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THE LEGAL THINGHOOD OF NONHUMAN ANIMALS

*Steven M. Wise**

I. INTRODUCTION

The first article in this series of five explained how the ancient Greek, Roman, and Hebrew worlds embraced the idea that the universe had been divinely designed in a Great Chain of Being[1] for the benefit of human beings.[2] This human-centered construct both justified and motivated the human domination of every earthly creature.[3] This idea of a Great Chain of Being produced, and for centuries reinforced, Western secular and ecclesiastical societies that were preoccupied with notions of hierarchy that formally reached their political zenith in feudalism, but explicitly continued to shape Western human political relationships into the eighteenth century.[4] The Great Chain of Being exerts a more subtle, yet palpable, authority upon the way in

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[1] The Great Chain of Being was a linear and immutable hierarchy of every entity that existed or could exist in the universe. It was the most widely familiar Western conception of how this universe was organized from Hellenic Greece to the 19th century.

[2] This is the second article in a series of five by the author whose overall purpose is to explain why fundamental legal rights need not be restricted to human beings and why a handful of rights that protect fundamental interests of human beings also should protect the fundamental interests of such nonhuman animals as chimpanzees and bonobos.

[3] Steven M. Wise, *How Nonhuman Animals Were Trapped in a Nonexistent Universe*, 1 ANIMAL L. 15, 17–18 (1995). The name given to this idea is "teleological anthropocentrism."

[4] ARTHUR O. LOVEJOY, THE GREAT CHAIN OF BEING—A STUDY OF THE HISTORY OF AN IDEA 205–07 (Harper Torchbook, 1st ed. 1960) (1936); DOUGLAS RAE, EQUALITIES 159 n.21 (1981); Paul E. Sigmund, *Hierarchy, Equality, and Consent in Medieval Christian Thought*, *in* NOMOS IX 134–37 (J. Roland Pennock & John W. Chapman eds., Atherton Press 1967). Hierarchy, and not equality, remains a central theme in Chinese, Japanese, and Indian societies. SURYA

which those influenced by Western beliefs conceive nature, politics, religion, and, inevitably, law even today.[5]

It should therefore come as no surprise that hierarchy has long and explicitly dominated the political and legal relationships between humans and nonhuman animals in the Western tradition.[6] Justifying the massacre of guiltless nonhuman animals by the Flood, Rashi, the eleventh-century Jewish scholar, educator, and leading commentator on the Talmud, claimed that "since animals exist for the sake of man, their survival without man would be pointless."[7] His claim was widely shared.

The purposes of this second Article are two. The first is to recount how a "legal thinghood" of nonhuman animals rose from the ancient hierarchical cosmologies that the first article addressed. "Legal personhood" describes an entity with the capacity for legal rights.[8] "Legal thinghood" describes an entity with no capacity for legal rights. Its interests, if they exist, are not required to be respected. Instead, the entity is treated as property about which legal persons have legal rights and duties.[9] The ancient worlds that were dominated by teleological anthropocentrism hatched the jurisprudential idea that "*hominum causa omne jus constititum*" ("all law was established for men's sake").[10] And why should law not have been established solely for the sake of men? Everything else was.

PRAKASH SINHA, WHAT IS LAW? 21 (1989); Surya Prakash Sinha, *Non-Universality of Law*, 81 ARCHIVES PHIL. L. & SOC. PHIL. 185, 214 (1995).

[5] Stephen J. Gould, *Reversing Established Orders*, 104 NATURAL HIST. 12, 12 (Sept. 1995) (We should be skeptical "as we scrutinize the complex and socially embedded reasons behind the original formulations of our favored categories. Dualisms based on dominance may represent, most of all, the imposition of a preferred human order upon nature, and not a lecture directed to us by the birds and bees.").

[6] JOEL P. BISHOP, BISHOP ON CRIMINAL LAW § 594, at 434 (John M. Zane & Carl Zollman eds., 9th ed. 1923) ("Man has always held animals in subjection, to be used or destroyed at will for his advantage or pleasure."). Not just domesticated, but wild, nonhuman animals have long been "perceived (rightly or wrongly) as a resource for man's use and enrichment," Lawrence Berger, *An Analysis of the Doctrine that 'First in Time is First in Right,'* 64 NEB. L. REV. 349, 355 (1985), and often as the animate gift of a Creator.

[7] Marilyn A. Katz, *Ox-Slaughter and Goring Oxen: Homicide, Animal Sacrifice, and Judicial Process*, 4 YALE J.L. & HUMAN. 249, 274 (1992).

[8] IV ROSCOE POUND, JURISPRUDENCE 197 (1959) ("[T]he significant fortune of legal personality is the capacity for rights"); *see also id.* at 530 ("Persons have rights and duties; things have neither."). It is a mistake both of law and history to claim that animate entities cannot be property. Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty and Rights*, 62 SOC. RES. 539, 544, 553 (1995); *see also* Carleton K. Allen, *Things*, 28 CAL. L. REV. 421, 424 (1940).

[9] POUND, *supra* note 8, at 529–30; Allen, *supra* note 8, at 424–25.

[10] Dig. 1.5.2 (Hermogenianus, Epitome of Law, book 1) (Theodor Mommsen et al. eds., 1985) Unless otherwise indicated all citations to the *Digest* shall be to this translation.

The second purpose of this Article is to show how this nonexistent hierarchical universe has continued to play a critical role in perpetuating the legal thinghood of nonhuman animals.[11] This jurisprudential idea, implicit throughout the Old Testament and other ancient law, was incorporated by Justinian into his immensely influential sixth-century *Digest* and has continued to dominate Western jurisprudence.[12]

Section II of this Article explains that the legal thinghood of nonhuman animals stems from the most primitive legal systems known. The borrowing of ancient law, whether explicit or, as Justice Holmes believed, unconscious, long has been the primary business of lawmakers.[13] Holmes asserted that the rationales for whole chunks of modern law were mere subsequent inventions "to account for what are in fact survivals from more primitive times."[14] In his modern studies of comparative law, Professor Alan Watson repeatedly has demonstrated in detail that "to a truly astounding degree law is rooted in the past," and that while legal rules are often rooted in the concerns of the society in which they operate, and are unlikely to be wholly at odds with those concerns, the transplanting or borrowing of legal rules by one legal system from another is, and always has been, perhaps the most common source of legal development, especially for private law.[15] These legal borrowings, however, may not

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[11] *E.g.*, David Favre, *Wildlife Rights: The Ever-Widening Circle*, 9 ENVTL. L. 241, 243 (1979) ("The legal principles governing the relationship between humans and animals have remained constant through all of recorded history."). Professor Gary L. Francione well-documents the present negative consequences to nonhuman animals of their characterization as property. *See generally* GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (1995).

[12] Thus a 20th-century writer on jurisprudence could confidently repeat, word for word (and in Latin)—"*Hominum causa omne jus constititum.* The law is made for men and allows no fellowship or bonds of obligation between them and the lower animals." P.A. FITZGERALD, SALMOND ON JURISPRUDENCE 300 (Sweet & Maxwell, 12th ed. 1966).

[13] SHELDON M. NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES 148–49 (1989). Legal borrowing has been used to explain the origins of slave law in the American colonies. Bradley J. Nicholson, *Legal Borrowing and the Origins of Slave Law in the British Colonies*, 38 AM. J. LEGAL HIST. 38, 39 (1994). *But see* Jonathan A. Bush, *Free to Enslave: The Foundations of Colonial American Slave Law*, 5 YALE J.L. & HUMAN. 417, 424–25 (1993). "Common law" is a medieval English borrowing from the canon law's *jus commune*, itself borrowed from Roman law. Edward D. Re, *The Roman Contribution to the Common Law*, 29 FORDHAM L. REV. 447, 470–71 (1960–61).

[14] OLIVER WENDELL HOLMES, JR., THE COMMON LAW 33 (Mark D. Howe ed., 1963) (1881); *see also* Oliver Wendell Holmes, Jr., *Primitive Notions in Modern Law*, 10 AM. L. REV. 422, 423 (1876).

[15] ALAN WATSON, LEGAL TRANSPLANTS—AN APPROACH TO COMPARATIVE LAW 95, 108, 112 (University of Georgia Press, 2d ed. 1993) (1974) [hereinafter WATSON, LEGAL TRANSPLANTS]. In 1993, nineteen years after the first edition of *Legal Transplants*, Watson wrote in the second edition that he had "gravely underestimated the extent and impact of legal borrowing" in that

reflect current values and may constitute, instead, little more than manifestations of the extraordinary impact of authority and precedent upon legal culture, as well as the availability and accessibility of the borrowed law to the lawmakers.[16] As law—good, mediocre, and bad—tends to survive, its widespread borrowing means that the private law of a society frequently derives from a vastly different time, place, and culture, even from a different cosmology.[17] As every legal rule has its unique history, an understanding of this history is instrumental in the reconsideration to which every legal rule eventually becomes subjected.[18]

Section II of this Article also demonstrates how both the earliest Mesopotamian cuneiform "law codes" and the competing Hebrew laws sanctioned the ownership of both wild and domestic nonhuman animals, but on very different grounds. The ancient and recurring Near Eastern legal problem of what to do when an ox fatally gored a human being provides a prism through which to examine how the dramatically differing solutions to similar legal problems concerning nonhuman animals reflected the divergent cosmologies of ancient Near Eastern societies. As we will also see, the triumph of the divine, moralistic,

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first edition. *Id.* at 108; *see also* Alan Watson, *Legal Change: Sources of Law and Legal Culture*, *in* LEGAL ORIGINS AND LEGAL CHANGE 69, 73, 83–85, 94–95 (1991) [hereinafter WATSON, LEGAL ORIGINS]; ALAN WATSON, SOCIETY AND LEGAL CHANGE 79, 98 (1977) [hereinafter WATSON, LEGAL CHANGE]. Watson explains that one fundamental reason for the easy transplantation of Roman law was that it "divides naturally into self-contained and self-referential blocks." ALAN WATSON, THE MAKING OF THE CIVIL LAW 15 (1981) [hereinafter WATSON, CIVIL LAW]. "Rarely are arguments drawn by analogy from one block to another—from, say, sale to hire, or from acquisition of possession to acquisition of ownership. Nor in general are arguments used from religion, equity, or utility." *Id.* at 18. Because the Roman jurists generally used blocks of law in such an exceedingly formalistic manner, showing little interest in the effects of the rule's application or in its historical development, but only as abstract legal ideas, individual blocks of law easily could be sliced out and applied to different legal systems and experiences. *Id.* at 14–22; *see* Charles Donahue, Jr., Animalia Ferae Naturae: *Rome, Bologna, Leyden, Oxford and Queens County, N.Y.*, *in* STUDIES IN ROMAN LAW IN MEMORY OF A. ARTHUR SCHILLER 62 (Roger S. Bagnall & William V. Jarris eds., 1986) (discussing the block effect on the decision of *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805)).

[16] WATSON, LEGAL TRANSPLANTS, *supra* note 15, at 93–94, 99, 112–14; WATSON, LEGAL CHANGE, *supra* note 15, at 104–05; WATSON, LEGAL ORIGINS, *supra* note 15, at 73.

[17] WATSON, LEGAL CHANGE, *supra* note 15, at 7–8. Watson cautions that "it is very easy to overestimate the extent to which ancient law has not survived." *Id.* at 89, 98.

[18] *Id.* at 132–33; HOLMES, *supra* note 14, at 33. Appropriate caution shall be used to interpret legal terms that have been used over long periods of time in their proper contexts. RICHARD TUCK, NATURAL RIGHTS THEORIES—THEIR ORIGIN AND DEVELOPMENT 12, 13 (1979). *See* June Starr, *The "Invention" of Early Legal Ideas: Sir Henry Maine and the Perpetual Tutelage of Women*, *in* HISTORY AND POWER IN THE STUDY OF LAW: NEW DIRECTIONS IN LEGAL ANTHROPOLOGY 345–46 (June Starr & Jane F. Collier eds., 1989).

and homocentric Old Testament law over the secular and utilitarian law of Mesopotamia decisively impressed the legal thinghood of nonhuman animals into Western law.

Section III of this Article discusses how the idea of law as justice, and not merely divine power, evolved within the hierarchical Hebrew, Greek, and Roman cosmologies. Section III further discusses how the natural law ideas of the Greek and Roman Stoics influenced the development of the Roman private law of nonhuman animals and embedded themselves in Justinian's immensely influential *Institutes* and *Digest*.

Section IV explains how the ancient hierarchical cosmologies affected medieval law and illustrates humanity's persistent attempts to reassert and fortify its claimed dominant hierarchical status through such legal mechanisms as the Continental "trials" of nonhuman animals and the English deodand.

Section IV also discusses how the ancient idea of the legal thinghood of nonhuman animals fertilized the writings of the great common law judges, commentators, and political philosophers, and how they in turn planted the idea deeply within modern common law. Section IV illustrates how the anti-cruelty statutes that blossomed in the nineteenth century in England and the United States did not disavow, but rather reaffirmed, the legal thinghood of nonhuman animals.

The paradigm of all nonhuman animals as legal things has presented formidable obstacles to the development of personhood for nonhuman animals under the common law, indeed throughout Western law.[19] But the modern rule of the legal thinghood of nonhuman animals was borrowed from ancient laws whose foundations have been destroyed and whose mechanical application today violates modern notions of fundamental principles of justice. The conclusion of this Article therefore urges a re-examination of this legal rule in light of the Darwinian revolution, modern scientific knowledge of the natures both of humans and of nonhuman beings, the decline of strict legal positivism, the post-World-War II rise of human rights both in domestic and international law, and the general principles of common law adjudication. This re-examination will begin in the third article in this series.

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[19] "Paradigm" is used in two primary senses of "disciplinary matrix" and "exemplar," first discussed by Thomas S. Kohn in *The Structure of Scientific Revolutions*. THOMAS S. KOHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS 181–91 (University of Chicago Press, 2d ed. 1977). The third article will discuss the nature of western legal change through the supplanting of some paradigms by others and begin the argument for a paradigm that supplants that of the legal thinghood of all nonhuman animals.

II. Origins of the Legal Thinghood of Nonhuman Animals

The earliest known law is preserved on Mesopotamian clay tablets.[20] In the fifteen hundred years between the Sumerian invention of writing[21] and the Greek evolution of the rule of law into the rule of right or justice, and not merely the wish and power of the Divine,[22] judicial and legislative authority in the Near East were concentrated in a temporal ruler. The ultimate theoretical source of Mesopotamian law was neither the ruler nor the gods, but a metadivine "transcendent primordial force" superior even to the gods.[23] The gods did not so much reveal the law to the temporal ruler as grant him the gift of the ability to perceive the ultimate source of law. This allowed him to promulgate secular laws in his own name that were in harmony with it.[24] It was the ruler who probably granted, revoked, or refused to grant individual rights.[25] The outstanding exception was the Old Testament law of the biblical Israelites, whose authorship was not secular, but divine.[26] The Hebrew God alone made law and no man, not even the king, could amend or escape it.[27]

While laws and judicial procedures for resolving disputes may or may not have predated writing,[28] the earliest written examples of law in any form, whether secularly or divinely inspired, clearly demonstrate the primitive legal recognition and sanction of human owner-

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[20] Shalom M. Paul, Studies in the Book of the Covenant in the Light of Cuneiform and Biblical Law 3 (1970).

[21] The Sumerians invented a writing around 3000 B.C. that employed ideographs. R.F. Willetts, The Civilization of Ancient Crete 91–92 (1977). Alphabetic writing first appeared about the eighth century B.C. *Id.* at 156.

[22] The Greeks began to evolve the rule of law, in the sense of right or justice, as opposed to divine command, beginning about the fifth century B.C. *See* Roscoe Pound, An Introduction to the Philosophy of Law 1 (1954); Raphael Sealey, The Justice of the Greeks 23, 150, 151, 155 (1994). Roman law borrowed the idea and came to correlate justice and law in Justinian's *Digest*. *See* A.P. D'Entreves, Natural Law—An Historical Survey 19 (1951) [hereinafter D'Entreves, Historical Survey].

[23] Paul, *supra* note 20, at 6.

[24] *Id.* at 7, 8.

[25] Sealey, *supra* note 22, at 150–52.

[26] Paul, *supra* note 20, at 36–37, 100; Carl S. Ehrlich, *Israelite Law*, *in* The Oxford Companion to the Bible 421 (Bruce M. Metzger & Michael D. Coogan eds., 1993).

[27] Michael Walzer, *The Legal Codes of Ancient Israel*, 4 Yale J.L. & Human. 335, 336, 340–41 (1992).

[28] *Compare* Sealey, *supra* note 22, at 52 ("One has but to suppose that judicial procedures for peaceful settlement of disputes were practised well before laws were issued in writing. That supposition is independently probable; for the *Works and Days* of Hesiod and the *Illiad* tell of judicial settlement of disputes but have no hint of any written laws.") *with* Michael Gagarin, Early Greek Law 122 (1986) ("The assumption . . . that the earliest lawgivers simply recorded in writing rules previously preserved only orally . . . runs counter to much of the evidence.").

ship of nonhuman animals. The utilitarian and secular Mesopotamian law was grounded in economics, not religion; its pervasive concern was the protection of property and compensation for damages.[29] Old Testament law, however, was based on a cosmology in which the Divine smoldered within each human being. The idea of a supreme humanity, apart from and superior to the natural world, and created in the image of God, was its overriding theme.[30] Any human or nonhuman animal who destroyed sacred human life was to be punished severely with no hope of forgiveness in this world.[31] Thus, the provisions for monetary compensation and property settlement that were common in the nonbiblical Near Eastern legal provisions had no analogue in biblical law.[32]

Together with the influence of the laws and cosmologies of the Greeks and Romans, the victory of biblical law over cuneiform law and cosmology determined the development of the legal thinghood of nonhuman animals. As the Near Eastern laws are the older, indeed the oldest known, they shall be addressed first.

A. *Ancient Near Eastern Law*

The earliest known law codes are The Laws of Ur-Nammu, King of Sumer and Akkad of the third dynasty of Ur, dating from approximately 2100 B.C.;[33] the Lipit-Ishtar Lawcode, probably from the first half of the nineteenth century B.C.;[34] the Laws of Eshnunna, created approximately 1920 B.C.;[35] and the Laws of Hammurabi, the Babylonian king whose reign probably began approximately 1728 B.C.[36] These were probably not "law codes" in the modern sense, in that they were

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[29] PAUL, *supra* note 20, at 8.

[30] Moishe Greenberg, *Some Postulates of Biblical Criminal Law*, *in* 16 YEHEZKEL KAUFMANN JUBILEE (Menahem Haran ed., 1960). "[T]he distinctions between animals and humans, and between human beings and God, exist from the outset and constitute the premise of the [biblical] narrative." Katz, *supra* note 7, at 277.

[31] PAUL, *supra* note 20, at 37, 100.

[32] *Id.* at 39.

[33] THE ANCIENT NEAR EAST—SUPPLEMENTARY TEXTS AND PICTURES RELATING TO THE OLD TESTAMENT 87 (James B. Pritchard ed., 1969) [hereinafter SUPPLEMENTARY TEXTS]. The two known tablets were produced in the scribal schools of Nippur and Ur in the nineteenth century B.C. *Id.* Others have dated this law code to about 2050 B.C. PAUL JOHNSON, A HISTORY OF THE JEWS 32 (1987).

[34] *See* ANCIENT NEAR EASTERN TEXTS RELATING TO THE OLD TESTAMENT 159 (James B. Pritchard ed., 2d ed. 1955) [hereinafter ANCIENT NEAR EASTERN TEXTS]. This Lawcode was reconstructed from clay tablets and fragments.

[35] Johnson dates these Laws to about 1920 B.C. JOHNSON, *supra* note 33, at 32. Another recent estimate is that they are of the 19th century B.C. Ehrlich, *supra* note 26, at 422.

[36] ANCIENT NEAR EASTERN TEXTS, *supra* note 34, at 163.

not prescriptive, and it is unknown to what degree they actually reflected existing law.[37] Their paragraphs generally began with "If, Given that," and ended by instructing the reader to take the action required under the circumstances.[38] Thousands of recovered clay tablets record actual ancient Near East lawsuits, some of which concerned domesticated nonhuman animals.[39] There exists an example from the mid-seventeenth century B.C. of a *misharum*-act, a royal utterance with prescriptive effects, that mentions goats, goat-wool, ewes, cattle, wool, cattle-herdsmen, goatherds, and shepherds.[40]

Three paragraphs of the fragmentary Laws of Ur-Nammu refer to sheep, a donkey-taker, a sheep-taker, and an oxen-taker.[41] Four paragraphs of the Lipit-Ishtar Lawcode, of which only a portion is known, refer to the penalties to be incurred by a man who rents an ox and damages his flesh, eye, horn, or tail.[42] The Laws of Eshnunna refer several times to transactions involving wool,[43] the hire and seizure of donkeys,[44] circumstances under which a man could be said to have stolen an ox,[45] and the penalties for owning an ox who gores[46] or a vicious dog who injures.[47] From this same period has survived a

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[37] JOHNSON, *supra* note 33, at 36–37.

> These so-called law codes are not comprehensive codices in the Roman sense. They are rather miscellaneous collections of laws, compiled in order to enhance the stature of the ruler as the originator of order in his land. Although they preserve important evidence of individual stipulations and of the legal structure of a given society, these legal compilations are best viewed as literary texts. In spite of the ancient fame of a text such as the Babylonian Laws of Hammura[b]i, it is significant that among the thousands of legal documents known from ancient Mesopotamia not one refers to that collection for a precedent, nor to any other.

Ehrlich, *supra* note 26, at 421. Instead they were "pious hopes and moral resolve rather than effective law . . . royal apologia and testaments. Their primary purpose was to lay before the public, posterity, future kings, and above all, the gods, evidence of the king's execution of his divinely ordered mandate." *Id.* at 32 (quoting J.J. Finkelstein, *Ammisaduqua's Edict and the Babylonian "Law Codes," in* J. CUNEIFORM S. 15: 102–03 (1961)).

[38] J.J. FINKELSTEIN, THE OX THAT GORED 15–16 & n.5 (1981).

[39] *See* SEALEY, *supra* note 22, at 145; ANCIENT NEAR EASTERN TEXTS, *supra* note 34, at 217; FINKELSTEIN, *supra* note 38, at 21 (a suit involving an ox from the Middle Babylonian period of approximately 1300 B.C.). Even more of the lawsuits and provisions of the "law codes" concern human slaves.

[40] SUPPLEMENTARY TEXTS, *supra* note 33, at 90–92; *see* SEALEY, *supra* note 22, at 33.

[41] SUPPLEMENTARY TEXTS, *supra* note 33, at 87 (lines 24–30, 87–96, 117–22).

[42] ANCIENT NEAR EASTERN TEXTS, *supra* note 34, at 161 (laws 34–37).

[43] *Id.* at 161–62 (laws 1, 15, 32).

[44] *Id.* at 162–63 (laws 10, 50).

[45] *Id.* at 163 (law 40).

