁷ Bacon consists of thin strips of salted and smoked meat that comes wrapped tightly in plastic; it shrivels up upon cooking, and has little nutritional value. The term "bacon" used to be used for a broader range of pig meat products. It was an old French word that originally meant pork, and cured pork products, and pork was called "bacon" in England up through Shakespeare's times. James Trager, THE ENRICHED, FORTIFIED, CONCENTRATED, COUNTRY-FRESH, LIP-SMACKING, FINGER-LICKING, INTERNATIONAL, UNEXPURGATED FOODBOOK 184 (1970). In the nineteenth century, bacon used to be considered "the poor man's substitute for meat." Reay Tannahill, FOOD IN HISTORY 330 (1973)(rev. ed. 1988).

or dogs the reader has known. We didn't have a dog at the time, although we did have a cat. She most definitely had a soul—a languid, liquid, lazy, lambent soul—but no one ever accused or prosecuted a cat for a crime, or so my exhaustive research on the subject would lead me to believe, except for the Cat Massacre in eighteenth century France, but that does not count since it had nothing to do with what the cats had done, and everything to do with the abominable behavior of the bourgeois towards their trod-upon apprentices. Poor *la grise*.¹⁸

Even though I have never resolved this issue of either canine or feline *mens rea*, it remains a subject of great interest to me. My own belief, and I have nothing but intuition to back it up, is that while the dog may not have the capacity for *mens rea*, the cat may have. Maybe I am just more attuned to the cat's psyche than the dog's. Of course, there is always an epistemological chasm between members of different species, a chasm with respect to humans I feel certain the cat would like to close.¹⁹ (The dog, I am not so sure of. They do not scrutinize us in

¹⁸ *La grise* was the name of a favorite cat of the master's wife in a Parisian printing shop during the late 1730s. The apprentices of this shop lived tough lives: "They slept in a filthy, freezing room, rose before dawn, ran errands all day while dodging insults from the journeymen and abuse from the master, and received nothing but slops to eat." Robert Darnton, *THE GREAT CAT MASSACRE AND OTHER EPISODES IN FRENCH CULTURAL HISTORY* 75 (Vintage Books, 1985)(1984). Among the masters, there was a passion for cats throughout the printing trade; one "bourgeois kept twenty-five cats. He had their portraits painted and fed them on roast fowl." *Id.* at 76. The apprentices, in the meantime, were plagued by nocturnal howlings of the alley cats; they were also plagued by envy and resentment towards the master, and took to feigning feline howling sounds under his window. The master ordered the alley cats killed, and the apprentices killed cats with a vengeance, including *la grise*, smashing her spine with an iron bar and stashing her in the gutter. Then the apprentices held a mock trial, prosecuted the cats, and strung them up on improvised gallows, including *la grise*. The master's wife let out a "shriek as soon as she saw a bloody cat dangling from a noose." *Id.* at 77. The story was reenacted "at least twenty times during subsequent days when the printers wanted to knock off for some hilarity." *Id.* With time, the cat massacre became the subject of burlesque songs and satire. Darnton's essay is an effort to understand why such an incident would have been the subject of humor. Some of the humor was due to resentment about the stratification of the printing trade with its disparities of wealth and privilege. Some was due to the "ambiguous ontological position" of cats. *Id.* at 89. Cats, Darnton argues, had ritual value, and the torturing of cats was a popular amusement in early modern Europe, probably because of their association with witchcraft and devilry.

¹⁹ I am convinced that the research into another species' mental processes goes both ways. Anyone who has been stared at by a cat in a discerning fashion knows of what I speak:

The next time you notice a cat fixing you with that enigmatic stare with eyes that are blue, green, chartreuse, gold, copper, yellow, brown, or whatever else may have come genetically forward in the animal's line, remember the cat is not just seeing you, it is not just recording you. It is contemplating you, evaluating you, and not

quite the same way.) On more than one occasion, I have tried to sit very still and think like a cat, but my powers of empathy and inference fail because I do not have, and never have had, four paws, a set of white whiskers—or a tail. Particularly the latter. Morphologically speaking, I possess analogs to the paws, and even the whiskers, but the human sacrum is a pathetic, truncated triangle of fused bone, nothing compared to the glamour and the glory of the feline tail. I know that I would have understood our cat much better if I had been given a tail, to know what it felt like to have something long, black and velvet, almost prehensile, sprouting out from above my rectum.²⁰

Perhaps it was the same for them, when they approached me. We no longer shared the same physiognomy. In my banishment, I have assumed the face of an unfathomable species, a foreign face that has so many openings, so many passages to the interior, two small, hairy ones that rhythmically blowout small blasts of carbon dioxide, and another large wet one below that makes noise and harbors two rows of skeletal material and a flopping, pink thing, covered with microscopic roses, and a menacing purple underside. Their faces remain smooth and orificeless, like those alabaster apples we bought in Oaxaca one year when we fled the winter winds, the snow in the driveway, and the blue ice.