[46] *Id.* at 163 (laws 53–55).

[47] ANCIENT NEAR EASTERN TEXTS, *supra* note 34, at 163 (laws 56, 57).

student exercise from a Sumerian scribal school that involved the writing of legal phrases that twice mention oxen.[48] The Laws of Hammurabi make numerous references to oxen,[49] sheep or wool,[50] asses,[51] pigs,[52] cattle,[53] and goats.[54]

The Middle Assyrian Laws[55] were found on clay tablets that date from the twelfth century B.C., though their text may derive from the fifteenth century B.C.[56] Tablet C + G refers to transactions involving oxen, asses, horses, goats, and beasts,[57] while tablet F refers to sheep and horses.[58] The Hittite Laws, found on clay tablets dating from the thirteenth century B.C., are based on a text from the fifteenth century B.C.[59] They make numerous references to such domesticated nonhuman animals as oxen, sheep, horses, asses, bulls, cattle, mules, dogs, and pigs,[60] as well as to their brandings.[61] Here also are found early references in the legal or quasi-legal literature to the human capture of wild nonhuman animals, as the compensation for the theft of a "*tamed* buck or a trained wild-goat or *tamed* mountain sheep" is to

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[48] SUPPLEMENTARY TEXTS, *supra* note 33, at 90 (¶¶ 9, 10).

[49] ANCIENT NEAR EASTERN TEXTS, *supra* note 34, at 166, 176, 177 (laws 7, 8, 224, 225, 241–56, 263, 268, 271).

[50] *Id.* at 166, 168–70, 177 (laws 7, 8, 57, 58, 104, 261–67).

[51] *Id.* at 166, 176, 177 (laws 7, 8, 224, 244, 269).

[52] *Id.* at 166 (law 8).

[53] *Id.* at 177 (laws 258, 261, 265).

[54] ANCIENT NEAR EASTERN TEXTS, *supra* note 34, at 177 (law 270).

[55] The original editors of the Middle Assyrian Laws believed that they were likely either the work of a private jurist or a legislator seeking to amend the law. G.R. DRIVER & JOHN C. MILES, THE ASSYRIAN LAWS 12–15 (Driver repr. with additions 1975) (1935). Sealey hypothesizes that while they might have borne some relation to law, they were more likely to have been literary creations. SEALEY, *supra* note 22, at 34–35.

[56] ANCIENT NEAR EASTERN TEXTS, *supra* note 34, at 180; SEALEY, *supra* note 22, at 33–34.

[57] ANCIENT NEAR EASTERN TEXTS, *supra* note 34, at 187 (laws 4–6a, 8).

[58] *Id.* at 187–88 (laws 1, 2).

[59] SEALEY, *supra* note 22, at 35. Ehrlich dates them to approximately the 16th century B.C. Ehrlich, *supra* note 26, at 421. Sealey believes that these texts were "book[s] of law" compiled by early jurists whose purpose was to expound on what the law was. SEALEY, *supra* note 22, at 36.

> If this way of understanding the Hittite Laws is right, they are markedly different from the Mesopotamian and Assyrian "laws." On the other hand they are not strictly prescriptive codes. The jurists who compiled them did not give them authority; any authority inherent in the provisions derived from the institutions that the compilers tried to describe. Yet the Hittite Laws, thus understood, are on the threshold that leads to prescriptive rules. The Greeks crossed that threshold.

Id. at 36–37.

[60] ANCIENT NEAR EASTERN TEXTS, *supra* note 34, at 191–96 (laws 45, 57–90, 129, 130, 148, 151, 152, 159, 164, 166–68, 178–81).

[61] *Id.* at 195 (law 163).

be the same as for a domesticated buck.[62] Compensation also is required for stealing either beehives or bees from a swarm,[63] and one could not steal birds.[64]

The Pentateuch, or first five books of the Old Testament, contains numerous "laws" in the ancient Near Eastern sense, all traditionally, if erroneously, attributed to Moses.[65] Neither the Mesopotamians nor the biblical Hebrews, however, actually had a word for "law."[66] The Pentateuch that emerged in its familiar form around the end of the fifth century B.C. stitched together a Mosaic law actually written over perhaps five hundred years that reflected legal thought of centuries earlier.[67] Indeed, the earliest of the Mosaic laws often are believed to have been promulgated between the fifteenth and thirteenth centuries B.C.[68]

As did the Mesopotamian cuneiform law codes, the Pentateuch routinely assumed the propriety and legality of owning nonhuman animals, both wild and domestic. The Ten Commandments forbid the coveting of the ox and the ass of one's neighbor.[69] The Levitical Holiness Code, which is part of the Priestly Code that includes the whole of *Leviticus* and portions of *Exodus* and *Numbers*,[70] also mentions cattle, fowls, goats, and wool.[71] Much of *Leviticus* consists of the reasons for and methods of the slaughter of domesticated nonhuman animals as sacrifices and offerings to God, though it is unclear how

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[62] *Id.* at 192 (law 65) (emphasis in original).

[63] *Id.* at 193 (laws 91, 92).

[64] *Id.* at 194 (laws 119, 120). Law 119 refers to stealing "a bird from a pond." *Id.*

[65] In the first century, the Jewish historian, Josephus, claimed that Moses had invented the word for "law" and was likewise the first legislator. JOSEPHUS, CONTRA APION 2.154, at 353, 355 (H. St. J. Thackery trans., 1926).

[66] "The Hebrew word most often translated as 'law,' tora (Torah), actually means teaching or instruction. As such it expresses the morally and socially didactic nature of God's demands on the Israelite people." Ehrlich, *supra* note 26, at 421. Similarly, in the Mesopotamian civilization, "a technical term for law itself did not exist, nor was there an expression for 'by the application of the law' or 'in virtue of such and such a law.'" PAUL, *supra* note 20, at 5.

[67] ROBIN L. FOX, THE UNAUTHORIZED VERSION—TRUTH AND FICTION IN THE BIBLE 85 (1991); PAUL, *supra* note 20, at 104 ("[M]uch of the juridicial content and formulation of [the Covenant Code] is pre-Mosaic and hence, pre-Israelite."); Finkelstein, *supra* note 37, at 17. Few dates associated with the Pentateuch can be considered settled.

[68] JOHNSON, *supra* note 33, at 32.

[69] *Exodus* 20:17.

[70] ROBERT H. PFEIFFER, INTRODUCTION TO THE OLD TESTAMENT 210 (1948).

[71] *Leviticus* 1:2–17; 3:1–16; 4:3–35; 5:2, 6–11, 14–18; 6:6, 24–30; 7:1–10, 22–34; 8:2, 14–32; 9:2–24; 16:3–28; 17:3–16; 19:19, 22; 20:15, 16, 25; 22:8, 17–23, 27, 28; 23:12, 18, 19; 24:18, 21; 25:7; 26:22; *see also Numbers* 8:81–12; 15:1–16; 18:15–18; 19:2–10; 29:1–31; 29:1–39. Leviticus "fits in very well with what we know of the political history of the Israelite in the thirteenth and twelfth centuries B.C. The same can be said of Deuteronomy." JOHNSON, *supra* note 33, at 35–36.

these sacrifices and offerings actually expiated sin.[72] *Leviticus* 11 reports God's purported dictation to Moses and Aaron of the detailed and extended list of the nonhuman animals, both wild and domesticated, that the Israelites were and were not permitted to eat.[73] Found here also is an injunction against the eating of the blood of wild nonhuman animals caught when men "hunteth and catcheth any beast or fowl that may be eaten."[74]

The Deuteronomic laws, which repeated then supplemented many of the laws given in prior books of the Pentateuch, forbade the theft of a neighbor's ass or ox, required the sacrifice of bulls, sheep, and other domesticated nonhuman animals, and enjoined certain kindnesses towards them.[75] The Deuteronomic laws also set forth a menu of those nonhuman animals who could and could not be eaten,[76] and

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[72]

> The arbitrary character and absolute authority of the Priestly Code appear not only in the exact amounts specified for these sacred tributes and fines, but also in the failure of the legislators to give a rational explanation of how and why these sacrifices and offerings produced the results ascribed to them .... Thus obviously, in spite of the old principle expressed in Lev. 17.11, "it is the blood that makes atonement by reason of the life (that is in it)," the Priestly authors held no theory on how sacrifices and offerings expiated sin.

PFEIFFER, *supra* note 70, at 269–70.

[73] "This is the law of the beasts, and of the fowl, and of every living creature that moveth in the waters, and of every creature that creepeth upon the earth." *Leviticus* 11:46. Forbidden domesticated nonhuman animals included those that do not "parteth the hoof," are "cloverfooted," and "cheweth the cud," such as the camel and swine. Permitted domesticated nonhuman animals included those who "whatsoever parteth the hoof, and is cloverfooted, and cheweth the cud." Forbidden wild nonhuman animals included the cony, *see* JONATHAN FISHER, SCRIPTURE ANIMALS—A NATURAL HISTORY OF THE CREATURES NAMED IN THE BIBLE 72 (The Pyne Press repr. 1972) (1834), hare, "all that have not fins and scales in the seas, and in the rivers, of all that move in the waters, and of any living thing which is in the waters, eagle, ossifrage," *id.* at 190, ospray, vulture, kite, raven, owl, night hawk, cuckow, *id.* at 78, hawk, little owl, *id.* at 197, cormorant, great owl, swan, pelican, gier eagle, stork, heron, lapwing, bat, "all fowls that creep, going upon all four," *Leviticus* 11:20, all flying creatures with four feet who do not have legs above their feet, "whatsoever goeth upon his paws, among all manner of beasts that go on all four," *id.* 11:21, the mouse, weasel, tortoise, ferret, chameleon, snail, mole, "every creeping thing that creepeth upon the earth," *id.* 11:41, and "whatsoevereth goeth upon the belly, and whatsoever goeth upon all four, or whatsoever hath more feet among all creeping things that creep upon the earth." *Id.* 11:42. Permitted nonhuman wild animals included "whatsoever hath fins and scales in the waters, in the seas, and in the rivers," *id.* 11:9, "every flying creeping thing that goeth upon all four, which have legs above their feet," *id.* 11:21, locusts, bald locusts, beetles, and grasshoppers.

[74] *Leviticus* 17:13–16.

[75] *Deuteronomy* 5:21; 12:2–28; 15:19–21; 17:1 22:1–4, 10; 25:4; *see Leviticus* 1–9 & n.38.

[76] *Deuteronomy* 14:3–21. Forbidden domesticated nonhuman animals included the camel and swine. Permitted domesticated nonhuman animals included the ox, sheep and goat, and "every beast that parteth the hoof and cleaveth the cleft into two claw, and cheweth the cud." *Id.* 14:6.

mandated a Sabbath rest, not just for the Israelite, but also for his children, slaves, oxen, asses, and cattle.[77] The Covenant Code found in *Exodus* details concerns with asses, sheep, and other "beasts of the field," as well as with the problem of the goring ox.[78]

A brief foray into the law of ancient Egypt is warranted before examining the deceptively complex problem of the goring ox. On authority of the fifth-century B.C. *History* of the Greek historian, Herodotus, it has been claimed that ancient Egyptian law punished the willful killing of a beast with death and the accidental killing by fine.[79] A literal reading of a portion of the *History* that concerns the Egyptian attitude towards sacred nonhuman animals supports this.[80] Even though some species were considered sacred, with even their accidental killings punishable by death,[81] Herodotus himself contradicts the notion that all nonhuman animals were considered sacred.[82] Instead, the sacred nonhuman animals probably were limited to specific Temple Animals, who were understood to be the incarnations of deities, other members of their species, and Fetish animals.[83] But whatever was the actual law of ancient Egypt with respect to nonhuman animals, no trace of it is known in modern Western law.

Forbidden wild nonhuman animals included those "that chew the cud," *id.* 14:7, that do not also "divide the cloven hoof," *id.*, hare, coney, all that are in the water that "hath not fins and scales," *id.* 14:10, eagle, ossifrage, osprey, glede, FISHER, *supra* note 73, at 121, kite, vulture, raven, owl, night hawk, cudkow, hawk, little owl, great owl, swan, pelican, cormorant, stork, heron, lapwing, *id.* at 151, bat, and "every creeping thing that flieth." Permitted wild nonhuman animals included the hart, *id.* at 132, the roebuck, *id.* at 233, fallow deer, *id.* at 79, wild goat, *id.* at 125, pygarg, *id.* at 220, wild ox, *id.* at 298, chamois, *id.* at 66, "all that are in the waters: all that have fins and scales, . . . all clean birds, . . . [and] all clean fowls." *Deuteronomy* 14:11.

[77] *Deuteronomy* 5:12–14.

[78] *Exodus* 21:28–36; 22:1–5, 9, 10–13, 19, 30, 31; 23:4, 5, 11, 12, 19; 29:1–42; 34:19–21. "The Mosaic Covenant . . . follows the form of an ancient Near Eastern treaty, such as those drawn up by the Hittites." JOHNSON, *supra* note 33, at 35.

[79] Irving Browne, *Animals as Offenders and as Victims*, 21 ALB. L.J. 265, 265 (1880) (quoting portions of the brief filed by Elbridge T. Gerry, President of and counsel to the American Society for the Prevention of Cruelty to Animals, *in* Davis v. American Soc'y for the Prevention of Cruelty to Animals, 75 N.Y. 362 (1880)).

[80] HERODOTUS, THE HISTORY, 2.65, at 159 (David Grene trans., 1987).

[81] HERODOTUS, BOOK II 184 (W.G. Waddell ed., 1964); W.W. HOW & J. WELLS, A COMMENTARY ON HERODOTUS 199 (1936). Both note that Cicero implied that it was a capital crime to kill an ibis, snake, cat, dog, or crocodile, and both relate the story of the Roman put to death for accidentally killing a cat in the first century B.C.

[82] HOW & WELLS, *supra* note 81, at 199.

[83] ALAN B. LLOYD, HERODOTUS, BOOK II 294–95 (1976).

B. *The Problem of the Goring Ox and the Triumph of Israelite Over Mesopotamian Cosmology*

The problem of the fatally goring ox is central to the understanding of the proper relationship between the Covenant Code and the earlier Mesopotamian cuneiform "law codes," and to the legal effect, both past and present, of the competing cosmologies of the Mesopotamians and Israelites. Chapters 21–23:19 of *Exodus* contain the only set of biblical laws drawn similarly to the "If, Given that" mode of the earlier Mesopotamian cuneiform "law codes."[84] This similarity of style, coupled with the use of similar phraseology about similar and sometimes exotic subjects, such as the problem of the fatally goring ox, make it likely that the law codes at least drew upon the same sources, if the later "codes" did not outright copy from the earlier.[85] Moreover, the ancient law of the goring ox has important implications for our understanding of the origins of the modern law's attitude toward nonhuman animals, as well as the early relationship between the law of nonhuman animals and the cosmology of the society that created that law. The Near Eastern laws of the goring ox are as follows:[86]

> **A. The Laws of Eshnunna**
>
> *sec. 53.* If an ox has gored another ox and caused its death, the owners of the oxen shall divide between them the sale value of the living ox and the carcass of the dead ox.
>
> *sec. 54.* If an ox was a habitual gorer, the local authorities having so duly notified its owner, yet he did not keep his ox in check and

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[84] FINKELSTEIN, *supra* note 38, at 16–17.

[85] *Id.* at 17–20; Walzer, *supra* note 27, at 340. That "in all the tens of thousands of cuneiform documents relating to legal matters that have thus far come down to us, there is hardly a single allusion to a real instance in which an ox killed or injured a person or another animal," FINKELSTEIN, *supra* note 38, at 21, supports Finkelstein's view that "we are confronted here not with independent developments, but with a single, organically interrelated, literary tradition." *Id.* In Paul's opinion:

> [t]he legal collection of Exodus emerges as an integral component of a vast juridicial canvas which extended throughout the ancient Near East. All indications point to an eclectic adaptation of native and fringe Mesopotamian legal traditions, which is a testimonial to the extent to which the earliest compilation of biblical laws was indebted to the rich heritage of its Mesopotamian forebears.

PAUL, *supra* note 20, at 104; Reuven Yaron, *The Goring Ox in Near Eastern Laws*, 1 ISRAEL L. REV. 396, 398 (1966). Alan Watson believes them excellent early examples of legal transplants. WATSON, LEGAL TRANSPLANTS, *supra* note 15, at 22, 24 ("The nature of the similarities of style and substance is such that they exclude the possibility of parallel legal development. Probably they share an ultimate common source.").

[86] The translations are Finkelstein's. FINKELSTEIN, *supra* note 38, at 20.

it then gored a man and caused his death, the owner of the ox shall pay two-thirds of a mina of silver [to the survivors of the victim].

sec. 55. If it gored a slave and caused his death, he shall pay fifteen shekels of silver.

B. The Laws of Hammurabi

sec. 250. If an ox, while walking along the street, gored a person and caused his death, no claims will be allowed in that case.

sec. 251. But if someone's ox was a habitual gorer, the local authority having notified him that it was a habitual gorer, yet he did not have its horns screened nor kept his ox under control, and that ox then gored a free-born man to death, he must pay one-half mina of silver.

sec. 252. If [the victim was] someone's slave, he shall pay one-third mina of silver [to the slave's owner].

C. The Covenant Code of *Exodus*

21:28. If an ox gores a man or woman to death, the ox shall be stoned to death, its flesh may not be eaten, but the owner of the ox is innocent.

21:29. But if the ox was previously reputed to have had the propensity to gore, its owner having been so warned, yet he did not keep it under control, so that it then killed a man or a woman, the ox shall be stoned to death, and its owner shall be put to death as well.

21:30. Should a ransom be imposed upon him, however, he shall pay as the redemption for his life as much as is assessed upon him.

21:31. Whether it [i.e. the ox] shall have gored a minor (lit. a son or a daughter) this same rule shall apply to him.

21:32. If the ox gores a slave or slavewoman, he must pay thirty shekels of silver to his owner, but the ox shall be stoned to death.[87]

21:35. If an ox belonging to one man gores to death the ox of his fellow, they shall sell the live ox and divide the proceeds, and they shall divide the dead one as well.[88]

21:36. But if the ox was previously reputed to gore, and its owner had not kept it under control, he shall make good ox for ox, but will keep the dead one for himself.

The differences in these formally similar "laws" reveal diverse societal attitudes toward nonhuman animals. The two Mesopotamian cuneiform law codes concerned attempts to remedy what we would classify today as tortious wrongs by a dangerous domestic nonhuman

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[87] *Id.* The two omitted verses from *Exodus* provide that when an ox or ass falls into an open pit, the pit owner must pay the owner of the ox or ass, but may keep the dead body. FINKELSTEIN, *supra* note 38, at 36.

[88] FINKELSTEIN, *supra* note 38, at 20. The parallel between this provision and § 53 of the Laws of Eshnunna is the closest known between a biblical law and a Near Eastern legal text. Yaron, *supra* note 85, at 398.

animal to persons and property.[89] In the Laws of Hammurabi, however, the section concerning the ox who gored a human to death stands beside other sections that concerned the circumstances under which property settlements were made for damages inflicted by an ox.[90] The silence of the cuneiform law codes as to the fate of the ox is highly significant.

Old Testament law also addressed remedies for tortious wrongs. Its law concerning the ox who gored a human to death followed the laws addressing crimes by one human against another.[91] Unique among the ancient law codes, Israelite law demanded capital punishment, and not merely compensation, for murder.[92] According to Paul, in Israelite law,

> [s]ince man is conceived as being created in the divine image, the sacredness of a human being becomes a primary concern of the law .... "Life and property are incommensurable" in the Israelite system of law, where religious rather than economic values predominate. As a correlate the death penalty is now abolished for all crimes against property, while remaining intact for one held culpable for the taking of human life.[93]

In near-eastern scholar Jacob J. Finkelstein's view:

> [i]t is not merely that wrongs against the person are of greater gravity than wrongs against property. It is rather that the two realms belong to utterly different mental sets. Different scales are used to weigh the two wrongs, and the correlative measures prescribed are of two distinct qualitative orders.[94]

But in addressing the fate of the goring ox himself, the Covenant Code transcends mere crime or tort. The killing of a human being, created in God's image, by a creature who lay, as every creature lay, below humanity in the universal and divinely ordained hierarchy of beings rent the fabric of the universe in a manner that was different

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[89] The Laws of Eshnunna, §§ 56, 57, treated a vicious dog who bit in the same way it treated a goring ox. Yaron, *supra* note 85, at 402, 404. In Yaron's opinion, the Laws of Hammurabi and the Covenant Code dispensed with the vicious dog, as he was redundant to the goring ox. *Id.* at 404.

[90] PAUL, *supra* note 20, at 82.

[91] *Id.*

[92] Walzer, *supra* note 27, at 340; *see also* PAUL, *supra* note 20, at 61–62 (comparing biblical law and cuneiform law penalties for homicide); *Genesis* 9:5–6 ("And surely your blood of your lives will I require; at the hand of every beast will I require it, and at the hand of man; at the hand of every man's brother will I require the life of man. Whosoever sheddeth man's blood, by man shall his blood be shed: for in the image of God made be man.").

[93] PAUL, *supra* note 20, at 39 (quoting Greenberg, *supra* note 30, at 18).

[94] FINKELSTEIN, *supra* note 38, at 37.

in kind, and not just degree, from any other transgression. Accordingly, the offender suffered unique punishment intended to mend the tear.[95] Moishe Greenberg emphasizes that "[a] beast that kills a man destroys the image of God and must give a reckoning for it."[96]

The crime of the human who allowed his ox fatally to gore another human was homicide, punishable by the usual penalty of death, presumably carried out in the usual manner.[97] But the Covenant Code alone required that under all circumstances the ox was not merely to be put to death, but was to be killed by stoning, a punishment reserved only for the most serious crimes against the community, and his flesh could not be eaten.[98] Crimes fit for stoning were those "thought to strike at the moral and religious fibers which the community as a whole sees as defining its essence and integrity. Such crimes, in other words, amount to insurrections against the cosmic order itself."[99]

The Mishnah, considered as the first document of rabbinical Judaism, was a law code created between the second century B.C., and the

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[95] Katz disputes the notion that the stoning of the goring ox reflects a special value assigned to human life, and instead links it to the special importance attributed to life-blood in the biblical culture. Katz, *supra* note 7, at 265. However, Katz agrees that the law of the goring ox "reflects the hierarchy governing relations between man and beast that was enjoined at the time of their creation" and "ultimately reflects fully the principles of the fundamental distinction between men and beasts in the Bible as well as that of mankind's limited dominion over the animal world." *Id.* at 268, 277. Katz sees humanity's dominion over nonhuman animals as "limited" in the sense that humanity is enjoined to slaughter them only in certain prescribed ways. *Id.* at 251–52. Bernard S. Jackson suggests that originally the goring ox was to be stoned merely to protect the community from religious contagion, Bernard S. Jackson, *The Goring Ox*, *in* ESSAYS IN JEWISH AND COMPARATIVE LEGAL HISTORY 108, 113–14 (1975), though he concedes that, while utilitarian in origin, the law of the goring ox "was instrumental in the creation, within the Biblical period, both of the idea of the divine accountability of animals, and thence of the idea of their punishment at human hands." *Id.* at 118, 120. "[B]loodguilt rests upon the ox, and hence it is summarily executed." PAUL, *supra* note 20, at 81.