I am certain that cats are capable of embarrassment—at least our cat was—demonstrating a self-consciousness that might be a necessary condition to moral development. Necessary, but not sufficient, as philosophers are wont to say when they are in the mood to exclude. Our cat also understood the *malum prohibitum*—that shredding the sofa resulted in a swat of the newspaper. That much was not remarkable—dogs too can understand the *malum prohibitum*.²¹ Jumping down

just as an individual for the moment at hand but rather as part of its long-range store of information about the human race.

Roger A. Caras, *A CAT IS WATCHING: A LOOK AT THE WAY CATS SEE US* 150 (1989).

²⁰ In a typical cat, the long, flexible tail has between 21 and 23 caudal vertebrae. Because of its long spine, and the numerous bones in tails that range from 8 to 12 inches, the cat has 40 more bones than humans. A large percentage of cats in Asia have a kink in their tails. In Hong Kong, about one-third of the cats have tail kinks, and in the Malay States, this rises to two-thirds, and in Singapore, 69%, not 70%, of the cats have tail kinks. The kink is caused by a twisting and fusing of several of the tail-bones, and may have a hidden advantage. Desmond Morris, *CAT WORLD: A FELINE ENCYCLOPEDIA* 428-29 (1996).

²¹ David Hume also argued that dogs were capable of learning a *malum prohibitum*: From the tone of voice the dog infers his master's anger, and foresees his own punishment... The inference he draws from the present impression is built on experience, and on his observation of the conjunction of objects in past instances. As you vary this experience, he varies his reasoning. Make a beating follow upon

from sofas is their forte,²² along with that dogged doggy response to the reward: Up, Dog, up, biscuit, biscuit, Good Boy, Good Boy. Slobber, slobber. No self-respecting cat would ever be caught in the habit of obedience, if you favor Austinian rhetoric,²³ at least not for a measly dog biscuit; their price is much too high. But they might scat if you routinely swatted. That much the cat shares with the dog—swatability, scatibility.²⁴ Both species are swatile, scatile.²⁵ (Origins unknown, the latter having nothing to do with excrement, however. You need an “o” for that.)

But the cat as agent? For the same reasons there are no cat obedience schools; they are not amenable to agency relationships, except

one sign or motion for some time, and afterwards upon another; and he will successively draw different conclusions according to his most recent experience. David Hume, *A TREATISE OF HUMAN NATURE*, Part III, Section xvi, reprinted in *Animal Rights and Obligations*, *supra* note 15, at 70.

²² Just as there is a dichotomy between the city mouse and the country mouse, there is one between the city dog and the country dog, at least with respect to rules about animals jumping up on the furniture. Some owners feel that dogs belong on the floor exclusively, and others feel they are members of the family and should be allowed on chairs and sofas. “Generally the split is between country and city, with country dogs being relegated to the floor and city dogs having the run of the place.” Milo Pearsall and Charles Leedham, *DOG OBEDIENCE TRAINING* 41 (1979). The dichotomy works for cats as well. Country cats are often not even allowed to be “floor cats,” never being permitted in the house at all, leading their lives in barns where they perform their function of killing the country mice. Our cat was clearly a city cat. She was allowed, even encouraged, to get up onto the bed to sleep with me.

²³ In Lecture VI of *The Province of Jurisprudence Determined*, John Austin lists the characteristics of the sovereign, including that “[t]he bulk of the given society are in a habit of obedience or submission to a determinate and common Superior.” John Austin, *The Province of Jurisprudence Determined* (1832), reprinted in Joel Feinberg and Hyman Gross (eds.), *PHILOSOPHY OF LAW* 40 (5th ed. 1995).

²⁴ As is true of all *malum prohibitum*, the maker and executor of the law must educate the citizen about the prohibited behavior: “As he [the dog] grows and investigates new horizons, he’ll try to climb up just to see what’s there. Push him off gently and tell him, ‘Off,’ a few times and he’ll get the idea.” Pearsall and Leedham, *supra* note 22, at 41. (Note the gentleness of the education process in this book. No swatting by the law maker here.) Even though the dog may not understand a *malum in se*, he is capable of downright sneaky behavior: “Later, he may perversely decide that the soft couch or chair represents heaven on earth to him and occupy it while you’re out of the house. You can’t correct him directly, as you’ll never catch him up there despite evidence that he was.” *Id.*

²⁵ One problem with the cat is that while it may be swatable or swatile, it also swats. One writer about animals commented: “Cats have no respect for authority. They are not cooperative and friendly pack animals. Give a cat a stern command and you are likely to be ignored or swatted. Put a choke collar on a cat to discipline it and you have a cat on its back with its claws and teeth raking your arm.” Jean Craighead George, *HOW TO TALK TO YOUR ANIMALS* 104 (1985).

as the principal. There again, the dog is different; he is directable.²⁶ Guide dogs definitely are, and if a guide dog makes a grievous error, and takes its blind owner onto the Golden Gate Bridge, clicking his stick against the girders—we would lay blame upon that guide dog. We might even be morally justified in cursing that guide dog.²⁷ Aquinas worried about this a lot: Is it appropriate to curse irrational creatures? *Utrum liceat irrationabiles creaturas adjurare?* Curses and blessings, he argued, could only be pronounced against beings who might receive good or bad impressions from the pronouncement; they must therefore be rational.²⁸ How then to justify upholding animal responsibility? On the basis of agency theory: The animal is not the agent of God, but of Satan, or Satan as the youth of a devil cult scrawled on a boulder in Northport, New York.²⁹ Under this theory, the church had the power to excommu

²⁶ Some dogs are more into the obedience routine than others. Consider these words from a dog obedience judge:

The best obedience dog is a dumb golden retriever. Even a dumb golden is bright enough to figure out what you want him to do, and he wants to please so much that he does it. Just as importantly, he doesn't get bored and is not easily distracted.

Since he is not trying to figure out what is going on, he doesn't design new ways of responding and ends up doing exactly what you taught him in the first place.

Stanley Coren, *THE INTELLIGENCE OF DOGS: A GUIDE TO THE THOUGHTS, EMOTIONS, AND INNER LIVES OF OUR CANINE COMPANIONS* 191 (1995). As far as I can tell, these are the character traits that law firms look for in their associates.

²⁷ Being a good guide dog is not only a matter of canine intelligence; personality characteristics come into play as well. Clarence Pfaffenberger was instrumental in developing the training and selection programs for guide dogs for blind people in the mid-1940s. At first, only 9 percent of all dogs that started the program finished it successfully. Eventually, he began breeding for both intelligence and personality, finding that some "traits allow dogs to apply their full adaptive intelligence in such a way that they became excellent working and obedience dogs, while others forever block dogs from achieving useful levels of functioning." Coren, *id.* By the end of the 1950s, he raised the percentage of dogs successfully completing the program from 9 to 90 percent.

We would have to know why a guide dog for a blind person would lead its owner onto the Golden Gate Bridge before laying blame. The fault may lay in the Pfaffenbergers of the guide dog guild, for placing defective dogs into the stream of commerce, or into the stream of traffic, or onto the Golden Gate Bridge.

²⁸ See Evans, *supra* note 5, at 53. For Aquinas, man is a rational being, and therefore "has its share of the Eternal Reason, by which it has a natural inclination to its due act and end; and this participation of the eternal law in the rational creature is called the natural law." Thomas Aquinas, *SUMMA THEOLOGICA*, Part I of Second Part, Question XCI, Art. 2. Animals are irrational creatures, and they do not "move themselves but are moved by others. Consequently man cannot impose laws on irrational beings, however much they may be subject to him." *Id.* at Question XCIII, Art. 5.

²⁹ In the summer of 1984 in Northport, New York, there was a ritual killing and mutilation of an 18 year old youth by followers of a satanic cult. The perpetrators, one of whom committed suicide in the Suffolk County jail, were under the influence of drugs

nicate and punish offending animals with death. It was not actually the animal who was pronounced against, as much as the devil.

This theory provided the basis for most medieval trials against felonious animals, although there was another theory propounded by a Swiss, Edouard Osenbruggen who held that the medieval mind regarded domestic animals just as much a part of the household as humans, and thus were entitled to the same legal protection. *Wergeld*, the fine paid by the offender who had committed manslaughter, extended to beasts, women and serfs. Old Germanic law even allowed animals to be competent witnesses, when others were not available. The same was true of old French law. A man who was accused of committing a murder in his own home was allowed to bring a cat, dog or cock into court, and swear to his innocence in their presence.³⁰

It might be safe to bring in a dog, who tends to be servile, pant, pant, lick, lick,³¹ but who would trust a cat not to turn you in? And I don't know much about the fidelity of a cock, but I suspect they lack the imagination to either point the tarsus or to exculpate. I once had a flat tire in Michigan next to a turkey farm (oh, the cacophony of those overlapping, dare I say desperate, gobble gobbles of the week before Thanksgiving), and I was unimpressed generally with the turkey's intellect.³² The cock, I assume, is equally dull. It is a shame that BLTs

during the four hour torture. They scrawled across a boulder this cult message: SATIN LIVES!, Thomas Maier and Rex Smith, "A Shared Secret: Murder in Northport," *Newsday*, October 14, 161 (1990).

³⁰ 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, 719 (1915).

³¹ There is a dog licking scene in the Bible, in Luke's version of the rich man and Lazarus: "There was a rich man, who was clothed in purple and fine linen and who feasted sumptuously every day. And at his gate lay a poor man named Lazarus, full of sores, who desired to be fed with what fell from the rich man's table; moreover the dogs came and licked his sores." Luke 19, in *NEW OXFORD ANNOTATED BIBLE WITH THE APOCRYPHA* 1270 (1977). These dogs were licking, not to seek approval, but for nourishment.