[96] Greenberg, *supra* note 30, at 15.

[97] FINKELSTEIN, *supra* note 38, at 26. All three codes regulated only the ox who fatally gored a human being, but not less harmful human gorings. Yaron, *supra* note 85, at 404.

[98] FINKELSTEIN, *supra* note 38, at 26. In Finkelstein's view, death by stoning "in biblical tradition and elsewhere in the ancient Near East, is reserved for crimes of a special character," those that "'offend' the corporate community or are believed to compromise its most cherished values to the degree that the commission of the offense places the community itself in jeopardy." *Id.* at 26–27. These special crimes included the worship of foreign gods, child sacrifice, sorcery, blasphemy, and violation of the sabbath. *Id.* at 27. By inserting the verses on oxen and pigs falling into pits, "[t]he biblical author is, in effect, warning us that those cases in which the victim of the goring ox was another ox are of an entirely different order from those cases in which the victim was human." *Id.* at 37.

[99] *Id.* at 28; *see also* 1 EMANUEL B. QUINT & NEIL S. HECHT, JEWISH JURISPRUDENCE—ITS SOURCES AND MODERN APPLICATIONS 37–38 (1980).

second century. It ordered fatally goring oxen, other domestic nonhuman animals used for bestial purposes, and such wild nonhuman animals who had killed humans as the wolf, lion, bear, leopard, panther, and serpent, to be "tried" before the Lesser Sanhedrin, comprised of twenty-three judges, then put to death.[100] As with the Covenant Code, the fatally goring ox was to be stoned to death, but no portion of his body could be used, no matter what his value was to his owner; instead, he was to be obliterated from the consciousness of the community.[101] This was despite the fact that the price of an ox often equalled that of a human slave, and his uncompensated destruction in this manner could ruin his owner.[102] Pecuniary damages came into play only when the human fatally gored was a slave and the loss was then limited to the economic.[103] But the ox who gored a slave was stoned to death because the victim, though a slave, was still a human being.[104]

These different legal solutions to identical legal problems reflected the dramatically differing cosmologies of the Mesopotamian and Israelite societies. Mesopotamian cosmology did not view human beings as qualitatively different from the rest of nature, but rather as part of a continuum. It did not demand that humans dominate the rest of nature.[105] Not only were humans not believed to be the apex or center of the universe, but nature was seen as complete before humans were even created. Mesopotamians saw human society as just one of many societies within the universe.[106] The Mesopotamians believed that

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[100] FINKELSTEIN, *supra* note 38, at 32; The Tractate *Sanhedrin* 1.4, *in* THE MISHNAH 383 (Herbert Danby trans., 1964). The rabbis reinterpreted the biblical rule to exonerate goring oxen if the human death had been accidental. In Finkelstein's opinion, this Talmudic view of the goring ox portion of the Covenant Code,

> attests, perhaps even more eloquently than do the instances in which the ox was to be condemned by stoning, the anthropocentric perspective upon all manner of experience. It is also the earliest unambiguous indication that the actions of an animal may be judged by human criteria to determine guilt or innocence.

FINKELSTEIN, *supra* note 38, at 32.

[101] FINKELSTEIN, *supra* note 38, at 28, 58. While the later Talmudic rabbis allowed for the automatic death-by-stoning penalty to be modified in the case of ox goring, they stood fast on the automatic death penalty for nonhuman animals used in bestial acts. *Id.* at 71.

[102] *Id.* at 57 & n.50.

[103] *Exodus* 21:32. The owner of the goring ox might also, if permitted, ransom his own life. *Id.* 21:30.

[104] PAUL, *supra* note 20, at 83.

[105] FINKELSTEIN, *supra* note 38, at 8–13, 39; HENRI FRANKFORT ET AL., BEFORE PHILOSOPHY—THE INTELLECTUAL ADVENTURE OF ANCIENT MAN 12 (1949) (In Mesopotamian cosmology, "the realm of nature and the realm of man were not distinguished.").

[106] FRANKFORT ET AL., *supra* note 105, at 152.

humanity was created merely to relieve certain gods of onerous physical labors and humanity's purpose "was little else than 'the care and feeding of the gods.'"[107] At least in the context of the goring ox, the Mesopotamians applied the same rules to both human and nonhuman animals.

In contrast, the Old Testament distilled human beings from the rest of nature. Humans occupied a central place in the universe between God and nature and were believed to have been created in God's image.[108] In Finkelstein's words, by the Covenant Code,

> [t]he real crime of the ox is that by killing a human being—whether out of viciousness or by an involuntary motion—it has committed a *de facto* insurrection against the hierarchic order established by Creation: Man was designated by God "to rule over the fish of the sea, the fowl of the skies, the cattle, the earth, and all creatures that roam over the earth."[109]

The moralistic and anthropocentric cosmology and law of the Pentateuch swept aside the utilitarian and secular cosmology and law of Mesopotamia. In the Israelite world, the enslavement of both human and nonhuman animals was universal, while wild nonhuman animals were considered fair game. Law as justice, and even philosophy, lay far in the future with the Greeks. Yet, in tandem with a Roman law interwoven with Greek and Stoic ideas, the Pentateuch was to shape numerous aspects of Western law and profoundly affect the development of the modern legal thinghood of nonhuman animals.[110]

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[107] FINKELSTEIN, *supra* note 38, at 12. Abnormalities of all kinds might be seen as ominous and strange by the Mesopotamians, but not as "unnatural." *Id.* at 71.

[108] FINKELSTEIN, *supra* note 38, at 7, 46; Wise, *supra* note 3, at 30–31; *see Genesis* 9:5–6.

> The world and all that is in it are created by Will, and every category of thing is testimony to that Will which had by design ordained the features and attributes defining the category. Deviations from the standard are thereby not only abnormal but appear to challenge the order of Creation in varying degrees.

FINKELSTEIN, *supra* note 38, at 71–72.

[109] FINKELSTEIN, *supra* note 38, at 28 (quoting *Genesis* 1:26, 28); *see also* United States v. Seifuddin, 820 F.2d 1074, 1076 (9th Cir. 1987); PAUL, *supra* note 20, at 79 (The nonhuman animal responsible for the death of a human being was seen as "destroying the image of God and thus is held accountable for being objectively guilty of a criminal action.").

[110] Finkelstein noted "the biblical sense of hierarchy inherent in some American opinions expressed in the context of the conflicting interests of ecology and commercial expansion, which assert the invariable priority of human, or social, interests over those of the animal world, or of nature in general." FINKELSTEIN, *supra* note 38, at 83.

III. Law as Human Justice in Greek and Roman Societies

A. *The Treatment of Nonhuman Animals in Greek Law*

Little is known of pre-Classical Greek law on the ownership and acquisition of things.[111] But when legal scholar Edith Hamilton nicely summarized the status of human slaves during the period of Greek dominance, she could have been explaining the legal thinghood of nonhuman animals: No one "ever gave a thought to slaves, no more in the West than in the East. Everywhere the way of life depended on them. One cannot say they were accepted as such, for there was no acceptance. Everyone used them; no one paid attention to them."[112] Similarly, in the *Iliad* and the *Odyssey*, Homer treated "the ox almost as a unit of currency."[113]As one commentator has noted, "even before the XVIIIth Dynasty in Egypt, the slave was legally defined as a thing; and the same conception prevailed in Babylonia, Assyria, Greece, Rome, India, China, and parts of medieval Europe."[114] The Cretan Law Code of Gortyn, also called the Great Code, was the first known comprehensive European law code and the only ancient Greek law code to survive intact. A likely product of the fifth century B.C.,[115] it referred both to the ownership of cattle by serfs and to the division of inherited livestock.[116] A partial so-called Second Code which, together with the Great Code, are sometimes referred to as the Gortyn Codes, addressed the remedying of damages done by farm animals and the stealing of domesticated nonhuman animals and birds.[117]

The laws of Athens, especially those concerning property, appear exceedingly primitive alongside the comprehensive property laws of the Romans' much less modern law.[118] Few Athenian statutes have

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[111] Sealey, *supra* note 22, at 61–62.

[112] Edith Hamilton, The Echo of Greece 23 (1957).

[113] Douglas M. MacDowell, The Law in Classical Athens 138 (1978). This idea persisted until at least the time of the Norman Conquest of England. II Frederick Pollack & Frederick W. Maitland, The History of English Law Before the Time of Edward XI 149–50 (1895).

[114] David B. Davis, The Problem of Slavery in Western Culture 32 (1966).

[115] Willetts, *supra* note 21, at 165. However, "[d]ates in the sixth and fourth centuries cannot be excluded." Sealey, *supra* note 22, at 38. Legal inscriptions exist in fragments from as early as the seventh century B.C., Gagarin, *supra* note 28, at 81, which is approximately 100 years after it is estimated that the Greeks began to write. *Id.* at 19, 130.

[116] Willetts, *supra* note 21, at 218, 219.

[117] Sealey, *supra* note 22, at 37.

[118] "There was, for example, no Greek noun for ownership, as distinct from possession; and other concepts and principles which are precisely defined in modern law were left undefined by

been preserved; most of what is known of Classical Greek law is drawn from the published speeches of litigants, rather than from the writings of philosophers or jurists.[119] However, the few known jurisprudential facts show the existence of lawsuits concerning domesticated nonhuman animals, including one famous suit involving domesticated peafowl, and confirm that nonhuman animals were treated as legal things.[120]

Scanty secondary sources survive, though not trial records, that claim that the Athenians held murder trials of nonhuman animals, inanimate objects, and unknown humans on the Pyrtaneum, a structure located on the west side of the Agora.[121] It is often presumed, but upon slim evidence,[122] that, if convicted, the nonhuman animals were either killed, cast beyond the borders, or both, while the inanimate objects were cast beyond the borders.[123]

The Classical Greeks neither employed legal reasoning nor developed a lasting body of law. In practice, Athenian law often appeared to be geared more toward the practical settlement of disputes than

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the Athenians, who just took their own customs for granted in an unsophisticated manner." MACDOWELL, *supra* note 113, at 133; *see* A.R.W. HARRISON, THE LAW OF ATHENS 200–05 (1968).

[119] SEALEY, *supra* note 22, at 138; Stephen Todd & Paul Millett, *Law, society and Athens*, *in* NOMOS, ESSAYS IN ATHENIAN LAW, POLITICS AND SOCIETY 14 (Paul Cartledge et al. eds., 1990).

[120] Paul Cartledge, *Fowl play: a curious lawsuit in classical Athens (Antiphon xvi, frr. 57–59 Thalheim)*, *in* NOMOS, ESSAYS IN ATHENIAN LAW, POLITICS AND SOCIETY 41–61 (Paul Cartledge et al. eds., 1990); MACDOWELL, *supra* note 113, at 146, 233.

[121] The Pyrtaneum served numerous functions, including perhaps those of a lawcourt. STEPHEN G. MILLER, THE PYRTANEION: ITS FUNCTION AND STRUCTURAL FORM 18 (1978); *see* E.P. EVANS, THE CRIMINAL PROSECUTION AND CAPITAL PUNISHMENT OF ANIMALS: THE LOST HISTORY OF EUROPE'S ANIMAL TRIALS 9, 172–74 (Faber & Faber, Ltd. repr. 1987); FINKELSTEIN, *supra* note 38, at 58–60 (quoting the four classical sources of trials at the Pyrtaneum and the sole very brief classical reference, that of Aristotle, to the trial of nonhuman animals); MACDOWELL, *supra* note 113, at 117; Paul S. Berman, Note, *Rats, Pigs, and Statues on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 288, 288, 290, 294–96 (1994); Walter W. Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 U. PA. L. REV. 696, 696–700 (1916).

[122] Katz says that "[t]he end result of such trials was in all likelihood execution and expulsion of the animal's corpse. This, at any rate, is what Plato, our *only* witness on the matter, *suggests*." Katz, *supra* note 7, at 270 (emphasis added).

[123] HOLMES, *supra* note 14, at 8; MACDOWELL, *supra* note 113, at 117; Hyde, *supra* note 121, at 700; *see also* J.W. Goldsmith, Jr.—Grant Co. v. United States, 254 U.S. 505, 511 (1921) (noting in the context of a forfeiture case, that "among the Athenians, whatever was the cause of a man's death, by falling upon him, was exterminated or cast out of the dominions of the republic" (quoting Blackstone)).

toward enforcing laws or securing justice.[124] Law, as opposed to government, was not a subject either of Greek philosophy or science, nor was it systematized.[125] The Greeks had no word for law as a body of principles, as opposed to a specific law.[126] In contrast to the non-legislative Mesopotamian "law codes," however, the early Greek codes were true law.[127] The Gortyn Codes have been said to signify "the end of the period of primitive law and the commencement of mature law."[128] Moreover, the Greeks were the first to engage in true legislation.[129] The Greeks also were the first to recognize rule by law not just as power, but in the sense of what was just or right.[130] Some claim that Aeschylus virtually invented law as right or justice in *The Orestia* trilogy of 458 B.C.[131] Within twenty years, this idea of law flowered in Sophocles's seminal confrontation between the power of King Creon and the right given by the gods to humanity in *Antigone*. Plato soon claimed that acting justly involved giving each person his due, an idea incorporated 800 years later in Justinian's *Digest* as "[j]ustice is a steady and enduring will to render unto everyone his right," and in his *Institutes* as "[j]ustice is the constant and perpetual wish to render every one his due."[132]

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[124] Paul Millett, *Sale, credit and exchange in Athenian law and society, in* NOMOS, ESSAYS IN ATHENIAN LAW, POLITICS AND SOCIETY 179 (Paul Cartledge et al. eds., 1990); Todd & Millett, *supra* note 119, at 14.

[125] WILLETTS, *supra* note 21, at 165. "[T]he profession of lawyer did not exist even in the Classical age." *Id.*

[126] SEALEY, *supra* note 22, at 57–58.

[127] GAGARIN, *supra* note 28, at 132–33.

[128] WILLETTS, *supra* note 21, at 164, 167.

[129] GAGARIN, *supra* note 28, at 144. They developed "a body of rules specifically to be used in the judicial settlement of disputes." *Id.*

[130] *Id.* at 53–54. Justice and written law were first equated in the fifth century B.C., though justice may have been an effect, and not a cause, of written law. *Id.* at 123–24.

[131] "The *Orestia* ushers in the luminous idea of law, not force, as the mediator between self and community. When Athena remands Orestes to human judgment in the Areopagus [rather than leaving him to the Furies], a new age begins in Western political thought—the age of law." Burt Neuborne, *Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech*, 27 HARV. C.R.-C.L. L. REV. 371, 372 (1992) (footnotes omitted). Neuborne notes that "Freud called the culmination of the *Orestia* 'the decisive step of civilization.'" *Id.* at 372 n.13 (citing Robert Fagles, *A Reading of the* Orestia*: The Serpent and the Eagle, Introduction to* AESCHYLUS, THE ORESTIA 12 (Robert Fagles ed., 1975)); *see* RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 34 n.15 (1988).

[132] THOMAS C. SANDARS, THE INSTITUTES OF JUSTINIAN 67 (1984) (Unless otherwise indicated, all citations to the *Institutes* shall be to this translation.); LLOYD L. WEINREB, NATURAL LAW AND JUSTICE 45–46 (1987).

B. *Nonhuman Animals in Roman Law*

The outlines, structure, and details of Roman law have had a dramatic impact upon modern Western law as a whole,[133] and especially upon property law.[134] As in much of Roman society, Greek footprints appear, and following Greek law, the legal thinghood of nonhuman animals was a Roman legal axiom.[135] Livy, the first-century B.C. historian, reported that in the middle of the fifth century B.C., the Romans sent an embassy to Greece to study the laws of Solon and other Greek lawgivers to help the Romans prepare what became known as the Twelve Tables.[136] But Livy's history was often unreliable, and so the true origin of the Twelve Tables has remained shrouded in legend.[137] But whatever their origins, the Twelve Tables and their associated legal rules concerning persons and, most especially, property[138] undoubtedly shaped the development of Roman law and there-

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[133] *See, e.g.*, Lane v. Cotton, 88 Eng. Rep. 1458, 1463 (P.C. 1701) ("[T]he laws of all nations are doubtless raised out of the ruins of the civil law, as all Governments are sprung out of the ruins of the Roman Empire, [and] it must be owned that the principles of our law are borrowed from the civil law, therefore grounded upon the same reason in many things."); Livingston v. McDonald, 21 Iowa 160, 168 (1866) (referring to Roman law as "embodying the accumulated wisdom and experience of the refined and cultivated Roman people for over a thousand years, though not binding as authority, is often of great service to the inquirer after the principles of natural justice and right."); D'ENTREVES, HISTORICAL SURVEY, *supra* note 22, at 17 ("It is no exaggeration to say that, next to the Bible, no book has left a deeper mark upon the history of mankind than the Corpus Iuris Civilis.").

[134] "The main divisions of the law, the major institutions, the boundary lines between one institution and another—all as fixed by the Romans—are so ingrained in us that we find it very difficult to conceive of the possibility of other arrangements." WATSON, LEGAL TRANSPLANTS, *supra* note 15, at 90; *see also* DAVIS, *supra* note 114, at 32; DONALD R. KELLEY, THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION 64 (1990) (footnote omitted) ("Roman law has provided the vocabulary—the terminology, conceptualizations, formulas, premises, and as it were the 'fore-structure'—for much of civilized life in Western terms."); WATSON, LEGAL CHANGE, *supra* note 15, at 79, 98.

[135] *See* WATSON, LEGAL TRANSPLANTS, *supra* note 15, at 25. Watson, however, proposes the minority view that neither the Twelve Tables nor the later course of Roman law was much influenced by Greek law. *Id.* at 26–29, 76; ALAN WATSON, ROME OF THE XII TABLES: PERSONS AND PROPERTY 179 & n.15 (1975) [hereinafter WATSON, TWELVE TABLES]; *see also* SEALEY, *supra* note 22, at 154–55.

[136] WATSON, TWELVE TABLES, *supra* note 135, at 177–78. Present knowledge of the Twelve Tables is only indirect, as the bronze tablets upon which they were inscribed and erected in the Roman Forum were likely consumed in the Gauls' burning of Rome in 390 B.C.

[137] H.F. JOLOWICZ, HISTORICAL INTRODUCTION TO THE STUDY OF ROMAN LAW 4–5, 105–08 (1961); WHO WAS WHO IN THE ROMAN WORLD, 753 BC—AD 476 125–26 (Diana Bowder ed., 1980).

[138] KELLEY, *supra* note 134, at 40 (footnote omitted) (The Roman state "was based above all on respect for property—that is, their own property.").

fore of modern law to such a high degree that they can be considered "the foundation of modern Western jurisprudence."[139]

From the beginning, "person" in Roman law comprehended every being who had rights, while "thing" included everything that could be considered as the object of the right of a person.[140] Gaius, the second-century Roman jurist whose *Institutes* was the most influential Roman jurisprudential text up to the time of Justinian, was the first to divide the law into the now-familiar categories of persons, things, and actions.[141] Those beings who were believed to lack free will—women, children, slaves, the insane, and nonhuman animals—were all at some time classified as property.[142] Nonhuman animals never shed their property status, never had rights, and never were subject to duties. They were always classified as *res* and not as *personae*.[143] The legal right even arbitrarily to deprive nonhuman animals of their lives and liberties and to exert total control over those nonhuman animals that they allowed to live was so ingrained into Roman law that history reveals not a single instance of a Roman jurist questioning its legality or even its propriety.

An intensely practical people, the Romans carefully regulated property. One major division of *res* was between those things that were exclusively owned by individuals, *res in patrimonio*, and those things that belonged to no one in particular, or to no one at all, *res extra patrimonio*.[144] An important subdivision of *res in patrimonio*, from at least the time of the Twelve Tables until Justinian abolished the distinction in the *Institutes* and *Digest*, was between *res mancipi* and

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[139] WATSON, TWELVE TABLES, *supra* note 135, at 3. The Twelve Tables "were the epitome of the common law of Rome" and "represent the source of the vast and complex system of jurisprudence which, perfected by the accomplished lawyers of the Empire, now constitutes the foundation of modern legislative action and judicial procedure throughout the world." 1 S.P. SCOTT, THE CIVIL LAW INCLUDING THE TWELVE TABLES, THE INSTITUTES OF GAIUS, THE RULES OF ULPIAN, THE OPINIONS OF PAULUS, THE ENACTMENTS OF JUSTINIAN, AND THE CONSTITUTIONS OF LEO 10 (1973).

[140] SANDARS, *supra* note 132, at 26. "If a Roman person 'owned' a thing, the link between person and thing seemed, to Roman jurists, as direct and unshakable as the link between biological mother and child seems to us." James Q. Whitman, *The Seigneurs Descend to the Rank of Creditors: The Abolition of Respect*, 1790, 6 YALE J.L. & HUMAN. 249, 255 (1994).

[141] Dig. 1.5.3 (Gaius, Institutes, book 1).

[142] SANDARS, *supra* note 132, at 50.

[143] *Id.* at 26.

[144] 2 PATRICK MAC CHOMBAICH DE COLQUHOUN, A SUMMARY OF THE ROMAN CIVIL LAW ILLUSTRATED BY COMMENTARIES AND PARALLELS FROM THE MOSAIC, CANON, MOHAMMEDAN, ENGLISH, AND FOREIGN LAW, § 922, at 1 (Fred B. Rothman & Co. 1988) (1851); T. LAMBERT MEARS, ANALYSIS OF M. ORTOLAN'S INSTITUTES OF JUSTINIAN, INCLUDING THE HISTORY AND GENERALIZATION OF ROMAN LAW 142 (1876); Allen, *supra* note 8, at 430.

res nec mancipi.[145] *Res mancipi* included those things that were of the greatest concern to a farmer in an early agricultural society: his land and buildings on Italian soil, his human slaves, and his domesticated nonhuman animals who had to be broken in for use, such as oxen, horses, mules, and asses.[146] According to Gaius, the Sabinians considered these few species of nonhuman animals *res mancipi* from birth, while the Proculians required that they first be broken in.[147] Though the Romans later employed such nonhuman animals as elephants and camels as beasts of burden, neither they nor other nonhuman animals ever were considered *res mancipi*.[148]

As fifth-century Rome was an agrarian society, it is unsurprising that both the Twelve Tables and the legal rules that surrounded it stressed farming. The right to human ownership of nonhuman animals was simply assumed and neither justified nor believed to require justification.[149] Table VII(7) permitted one to "drive one's beast" across the land of another if a road was impassable, while Table VIII(7) forbade one from pasturing one's "animals" on a neighbor's land.[150] Table VIII(6) probably provided an *actio de pauperie* for any damages

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[145] Only Roman citizens could acquire *res mancipi*. In contrast to *res nec mancipi*, the ownership of which could be obtained by *traditio*, or the bare delivery of the thing, ownership interests in *res mancipi* were secured by *mancipatio* or *in jure cessio*, and usually required a formal ceremony that conferred ownership *ex jure Quiritium*, and bestowed a warranty of title. WILLIAM L. BURDICK, THE PRINCIPLES OF ROMAN LAW AND THEIR RELATION TO MODERN LAW 312–13 (Wm. W. Gaunt & Sons, Inc. repr. 1989); DE COLQUHOUN, *supra* note 144, §§ 931, 996, at 13–14, 63; JOLOWICZ, *supra* note 137, at 139–56; SCOTT, *supra* note 139, at 112 n.2; ALAN WATSON, THE LAW OF PROPERTY IN THE LATER ROMAN REPUBLIC 16–17 (1968) [hereinafter WATSON, PROPERTY LAW].

[146] G. Inst. 2.14a & 2.15. *Res mancipi* was "the more important class of property in an early agricultural society: the stress is obviously laid on what is useful for farmers." WATSON, TWELVE TABLES, *supra* note 135, at 4 n.3, 136, 137. Similarly, one author writes,

> *[r]es mancipi* . . . originally consisted of the important objects of a man's household, *i.e.*, those things identified with himself, as his land, the house on it . . . , his wife, children, slaves, and beasts of burden, and this list never increased, though instruments of cultivation . . . , if incorporated for perpetual use with the land, were held to be *mancipi* . . . .

MEARS, *supra* note 144, at 83.

[147] G. Inst. 2.15; WATSON, PROPERTY LAW, *supra* note 145, at 17. The Sabinians and Proculians constituted the two great and often opposing schools of Roman jurists, the former tending to interpret law more expansively, the latter more literally.

[148] Gaius and Ulpian, the third-century Roman jurists, claimed that this was because they were either wild or unknown to the Romans at the early date that the list of *res mancipi* was fixed. G. Inst. 2.16; DE COLQUHOUN, *supra* note 144, at 14; WATSON, TWELVE TABLES, *supra* note 135, at 136 n.13.

[149] WATSON, TWELVE TABLES, *supra* note 135, at 165.

[150] W.A. HUNTER, A SYSTEMATIC AND HISTORICAL EXPOSITION OF ROMAN LAW IN THE ORDER OF A CODE 20 (J. Ashton Cross trans., 4th ed. 1903).

done to another's slaves or nonhuman animals[151] by "quadrupes."[152] Liability for the damages caused to another's slaves or nonhuman animals attached "to the physical corpus which caused the damage."[153] The owner of that physical corpus could offer pecuniary damages or make a noxal surrender, which involved handing over the offending corpus, including a nonhuman animal, to the victim.[154]

During the Republic, the Edict of the *Curule Aediles* prohibited the bringing or keeping of wild nonhuman animals and others likely to cause mischief upon public ways or thoroughfares.[155] A breach of the Edict that resulted in damage or injury reaped a penalty or double compensation, though not a noxal surrender.[156] The scope of the *actio de pauperie* probably remained unchanged until the promulgation of the *lex Aquilia*, which was completed approximately 287 B.C., and was intended to supersede, or at least to supplement, much of the law of the Twelve Tables.[157] As did the Twelve Tables, the *lex Aquilia* sometimes identically regulated behavior towards both domesticated

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[151] This section of the Twelve Tables concerned damages by nonhuman animals to any property. However, at that time of the Twelve Tables, *pauper* probably meant "producing little," so that this provision "would then mean '[i]f a four-footed animal caused the state of being unproductive.' The clause would thus originally cover only injuries to the instruments of production, primarily slaves and *pecudes* [animals that go in herds]; and only such injuries as would seriously affect the slave's or animal's productivity." Alan Watson, *The Original Meaning of Pauperies*, *in* WATSON, LEGAL ORIGINS, *supra* note 15, at 129, 133–34. It is not known whether the *actio de pauperie* covered injuries to land serious enough to cause a lack of productivity. *Id.* at 138. The *actio de pauperie*, like the noxal surrender, *see infra* note 161, and the coelecanth, have survived into the twentieth century. O'Callaghan v. Chaplin, A.D. 310 (South Africa 1927) (From within its glass house, the court threw out the observation that England's failure to abolish the deodand until 1846 constituted "a remarkable example of the conservatism of *English* law." *Id.* at 321 (emphasis added)).

[152] WATSON, LEGAL ORIGINS, *supra* note 15, at 129. While "quadrupes," as used in the Twelve Tables, literally meant "four-footed animal," and originally may have been limited to cattle, *O'Callaghan*, A.D. at 313, it

> can be used widely to mean any four-footed animal or narrowly to refer to a domestic animal. The illustrations in the texts (of the *Digest*) all refer to domestic farm animals or dogs, but Ulpian says that the action extends to all quadrupeds (*omes quadrupeds*) and Paul that an extension of it (*actio utlilis*) extends to other animals (*aliud animal*).

A.M. Honore, *Liability for Animals: Ulpian the Compilers*, *in* SATURAE ROBERTO FEENSTRA—SEXAGESIMVM QVINTVM ANNVM AETATIS AB ALVMNIS COLLEGIS AMICIS ABLATA 239 (J.A. J.E. Spruit, & F.B.J. Wubbe eds., 1985).

[153] Dig. 9.1.1.12 (Ulpian, Edict, book 18).

[154] Dig. 9.1.1.1, 11–16 (Ulpian, Edict, book 18).

[155] J. Inst. 4.9.1; R.W. LEAGUE, ROMAN PRIVATE LAW FOUNDED ON THE "INSTITUTES" OF GAIUS AND JUSTINIAN 433–34 (1948).

[156] O'Callaghan v. Chaplin, A.D. 310 (South Africa 1927).

[157] ALAN WATSON, ROMAN SLAVE LAW 46 (1987) [hereinafter WATSON, SLAVE LAW]; *see* HOLMES, *supra* note 14, at 10–17.

nonhuman animals and human slaves.[158] For example, the first chapter of the *lex Aquilia* provides that "[i]f anyone kills unlawfully a slave or servant-girl belonging to someone else or a four-footed beast of the class of cattle, let him be condemned to pay the owner the highest value that the property had attained in the preceeding [sic] year."[159] Similarly, the Edict of the *Curule Aediles* held sellers of both human slaves and domesticated nonhuman animals strictly liable to buyers to whom defects had not been specifically declared.[160]

Following the *lex Aquilia*, the *actio de pauperie* came to be limited to damages by any "four-footed animal,"[161] inflicted "without any legal wrong on the part of the doer and of course, an animal is incapable of inflicting a legal wrong because it is devoid of reason."[162] However, for liability to attach, the nonhuman animal had to have been "moved by some wildness contrary to the nature of its kind."[163]

Only two judicial opinions, authored by Trebatius and Proculus, that concern the occupation of wild nonhuman animals have survived from Classical Roman law.[164] Offering no justifications, they simply agreed that humans could occupy wild nonhuman animals, differing only as to the degree of control that must be obtained before the natural liberty of a nonhuman animal was lost.[165] Gaius reported Trebatius's older opinion that a wild nonhuman animal wounded severely enough to be captured became the property of the hunter so long as

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[158] WATSON, SLAVE LAW, *supra* note 157, at 46, 54–57. Nineteenth-century slavery was to draw powerful support from the Judeo-Christian and Roman traditions that frequently classified human slaves with nonhuman animals. Thornton Stringfellow, *A Brief Examination of Scripture Testimony on the Institution of Slavery*, *in* THE IDEOLOGY OF SLAVERY 136 (Drew G. Faust ed., 1981).

[159] Dig. 9.2.2 (Gaius, Provincial Edict, book 7).

[160] WATSON, SLAVE LAW, *supra* note 157, at 49–50; *see* HOLMES, *supra* note 14, at 10–17.

[161] Dig. 9.1.2 (Ulpian, Edict, book 18); *see* WATSON, LEGAL ORIGINS, *supra* note 15, at 137. The apparent reason for Ulpian's narrow construction of the pauperian action was that it had begun to appear primitive to late Republican and classical jurists due to its imposition of strict liability upon the owner and its option to the owner of noxal surrender, which compensated the victim of an attack solely by surrendering to the victim the nonhuman animal who had attacked him. TONY HONORE, ULPIAN 249 (1982). To many victims, such compensation may have appeared inadequate.

[162] Dig. 9.1.3 (Ulpian, Edict, book 18); *see* O'Callaghan v. Chaplin, A.D. 310 (South Africa 1927).

[163] Dig. 9.1.7 (Ulpian, Edict, book 18).

[164] Donahue, *supra* note 15, at 45.

[165] Donahue suggests that the four reasons why a classical Roman jurist might have wanted to know who owned a wild nonhuman animal were that the owner could sue for theft, a former owner was not liable for damage caused by one, capturing one was not regarded as being a "fruit" of land ownership, and negligent or intentional damage to one did not give rise to an action under the *lex Aquilia*. *Id.* at 47.

the chase continued unabated.[166] In the newer opinion, Proculus claimed that ownership of a wild boar who had fallen into a trap set by one human, then carried off by another, depended simply upon who had obtained mastery over the boar; "[t]he cardinal rule is that if he has come into my power the boar has become mine."[167]

Unlike the Greeks, the Romans did not hesitate to wreathe their philosophy and theology, much of which they had borrowed from the Greeks, directly into their law.[168] Roman law was substantially Roman legislation, and for many centuries, Roman legislation was substantially the product of a natural law philosophy borrowed from Greek Stoicism.[169] The Roman concept of natural law, a first cousin to the

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[166] *Id.* at 43, 45. Trebatius followed the view that a wild animal, wounded to the point of capture,

> becomes ours at once and that it is ours so long as we chase after it; but, if we abandon the chase, it ceases to be ours and is open to the first taker. Hence, if, during the period of our pursuit, someone else should take the animal, with intent to profit thereby, he is to be regarded as stealing from us.

Dig. 41.1.5 (Gaius, Common Matters or Golden Things, book 2). *Common Matters* generally is believed to be a post-classical work. Donahue, *supra* note 15, at 44; *see also* J. Inst. 2.1.13 (virtually identical to the *Digest*, it does not name Trebatius, but refers to "others").

[167] Dig. 41.1.55 (Proculus, Letters, book 2). Donahue analogizes the Roman *actio in factum*, which was based on the *lex Aquilia*, to the more familiar "action on the case." Donahue, *supra* note 15, at 47 n.26.

[168] Ulpian termed law a "genuine philosophy." Dig. 1.1.1.1 (Ulpian, Institutes, book 1). By Ulpian's time,

> a lawyer who was alive to the new currents needed to defend his calling by showing it was based on reason and served the ideal of justice for all .... Thinking people were no longer content with the traditional way of life, serving the state, and conforming with the received laws and customs.

HONORE, *supra* note 161, at 30–31.

[169] KELLEY, *supra* note 134, at 44, 47; 1 WILLIAM E.H. LECKY, HISTORY OF EUROPEAN MORALS 314–15 (1869); Re, *supra* note 13, at 452 (noting the "Roman jurists who confessed the alliance of philosophy with law" (quoting 1 CHARLES P. SHERMAN, ROMAN LAW IN THE MODERN WORLD 61 (2d ed. 1922))).

As one legal historian put it,

> [t]he point of contact between the Stoic philosophy and Roman jurisprudence is to be found in the theory of the Law of Nature—which the Stoics had deduced from their conception of the universe, and which the Roman jurists employed, under the name *jus naturale*, to indicate the natural or ethical foundation upon which civil law must rest.

WILLIAM C. MOREY, OUTLINES OF ROMAN LAW COMPRISING ITS HISTORICAL GROWTH AND GENERAL PRINCIPLES 109 (12th impression 1902); *see* A.P. D'ENTREVES, NATURAL LAW—AN INTRODUCTION TO LEGAL PHILOSOPHY 20, 23, 25, 27 (2d ed. 1971) [hereinafter D'ENTREVES, LEGAL PHILOSOPHY] ("Natural law was [Justinian's] keystone. . . . [The Roman doctrine of natural law] was borrowed wholesale from Greek philosophy, particularly from Stoicism. . . . Under the influence of Stoic philosophy the doctrine of natural law passed into Roman law—to be handed on in later thought."); H. MCCOUBREY, THE DEVELOPMENT OF NATURALIST LEGAL THEORY 31–36 (1987); *see also* CHARLES G. HAINES, THE REVIVAL OF NATURAL LAW CON-

later idea of natural rights, helped lay the foundation for natural rights by attempting to ground Roman law on reason, nature, and principles of justice, rather than sheer power.[170] According to legal historian William Morey,

> [t]he praetorian law, like the old *jus civile*, had grown up through procedure. Under the Empire, however, the belief that law was founded upon ethics, that the specific duties of men were derived from certain ultimate and universal principles of natural justice, furnished a new impulse and gave a new direction to legal development.[171]

The legal thinghood of nonhuman animals is a clear example of the marriage of Greek philosophy and Roman law. This outcross merged with biblical law to pass largely unchanged into the common law, first of England and then of the United States.[172]

Before the Augustinian blend of Stoic philosophy and biblical cosmology could twine with Roman law, however, the Christian religion had to be lifted from the desperate place to which a long series of Roman Emperors had relegated it.[173] In 313, just ten years after the Emperor Diocletian's Great Persecution of Christians, Constantine

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CEPTS: A STUDY OF THE ESTABLISHMENT AND OF THE INTERPRETATION OF LIMITS ON LEGISLATURES WITH SPECIAL REFERENCE TO THE DEVELOPMENT OF CERTAIN PHASES OF AMERICAN CONSTITUTIONAL LAW 8 & n.4, 9 (1930); C.H. ZIEGLER, ROMAN PRIVATE LAW 22 (MacMillan & Co., Ltd., 2d ed. 1948). *But see* WATSON, LEGAL TRANSPLANTS, *supra* note 15, at 116 (The *Digest's* definition of natural law "has no philosophical interest or direct practical import. It was adopted . . . to deny significance to natural law . . . for Roman jurists, law was always positive law."); Alan Watson, *The Legacy of Justinian Natural Law*, *in* ROMAN LAW AND COMPARATIVE LAW 214–16 (1991). Watson's dissent may exemplify a split between historians on the one hand and political philosophers and students of Roman law on the other. D'ENTREVES, HISTORICAL SURVEY, *supra* note 22, at 20, 28. It is also consistent with Watson's minority belief that Roman law was largely uncontaminated by Greek thought. WATSON, LEGAL TRANSPLANTS, *supra* note 15, at 76 & n.9. At least with respect to the law concerning the relationship between human and nonhuman animals, however, Watson has erred. Greek, and especially Stoic cosmology permeated Roman law, though it was neither more obvious nor explicit than is the biblical cosmology, or the Roman law, that permeates Western law today.

[170] D'ENTREVES, LEGAL PHILOSOPHY, *supra* note 169, at 35; *see also* CHESTER J. ANTIEAU, THE HIGHER LAW—ORIGINS OF MODERN CONSTITUTIONAL LAW 52 (1994) ("To the Roman Stoics, natural law was probably not a legal basis for disregarding positive laws in conflict with higher law, but . . . the seeds of natural law were to ripen in a few centuries into a higher law that would effectively void mandates of temporal rulers in conflict therewith . . . ."); HAINES, *supra* note 169, at 11.

[171] MOREY, *supra* note 169, at 107.

[172] The two leading commentators on the first 700 years of English common law, Bracton and Blackstone, expressly relied upon Roman law to explain the human ownership of wild nonhuman animals. Donahue, *supra* note 15, at 41.

[173] Wise, *supra* note 3, at 30–34.

triumphed over his rival, Maxentius. Grateful for what he believed to have been the help that the Christian God had rendered him at the Milvian Bridge near Rome, the new Emperor issued the Edict of Milan. This, and other ordinances, restored a great measure of power, property, and legal rights to the long-suffering Christian community and ultimately led to the adoption of Christianity as the state religion of Rome.[174] This set the stage for the formal influence of Christian theology upon Roman law.

In 533, two monumental works of imperial Christian Roman jurisprudence appeared. The *Digest*, or *Pandects*, collected the writings of the great Roman jurists, primarily of the second and third centuries.[175] The *Institutes* were extracts intended to be used for teaching in place of the outdated *Institutes* of Gaius. Together they constituted the core of Justinian's attempts to reformulate a new Roman code intended to cover all of Roman law.[176] It was to be as free as possible from vagueness, contradictions, and incompatibilities with Christian teachings.[177]

Though his empire was Christian, many of the laws Justinian republished originated from pagan Emperors, some of whom had persecuted Christians.[178] Few laws that appeared in the *Institutes* or *Digest* had been promulgated before the two Antonine emperors, Antoninus Pius and Marcus Aurelius, "but this is precisely the period when the empire was at its best and greatest and the Roman tradition was being consolidated and interpreted in the benevolent light of the stoicism of Marcus Aurelius."[179] Two major branches of Justinianic Roman law, private law and property law, concerned nonhuman animals.

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[174] EUSEBIUS, THE HISTORY OF THE CHURCH FROM CHRIST TO CONSTANTINE 401–08 (G.A. Williamson trans., 1985); MICHAEL GRANT, CONSTANTINE THE GREAT 156–59 (1993).

[175] These writings included "statements of principles, discussions of rules, commentary on the scope or interpretation of edicts and statutes, qualifications of other juristic opinion, and the treatment of problem cases, real or hypothetical." WATSON, CIVIL LAW, *supra* note 15, at 11. With the possible exception of Hermogenianus, it contains no text attributable to anyone who lived after the third century. *Id.*

[176] 1 EDWARD GIBBON, THE DECLINE AND FALL OF THE ROMAN EMPIRE 634–71 (The Modern Library 1932) (1899); JOHN J. NORWICH, BYZANTIUM: THE EARLY CENTURIES 196 (1988). The *Digest* and *Institutes* were two of four parts of the *Corpus Juris Civilis*. A third was the *Code*, which compiled Imperial constitutions, while the fourth was the *Novels*, which embraced Justinian's subsequent legislation. WATSON, CIVIL LAW, *supra* note 15, at 11–13. To forestall the confusion that has necessitated the massive revision of Roman law, Justinian unsuccessfully tried to prohibit all subsequent commentary. Mommsen et al. eds., *supra* note 10, at xlviii–xlix.

[177] Mommsen et al. eds., *supra* note 10, at lv–lvi; GLANVILLE DOWNEY, CONSTANTINOPLE IN THE AGE OF JUSTINIAN 69, 72, 75 (1960); KELLEY, *supra* note 134, at 53–54; NORWICH, *supra* note 176, at 196.

[178] P.N. URE, JUSTINIAN AND HIS AGE 144–45 (1979).

[179] *Id.* at 146.

Before Justinian, private law was divided into two, and sometimes three, major parts. Gaius bifurcated the law into the *jus civile* (civil law), which was "[t]hat law which a people establishes for itself . . . peculiar to it," and the *jus gentium* (law of nations), or "the law that natural reason establishes among all mankind [that] is followed by all peoples alike . . . as being the law observed by all mankind."[180] Half a century later, Ulpian separated the law into the *jus civile*, *jus gentium*, and *jus naturale*. The *jus gentium* applied to all and only human beings, while the *jus naturale* concerned all animals, including human beings.[181] In Ulpian's opinion, all humans were born free by the law of nature; slavery, which was contrary to the law of nature, existed only by the *jus gentium*.[182] Ulpian's contemporary, the jurist Paul, noted that "[t]he term 'law' is used in several senses: in one sense, when law [*jus*] is used as meaning what is always fair and good, it is natural law [*jus naturale*]."[183] The *Institutes* and the *Digest* incorporated both Gaius's bifurcation and Ulpian's trifurcation of Roman law, though they appear contradictory.[184]

This contradiction was the only time in Roman law that the law of nations (*jus gentium*) was said to violate natural law (*jus naturale*).[185] The *Digest*, quoting Florentinus, a jurist of the mid-second century, said that "[s]lavery is an institution of the *jus gentium*, by which a person contrary to nature is subjected to another's ownership."[186] The *Institutes* stated that "[s]lavery is an institution of the law of nations,

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[180] G. Inst. 1.1, *in* THE INSTITUTES OF GAIUS, (Francis De Zulueta trans., 1991).

[181] J. Inst. 1.2.1; Dig. 1.1.1.2–4 (Ulpian, Institutes, book 1). Dig.1.1.1.3–4 says:

> 3. *Jus naturale* is that which nature has taught to all animals; for it is not a law specific to mankind but is common to all animals—land animals, sea animals, and the birds as well. Out of this comes the union of man and woman which we call marriage, and the procreation of children, and their rearing. So we can see that the other animals, wild beasts included, are rightly understood to be acquainted with this law.
>
> 4. *Jus gentium*, the law of nations, is that which all human peoples observe. That it is not co-existent with natural law can be grasped easily, since this latter is common to all animals whereas *jus gentium* is common only to human beings among themselves.

[182] J. Inst. 1.2.1; Dig. 1.1.4 (Ulpian, Institutes, book 1); WEINREB, *supra* note 132, at 45.

[183] Dig. 1.1.11 (Paul, Sabinus, book 14).

[184] J. Inst. 1.1.4; Dig. 1.1.1.2–4 (Ulpian, Institutes, book 1); J. Inst. 1.2.11; Dig. 1.1.9 (Gaius, Institutes, book 1).

[185] For Davis, "the institution of slavery has always been a source of conceptual contradiction . . . [that partly] arose from the impossibility of transforming a concious [sic] being into a totally dependent and nonessential conciousness [sic]—one whose essence is to be the mere instrument and confirmation of an owner's will." DAVID B. DAVIS, SLAVERY AND HUMAN PROGRESS 20 (1984). Even Watson concedes that both the *Digest* and the *Institutes* "betray[] an uneasiness over the morality of slavery." *See* WATSON, SLAVE LAW, *supra* note 157, at 8.

[186] Dig. 1.5.4.1 (Florentinus, Institutes, book 9).

by which one man is made the property of another, contrary to natural right."[187] Violation of natural law did not mean violation of a natural right, for it is far from clear that the Romans ever possessed the concept of a subjective right.[188] The Latin meaning of what we would today very roughly interpret as a "right," the term *jus* or *ius*, varied as would be expected during its lengthy history of use.[189] Classical Romans sharply distinguished between having a *dominium*, or ownership, in something, as opposed to a *jus*, which was that which could be seen as objectively right in a particular situation.[190] *Jus* more nearly meant "law" in a general sense, while specific rules of law were called *jura*.[191] In the late post-Justinianic Empire, *dominium* came to be seen as a kind of *jus*, and while both were used in ways similar to the ways in which the modern term "right" is used, they did not mean "right" in the modern, or even in the medieval, sense.[192] This tension between the natural law and the law of nations lasted one thousand years.[193]

This legal contradiction had implications both for human slaves and for nonhuman animals, for the Romans often drew their law from the same well. If the denial of liberty to all animals, human and nonhuman, violated a natural law that equally applied, then were the keeping of both nonhuman animals and humans in slavery not equal violations of natural law?[194] Legal scholar Alan Watson, whose point was that the Justinianic texts did not consider human slavery immoral,[195] has suggested two justifications for the contradiction. Unlikely as it may seem, the Roman jurists may never have noticed the contradiction.[196] Or they may have noticed, but did not consider the matter important

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[187] J. Inst. 1.3.2. In Tuck's opinion, "[i]t is among the men who rediscovered the *Digest* and created the medieval science of Roman law in the twelfth that we must look to find the first modern rights theory." TUCK, *supra* note 18, at 13. Finnis locates the time of the first development of a modern rights theory as between the 13th and 17th centuries. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 206–07 (1980).