³² The domesticated turkey evidently began with the Aztecs, and was brought to Europe sometime early in the 16th century and immediately enjoyed enormous popularity. According to one contemporary account from the early 17th century, farmers were driving turkeys from "Languedoc [in France] to Spain in flocks, like sheep," just as geese had been driven since Roman times. Trager, *supra* note 17, at 76-78. The history of the turkey in Europe is complicated by the fact that since the middle ages, the English had been receiving many new foods from the Turks, and used the word "turkey" to mean any "big, edible fowl that was not familiar to them." *Id.* at 77. Thus even in the 14th century, there is an account of a Devonshire man who had on his coat of arms "three turkey-cocks in their pride proper," long before any exposure to the Americas. The Aztecs, by the way, were also responsible for corn and cocoa which forms the basis of chocolate. Possibly there were Aztec versions of CLTs.

are made with dead pigs. I could eat a TLT with little guilt, although it might be the spice of guilt that adds savor to the BLT.

Of course, the ecclesiastical courts specialized in the prosecution of wild animals and pests, usually for crimes such as crop destruction or vineyard infestation. Their punishment was death, or excommunication or banishment by formal decree. It was often difficult to get the defendants to appear, despite the issuance of multiple summons, but an advocate would still be named to defend the culprits. In 1565, Maître Marin was appointed to defend some grasshoppers before the Tribunal de l'Officialité in Arles, and argued that his clients were justified in eating what was necessary for their welfare. He lost his case, and the grasshoppers were condemned, banished from the region "on pain of dire anathematization from the altar, which the church threatened to repeat until the last of culprits had obeyed the sentence of the court."³³

If they had just done some more research, and realized that my little doggy articles were but a drop in the bucket, a kernel in the ear of corn, a single green pea in a pod, a canine tooth in God's gaping mouth, a single flavor of Baskin Robbins ice cream,³⁴ then the ancestors of the gray wolf would have been spared.³⁵ If they just could have seen: other

³³ Hyde, *supra* note 30, at 707.

³⁴ The history of ice cream is shrouded in food lore mystery. Some claim that the Aztec emperor, Montezuma, would have his servants pour liquid chocolate into the snows of distant mountains, and when frozen, the chocolate would be "rushed to the emperor for his delight." CRAIG CLAIRBORNE'S THE NEW YORK TIMES FOOD ENCYCLOPEDIA 222 (1985)(compiled by Joan Whitman). Others claim that ice cream was brought back from China by Marco Polo in the fourteenth century, with "tales of Orientals reclining on embroidered cushions, dabbing at dishes of ice brought from the mountains on camel back, and flavored with exotic fruits." *Id.* at 221-22.

Not much is known about American ice cream developments, although it is established that Thomas Jefferson brought back an ice cream recipe from France, that George Washington made ice cream, that Mrs. Alexander Hamilton served it, and Dolly Madison made it popular. Trager, *supra* note 17, at 126. By the early 1900s, millions of Americans were eating ice cream in "sodas, sundaes and out of bucket freezers." *Id.* The first portable freezer was invented in 1846, and in 1851, Jacob Fussell set up the first wholesale ice cream business. The ice cream cone was invented at the St. Louis World's Fair of 1904. *Id.* at 126-127.

Widespread refrigeration made the United States the world's biggest consumer of ice cream. Here is a valuable statistic: Since 1972, enough ice cream has been produced in the United States each year to fill the Grand Canyon. Lawrence D. Chilnick (ed.), THE FOOD BOOK: THE COMPLETE GUIDE TO THE MOST POPULAR BRAND NAME FOODS IN THE UNITED STATES 225 (1987). The creation and perpetuation of statistics like this one are what make scholarship such a noble endeavor.

³⁵ The most likely candidate for ancestor of the domesticated dog of Europe, Asia, and North American is the gray wolf, with a great many subspecies and local varieties. (The wolf varies so much in color, that individual members in a pack can be easily

animals were prosecuted as well. All over medieval Europe, animals were brought to justice, condemned and put to death: "asses, beetles, bloodsuckers, bulls, caterpillars, cockchafers, cocks, cows, dogs, dolphins, eels, field mice, flies, goats, grasshoppers, horses, locusts, mice, moles, rats, serpents, sheep, slugs, snails, swine, termites, turtledoves, weevils, wolves, worms and nondescript vermin."³⁶

But the most common defendants were pigs who ran freely through the streets of the towns, and seemed to have a propensity for eating infants.³⁷ The sows were the most murderous,³⁸ (and hungry) and were considered particularly vulnerable to possession by the devil. (Or Satan.) It is ironic that the cat, who is the least amenable of animals to forming an agency relationship, is the beast most frequently portrayed in our

distinguished.) Northern wolves are much larger than southern ones, and it is probable that dogs came from a smaller central or southern variety. The other possible candidate for ancestor is the jackal, primarily an African animal, although its range extends into Mesopotamia, southeastern Europe, and India. "The jackal is less social than the dog; it howls in a manner unlike any domestic dog and has a narrow, foxlike head-factors that make it unlikely that it is the dog's ancestor." 5 NEW ENCYCLOPEDIA BRITANNICA 929 (1982). There were some howling dogs in my neighborhood that obviously descended from the jackal branch of the evolutionary tree; I suspected the same to be true of one of my colleagues at the law school.