[188] TUCK, *supra* note 18, at 7–8.

[189] *Id.* at 7.

[190] *See id.* at 7–8, 10.

[191] *Id.* at 8.

[192] *See id.* at 10–13.

[193] DAVIS, *supra* note 185, at 20, 83; WATSON, SLAVE LAW, *supra* note 157, at 7.

[194] *See* WATSON, PROPERTY LAW, *supra* note 145, at 215–16.

[195] *See* WATSON, LEGAL ORIGINS, *supra* note 15, at 276–77. D'Entreves agreed with Watson. "However contrary to natural law, such institutions as slavery could still appear, even to the Byzantine lawyers, as perfectly acceptable and legal." D'ENTREVES, HISTORICAL SURVEY, *supra* note 22, at 34.

[196] *See* WATSON, LEGAL ORIGINS, *supra* note 15, at 263.

enough to discuss.[197] This, too, appears unlikely in light of the fact that this was the sole instance of conflict between the *jus gentium* and *jus naturale*, and because the Stoics had been proclaiming human equality for centuries. Instead, perhaps the jurists noticed, but allowed the matter to remain unexamined because it contradicted their cosmologies and religions.[198] Or perhaps contradictions simply concerned them less than they concern us.[199]

Mature Roman property law expressly implemented the Stoic idea that by natural law nearly every thing had been created for use by humanity.[200] Romans acquired property in three ways. They could discover and reduce a thing to their control, create things through labor, or employ artificial methods approved by the prevailing social, economic, or legal system.[201] Domestic nonhuman animals and their offspring were considered the descendants of wild nonhuman animals who had been occupied originally then passed from one human to another through an approved artificial civil process.[202] From before the time of the Twelve Tables, they were simply assumed to belong to the human who lawfully controlled them.[203] Romans held a *dominium* over them "simply given by the fact, as it seemed to the Romans, of a man's total control over his physical world—his land, his slaves [human and nonhuman] or his money."[204]

Wild nonhuman animals were believed to have been originally acquired, and to be continually available to be acquired, by the natural method of occupation. The Romans believed that all the world's things

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[197] *Id.* Here D'Entreves disagreed with Watson. "If there are many contradictions between the texts, surely the Byzantine compilers must have been aware of them." D'ENTREVES, HISTORICAL SURVEY, *supra* note 22, at 34.

[198] *See* Wise, *supra* note 3, at 28–34.

[199] David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 64–65 (1990) (discussing the apparent unconcern of the early Talmudic rabbis with the paradox of God determining all human action and humans using free will).

[200] "Under the influence of the Stoic idea of *naturalis ratio* [Roman jurists] conceived that most things were destined by nature to be controlled by man. Such control expressed their natural purpose." POUND, *supra* note 22, at 110. "In the most fundamental way . . . Roman jurisprudence was anthropocentric." KELLEY, *supra* note 134, at 49.

[201] *See* KELLEY, *supra* note 134, at 60; POUND, *supra* note 22, at 109.

[202] *See* KELLEY, *supra* note 134, at 60.

[203] Gaius said that:

> [p]oultry and geese are not wild by nature . . . . Hence, if my geese or chickens be disturbed and fly so far away that I do not know where they are, nonetheless they remain my property so that anyone who takes them with a view to gain will be liable to me for theft.

Dig. 41.1.6 (Gaius, Common Matters or Golden Things, book 2); *see* J. Inst. 2.1.15, 16 (citing Dig. 41.1.5.6 (Gaius, Common Matters or Golden Things, book 2)).

[204] TUCK, *supra* note 18, at 10.

naturally were destined to be subject to private ownership.[205] Things fell into at least three sometimes confusing and overlapping categories of *res extra patrimonium*, also called *res extra commercium*, things that belonged to no individual in particular, as opposed to *res patrimonium*, things that belonged to someone.[206] The three formal Roman categories of *res extra patrimonium* were *res publicae* (those things owned by the State), *res communes* (those things owned in common), and *res nullius* (those things owned by no one).[207]

Res publicae were those things said to belong to the Roman state or that, while privately owned, were available to be used by the public. These included rivers, harbors, public roads, and river banks.[208] *Res communes* were things said to belong to the people in common. They included the air, the running water, the sea, sea bed and seashore to the highest winter floods, as well as the right to fish.[209] Along with unoccupied lands, abandoned property, precious stones, hidden treasure, and the property of an enemy captured in war, wild nonhuman animals generally were characterized as *res nullius*. In its ordinary sense, *res nullius* referred to those things that were capable by their very natures of individual appropriation, but that belonged to no one until a human being took possession of them through *occupatio*.[210] The Roman state asserted the power to regulate (*imperium*) the exploitation of wild nonhuman animals, but not to own (*dominium*) them; while nonhuman animals remained unoccupied, they remained unowned.[211]

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[205] POUND, *supra* note 22, at 110.

[206] W.W. BUCKLAND, A TEXT-BOOK OF ROMAN LAW FROM AUGUSTUS TO JUSTINIAN 186 (Wm. W. Gaunt & Sons, Inc. repr. 1990).

[207] "Some of the distinctions involved in this classification were evidently rather fluid in classical law." *Id.* at 184. For example, the seashore is characterized variously as *res commune*, *res publicae*, and *res nullius*. *Id.*; R.W. LEE, THE ELEMENTS OF ROMAN LAW 110 (4th ed. 1956); WATSON, PROPERTY LAW, *supra* note 145, at 13; Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 471, 475 (1970).

[208] J. Inst. 2.2; Dig. 1.8.5 (Gaius, Everyday Matters or Golden Words, book 2); DE COLQUHOUN, *supra* note 144, at 3–4; RUDOLPH SOHM, THE INSTITUTES—A TEXTBOOK OF THE HISTORY AND SYSTEM OF ROMAN PRIVATE LAW 303 (James C. Ledlie trans., 1907).

[209] J. Inst. 2.1.1; Dig. 1.8.2 (Marcian, Institutes, book 6); MEARS, *supra* note 144, at 143; SOHM, *supra* note 208, at 303.

[210] "[T]he only *res nullius* which are commonly encountered in everyday life are wild animals, and it is in regard to them that *occupatio* is mainly discussed." BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 131 (1962); *see, e.g.*, BUCKLAND, *supra* note 206, at 184–85; DE COLQUHOUN, *supra* note 144, at 4–5; HUNTER, *supra* note 150, at 255–57; SANDARS, *supra* note 132, at 160. Allen argues that wild nonhuman animals only became things when possessed. Allen, *supra* note 8, at 424, 431.

[211] Toomer v. Witsell, 334 U.S. 385, 402 n.37 (1946); Commonwealth v. Agway, Inc., 232 A.2d 69, 71 (Pa. Super. Ct. 1967); POUND, *supra* note 22, at 111. See Missouri v. Holland, 252 U.S. 416,

In harmony with Stoic natural law ideas incorporated into classical Roman law, both the *Institutes* and the *Digest* assumed that wild nonhuman animals lived in a "natural state of freedom"[212] or "natural state of liberty."[213] *Occupatio*, or obtaining title by seizing (*adprehensio*) possession of a thing that belonged to no one with the intention of owning it, was the oldest and most primitive form of obtaining title.[214] Wild nonhuman animals lived either at their natural liberty or within the control of a human being.[215] According to Gaius, "everything captured on land, in the sea, or in the air" was the captor's by occupation, "because they were previously no one's property."[216] However, unlike republican law, which allowed mere wounding to suffice for possession, imperial law required that wild nonhuman animals physically be captured before they could be reduced to private property.[217] Equally, by the law of nature, the natural freedom of wild nonhuman animals could be lost to human *occupatio*, then regained by escape.[218] Once "occupied" nonhuman animals remained private property, even if snatched away by other nonhuman animals, so long as they could be retrieved,[219] until and unless they regained their

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434 (1920), in which Holmes noted that "[w]ild birds were not in the possession of anyone; and possession is the beginning of ownership."

[212] Dig. 41.1.3 (Gaius, Common Matters or Golden Things, book 2) ("natural state of freedom"); Dig. 41.1.55 (Proculus, Letters, book 2) ("natural state of freedom") (Proculus was a first-century jurist); Dig. 41.1.44 (Ulpian, Edict, book 19) ("natural freedom").

[213] Dig. 41.1.5 (Gaius, Common Matters or Golden Things, book 2) ("natural state of liberty"); Dig. 41.2.3.14 (Paul, Edict, book 54) ("But those fish which live in a lake or beasts which roam in an enclosed wood are not in our possession, because they are left in their natural state of liberty."). The *Institutes* refer to the "natural liberty" of animals. J. Inst. 2.1.12 ("[W]hen [the animal] has escaped and recovered its natural liberty, it ceases to be yours. . . . It is considered to have recovered its natural liberty, if it has . . . escaped.").

[214] DE COLQUHOUN, *supra* note 144, at 35–38; MEARS, *supra* note 144, at 146–47; SANDARS, *supra* note 132, at 40; SOHM, *supra* note 208, at 317.

[215] Donahue, *supra* note 15, at 46.

[216] *Id.* at 44 (quoting and modifying G. Inst. 2.66–.67 "Thus, if we capture a wild animal, a bird, or a fish, [what we so capture becomes ours forthwith and] is held to remain ours so long as it is kept in our control."). According to Neratius, a jurist of the first century A.D.,

> [w]hat a man erects on the seashore belongs to him; for shores are public, not in the sense that they belong to the community as such but that they are initially provided by nature and have hitherto become no one's property. Their state is not dissimilar to that of fish and wild animals which, once caught, undoubtedly become the property of those into whose power they have come.

Dig. 41.1.14 (Neratius, Parchments, book 5). Paul said that "we possess those wild animals which we have penned up or the fish which we have placed in tanks." Dig. 41.2.3.14 (Paul, Edict, book 54).

[217] J. Inst. 2.1.13; Dig. 41.1.5 (Gaius, Common Matters or Golden Things, book 2); WATSON, PROPERTY LAW, *supra* note 145, at 47.

[218] Dig. 41.1.5; *see also* NICHOLAS, *supra* note 210, at 131.

[219] Dig. 41.1.44 (Ulpian, Edict, book 19).

natural liberty by escape,[220] or like bees, peacocks, doves, and pigeons, demonstrated the habit of leaving and returning into captivity.[221]

IV. The Development of the Legal Thinghood of Nonhuman Animals in Western Culture

A. *"Trials" of Nonhuman Animals*

Throughout the Middle Ages, and later, nonhuman animals were subjected to proceedings, then usually sentenced, in both secular and ecclesiastical courts across continental Europe.[222] Influenced by Roman, Germanic, and Anglo-Saxon law, human deaths resulting from attacks by nonhuman domestic animals earlier had been remedied by pecuniary damages paid and the offending nonhuman animal surrendered to the victim's kin.[223] The earliest secular judicial proceeding recorded in either trial records or customals took place in Fontenay-

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[220] J. Inst. 2.1.12; *see* Gaius, *Institutionum Iuris Civilis Commentarii Quatuor* 2.67 (Edward Poste trans., 1895); Dig. 41.1.1, 41.1.3 (Gaius, Common Matters or Golden Things, book 2); J. Inst. 2.1.11.

[221] J. Inst. 2.1.15; *see* G. Inst. 2.68; Dig. 41.1.5 (Gaius, Common Matters or Golden Things, book 2). The main classical text on the occupancy of wild animals is *The Institutes of Gaius*, Book II, which states:

> 66. Another title of natural law, besides Tradition, is Occupation, whereby things not already subjects of property become the property of the first occupant, as the wild inhabitants of earth, air, and water, as soon as they are captured.
>
> 67. For wild beasts, birds, and fishes, as soon as they are captured, become by natural law the property of the captor, but only continue so long as they continue in his power; after breaking from his custody and recovering their natural liberty, they may become the property of the next occupant; for the ownership of the first captor is terminated. Their natural liberty is deemed to be recovered when they have escaped from his sight, or, though they continue in his sight, when they are difficult to recapture.
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> 68. In those wild animals, however, which are habituated to go away and return, as pigeons, and bees, and deer, which habitually visit the forests and return, the rule has been handed down that only the cessation of the instinct of returning is the termination of ownership, and then the property in them is acquired by the next occupant; the instinct of returning is held to be lost when the habit of returning is discontinued.

Gaius, Elements of Roman Law 198–99 (Edward Poste trans., 2d ed. 1875); *see* Donahue, *supra* note 15, at 44.

[222] Most, if not all, of the existing primary evidence concerning the medieval and post-medieval trials and punishments of nonhuman animals derives from Karl von Amira, *Thierstrafen and Thierprocesse (Animal Trials and Animal Punishment)*, *in* 12 Mitteilungen des Osterreichischen Instituts fur Geschichtsforschung 545–601 (1891); *see* Finkelstein, *supra* note 38, at 70.

[223] Finkelstein, *supra* note 38, at 68–69; Glanville L. Williams, Liability for Animals—An Account of the Development and Present Law of Tortious Liability for Animals, Distress Damage Feasant and the Duty to Fence in Great Britain, Northern Ireland and the Common-Law Dominions 267 (1939); Jacob J. Finkelstein, *The Goring*

Aux-Roses in 1266.[224] However, secular judicial proceedings against nonhuman animals likely began well before 1266 and may have been even more widespread.[225] The procedure spread to the area around Paris, then throughout France and into the Low Countries, Germany, Switzerland, and Italy; it may have diffused to even a greater degree, but the search for evidence mainly has been limited to those areas.[226]

Ecclesiastical proceedings first were recorded in the fifteenth century in the areas bordering France, Switzerland, and Italy, and ultimately took place in Germany, Spain, the Scandinavian countries, Brazil, and Canada.[227] Although the practice of subjecting nonhuman animals to proceedings in the secular and ecclesiastical courts never took hold in England,[228] the values and principles behind these primarily Continental trials and punishments of nonhuman animals were shared with England,[229] and likely manifested themselves in the uniquely

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Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notions of Sovereignty, 46 TEMP. L.Q. 169, 191–92 (1973).

[224] Esther Cohen, *Law, Folkore and Animal Lore*, *in* PAST AND PRESENT 20 (1986).

[225] FINKELSTEIN, *supra* note 38, at 68; Hyde, *supra* note 121, at 703.

[226] ESTHER COHEN, THE CROSSROADS OF JUSTICE—LAW AND CULTURE IN LATE MEDIEVAL FRANCE 110–11 (1993); GRAEME NEWMAN, THE PUNISHMENT RESPONSE 299 n.26 (1978); Piers Beirnes, *The Law is an Ass: Reading E.P. Evans' The Medieval Prosecution and Capital Punishment of Animals*, *in* 2 SOCIETY AND ANIMALS 33 (1994).

[227] COHEN, *supra* note 226, at 119.

[228] E.P. Evans reports the trial of one dog in Scotland in the first half of the 16th century, of another dog in Chichester, England in 1771, and of a cock in Leeds, England in the 19th century. EVANS, *supra* note 121, at 285, 286. Finkelstein characterized the first report as "very dubious," the second as "questionable," and ignored the third. FINKELSTEIN, *supra* note 38, at 67, 68 & n.23. Evans's single American example involved the executions of a cow, two heifers, three sheep, two sows, and a dog, who were the victims of bestial acts in New Haven, Connecticut, in 1662. It is unclear where those nonhuman animals actually were tried. EVANS, *supra* note 121, at 148–49. Ewald reports the case of Thomas Granger, a 16-year-old or 17-year-old servant, who was executed at Plymouth, Massachusetts in 1642 along with the creatures he had sodomized. William Ewald, *Comparative Jurisprudence(I): What was it Like to Try a Rat?*, 143 U. PA. L. REV. 1889, 1905 n.28 (1995); *see also* Ralph W. Dox, *Beasts at the Bar*, 4 LINCOLN L. REV. 1, 6 (1931). Shakespeare either knew that Venetians engaged in the secular trials of nonhuman animals or assumed that his audiences were familiar with them, as Fratiano fulminated against Shylock in *The Merchant of Venice*:

> Thy currish spirit
> Govern'd a wolf, hang'd for human slaughter
> Even from the gallows did his fell soul fleet.

Act IV, Scene 1.2.

[229] This would be expected, as,

> [a]ll Western legal systems—the English, the French, the German, the Italian, the Polish, the Hungarian, and others (including, since the nineteenth century, the Russians)—have common historical roots, from which they derive not only a common terminology and common techniques but also common concepts, common principles, and common values.

English institution of the deodand.[230] Both the trials and punishments of nonhuman animals and the deodand derived from the biblical law of the goring ox.[231]

While the secular judicial proceedings occasionally involved bestiality or some other "unnatural crime,"[232] more often they concerned charges that a domesticated nonhuman animal, most frequently a pig, but sometimes a dog, horse, goat, ass, ox, bull, or cow, had killed a human being. In contrast, the ecclesiastical proceedings featured beetles, caterpillars, eels, flies, grasshoppers, rats, leeches, locusts, mice, moles, serpents, weevils, turtledoves, dolphins, and other creatures considered pests or vermin.[233] Elaborate procedures, often similar to secular procedures, but not true judicial proceedings, were employed against the pests and vermin subjected to proceedings in the ecclesiastical courts, as it was believed that the pests and vermin had been sent by God to punish humans for their sins.[234] Even in the secular courts,

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HAROLD J. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 539 (1983); *see* WATSON, LEGAL ORIGINS, *supra* note 15, at 74 (Watson summarizes the theme of his book, *The Making of the Civil Law*, as "the legal elements that have gone into the makeup of modern Western legal systems are everywhere the same.").

[230] FINKELSTEIN, *supra* note 38, at 68. A deodand (from the Latin *deo dandum*, "a thing to be given to God") was "any personal chattel which was the immediate occasion of the death of any reasonable creature, and which was forfeited to the crown to be applied to *pious* uses." BLACK'S LAW DICTIONARY (6th ed. 1990) (emphasis in original).

[231] FINKELSTEIN, *supra* note 38, at 68; Hyde, supra note 121, at 703.

[232] "And if a man lie with a beast, he shall surely be put to death: and ye shall slay the beast. And if a woman approach unto any beast, and lie down thereto, thou shalt kill the woman, and the beast: they shall surely be put to death." *Leviticus* 20:15–16. Finkelstein believed that "[i]n the strict sense, the 'execution' of animals used in acts of bestiality ought not to be treated under the rubric of animal punishment, for it is clear that in such cases the killing of the beast is purely ancillary to the execution of the human culprit." FINKELSTEIN, *supra* note 38, at 71; *see* Hyde, *supra* note 121, at 711. Bestiality was not the only "unnatural crime" that a nonhuman could commit. In Basel in 1474, a cock was burned at the stake for allegedly committing "the heinous and unnatural crime of laying an egg," an act that the cock's defense lawyer did not deny, but merely sought to mitigate as unpremeditated and involuntary. EVANS, *supra* note 121, at 162; *see* Hyde, *supra* note 121, at 708.

[233] FINKELSTEIN, *supra* note 38, at 64, 65. Finkelstein surmised that the turtledoves and dolphins, which ordinarily are not considered pests or vermin, may have been considered pests to fishermen and farmers. *Id.* at 64. Evans noted that von Amira,

> draws a sharp line of technical distinction between Thierstrafen and Thierprocesse; the former were capital punishments inflected [sic] by secular tribunals upon pigs, cows, horses, and other domestic animals as a penalty for homicide; the latter were judicial proceedings instituted by ecclesiastical courts against rats, mice, locusts, weevils, and other vermin in order to prevent them from devouring the crops, and to expel them from orchards, vineyards, and cultivated fields by means of exorcism and excommunication.

EVANS, *supra* note 121, at 2.

[234] FINKELSTEIN, *supra* note 38, at 65.

> [t]he cases of domestic animals that had killed persons were not trials at all. The judicial process in those instances consisted at most of a plain statement of the essential facts and the pronunciation of a verdict setting out the precise manner in which the animal was to be executed. There was no formal defense.[235]

Nonhuman animals therefore received the trappings of due process, but not due process itself. While domesticated nonhuman animals invariably were convicted and put to death by the secular courts in a manner that echoed the biblical law of the goring ox,[236] the ecclesiastical courts generally ordered such judgments of exorcism of the guilty as anathemas, maledictions, banishments, and excommunications.[237]

Both Finkelstein and Cohen correctly rejected the superficial claims of the nineteenth-century and early twentieth-century thinkers influenced by now-discredited notions of cultural positivism or social darwinism, such as the scholar E.P. Evans, anthropologist James Frazer, legal philosophers Hans Kelsen[238] and Oliver Wendell Holmes, Jr.,[239] jurispru-

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[235] *Id.* at 69. Esther Cohen, upon slim evidence, but consistent with her view that no distinction existed to the medieval mind between secular and ecclesiastical proceedings against nonhuman animals, claimed that, with the exception that the nonhuman animals never were brought into court, the prosecution of nonhuman animals closely followed the procedures set out for human beings, including arrest, pre-trial imprisonment, appointment of counsel, summonsing of witnesses, sentencing, execution, and occasionally, pardoning. COHEN, *supra* note 226, at 111–13. Similarly, Newman insisted that they "received due process of law every bit as good as that provided by humans." NEWMAN, *supra* note 226, at 93. However, Finkelstein pointed out that while secular prosecutions contained some of these elements, von Amira had gone "to great lengths" to demonstrate that secular trials were not conducted through a human-like judicial process and even had warned against conflating the secular and ecclesiastical trial processes. FINKELSTEIN, *supra* note 38, at 64, 69. For recent examples of mixing of the processes and sometimes even the failure to acknowledge that nonhuman animals were subjected to separate secular and ecclesiastical proceedings, see FRANCIONE, *supra* note 11, at 93–94; Berman, *supra* note 121, at 298–303. For an older and influential example, see Hyde, *supra* note 121, at 703–05.

[236] FINKELSTEIN, *supra* note 38, at 68.

[237] *Id.* at 64; Hyde, *supra* note 121, at 763.

[238] Kelsen, for example, writes:

> [i]n primitive law, animals, and even plants and other inanimate objects are often treated in the same way as human beings and are, in particular, punished. However, this must be seen in its connection with the animism of primitive man. He considers animals, plants, and inanimate objects as endowed with a "soul," inasmuch as he attributes human, and sometimes even superhuman, mental faculties to them. The fundamental difference between human and other beings, which is part of the outlook of civilized man, does not exist for primitive man. And he applies his law also to non-human beings because for him they are human, or at least similar to man.

HANS KELSEN, GENERAL THEORY OF LAW AND STATE 3–4 (Anders Wedberg trans., 1945).

[239] HOLMES, *supra* note 14, at 30–31 (The "germ" of "the development of the chief forms of

dential writer Glanville Williams, and others,[240] that judicial proceedings brought against nonhuman animals occurred because primitive minds could not comprehend the true categorical differences between human and nonhuman animals, and so humans mistakenly sought retribution against the nonhuman offender.[241] Evans wrote of humanity's "childish disposition to punish irrational creatures . . . common to the infancy of individuals and races."[242] Frazer believed that

> 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 inanimate creation, and second, between man and the brutes.[243]

But Finkelstein attributed Frazer's embarrassing failure to discuss the place of the goring ox in the Laws of Hammurabi to the fact that, though far older than the Covenant Code, they appeared more socially "evolved" and therefore fit ill within Frazer's progressive scheme of social evolution.[244]

Characteristically relying upon the science of his day, Holmes believed that "it is the universal tendency of the human mind . . . to hold

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liability in modern law for anything other than the immediate and manifest consequences of a man's own acts" was "the desire of retaliation against the offending thing itself.").

[240] A recent example is Carl Cohen, *The Case for the Use of Animals in Biomedical Research*, 315 NEW ENG. J. MED. 865, 867 (Oct. 2, 1986) ("No animal can commit a crime; bringing animals to criminal trial is the mark of primitive ignorance.").

[241] FINKELSTEIN, *supra* note 38, at 48–58; Cohen, *supra* note 224, at 20; Finkelstein, *supra* note 223, at 227–33. Ewald dispenses with such other occasionally proffered justifications as the idea that nonhuman animals were punished so that the crime might be forgotten, that it might be remembered, that other nonhuman animals would be deterred from evil, and that the demons that resided within nonhuman animals would be punished. Ewald, *supra* note 228, at 1905–10.

[242] EVANS, *supra* note 121, at 186. However, he contradicted his cultural positivism when he showed that "animal trials are absurd and abominable from a twentieth-century perspective, but they were saturated with cultural meaning when they were carried out." KEITH TESTER, ANIMALS AND SOCIETY—THE HUMANITY OF ANIMAL RIGHTS 74 (1991).

[243] James G. Frazer, *The Ox That Gored*, *in* 3 FOLK-LORE IN THE OLD TESTAMENT, STUDIES IN COMPARATIVE RELIGION, LEGEND AND LAW 445 (1919). *See generally* JAMES G. FRAZER, TOTEMISM AND EXOGAMY (1910).

[244] FINKELSTEIN, *supra* note 38, at 56. The seemingly harsher Covenant Code does not necessarily represent a retreat from the more enlightened Mesopotamian cuneiform law codes. Instead it places a greater emphasis on the religious, as opposed to the economic. PAUL, *supra* note 20, at 78–79. *But see* G.R. DRIVER & JOHN C. MILES, THE BABYLONIAN LAWS 443–44 (1952) (the more primitive Hebrew law treated the ox as a murderer and punished the owner with death, while the Babylonian laws treated the owner's offense as civil and did not treat the ox as a criminal).

a material object, which is the proximate cause of loss, in some sense answerable for it,"[245] a trait that he believed was shared especially by the primitive adult and the modern child.[246] Vengeance, not compensation, was the object of early legal procedures.[247] Similarly, Williams found that much of the earliest body of rules that can be considered law "was conditioned by the instinct of vengeance, of visiting with harm the visible source of a wrong. Instinct in those primitive days was but faintly tempered with reason, and hence vengeance was conceived not only against human beings but also against beasts and inanimate objects."[248] Unlike Frazer, Williams recognized the problem of the seemingly retrograde Covenant Code for an ever-progressing legal order, and sought to distinguish it. Williams could only speculate, however, that it was "possible" that the differences between it and the Laws of Hammurabi were not as significant as they seemed, for "the killing of the ox may *conceivably* have existed under Hammurabi even though he does not mention it."[249] This may explain Williams's puzzlement at the "curious recrudescence of earlier notions in the criminal prosecution and punishment of animals, which extended [from the middle ages] into quite recent times."[250]

Recent scholarship denies that these secular and ecclesiastical proceedings were the results of a general anthropomorphization of nonhuman animals or of beliefs that nonhuman animals could achieve the mental state required for human beings to commit crimes or were otherwise morally guilty of crime.[251] The secular proceedings at least came about because of an awareness that there was

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[245] NOVICK, *supra* note 13, at 148–49; Holmes, *supra* note 14, at 430.

[246] Holmes, *supra* note 14, at 428–29. "Much of Holmes' legal thought can be explained in terms of . . . scientific positivism—what Holmes himself called 'the scientific way of looking at the world.'" Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787, 795 (1989) (quoting *The Holmes-Cohen Correspondence, in* PORTRAIT OF A PHILOSOPHER: MORRIS R. COHEN IN LIFE AND LETTERS 313, 321 (L. Rosenfield ed., 1962)).

[247] Holmes, *supra* note 14, at 430, 437.

[248] WILLIAMS, *supra* note 223, at 9.

[249] *Id.* at 274 n.1 (emphasis added).

[250] *Id.* at 266 n.5.

[251] Cohen, *supra* note 224, at 16–17; Finkelstein, *supra* note 223, at 227–33. Cohen criticizes Finkelstein's claim that the subjection of nonhuman animals to judicial proceedings in a manner similar to that of humans was specific only to societies that placed human above nonhuman animals in a divinely mandated hierarchy, as required by the Judeo-Christian tradition. Cohen, *supra* note 224, at 17–19. Indeed, Finkelstein stated that "the central thesis of this entire essay would fall to the ground if a single clear and unambiguous instance of such a procedure could be adduced by a non-Western source." FINKELSTEIN, *supra* note 38, at 55. One of Cohen's two grounds, that "[t]he idea of animal trials also existed in western culture outside the Judaic

> an unbridgeable gulf between mankind and the rest of creation, and there is beyond that an acute sensitivity towards boundary breaching between kinds within the world of living things . . . . Animals that have killed persons were to be extirpated because the very fact of their having done so disturbed the cosmological environment in a way that could not be tolerated: the act appeared to negate the *hierarchically* differentiated order of creation by which man was granted sovereignty in the physical world. The visible evidence of the breach of this order had to be removed—and removed in solemn public procedure—in order that the cosmological equilibrium would be widely recognized as having been restored. The law in Exod. 21:28f, which requires that an ox who gored a person to death be stoned and its flesh not eaten is the earliest expression of this deeply felt sense.[252]

This perception of a breach of hierarchy probably accounted for the custom of thirteenth-century and fourteenth-century Burgundy of the inverted hanging of nonhuman animals who killed humans, as well as Jews who killed Christians, as a sign of special infamy.[253] Their reversals of the natural hierarchy demanded counter-reversals to set the universe right again.[254]

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tradition, in Plato's writings," Cohen, *supra* note 224, at 18, is weak in light of the fact that Plato, and later Greek thinkers, employed a hierarchy similar to the biblical hierarchy. Wise, *supra* note 3, at 18–30. Even if Cohen is correct, this merely undermines Finkelstein's thesis that the subjection of nonhuman animals to judicial proceedings was specific *only* to societies that placed human above nonhuman animals in a divinely mandated hierarchy, as required by the Judeo-Christian tradition. It does not undermine Finkelstein's claim, which Cohen joins, that societies with a belief in a cosmological hierarchy similar to that of the biblical Jews subjected nonhuman animals to judicial procedures.

[252] FINKELSTEIN, *supra* note 38, at 70, 73 (emphasis in original).

> Within the hierarchy of the universe, animals occupied a lower rung than humans, and therefore any damage by an animal to a human being was an offense against justice. It was therefore necessary to try offending animals and punish them, not so much as individual retribution against the specific beast, but far more as a gesture restoring the balance of justice.

COHEN, *supra* note 226, at 110; TESTER, *supra* note 242, at 74 ("The broad thesis that can be extracted from Evans' [sic] work is that animal trials attempted to reassert the primacy of humanity in the God-ordained scheme."); Beirnes, *supra* note 226, at 29 ("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.").

[253] COHEN, *supra* note 226, at 113, 117–18; Cohen, *supra* note 224, at 12 n.20 (While Jews were hung upside-down all over Europe, only in Burgundy were nonhuman animals so hung.).

[254] COHEN, *supra* note 226, at 175 ("When flesh-and-blood animals were placed in a human position on the dock and tried for homicide, this reversal of the natural order was righted by a second inversion, that of hanging the animal upside-down."); Beirnes, *supra* note 226, at 30 ("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-inspired hierarchy of God's creation."). Conversely, convicted human criminals might be "animal-

The arguments made by both sides of a 1587 ecclesiastical trial of weevils accused of destroying French vineyards at St. Julien confirm the role of hierarchy in proceedings against nonhuman animals.[255] Both counsel conceded the existence of a hierarchical universe in which nonhuman animals had been created subservient to human beings.[256] The defense counsel claimed that, although subservient, nonhuman animals had been created before human beings, were blessed by God, and therefore, had the right to eat what they needed to live.[257] The prosecutor replied that, although created first, animals existed only to serve humanity.[258] The defense counsel countered that, while that may be true, only God had the power to excommunicate the weevils.[259]

The hierarchy was emphasized again, ironically, in the murder prosecution of an insane man before an ecclesiastical court in Berne in 1666.[260] Against the plea that an insane man could not be held responsible for his actions, the prosecutor appealed to the biblical law of the goring ox, which mandated the death of the ox even though the ox was not responsible for his actions.[261] The court rejected the argument because "as no law was given to the ox, it cannot violate any," for "although God enacted a law for the ox, he did not enact any for the insane man."[262] The court insisted that "the distinction between the goring ox and the maniac must be observed. 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."[263]

Early proceedings against nonhuman animals were not merely the irrational result of primitive minds. The community's purpose in bringing them neither was to eliminate a proven danger nor to wreak vengeance, but to right terrible insults against the ordained, immuta-

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ized" by being hung alongside dogs or wolves or being sewn into a sack with such nonhuman animals as a monkey, dog, viper, and cock. COHEN, *supra* note 226, at 171. In light of the hierarchy of beings, "any identification of the human with an animal life-form [was] the greatest of degradations." *Id.* Bestiality also frequently was understood to breach the ordained hierarchy of the universe and divinely placed boundaries. FINKELSTEIN, *supra* note 38, at 71.

[255] The story is told in EVANS, *supra* note 121, at 37–49.

[256] *Id.* at 42–45.

[257] *Id.* at 42–44.

[258] *Id.* at 44.

[259] Evans reported that the court's decision is unknown as the final page was destroyed. *Id.* at 49.

[260] FINKELSTEIN, *supra* note 38, at 70.

[261] *Id.*

[262] *Id.* (quoting EVANS, *supra* note 121, at 171).

[263] *Id.*

ble, and universal hierarchy, which were insults against justice itself.[264] The proceedings "both juxtaposed and identified the preservation of the universal hierarchy with the maintenance of justice. Justice thus assumed the proportions of supra-human, universal law."[265]

B. *The Evolution of the English Law of Forfeiture*

Although the English also subscribed to a divine and immutable hierarchy, they characteristically reacted to its breach by nonhuman animals in a manner different from the Continent.[266] The English equivalent of the "trial" and punishment of nonhuman animals was the deodand.[267]

The origins of the deodand are traceable to two primary legal sources. The first consists of Saxon, Roman, and perhaps Greek law.[268] Chapter 13 of the Laws of Alfred the Great, which date to about 900 A.D., required the noxal surrender of any tree, and by implication any nonhuman animal, that caused the death of a human being.[269] While the noxal surrender was a part of early English private law, deodands were considered Pleas of the Crown as early as Bracton's time (the latter half of the thirteenth century).[270] Early in his discussion of Pleas of the Crown, Bracton said that homicide was limited to the killing of one human by another, and he excluded from the definition of homicide the killing of a human by nonhuman animals or things, as they lacked reason, and were incapable of forming the required intention.[271] These

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[264] Cohen, *supra* note 224, at 11.

[265] COHEN, *supra* note 226, at 83, 113.

[266] Beirnes, *supra* note 226, at 34.

[267] See *supra* note 230 for the definition of the deodand.

[268] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681–92 (1974); J.W. Goldsmith, Jr.—Grant Co. v. United States, 254 U.S. 505, 510–11 (1921). The pre-Judeo-Christian practices to which the United States Supreme Court referred were likely those of Athens, and the *noxae deditio*, or noxal surrender, of Roman law. *See* FINKELSTEIN, *supra* note 38, at 75. After quoting much of the Supreme Court's discussion of the origins of deodand, the United States District Court for the Western District of Missouri, in *United States v. One 1963 Cadillac Coupe de Ville*, concluded that "[w]hen this ancient concept is recalled, our understanding of the law of forfeiture of chattels is more easily understood." United States v. One 1963 Cadillac Coupe de Ville, 250 F. Supp. 183, 185 (W.D. Mo. 1966).

[269] WILLIAMS, *supra* note 223, at 267.

[270] Finkelstein, *supra* note 223, at 181–82. Pleas of the Crown determined both major and minor criminal actions. HENRI DE BRACTON, BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND (*TRACTATUS DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE*) 327 (Samuel E. Thorne trans., 1968) [hereinafter BRACTON].

[271] BRACTON, *supra* note 270, at 340, 379.

unreasoned killings of humans instead were classified as misadventures and subjected to deodand.[272]

Established in Roman law as early as the time of the Twelve Tables, approximately 450 B.C.,[273] the noxal surrender, at least in its earliest form, was mandated when such an instrument as a slave, child, nonhuman animal, or inanimate object inflicted harm upon a person without malicious intent by the instrument's owner.[274] The instrument's surrender to the injured person or that person's relatives prevented any further legal action by the injured person or that person's relatives.[275]

The second, and likely more powerful, influence on the development of the deodand was biblical law.[276] Not only were the Laws of Alfred the Great prefaced by *Exodus* 21 and 22,[277] but biblical mores imbued many parts of Anglo-Saxon law.[278] More importantly, the Norman and Angevin kings wrested a unique degree of spiritual control from the church. Under their influence, the widely held biblical belief in human transcendence began to have secular consequences.[279] Both the law of

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[272] *Id.* at 379, 384, 424.

[273] WATSON, TWELVE TABLES, *supra* note 135, at 3.

[274] Finkelstein, *supra* note 223, at 181; *e.g.*, E.C. CLARK, HISTORY OF ROMAN PRIVATE LAW, PART III, REGAL PERIOD 60 (Wm. W. Gaunt & Sons, Inc. repr. 1990); HOLMES, *supra* note 14, at 6–11. Noxal surrender exists today in modified form in Article 2321 of the Louisiana Civil Code:

> [t]he owner of an animal is answerable for the damages he has caused; but if the animal had been lost, or had strayed more than a day, he may discharge himself from this responsibility, by abandoning him to the person who has sustained the injury; except where the master has turned loose a dangerous or noxious animal, for then he must pay for all the harm done, without being allowed to make the abandonment.

LA. CIV. CODE ANN. art. 2321 (West 1979); *see* Willis v. Schuster, 28 So.2d 518, 521 (La. Ct. App. 1946) ("We are deeply impressed by the similarity between the provisions of this codal article and the provisions of Title IX of Book IV of the 'Institutes of Our Lord Justinian.'"); *see also* Winter v. Mudianse, 22 Ceylon N.L.R. 153 (1920).

[275] CLARK, *supra* note 274, at 60; Finkelstein, *supra* note 223, at 181.

[276] Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 681 n.17 (1974) ("[i]f an ox gore a man or a woman, and they die, he shall be stoned: and his flesh shall not be eaten" (citing *Exodus* 21:28)). In J.W. Goldsmith, Jr.–Grant Co. v. United States, 254 U.S. 505, 511 (1921), the United States Supreme Court quoted Blackstone's observation that "[a] like punishment [to deodand] is in like cases inflicted by the Mosaical law: 'If an ox gore a man that he die, the ox shall be stoned, and his flesh shall not be eaten.'" *See* FINKELSTEIN, *supra* note 38, at 68 ("Both the deodands and the punishment of animals were strongly inspired by the goring-ox laws of Exod. 21:28f."); *id.* at 77 (discussing the "transformation of the biblical ox condemned to death by stoning into the deodand of medieval England"); *id.* at 81 ("[T]he deodands were the distinctively English reflex of the biblical law of the goring ox.").

[277] WILLIAMS, *supra* note 223, at 267 & n.1.

[278] FINKELSTEIN, *supra* note 38, at 75; Finkelstein, *supra* note 223, at 181.

[279] FINKELSTEIN, *supra* note 38, at 79; *see* Finkelstein, *supra* note 223, at 170–71.

the goring ox and of the deodand depended upon a hierarchical universe whose objective breach demanded strict reparation.[280] Biblical law demanded the ox's obliteration for his breach of the universal law, not his forfeiture in the modern sense in that the state gained his value.[281] But the death of an Englishman caused by a nonhuman animal or inanimate object came to lead neither to a Roman-style noxal surrender nor to the Continental secular or ecclesiastical trial, but to the uniquely English deodand, a forfeiture to God through the agency of the state.[282]

The English common law of deodands did not flourish in either the American colonies or in the United States. The reason, in Finkelstein's view, was that the New England Puritans rejected the merger of political and sacred authority in the person of the King that the deodand exemplified.[283] The leading American case on the nature of the deodand, *Parker-Harris Co. v. Tate*, claimed that,

> [a]t the base of the doctrine was superstition—the implication that the cart or the ox drawing it, for example, was morally affected for having caused the death . . . [a] doctrine . . . deemed so repugnant to our ideas of justice as not to be included as a part of the common law of this country.[284]

The Tennessee Supreme Court in *Parker-Harris* erred if, under the influence of cultural positivists and social darwinists whose opinions were then current if not dominant, the "superstition" to which it referred was that the offending cart itself and the offending ox himself actually were considered to be guilty. If, however, the "superstition" was the idea that the universe existed in an immutable hierarchy and that such breaches of that hierarchy as the killing of a human being by a nonhuman animal or inanimate object had to be punished, the court was entirely correct. This second suggested understanding of the "superstition" of this hierarchy has important implications for determining whether fundamental legal rights necessarily are restricted to human beings. Only a court that understands how thor-

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[280] FINKELSTEIN, *supra* note 38, at 77, 81.

[281] *Id.* at 79–80.

[282] Bracton sought to restrict the deodand to those things that were in motion at the time they caused human death. BRACTON, *supra* note 270, at 384. But the courts generally ignored him. POLLACK & MAITLAND, *supra* note 113, at 474 n.4.

[283] FINKELSTEIN, supra note 38, at 82.

[284] Parker-Harris Co. v. Tate, 188 S.W. 54, 55 (Tenn. 1916); *see, e.g.*, State v. Champagne, 538 A.2d 193, 197 (Conn. 1988); *see also* Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663, 683 (1974).

oughly the ancient idea of the universe as a designed and immutable Great Chain of Being has been supplanted by modern evolutionary fact can understand, and therefore be receptive to, the argument that certain fundamental legal rights are not necessarily restricted to human beings.

While common law deodand never entered American law, the associated English law of statutory forfeiture was enforced even in the colonies.[285] Running through the case law of the United States Supreme Court decisions interpreting forfeiture statutes is "the fiction 'that the thing is primarily considered the offender.'"[286] Alongside appear the contradictory themes that although forfeiture punishes the owner, an owner's innocence is not a common law defense to forfeiture.[287] Common law deodand was not finally abolished in England until August 18, 1846.[288]

C. *The Common Law of Nonhuman Animals*

The ancient belief of human transcendence virtually commanded the common law thinghood of nonhuman animals in a form substantially borrowed from Roman and Hebrew law.[289]

Roman law began to influence the development of English law no later than the re-introduction of Christianity into England by Saint Augustine of Canterbury, fewer than seventy years after the appearance of Justinian's *Digest* and *Institutes*.[290] The laws of Ethelbert of

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[285] *Calero-Toledo*, 416 U.S. at 683–84; C.J. Hendry Co. v. Moore, 318 U.S. 133, 139 (1943).

[286] Austin v. United States, __ U.S. __, 113 S. Ct. 2801, 2808 (1993) (quoting J.W. Goldsmith, Jr.—Grant Co. v. United States, 254 U.S. 505, 511 (1921)). Among other chattels, nonhuman animals have been held subject to forfeiture. United States v. One Black Horse, 129 F. 167 (D. Me. 1904); United States v. Two Bay Mules, 36 F. 84 (W.D.N.C. 1888); United States v. Two Horses, 28 F. Cas. 294 (E.D.N.Y. 1878) (No. 16578).

[287] Bennis v. Michigan, ___ U.S. ___, 64 U.S.L.W. 4124 (Mar. 5, 1996); *Austin*, 113 S. Ct. at 2,808–10; *Calero-Toledo*, 416 U.S. at 684–86.

[288] 9 & 10 Vict. c. 62 (1846); *see also* Finkelstein, *supra* note 223, at 250. Finkelstein explained that, while the deodand disappeared, its principle has continued to animate the modern law of forfeiture, in which deodands have been transfigured to go not to God, but to the government. Finkelstein, *supra* note 223, at 250–51.

[289] The common law's past and present refusal to recognize a cause of action for the wrongful death of a human being has been another major effect of human transcendence. Eight days after Parliament abolished the deodand, the first statute to abrogate the common law rule that barred recovery for the wrongful death of a human being, Lord Campbell's Act—formally known as the Act for Compensating the Families of Persons Killed by Accidents—took effect. 9 & 10 Vict. c. 96 (1846); Finkelstein, *supra* note 223, at 270–71.

[290] Roman law, including the law of nonhuman animals similarly influenced Scottish law. The influential Cromertie Manuscript, written approximately 1450, contains a collection called the

Kent (approximately 600), Ina of Wessex (approximately 700), Alfred the Great (approximately 900), and Canute (about 1030) all reflect Roman influence.[291] The century between the Norman Conquest of 1066 and the appearance, approximately 1187, of the first major common law treatise, Glanvill's *Tractatus de Legibus et Consuetudinibus*, has been called "the Roman epoch of English law," as Roman law was so often cited in the nascent common law courts.[292] Glanvill's treatise, whose very title and preface were marked by Roman influence, would have bewildered any reader ignorant of Roman law.[293] Thirty years after the appearance of Glanvill's treatise, the Magna Carta was signed, inspired more by Roman law than by feudal law.[294]

1. The Common Law of Nonhuman Animals from Bracton to Coke

The following generation produced the greatest medieval common law treatise, Bracton's *Tractatus de Legibus et Consuetudinibus Angliae*.[295] Controversy once raged over Bracton's Roman antecedents. While some saw few Roman elements,[296] a larger and increasingly influential number detected a great many.[297] Bracton's division of things and his relationships between rights and things appeared especially dominated by Azo's early thirteenth-century Italian commentaries on

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liber di iudicus, that includes four chapters on wild nonhuman animals taken nearly verbatim from Justinian's *Institutes* 2.1.12–.16. Peter Stein, *Roman Law in Medieval Scotland*, *in* PETER STEIN, THE CHARACTER AND INFLUENCE OF THE ROMAN CIVIL LAW 273, 280, 323 (1988).