³⁶ Hyde, *supra* note 30, at 708.

³⁷ Wild pigs were first domesticated in China more than 5,000 years ago, although there are still many wild pigs that roam the forests of Asia, Europe and the Pacific islands, existing on whatever they can scavenge. During the middle ages, some Chinese pigs were crossed with European pigs to produce "lard pigs." Medieval pigs "were greased and turned loose in enclosures, where they were chased by serfs to amuse the nobility. Later, in the eighteenth century, France's Louis XIV had pigs dressed in clothing to entertain the royal court." Trager, *supra* note 17, at 183. It was not until the nineteenth century that any thought was given to improving the breeds; then lard pigs were broken down into different breeds in England. Eventually breeders came to talk about lard pigs and bacon pigs; the latter were not developed until the twentieth century. Now they look for "meat pigs" which can be of almost any breed, including the Duroc (formerly called Duroc-Jersey), Poland China, Chester White, Hampshire, Sport, Berkshire, Hereford, Mulefoot and OIC. There is no native American pig, unless we count the peccary, or javelina; he is related to the pig, but so is the hippopotamus. *Id.* at 184-85. I have no desire to try an HLT.

³⁸ The pig did not have a monopoly on infant eating; dogs engaged in the practice too. Even in this century, the occasional dog mauls the occasional small human: "Or the stranger than fiction story of the Texas hairdresser who was somewhat upset when her pet Rottweiler killed and ate her four-week-old daughter, but who wept hysterically when told that the animal would have to be destroyed. 'I can always have another baby,' she said after the incident, 'but I can't replace my friend Byron.'" James Serpell, IN THE COMPANY OF ANIMALS: A STUDY OF HUMAN-ANIMAL RELATIONSHIPS 22 (B. Blackwell, 1986). One would hope that she would not repeat the mistake of having another baby and another Rottweiler at the same time.

century as the familiar of female witches.³⁹ The sow would have been a better candidate for being in league with the she-devil, particularly if the sow were black, but of course, all those Halloween decorations would have to be recalled, and pigs on a broom stick would not only be aesthetically unappealing, but imprudent aerodynamically.

Surely there would have been less of a furor if they had chosen pigs instead of dogs as their victims.⁴⁰ Perhaps if I had written an article about porcine feloniousness,⁴¹ instead of canine, the BLT would have become a thing of the past, like cuff links and pickles in barrels: pigs too

³⁹ The cat's problem was its association as something sacred and holy by ancient, pagan religions. Once treated as a god by the Egyptians, the cat was turned into the wicked sorcerer's familiar of medieval Europe. Similarly Freya, the Viking goddess of love, turned into a witch and her faithful cats became her familiars. In the city of Metz during the 10th century, a ceremony known as "Cat Wednesday" took place on the second Wednesday in Lent. It involved the burning of hundreds of cats on the grounds they were "witches in disguise." Feline persecutions continued for the next eight centuries. Black cats were particularly vulnerable. It was not the cat that was at fault, but the "fiend that occupied its body." Morris, *supra* note 20, at 476-77. Another problem the cat had was its "haughtiness and its refusal to become completely subservient to human demands, unlike the dog, the horse, the sheep, and other easily controlled domestic animals." *Id.* at 478.

⁴⁰ Pigs are of great use to man, although it is actually the virtues of the dead pig we should extoll:

The modern pig is one of the most efficient converters of feedstuffs and domestic and agricultural waste into edible protein. For every 3.5 kilograms of food it consumes it gains a kilogram in weight, and almost every part of its anatomy is of material or nutritive value. We pickle its trotters, make black puddings from its blood, sausages from its intestines, and expensive and durable leathersgoods from its skin. We even emulsify its thick white fat for the production of ersatz ice-cream.