[291] Re, *supra* note 13, at 458–60.

[292] *Id.* at 468 (quoting HUNTER, *supra* note 150, at 109 (3d ed. 1897)); *see* JOHN BEAMES, A TRANSLATION OF GLANVILL xiii–xix (1900); THEODORE F.T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 258–59 (5th ed. 1956).

[293] Re, *supra* note 13, at 469–70.

[294] *Id.* at 477.

[295] PLUCKNETT, *supra* note 292, at 258; POLLACK & MAITLAND, *supra* note 113, at 206; *see supra* note 270.

[296] FREDERICK W. MAITLAND, BRACTON AND AZO xiv (1895).

[297] C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW 218–19 (1949); CARL GUTERBOCK, BRACTON AND HIS RELATION TO ROMAN LAW 48–55 (Brinton Coxe trans., 1979); HOLMES, *supra* note 14, at 19–20; PLUCKNETT, *supra* note 292, at 261–62; Peter Stein, *Roman Law and English Jurisprudence, Yesterday and Today*, *in* STEIN, *supra* note 290, at 152; Re, *supra* note 13, at 470–75. *See generally* Paul Vinogradoff, *The Roman Elements in Bracton's Treatise*, 32 YALE L.J. 751 (1923); George E. Woodbine, *The Roman Element in Bracton's De Adquirendo Rerum Dominio*, 31 YALE L.J. 827, 829 (1922). Perhaps in reaction to the overenthusiastic denigrations of Bracton's Romanism, 19th-century historian Kenelm Digby found Rome "in almost every line of Bracton's great treatise." KENELM DIGBY, INTRODUCTION TO THE LAW OF REAL PROPERTY 66 (3d ed. 1876); *see also* HENRY S. MAINE, ANCIENT LAW 67–68 (1986). Woodbine correctly found both extremes "manifestly incorrect." Woodbine, *supra*, at 829.

Justinianic law, *Summa Codicis* and *Summa Institutionum*.[298] Bracton's treatment of nonhuman animals clearly incorporated Roman law.

Bracton's devotion of twenty times more space to discussing the status of things rather than persons reflected medieval England's Roman-like fascination with obtaining and retaining private property.[299] Following Azo, Bracton wrote that things, including nonhuman animals, could be acquired according to the natural law or *jus gentium*—the law of nations—and by the civil law that had sprung from the founding of states.[300] Domestic nonhuman animals and wild nonhuman animals or human slaves could be acquired by capture or accession (whereby the offspring of one's nonhuman animals became one's property).[301] Theft of human slaves and nonhuman animals alike was a felony.[302]

Running water, the air, sea, and seashores were common (*communes*) by natural law, while rivers, their banks, and the right to fish within them were public (*publicae*).[303] Both human beings and wild nonhuman animals were *res nullius* by nature, though nature did not allow free men to be owned.[304] However, echoing Ulpian and Justinian, Bracton pronounced human slaves as property by the *jus gentium*, though the practice was contrary to natural law.[305] By the *jus gentium* or *jus naturale*, one also could acquire dominion over "wild beasts, birds, and fish that is, all the creatures born on the earth, in the sea or in the heavens, that is, in the air no matter where they may be taken."[306]

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[298] GUTERBOCK, *supra* note 297, at 51–52, 85; 1 CHARLES P. SHERMAN, ROMAN LAW IN THE MODERN WORLD 357–58 (3d ed. 1937); Vinogradoff, *supra* note 297, at 751; Woodbine, *supra* note 297, at 832–35.

[299] KELLEY, *supra* note 134, at 167. Because feudal law was tightly bound to real property, the early common law paid comparatively little attention to personal property. The greatest legal treatise of the 15th century, *Littleton's Tenures*, was wholly to concern real property. But the early common law rules of personal property that did exist generally were borrowed from Roman law. *See generally* THOMAS LITTLETON, LITTLETON'S TENURES IN ENGLISH (Fred B. Rothman & Co. 1985) (1903).

[300] BRACTON, *supra* note 270, at 42; 7 WILLIAM HOLDSWORTH, A HISTORY OF ENGLISH LAW 489 & n.2 (1926); MAITLAND, *supra* note 296, at 101.

[301] BRACTON, *supra* note 270, at 39, 42–44.

[302] *Id.* at 42–49.

[303] *Id.* at 39–40. Following Azo, Bracton wrote that "[t]hose things are taken to be public that belong to all people, that is, which are for the use of mankind alone. Those that belong to all living things may sometimes be called common." *Id.* at 40.

[304] *Id.* at 41. Conversations with Attorney Thomas Marcoline, who astutely translated Bracton from Latin, have helped me realize that, along with nonhuman animals, Bracton indeed categorized human beings in general as *res*.

[305] *Id.* at 29–31, 40, 48.

[306] BRACTON, *supra* note 270, at 42. "When they are captured, they begin to be mine, because

Approximately thirty years after Bracton's death in 1268, *Fleta* completed the first commentary on Bracton's work.[307] Written in Latin, *Fleta* substantially relied upon Bracton, though one may find firm imprints of Justinian's *Institutes* and Azo as well.[308] Following Bracton, *Fleta* claimed that such things as the air, sea, and seashore were common, that the rights to fish and moor along riverbanks or at ports were public, and that theatres and stadia were community, while other things belonged to no one, either by nature or natural law.[309]

According to *Fleta*, "[b]y the law of nations or by natural law" the ownership of things could be acquired in many ways.[310] By accession, ownership was acquired of the progeny of domesticated nonhuman animals.[311] One might hunt, fish, confine, or seize

> things that are not the property of anyone else and which now do not belong to the king by civil law and are not common property as once they were. Such are wild beasts, birds, fish and animals which have never been domesticated and which are born on the earth, in the sea or in the air.[312]

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they are forcibly kept in my custody, and by the same token, if they escape from it and recover their natural liberty they cease to be mine and again made the property of the taker." *Id.* "They recover their natural liberty when they escape from my sight into the free air and are no longer in my keeping, or when, though still within my view, their pursuit is no longer possible." *Id.*

Bracton inconsistently claimed that captured wild animals were the property of the king. *Id.* at 41, 42, 166–67, 293; *see* HOLDSWORTH, *supra* note 300, at 490; MAITLAND, *supra* note 296, at 103. But Holdsworth believed "there is no reason to think that this was ever the law of England." HOLDSWORTH, *supra* note 300, at 491. In Maitland's opinion, Bracton made this sweeping claim merely to propitiate his king, as otherwise "it seems to override all the law about wild beasts that he is going to copy from Azo." MAITLAND, *supra* note 296, at 103. But "[t]his stated, however, he is content to copy from Azo some of those rules of natural law which have now given way to this wonderful *ius civile*, and which may hold good in England subject to royal rights." *Id.* After the Norman Conquest, the English Sovereigns attempted to claim the sole right to take wild nonhuman animals, but they were limited to a small number of Royal species, such as whales, sturgeons, and swans, from the signing of the *Magna Carta* in 1215. Lewis v. State, 161 S.W. 154, 155 (Ark. 1913); State v. Mallory, 83 S.W. 955, 956 (Ark. 1904). *See generally* The Case of Swans, 7 Coke Rep. 16, 77 Eng. Rep. 435 (K.B. 1592).

[307] 4 FLETA, BOOKS V & VI xv, xvii, xxi, xxv (G.O. Sayles trans. & ed., 1984). Fleta is not the author's name, for the author is unknown and told readers that it was written "in Fleet," the prison. 2 FLETA, PROLOGUE, BOOKS I & II 3 (H.G. Richardson & G.O. Sayles trans. & ed., 1955); *see* 4 FLETA, BOOKS V & VI, *supra* at xvii. In the opinion of a translator and editor of *Fleta*, the author deserves "a high place among the medieval legal historians from whom we must learn our common law." *Id.* at xxv.

[308] 4 FLETA, *supra* note 307, at xix–xx.

[309] 3 FLETA, BOOKS III & IV 1–2 (H.G. Richardson & G.O. Sayles trans. & ed., 1972).

[310] *Id.* at 2.

[311] *Id.*

[312] *Id.* "Things are said to belong to no one in various ways: for example, by nature or by natural law, like birds and wild animals and fish." *Id.*

Mere pursuit or even wounding was insufficient to vest property rights in the captor, but once physically captured, both human slaves and nonhuman animals remained the property of the captor until and unless they escaped.[313] Once free, both human slaves and nonhuman animals regained their natural liberty until captured again.[314] The single exception was tame nonhuman animals who were accustomed to leaving and returning—they remained property so long as they continued to intend to return.[315]

A second anonymous treatise, entitled *Britton* and written in French, appeared at approximately the same time as, or perhaps somewhat later than, *Fleta*.[316] Because the lawyers of the day were more familiar with French than Latin, *Britton* had a wider popularity than did *Fleta*.[317] Like *Fleta*, *Britton* was based substantially upon Bracton, and certainly so with respect to the legal treatment of nonhuman animals. After discussing the familiar categories of property, *Britton* said that domesticated nonhuman animals were property, even those who strayed, as were their young and what they produced.[318] There were "also some things which in their natural state are no one's property, and whereof none can make a gift, as birds, stags, does, and other wild beasts, and fishes."[319] One acquired them by capture, not mere wounding, in other than a forbidden place or warren, and kept them, unless they escaped "and resume[d] [their] wildness and [their] natural state, so that there is no likelihood of [their] return."[320] Similarly, one could acquire fish, as well as bees in a hive, by enclosing them.[321]

Near the turn of the seventeenth century, in *The Case of Swans*,[322] Lord Coke, in reliance upon a case from the time of Henry VI, held

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[313] *Id.*

[314] 3 FLETA, *supra* note 309, at 2.

[315] *Id.*

[316] Some believe the two treatises were written nearly at the same time; others believe that *Britton* was based upon *Fleta*. 1 FRANCIS M. NICHOLS, BRITTON xxvii (Wm. W. Gaunt & Sons, Inc. 1983); *see* 4 FLETA, *supra* note 307, at xxv; PLUCKNETT, *supra* note 292, at 265.

[317] PLUCKNETT, *supra* note 292, at 265–66.

[318] NICHOLS, *supra* note 316, at 215.

[319] *Id.* at 214.

[320] *Id.* at 215. Property also could be acquired,

> by virtue of franchises granted by us concerning things found, which do not belong to anybody, as wreck of sea, beasts astray, rabbits, hares, fish, pheasants, partridges, and other wild creatures; that is to say, by a franchise to have wreck of sea found on his soil, waifs and estrays found in his fee, and warrens in his demesne lands.

Id. at 216.

[321] *Id.* at 215.

[322] 7 Coke Rep. 16, 77 Eng. Rep. 435 (K.B. 1592).

that a man would acquire an absolute property interest in domestic nonhuman animals (*domitae naturae*), but only a qualified or possessory property interest in those wild nonhuman animals (*ferae naturae*) not owned by the king.[323] The latter could be acquired by capture or domestication, but all property interests were lost if they regained their "natural liberty" with no intention to return (*animum revertendi*).[324] Common law courts soon awarded ownership of such captured wild nonhuman animals as "one hundred musk-cats and sixty monkies," in trover and conversion, as "they are merchandise and valuable,[325] and in trover for a 'greey-hound.'"[326] Coke later wrote that some nonhuman animals, both wild and domestic, such as bears, foxes, apes, monkeys, polecats, ferrets, dogs, and cats were of a base nature, as they were unfit for human consumption; consequently, they were not the subject of larceny.[327]

2. The Thinghood of Nonhuman Animals in Hobbes and Locke

In the middle of the seventeenth century, Thomas Hobbes argued that the right of humans over nonhuman animals originated, as did every right, as a law of nature.[328] Neither property nor murder existed in Hobbes's mythical state of nature, but a perpetual war was waged by every man against every man.[329] Nothing could be unjust, for there was no justice, and every man had the same right to every thing.[330] The fundamental natural law was that human beings should "seek

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[323] *Id.* at 16a–b, 77 Eng. Rep. at 436–37.

[324] *Id.* at 17b, 77 Eng. Rep. at 438.

[325] *See generally* Grymes v. Shack, Cro. Jac. 263, 79 Eng. Rep. 226 (K.B. 1612). The court noted a similar case involving a parrot and contrasted it with a case involving a hawk.

[326] *See generally* Ireland v. Higgins, Cro. Eliz. 126, 78 Eng. Rep. 383 (K.B. 1593). The court held that the greyhound was tame as a matter of law and recalled the successful replevin of a ferret, which was of a baser nature than a greyhound, and the successful suit for trespass of a bloodhound.

[327] 3 COKE INST. 109–10 (1644). Larceny was then a capital offense and "[t]hey ought not to be things of a base nature, as Dogs, Cats, Bears, Foxes, Monkeys, Ferrets, and the like, which, howsoever they may be valued by the Owner, shall never be so highly regarded by the Law, that for their sakes a Man shall die." 1 HAWKINS P.C. 93 (1716–21).

[328] THOMAS HOBBES, LEVIATHAN 88–91 (Richard Tuck ed., Cambridge University Press 1992) (1651) [hereinafter HOBBES, LEVIATHAN]; Thomas Hobbes, *De Cive*, *in* 2 THE ENGLISH WORKS OF THOMAS HOBBES OF MALMESBURY 113 (William Molesworth ed., John Bohn 1966) (1841) [hereinafter Hobbes, *De Cive*]; *see* NORBERTO BOBBIO, THOMAS HOBBES AND THE NATURAL LAW TRADITION 41, 130–31 (Daniela Gobetti trans., 1993) (also explaining that theft and murder transgress natural law, but until the sovereign gives content to the words they have no meaning); JOHANN P. SOMMERVILLE, THOMAS HOBBES—POLITICAL IDEAS IN AN HISTORICAL CONTEXT 49 (1992).

[329] HOBBES, LEVIATHAN, *supra* note 328, at 88–90.

[330] *Id.* at 91.

peace and follow it."[331] Humanity had sought peace by entering into a permanent compact through which individual humans gave up and irrevocably transferred to the state nearly all of their natural rights.[332] The sovereign, with virtually untrammeled discretion, then determined what was just and unjust, what could be considered private property, and what was necessary for the peace and security of the subjects.[333] The subjects retained just the minimum liberties to govern their own bodies, to defend themselves, and to enjoy food, water, air, and those other necessities "to preserve the bare conditions of a tolerable life."[334]

One could not covenant with a nonhuman animal "because not understanding our speech, they understand not, nor accept of any translation of right; nor can [they] translate any Right to another; and without mutual acceptance there is no Covenant."[335] Unlike human beings who could covenant with one another, nonhuman animals, who could not, were doomed to remain forever in a state of nature, subject to the absolute pleasure of human beings:

> [o]ur dominion thereof over beasts, hath its original [sic] from the *right of nature*, not from *divine positive right*. For if such a right had not been before the publishing of the Sacred Scriptures, no man by right might have killed a beast for his food, but he to whom the divine pleasure was made manifest by holy writ; a most hard condition for men indeed, whom the beasts might devour without injury, and yet they might not destroy them. Forasmuch therefore as it proceeds from the right of nature, that a beast may kill a man, it is also by the same right that a man may slay a beast.[336]

In John Locke's view, all of nature had been created by God, who was the "sole Lord and Proprietor of the Whole World."[337] As the Creator, nature was God's property to do with as He saw fit "in the way that clay is subject to the potter's will,"[338] or as a tenant was

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[331] *Id.* at 92.

[332] BOBBIO, *supra* note 328, at 54–55.

[333] *Id.* at 70–72, 138; HOBBES, LEVIATHAN, *supra* note 328, at 124; SOMMERVILLE, *supra* note 328, at 89.

[334] HOBBES, LEVIATHAN, *supra* note 328, at 151; HOWARD WARRENDER, THE POLITICAL THEORY OF THOMAS HOBBES—HIS THEORY OF OBLIGATION 189 (1957).

[335] HOBBES, LEVIATHAN, *supra* note 328, at 97.

[336] Hobbes, *De Cive*, *supra* note 328, at 113–14.

[337] JOHN LOCKE, TWO TREATISES OF GOVERNMENT § 1.39, at 168 (Peter Laslett ed., 1988) [hereinafter LOCKE, TREATISES].

[338] JOHN LOCKE, ESSAYS ON THE LAW OF NATURE 157 (Wolfgang Von Leyden ed., 1965)

subject to the will of his proprietor.[339] Moreover, God had imbued all creation with purpose.[340] God had made the "inferior ranks of Creatures" solely for the use of human beings,[341] and it was God's purpose, as revealed through *Genesis* 1:28 and 9:1–3, that human beings multiply, subdue the earth, and exercise dominion over His animals.[342] The bounty of the world, inanimate and animate, was therefore mankind's property by God's grant.

> God's super-eminent superiority gave Him a right over everything. It followed that His inferiors enjoyed a right only in terms of the aspect and extent granted by Him. . . . [M]ankind enjoyed a right to the earth and its creatures because God decided it was so. . . . On this basis, then, rights would be grants made from God.[343]

A necessary corollary to God's purpose for mankind was that mankind had a duty to preserve itself.[344] Locke believed this "fundamental law of nature" formed "the basis of natural law,"[345] and that humanity possessed not just the right, but the duty, to use animals and nature for God's purposes.[346] "And thus Man's *Property* in the Creatures, was

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[hereinafter LOCKE, ESSAYS]; *see, e.g.*, LOCKE, TREATISES, *supra* note 337, § 2.6, at 271 (Humans may not harm one another in their life, health, liberty, or possessions "[f]or Men being all the Workmanship of one Omnipotent, and infinitely wiser Maker; All the Servants of one Sovereign Master, sent into the World by his order and about his business, they are his Property whose Workmanship they are . . . ."); A. JOHN SIMMONDS, THE LOCKEAN THEORY OF RIGHTS 21 (1992).

[339] IAN HARRIS, THE MIND OF JOHN LOCKE 153 (1994). The 17th-century English saw even human society as an ordained hierarchy of superiors and inferiors. *Id.* at 11, 17, 18.

[340] *Id.* at 154–55.

[341] LOCKE, TREATISES, *supra* note 337, § 2.6, at 271.

[342] HARRIS, *supra* note 339, at 34, 153–54, 214–15.

[343] *Id.* at 246. The antecedents of the idea that nonhuman animals are human property by God's grant may be seen in Jean Gerson's, *De Vita Spirituali Animae*, written in 1402. "There is a natural *dominium* as a gift from God, by which every creature has a *jus* directly from God to take inferior things into its own use for its own preservation. . . . In this way Adam had *dominium* over the fowls of the air and the fish in the sea . . . ." TUCK, *supra* note 18, at 27 (quoting 9 JEAN GERSON, OEUVRES COMPLETES 134 (P. Glorieux ed., 1973)).

[344] HARRIS, *supra* note 339, at 155, 215; LOCKE, TREATISES, *supra* note 337, §§ 1.86, 1.87, at 205.

[345] Locke explains his concept of natural law:

> [b]y the basis of natural law we mean some sort of groundwork on which all other and less evident precepts of that law are built and from which in some way they can be derived and thus they acquire from it their binding force in that they are in accordance with that, as it were, primary and fundamental law which is the standard and measure of all the other laws depending upon it.

LOCKE, ESSAYS, *supra* note 338, at 205.

[346] HARRIS, *supra* note 339, at 153–54, 214–15. Locke described humanity's rights of dominion over nonhuman animals:

founded upon the right he had, to make use of those things, that were necessary or useful to his Being."[347] Reason, whose purpose was to allow humans to distinguish good from evil and to control their passions, was central both to mankind's entitlement and to its ability to subdue the natural world.[348] Human intellect "implied humanity's dominion over nature."[349]

However, as God had given the world and all its creatures not to individual humans, but to mankind in common,[350] Locke sketched his justification for individual property ownership.[351] Humanity's natural liberty and equality produced individuals, each of whom had "a *Property* in his own *Person*."[352] Therefore, the

> *Labour* of his Body and the Work of his hands, we may say are properly his Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his Labour with, and joyned to it something that is his own, and thereby makes it his *Property*.[353]

> [m]an had a right to a use of the Creatures, by the Will and Grant of God. For the desire, strong desire of Preserving his Life and Being having been Planted in him, as a principle of Action by God himself, Reason, *which was the Voice of God in him*, could not but teach him and assure him, that pursuing that natural Inclination he had to preserve his Being, he followed the Will of his Maker, and therefore had a right to make use of those Creatures, which by his Reason or Senses he could discover would be serviceable thereunto.

LOCKE, TREATISES, *supra* note 337, § 1.86, at 205 (emphasis added).

[347] LOCKE, TREATISES, *supra* note 337, § 1.86, at 205 (emphasis added). This is "Locke's ultimate justification of property." *Id.* at 205 nn.19–28, § 1.39, at 167, § 1.92, at 209; §§ 2.25–.26, at 285–86. "Property, whose Original is from the Right a man has to use any of the Inferior Creatures, for the Subsistence and Comfort of his Life, is for the benefit and sole Advantage of the Proprietor, so that he may even destroy the thing . . . ." *Id.* § 1.92, at 209.

[348] HARRIS, *supra* note 339, at 150, 176.

[349] *Id.* at 152. Locke explained that,

> [w]hether we consider natural *Reason*, which tells us, that Men, being once born, have a right to their Preservation, and consequently to Meat and Drink, and such other things, as Nature affords for their Subsistence: *Or Revelation*, which gives us an account of those Grants God made of the World to *Adam*, and to *Noah*, and his Sons, 'tis very clear, that God, as *King David* says, . . . *has given the Earth to the Children of Men*, given it to Mankind in common.

LOCKE, TREATISES, *supra* note 337, § 2.25, at 285–86 (emphasis in original).

[350] LOCKE, TREATISES, *supra* note 337, § 1.24, at 157, § 1.29, at 161, § 1.39, at 168, § 1.40, at 169, § 1.43, at 171, § 1.67, at 189–90, § 1.87, at 206, § 2.25–.26, at 285–86.

[351] *Id.* § 2.26, at 286–87. Locke's labor appropriation theory applied only to that given naturally in common, not to such property as land jointly held in common by consent. SIMMONDS, *supra* note 338, at 236–37.

[352] LOCKE, TREATISES, *supra* note 337, § 2.27, at 287 (emphasis in original); *see also id.* § 2.4, at 269.

[353] *Id.* § 2.27, at 288 (emphasis in original). This method for the acquisition of property "derived

It was labor that made the apples and acorns one picked, the deer and the hare that one hunted, the fish that one caught, and the bear that one tamed one's property:

> [f]or being a Beast that is still looked upon as common, and no Man's private Possession; whoever has imploy'd so much *labour* about any of that kind, as to find and pursue her, has thereby removed her from the state of Nature, wherein she was common, and hath *begun a Property*.[354]

The value of nonhuman animals was instrumental and lay solely in their capacities to be mixed with human labor.[355] As opposed to Hobbes, property in animals derived from mankind's natural "right to use," but until that use occurred, mankind in common held the interest.[356]

Hobbes and Locke both supported the fundamental concept of "possessive individualism," which held that each human being owned such an attribute as individual liberty in the same manner as property might be owned.[357] However, these two great figures of the seventeenth century disagreed about the nature of human beings and the consequences that flowed from their nature. Their agreements and disagreements colored numerous jurisprudential writings that followed, including those that concerned the legal thinghood of nonhuman animals.