Serpell, *supra* note 38, at 16. Serpell goes on to chastise us for our treatment of living pigs: "And in return for this outstanding contribution, we treat pigs like worthless objects devoid of feelings and sensations. By rights, we ought to be eternally grateful to pigs for the extraordinary sacrifices they make on our behalf. Instead, the quality of life we impose on them suggests nothing but contempt and hatred." *Id.*

⁴¹ There are people who have pigs as pets. Ann Hinson operates a fruit and vegetable shop in Rock Hill, South Carolina, and brings her pig, Willie, to work every day. Hinson is a fan of pigs as pets; Willie is her second pig. "Willie is really intelligent, and very clean. Plus they are so easy to potty train. It is like they understand English. He stays in my house and sleeps right next to my bed. My sister would laugh at that, since I won't even let my mother's dog into my house. Well, actually, I did, but I made him sleep in the bathtub." "Meet Your Neighbors," *The Herald* (Rock Hill, South Carolina), May 25, 1997, at 4c. Willie travels in Hinson's car, walking up a ramp and sitting in the front next to his owner's legs. He also likes to sneak around and untie the shoes of humans. Perhaps an animal who understands how to do that is capable of forming the requisite *mens rea* for a crime.

would have been nearly wiped out.⁴² Maybe the canine holocaust could have been averted had they broadened the scope of their research to popular culture.⁴³ Probably their research assistants brought them my articles, and that was all they could see, what was put before them. Maybe what happened was attributable to their failure to look off the page and around the corner in their search for understanding—the myopic academic stuck in his ivory disc, hanging low on the horizon. Defining the problem too narrowly results not only in bad scholarship; it can cost lives as well.

After all, if the staff anthropologist had been watching TV, he would have seen many good dogs,⁴⁴ although they are mostly on reruns.⁴⁵

⁴² The loss of pigs could have disastrous effects on the research on xenotransplants utilizing pig organs and tissue. The pig might be an ideal donor: it can be bred rapidly, is raised free of known diseases, and humans are used to slaughtering them already. The most obvious donor from outside the species ought to be the primates, but they are not ideal organ donors because they are frequently infected with disease, their reproductive cycle is slow, and there are “ethical issues raised by the use of such intelligent beings.” Lawrence M. Fisher, “Down on the Farm, A Donor, Business Section,” New York Times, January 5, 1995, at 1.

⁴³ See, e.g., Anthony Chase, *Toward a Legal Theory of Popular Culture*, 1986 Wis. L. Rev. 527; Lawrence M. Friedman, *Law, Lawyers, and Popular Culture*, 98 Yale L. J. 1579 (1989). Friedman defines popular culture as “the norms and values held by ordinary people, or at any rate, by non-intellectuals, as opposed to high culture, the culture of intellectuals and the intelligentsia, or what Robert Gordon has called ‘mandarin culture’.” *Id.* at 1579.

⁴⁴ There are approximately ten infant deaths per year in the United States that arise from dog attacks. The incidence of this condition is “so low that one is probably more likely to get struck on the head by a falling brick than to have a catastrophe of this nature occur.” Nicholas H. Dodman, *THE DOG WHO LOVED TOO MUCH: TALES, TREATMENTS, AND THE PSYCHOLOGY OF DOGS* 93-94 (1996) (This statistic is only comforting if one is not a parent of the unfortunate ten infants.)

We are perhaps lucky that they did not read this comparative statistic about bricks falling on human heads. All of the bricks and all of the brick houses might have been destroyed. This could have caused a serious housing shortage in some parts of the world, and deprived many of their shelter.

⁴⁵ The enormous cost of wiring the cities for cable is probably responsible for the flood of reruns on television, particularly on children’s channels like Nickelodeon. In the late 1980s, Nickelodeon was purchased, along with MTV and VH-1 from Warner-Amex by Viacom. The group was sold, including their libraries, for \$450 million. Viacom could therefore ill-afford new production costs, and started to rerun the “ancients,” such as the Donna Reed Show, Lassie, and Dennis the Menace. They needed to fill up broadcast hours, and the reruns were available and cheap. Cy Schneider, *CHILDREN’S TELEVISION: THE ART, THE BUSINESS, AND HOW IT WORKS* 202 (1987).

Experts in communication warn that television cannot survive without new production, but without reruns, entire generations of children would have been deprived of the exploits of Lassie, as well as those of Arnold Ziffel, the pig on Green Acres. Lassie’s intelligence, at least as portrayed on TV, was all a ruse. Lassie “crawled under gunfire,

There have been few role models for the good pig on television, unless we count Arnold on Green Acres, Mr. Ziffel's son. I certainly would be willing to. Even though he always wanted to go to Hollywood, that should not be counted against him.⁴⁶ There are a lot of good pigs in Hollywood, I am sure.

The problem was: they only saw the tip of the iceberg. They were adrift in the cold waters of academic literature, and my little articles about medieval felonious dogs were jutting out into the sky and air, melting ever so imperceptibly in the slanting rays of the arctic sun. That was all they saw; all that was available to them, while underneath in the frigid sea was a large massive mountain of unread frozen scholarship, mostly in French and German—scholarship about all those other presumably culpable species. And then someone, and I still do not know which one of them it was, but I have my suspicions, got the terrible idea to take what the pages of a law review said seriously, to be instrumental: let's help them out. Let's rid them of these vicious beasts. It was someone's misplaced idea; praxis gone wild. The choice of victims was too narrow, and they missed the historical period: only late twentieth century dogs died.⁴⁷

No one here knew that my articles had anything to do with the canine holocaust.⁴⁸ How would they? And were it not for my recently granted privileges to watch TV, I myself would not have known that it had happened. But when I saw the news, I knew instantly what had

sneaked through a tortuous maze of fallen electrical wires, jumped out windows, or leapt through the air to knock a criminal down." Coren, *supra* note 26, at 9. Cloris Leachman, who played the mother in one of the many Lassies' TV families, noted that "to make the dog seem extremely clever the script writers had to play down the intelligence of the humans on the screen. She observed that, 'they had to find reasons for us to be morons so the dog could outsmart us.'" *Id.*

⁴⁶ Some have pointed out that Arnold the Pig was at least a good actor. Eva Gabor, who played Mrs. Oliver Wendell Douglas in 170 episodes of Green Acres, never won an Emmy for her performances, whereas Arnold the Pig won two Patsy Awards. Ronald L. Smith, SWEETHEARTS OF '60S TV 58 (1989).

⁴⁷ There may, of course, have been uncalculated environmental benefits from the canine holocaust. One study from the 1980s reported that on an average day, the dog population of Britain deposited 4.5 million litres of urine and 1 million kilograms of feces, some of it in parks and other public places where it might interfere with human recreation. D.N. Baxter & I. Leck, *The Deleterious Effects of Dogs on Human Health: Canine Woonoses*, Community Med. 6, 185-197 (1984), cited in Serpell, *supra* note 38, at 14. There were no similar statistics for the deposition of feline waste in Britain: a lacuna in the literature.

⁴⁸ Originally the term "holocaust" mean a sacrifice, particularly one on a large scale, by fire. It came to mean "complete destruction, esp. of a large number of persons; a great slaughter or Massacre." OXFORD ENGLISH DICTIONARY 315 (1989).

taken place, and why: I know their methods, how they go about things. I sat there in the lounge, watching those helmet head reporters on the street with their silver ice cream cones, interviewing dog owners who were crying and wringing their hands over their pets who had just dropped dead. There they were, those Friskies, Ladies, Angels, Rogers, one minute, pant, pant, bark, bark, lick, lick, and the next, crumpled in a heap on the grass—thousands and thousands of man's best friends, felled instantaneously by some mysterious malady with no symptoms except a broken heart. And I felt sorry for their owners—not guilty, but sorry.⁴⁹ I was never much of a dog lover myself, but I could imagine how they must have felt, thinking how I would have felt, had our cat suddenly collapsed with no warning, never to get up again.⁵⁰ There was a time I was inordinately fond of our cat; I loved the way she slept on the bed, a curled up ball of black fur, keeping my cold feet warm. I do so love having feet.

But I also recognized a certain hypocrisy so characteristic of man—perhaps of us all—a tendency to see some, and not all, and the some seen are the some that count. This holocaust was no different than the one that happens in animal shelters as a matter of course.⁵¹

⁴⁹ Of course the canine holocaust was a great boon to the pet cemetery industry. These are big businesses, and imitate facilities for human burial:

For example, the "Pet Haven" in Gardena, California, a four-and-a-half acre site containing the remains of more than 28,000 animals including the favorite dogs of Edward G. Robinson and Nat "King" Cole, provides the owners of the deceased with a cemetery plot; a flower container; the services of a "groomer"; a choice of caskets (satin-lined redwood or water-proof polyurethane), and viewing rooms containing plastic flowers and effigies of the Virgin Mary where owners can hold services or merely commune with the Dearly Departed. Black diamond-granite headstones etched with portraits of the deceased, and perpetual "memory lights" are optional extras.

Serpell, *supra* note 38, at 24.

⁵⁰ The reverence that the Egyptians felt for the cat, as manifested in the cult of Bastet which lasted over a thousand years, did not always inure to the benefit of the living cat. I cringe to read about how people used to take mummified cats to Bastet's religious festivals to gain favor with the goddess by showing her how they revered their dead pets. Because dead pets were not always available, they had to be supplied, and there was a lucrative trade in ready-made cat mummies; the extent of the trade is known from the vast scale of the cat cemeteries that have been unearthed in Egypt. X-rays of some of the millions of mummified cats revealed "that their deaths had often been 'encouraged.' Many were very young adult cats and had had their necks neatly broken." Morris, *supra* note 20, at 45. Such are the dangers of being a sacred symbol.

⁵¹ Of course this last century has been remarkable for its holocausts of human victims. During the twenty-three years of the Stalin era in the former USSR, there are estimates of 20 million dead, a figure which includes the executions, the deaths in camps, and the victims of collectivization. The figures for China in the consolidation phase are lower,

Thousands of dogs are killed every day in this country, because they were abandoned and left to the streets, or to unclean cages; ultimately they are led to the gas chamber.⁵² Some dogs were the lucky ones, that's all, and led a charmed life, until an interfering so-and-so read about some European legal history, and misunderstood the dog's inability to form *mens rea*.⁵³ Those whose demise was reported on TV were the dogs of affluence, elite dogs, dogs of privilege and ease. But there were other

estimated at somewhere between 1 and 3 million dead, and the total loss of Jewish life as a result of the Nazi "final solution" is estimated at 6 million. More significant than the scale of terror in these totalitarian systems has been its "use against *whole categories of people* irrespective of any evidence of guilt or even intention of threatening the political system." Juan J. Linz, *Types of Political Regimes and Respect for Human Rights: Historical and Cross-national Perspectives*, in Asbjørn Eide and Bernt Hagtvet (eds.), *HUMAN RIGHTS IN PERSPECTIVE: A GLOBAL ASSESSMENT* 211 (1992).

Much like the canine holocaust perpetrated by the aliens, the persecuted belonged to certain groups, ethnic or social, and were put to death

on the basis of collective guilt. This list of victims is unique to modern times. In those cases, the victims did not need to be personally guilty or any acts against the state or the social order, nor did their persecutors have to attempt to make a case against them based on any charges, trumped up or real, nor could they represent in many cases any real threat even if they had wanted to. Their fate was the result of ideological preconceptions, often, as in the case of Hitler, formulated before coming to power, which deprived those people of their human character and linked the creation of a better society with their destruction. Thus, the Holocaust was in the eyes of a Himmler a painful duty in the service of historical tasks for which future generations would be grateful.

Id. at 212.

⁵² The American Humane Association (AHA) reports that 56% of shelter animals are stray, and 44% are surrendered by owners. The AHA also reports that about 61% of shelter intakes are euthanized, 14% are reclaimed by owners, and 25% are adopted into new homes. Approximately 2.4 million dogs are euthanized per year. Gary J. Patronek and Andrew N. Rowan, *Determining Dog and Cat Numbers and Population Dynamics*, 8(4) *Anthrozoos* 199-205 (1995).

⁵³ It would be fascinating to read what they wrote upon their return; about how they saved the day, the day the dogs died. David Kennedy writes about how international human rights workers characterize themselves in written accounts of visits to other lands:

Many of the stories that we characteristically tell ourselves about human rights missions have a similar plot: a knight bursts forth from his domain, has a number of adventures crossing borders, foiling enemies, or bonding friendships, and eventually reaches the land beyond the pale, returning with tales aplenty. Stories like this are good fun. But they also reinforce a particular set of ideas about potent actors and their terrain, placing the calculating activist in center stage, bringing reason and justice to the land of the unjust and the victimized. Through these stories we construct our activism in the image of cultural stereotypes about men and women, avengers and victims . . .

David Kennedy, *Spring Break*, 63 Tex. L. Rev. 1377, 1379 (1985).

dogs, the rejects from Christmas, the 102nd of the 101 Dalmatians, the wild dogs, the dogs with no bones, no homes, no pats of affection—they were annihilated too. There was no one to mourn them; there never is. Those dogs are killed every day, and no one cries for them on TV, or looks for the hidden theory that explains their cruel fate, or the circumstances of their corporate death.⁵⁴ What difference does it make to anyone who is their executioner, which dominant species or from whence they come?

Some were spared, as with other holocausts, by quirks of fate, dogs in disguise as deans of law schools, dogs on the run, dogs living underground, and there were those other members of the family *Canidae*, the sleek wolves, the jackals, and the cunning foxes. They still run free in whatever wild spaces are left on this planet. But the culprits of yore, the domesticated dogs, man's companion for at least 10,000 years, the descendants of the pilloried, the burned, and the hung dogs of the middle ages: their history and future has been altered forever. Such is the power of scholarship—good and bad, mine and theirs—and unbridled assumptions of superiority; the seductiveness of eloquence and veiled insanity.

⁵⁴ The pot-bellied pig has also been dumped in humane societies in the past ten years. There are over a million pot-bellied pigs in the United States, and most are not working out for their owners. Usually the pet owner loses interest in the pigs once they grow to be 150 pounds. Pigs are "more like cats" and "can be independent and aloof." Kathy Rogers, "Potbellied Pigs Losing Their Appeal as Pets," St. Louis Post-Dispatch, March 15, 1997, at 35. Pigs also have a "crushing bite, worse than a dog bite, because it tears the skin in ragged edges. Aggressiveness such as head swiping, charging and barking are all natural behavior for pigs beginning at two years of age." *Id.* Pigs are also herding animals, and will look to other family pets or small children to form a pack, and because they are so intelligent, "they present a challenge to their owners. You have to stimulate them and think of things to do with them." *Id.* Apparently pot-bellied pigs are being discarded by owners all across the country; the pigs are either euthanized or killed in slaughterhouses. The lucky ones in St. Louis can go to a sanctuary run by the Large-Animal Rehabilitation Center in Union, Missouri.