3. The English Common Law Thinghood of Nonhuman Animals from Blackstone to the Present

In his enormously influential mid-eighteenth-century *Commentary on the Laws of England*, William Blackstone identified the legal thinghood of nonhuman animals as the child of Roman and Old Testament laws and cosmologies.[358] *Genesis* was the exclusive and divine source

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from Roman law, is almost a description of acquisition of title to a *res nullius*." MCCOUBREY, *supra* note 169, at 70.

[354] LOCKE, TREATISES, *supra* note 337, § 2.30, at 289–90 (emphasis in original); *see also id.* § 2.37, at 294–95.

[355] *See* Walton H. Hamilton, *Property—According to Locke*, 41 YALE L.J. 864, 867 (1932).

[356] LOCKE, TREATISES, *supra* note 337, § 1.87, at 206; *see* SIMMONDS, *supra* note 338, at 239.

[357] C.B. MACPHERSON, THE POLITICAL THEORY OF POSSESSIVE INDIVIDUALISM: HOBBES TO LOCKE 3 (1962). Richard Tuck argues that the idea of "possessive individualism" predated both men by 300 years. TUCK, *supra* note 18, at 3, 16–29.

[358] "In the history of American institutions, no other book—except the Bible—has played a role so great as Blackstone's *Commentaries on the Laws of England*." DANIEL BOORSTIN, THE MYSTERIOUS SCIENCE OF THE LAW: AN ESSAY ON BLACKSTONE'S *COMMENTARIES* SHOWING HOW BLACKSTONE, EMPLOYING EIGHTEENTH CENTURY IDEAS OF SCIENCE, RELIGION, HIS-

of humanity's claim to ownership of nearly everything, including nonhuman animals.[359] "The earth, therefore, and all things therein," he claimed, "are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator."[360] Roman law had recognized that the individual's taking of wild nonhuman animals reduced them to property.[361] Humanity therefore had received "a right to pursue and take any fowl or insect of the air, any fish or inhabitants of the waters, and any beast or reptile of the field: and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country."[362] Mimicking nature, law, too, was arranged in a hierarchy.[363] Thus the legal thinghood of

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TORY, AESTHETICS, AND PHILOSOPHY, MADE OF THE LAW AT ONCE A CONSERVATIVE AND A MYSTERIOUS SCIENCE iii (1958). The Bible and the *Commentaries* sounded nearly identical notes on the relationship between human and nonhuman animals.

The structure of the *Commentaries* derived from Justinian's *Institutes*, either directly or through Matthew Hale's, *The Analysis of Law: Being a Scheme, or Abstract, of the Several Titles and Partitions of the Law of England, Digested into Method*, first published in 1713. *See* Alan Watson, *The Impact of Justinian's* Institutes *on Academic Treatises: Blackstone's* Commentaries, *in* ROMAN LAW AND COMPARATIVE LAW, *supra* note 169, at 175, 165–76; *see also* STEIN, *supra* note 290, at 155–56, 173. Book 2 on the law of things corresponded to books 2 and 3 of the *Institutes*. Alan Watson, *The Impact of Justinian's* Institutes *on Academic Treatises: Blackstone's* Commentaries, *in* ROMAN LAW AND COMPARATIVE LAW, *supra* note 169, at 173.

[359] Borrowing from *Genesis* 1:28, Blackstone wrote:

> [i]n the beginning of the world, we are informed by holy writ, the all-bountiful creator gave to man "dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." This is the only true and solid foundation of man's dominion over external things, whatever airy metaphysical notions may have been started by fanciful writers on the subject.

II WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND, at *2–*3.

[360] *Id.* at *3.

[361] *Id.* at *411 (quoting J. Inst. 2.1.12).

[362] BLACKSTONE, *supra* note 359, at *403. Blackstone explained the existing civil restrictions:

> [t]he restrictions which are laid upon this right, by the laws of England, relate principally to royal fish, as whale and sturgeon, and such terrestrial, aerial, or aquatic animals as go under the denomination of *game*; the taking of which is made the exclusive right of the prince, and such of his subjects to whom he has granted the same royal privilege. But those animals which are not expressly so reserved, are still liable to be taken and appropriated by any of the king's subjects, upon their own territories; in the same manner as they might have taken even game itself, till these civil prohibitions were issued: there being in nature no distinction between one species of wild animals and another, between the right of acquiring property in a hare or a squirrel, in a partridge or a butterfly: but the difference, at present made, arises merely from the positive municipal law.

Id. (emphasis in original).

[363] *Id.* at *95. Blackstone saw the "finger of nature" tracing much of the common law of England. *Id.* at *316; *see* BOORSTIN, *supra* note 358, at 47.

nonhuman animals in the common law was the logical and inevitable consequence both of the laws of nature and of the biblical God.[364]

By their natural and divine rights humans could hold absolute property interests in those tame and domestic nonhuman animals whom they occupied,[365] as well as in their offspring.[366] Humans had no absolute interest, but rather only a qualified, limited property interest in wild nonhuman animals,[367] as the natures of wild nonhuman animals rendered them as incapable of being owned absolutely as did the natures of light, air, and water.[368] These qualified interests materialized under just four circumstances: when the wild nonhuman animals were tamed, were confined so that they could not escape, were otherwise unable to escape because they are too young or too weak,[369] or were the subject of a special privilege to hunt, take, or kill.[370] If occupied wild nonhuman animals managed to regain their natural liberty, all human property interests in them instantly ceased, unless the nonhuman animals had an *animum revertendi*, the intention or habit of returning.[371] But while they remained under human control,

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[364] In Blackstone, "the law of property in animals seemed to be treated almost as a branch of natural science . . . [t]he reader was encouraged to believe it as absurd that the English law of animals should be otherwise." BOORSTIN, *supra* note 358, at 130–31.

[365] BLACKSTONE, *supra* note 359, at *390.

[366] Blackstone is explicit about the Roman antecedents to the English law of accession and their validity during his time:

> [t]he doctrine of property arising from accession is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroiding of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement . . . [a]nd these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts.

Id. *404–*05 (citations omitted).

[367] *Id.* at *391.

[368] *Id.* at *14.

[369] *Id.* at *391–*92.

[370] BLACKSTONE, *supra* note 359, at *394–*95. According to Blackstone:

> [a] man may, lastly, have a qualified property in animals *ferae naturae, propter privilegium*: that is, he may have the privilege of hunting, taking, and killing them, in exclusion of other persons. Here he has a transient property in these animals, usually called game, so long as they continue within his liberty; and may restrain any stranger from taking them therein: but the instant they depart into another liberty, this qualified property ceases.

Id. The *propter privilegium* was mentioned by Coke in *The Case of Swans*, where it was said to be "not a right of property, as classed by Blackstone, but merely a right of privilege." The Case of Swans, 7 Coke Rep. 16, 17b, 77 Eng. Rep. 435 (K.B. 1592).

[371] BLACKSTONE, *supra* note 359, at *392–*93.

the human property interest in them was as fully protected by the civil law as was any other property interest.[372] Echoing Coke, Blackstone agreed that only the theft of those species that were fit for food was considered to be a crime at common law.[373] All human interests in wild nonhuman animals, except the special privilege,[374] were a kind of occupancy, which Blackstone believed to be both "the original and only primitive method of acquiring any property at all"[375] and "the true ground and foundation of all property."[376]

Since Blackstone, the legal thinghood of both wild and domestic nonhuman animals in the English common law has continued to incorporate Roman law. In the leading nineteenth-century English case of *Blades v. Higgs*,[377] Lord Chelmsford concluded that, with respect to obtaining the right of property in living wild nonhuman animals, "there seems to be no difference between the Roman and common

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[372] *Id.* at *403. "But while they thus continue my qualified or defeasible property, they are as much under the protection of the law as if they were absolutely and indefeasibly mine: and an action will lie against any man that detains them from me, or unlawfully destroys them." *Id.* at *393.

[373] Blackstone writes:

> [i]t is also as much felony by common law to steal such of them as are fit for food, as it is to steal tame animals: but not so, if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing-birds; because their value is not intrinsic, but depending only on the caprice of the owner: though it is such an invasion of property as may amount to a civil injury, and be redressed by a civil action.

Id. at *393–*94.

[374] The special privilege to hunt, take, or kill was an example of a natural right restricted by positive law. *Id.* at *411–*12.

[375] *Id.* at *400. Blackstone noted the dispute:

> among the writers on natural law, concerning the reason why occupancy should convey this right, and invest one with absolute property: Grotius and Puffendorf insisting, that this right of occupancy is founded on a tacit and implied assent of all mankind, that the first occupant should become the owner; and Barbeyrac, Titius, Mr. Locke, and others, holding that there is no such implied assent, neither is it necessary that there should be; for the very act of occupancy, alone, being a degree of bodily labour, is, from a principle of natural justice, without any consent or compact, sufficient of itself to gain a title.—A dispute that savours too much of nice and scholastic refinement! However, both sides agree in this, that occupancy is the thing by which the title was in fact originally gained . . . . Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shews an intention to abandon it . . . .

Id. at *8–*9; *see also id.* at *405 ("the right of occupancy itself is supposed by Mr. Locke, and many others, to be founded on the personal labour of the occupant").

[376] BLACKSTONE, *supra* note 359, at *258.

[377] 11 Eng. Rep. 1474, 1481 (1865).

law."[378] Similarly, the English common law protection of property rights in domestic nonhuman animals, as well as in wild nonhuman animals legally reduced to possession, remains virtually Roman.

4. The American Common Law Thinghood of Nonhuman Animals

The American Colonies received Blackstone's common law much as the Continental Europeans had 1,000 years before received Justinian's civil law.[379] But the American Revolution naturally triggered a fierce debate within the new states as to the degree to which the English troops had driven out English laws. Perhaps amazingly, both English common law and statutory law ultimately were re-enacted to varying degrees in an atmosphere of naked hostility to the authority of English custom that so long and so firmly had underpinned English common law.[380] The pivotal figure in this transplantation of English common law to post-Revolutionary America was James Kent, retired Chancellor of New York.[381]

Through his massive *Commentaries on American Law*, Kent fashioned himself as the American Blackstone.[382] But how to legitimate the old common law in the new country? Blackstone had once clothed the common law precisely in the mantle of the timeless English custom that Americans now forswore. Kent now insisted that, far from abolishing the English common law, the American Revolution had been "calculated to strengthen and invigorate all the just principles

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[378] *Id.* The single major difference between Roman law and the English common law of wild nonhuman animals was that in Roman law, even a trespasser acquired a property interest in wild nonhuman animals reduced to possession, while under the English common law a landowner or the landowner's grantee might have a *ratione soli* or *ratione privilegii* to take them while they remained on the land. *Id.* at 1481, 1478–79; Sutton v. Moody, 91 Eng. Rep. 1063, 1063–64 (1697); The Case of Swans, 7 Coke Rep. 16, 18a–b, 77 Eng. Rep. 435 (K.B. 1592); EARL OF HALSBURY, 1 HALSBURY'S LAWS OF ENGLAND, §§ 914–17, at 531–33 (Viscount Hailsham ed., Butterworth & Co., Ltd., 2d ed. 1931); NICHOLAS, *supra* note 210, at 131 (Except for the right of a landowner to the wild animals on his land, "the rules of English law as to the ownership of wild animals are the same as and seem to derive from those of Roman law."); Earl C. Arnold, *The Law of Possession Governing the Acquisition of Animals* Ferae Naturae, 55 AM. L. REV. 393, 403–04 (1921).

[379] BOORSTIN, *supra* note 358, at 3.

[380] The states differed mostly on the acceptability of comparatively recent English court decisions and statutes. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 107–15 (Simon & Schuster, 2d ed. 1985) (1973). For example, in 1799, New Jersey forbid the citation or reading of any English case decided after July 4, 1776 in any New Jersey court. Kentucky enacted a similar statute in 1807. *Id.* at 111–12.

[381] With Joseph Story, Kent was "[b]y common consent, [one of] the two most significant figures in American legal literature in the first half of the 19th century." *Id.* at 329.

[382] *Id.* at 332.

of that law, suitable to our state of society and jurisprudence."[383] Accordingly, he felt free to borrow wholesale from the substance of English common law. Yet, Kent rejected English custom as its basis and instead dressed the new American common law in universal rules of natural law.[384] As this new common law was laced with civil law, Kent emphasized the importance of the study, influence, and universality of many of the civilians' ancient and familiar principles, including those that concerned the relationship between human and nonhuman animals.[385]

For Kent, occupancy remained "the natural and original method of acquiring [first title to property, in land and moveables]: and upon the principles of universal law, that the title continues so long as occupancy continues."[386] A nonhuman animal who belonged "to the class of tame animals, as, for instance, to the class of horses, sheep, or cattle" was the subject of absolute property.[387] Nonhuman animals, such as "pigeons in a pigeon house, deer in a park, and fish in an artificial pond" passed, along with real estate, as heirlooms.[388] Wild nonhuman animals *ferae naturae*, once reclaimed by the art and power of man, were the subjects of only qualified property interests.[389] All property interests in wild nonhuman animals ceased when they were abandoned or escaped and reverted "to their natural liberty and ferocity, without the *animus revertendi*."[390] Yet while this qualified property right remained in force, it was to be "as much under protection of law as any other property."[391] Kent asserted the identity among

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[383] JAMES KENT, 2 COMMENTARIES ON AMERICAN LAW *27 (1896). Kent "[took] it for granted, that the common law of England, applicable to our situation and governments, is the law of this country, in all cases in which it has not been altered or rejected by statute, or varied by local usages, under the sanction of judicial decisions." *Id.* at *28.

[384] Carl F. Stychin, *The Commentaries of Chancellor James Kent and the Development of an American Common Law*, 37 AM. J. LEGAL HIST. 440, 440 (1993). It was natural law in the sense that it was universal and could be discerned through careful study. *Id.* at 445, 447–51, 462.

[385] *Id.* at 453–54.

> I purpose [sic] only to allude to those general rules which were formed, digested, and refined by the sagacity and discussions of the Roman lawyers, and transferred from the civil law into the municipal institutions of the principal nations of Europe. By means of Bracton, they were introduced into the common law of England, and doubtless, they now equally pervade the jurisprudence of this United States.

KENT, *supra* note 359, at *360–*61.

[386] KENT, *supra* note 383, at *318.

[387] *Id.* at *347.

[388] *Id.* at *342.

[389] *Id.* at *347.

[390] *Id.*

[391] KENT, *supra* note 383, at *347.

the Roman, civil, and common laws of the requirement that a human actually take physical possession of a wild nonhuman animal before attaining a property interest,[392] as well as the usual right to ownership by accession.[393]

As a judge, Kent participated in perhaps the most famous American case involving wild nonhuman animals, *Pierson v. Post*.[394] *Pierson* presented the question of who owned the carcass of a fox that Post had chased to exhaustion, when Pierson appeared and carried the fox off.[395] The parties "admitted that a fox is an animal *ferae naturae*, and that property in such animals is acquired by occupancy only."[396] The issue presented was essentially whether occupancy of a wild nonhuman animal was required to be established by the standards of republican or imperial Rome.[397] The seventeenth-century Hobbesian, Puffendorf, most directly influenced the majority opinion.[398] Puffendorf recognized no natural right to property; all property rights flowed from the original mythical compact, which protected those things removed from the common stock from seizure by another.[399] The sovereign, to whom most natural rights had been surrendered, could alter the rule of first occupancy and had often done so with regard to the hunting of wild nonhuman animals.[400] The rule that a thing in the dominion of no one was unowned, however, could not be altered and the occupation of a wild nonhuman animal required that a human kill, mortally wound, or severely maim her.[401] Relying upon Puffendorf, the imperial standards of Justinian's *Institutes*,[402] as well as Bracton and *Fleta*,[403] the New York Supreme Court of Judicature held that occu-

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[392] *Id.* at *348–*49.

[393] *Id.* at *360.

[394] 3 Cai. R. 174 (N.Y. Sup. Ct. 1805). *Pierson v. Post* remains a frequent subject of comment. Berger, *supra* note 6, at 349, 354–55; Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221, 1224–25, 1236 (1979); Eric T. Freyfogle, *Water Justice*, 1986 ILL. L. REV. 481, 496 (1986); Carol M. Rose, *Given-Ness and Gift; Property and the Quest for Environmental Ethics*, 24 ENVTL. L. 1, 5 & n.13 (1994). *See generally* Donahue, *supra* note 15.

[395] *Pierson*, 3 Cai. R. at 175.

[396] *Id.* at 176.

[397] *Id.* at 176–78.

[398] *Id.* at 178; Charles Donahue, *Noodt, Titius, and the Natural Law School: The Occupation of Wild Animals and the Intersection of Property and Tort*, *in* SATURAE ROBERTO FEENSTRA—SEXAGESIMVM QVINTVM ANNVM AETATIS COMPLENTI AB ALVMNIS COLLEGIS AMICIS ABLATA 613 (J.A. Ankum et al. eds., 1985) [hereinafter Donahue, *Natural Law*].

[399] Donahue, *supra* note 15, at 56–58; Donahue, *Natural Law*, *supra* note 398, at 613.

[400] *See* Donahue, *supra* note 15, at 57.

[401] *Id.* at 57; Donahue, *Natural Law*, *supra* note 398, at 613.

[402] J. Inst. 2.1.12.

[403] The views of Grotius and Barbeyrac also were discussed and, if they were not seen as

pation required the actual physical deprivation of a nonhuman animal's "natural liberty."[404]

The Lockean dissent embraced the eighteenth-century French annotator and translator of Puffendorf, Barbeyrac.[405] As the natural right to property predated society, one could occupy a wild nonhuman animal merely by making known the desire to seize her, then acting on it.[406] The wild nonhuman animal was thereby occupied through labor, which entitled one to ownership.[407] Thus the chase alone entitled Post to the fox.[408] The dissent's Lockean labor argument, however, as propounded by Barbeyrac, was defeated decisively by the majority's common law incorporation of imperial Roman law, as championed by Puffendorf.[409]

The most extensive American discussion of the legal thinghood of nonhuman animals occurred ninety years after *Pierson* in the United States Supreme Court case of *Geer v. Connecticut*.[410] *Geer* upheld the

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supporting the finding for Pierson, they were not seen as opposing it either. Pierson v. Post, 3 Cai. R. 174, 176, 177–78 (N.Y. Sup. Ct. 1805). In addition, Pierson's counsel cited Blackstone's *Commentaries*, *supra* note 359, at *403. In dissent, Justice Livingstone claimed that either counsel or court also cited John Locke, a claim that has proven difficult to confirm. *Pierson*, 3 Cai. R. at 180 (Livingstone, J., dissenting).

[404] *Pierson*, 3 Cai. R. at 178.

[405] *Id.* at 179–81.

[406] In this Barbeyrac agreed with the early 17th-century Dutch jurist, Grotius, though for Grotius, the "occupation of wild animals is clearly not . . . a primary principle of natural law. The rule may be changed by positive law." *Id.* at 56, 58.

[407] *Id.* at 58–59; Donahue, *Natural Law*, *supra* note 398, at 613–14. Donahue suggests that the increasing interest in the natural modes of occupation that began in the late sixteenth century may have been "the result of a desire to find immutable principles outside of the control of increasingly powerful sovereign law-makers," or an attempt "to make the Roman texts relevant to their contemporaries by showing how they contained fundamental principles that transcended time and place." Donahue, *supra* note 15, at 58.

[408] Donahue, *supra* note 15, at 55. The dissent considered this rule to be good policy, too, as by the pleadings it is admitted that a fox is a "wild and noxious beast." Both parties have regarded him, as the law of nations does a pirate. . . . His depredations on farmers and on barnyards, have not been forgotten; and to put him to death whenever found, is allowed to be meritorious, and of public benefit. Hence it follows, that our decision should have in view the greatest possible encouragement to the destruction of an animal, so cunning and ruthless in his career.

Pierson, 3 Cai. R. at 180 (Livingstone, J., dissenting).

[409] Epstein, *supra* note 394, at 1225–30; Rose, *supra* note 394, at 74–79. In rejecting Barbeyrac, the majority rejected:

> the one natural law writer they knew who expressly states that property is a natural right, in order to follow one that did not believe that property was a natural right. This rejection can be explained on the basis of the weight of the authorities. Barbeyrac's version of the natural law, like Blackstone's, is out of the mainstream.

Donahue, *supra* note 15, at 62.

[410] Geer v. Connecticut, 161 U.S. 519, 522 (1896), *overruled in part by* Hughes v. Oklahoma,

constitutionality under the Commerce Clause of a Connecticut statute that prohibited transportation outside the state of game birds lawfully killed within the state.[411] Referring to Roman,[412] and even Greek law,[413] the majority stated that "the fundamental principle upon which the common property in game rests have [sic] undergone no change."[414]

Geer then turned to the treatment of wild nonhuman animals under the common law:

> [t]he common law of England also based property in game upon the principles of common ownership, and therefore treated it as subject to governmental authority. Blackstone, whilst pointing out the distinction between things private and those which are

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441 U.S. 322 (1979). While *Geer*'s holding on the Commerce Clause was overruled, its discussion of the common law principles of the occupation of wild nonhuman animals remained largely unaffected.

[411] *Id.* at 535.

[412] The Court stated that "[a]mong other subdivisions, things were classified by the Roman law into public and common. The latter embraced animals *ferae naturae*, which, having no owner, were considered as belonging . . . to all the citizens of the State." *Id.* at 522. It repeated that under Roman law individual human beings were the owners in common with other citizens of game. *Id.* at 523. These claims were against the probable weight of Roman law, which tended to classify wild nonhuman animals as *res nullius*, things owned by no one, and not *res communes*, things owned by everyone, though the two sometimes were confused. The Court also cited to Pothier's argument that "[f]rom the very fact that God has given to human kind dominion over wild beasts, it does not follow that each individual of the human race should be permitted to exercise this dominion . . . . [T]he civil law can restrict what the natural law only permits." *Id.* at 524 (quoting POTHIER, TRAITE DU DROIT DE PROPERETE, Nos. 27–28). Finally, the Napoleonic Code accurately was said to sum up "this unbroken line of law," which reigned throughout all the countries of Europe. *Geer*, 161 U.S. at 526. "There are things which belong to no one, and the use of which is common to all. Police regulations direct the manner in which they may be enjoyed." *Id.* (quoting Articles 714 & 715 of the Napoleonic Code). Unlike *Geer*, Napoleon did not confuse *imperium* with *dominium*. *Id.*

[413] The Court stated that "[f]rom the earliest traditions the right to reduce animals *ferae naturae* to possession has been subject to the law-giving power." *Geer*, 161 U.S. at 522 (quoting 4 MERLIN, REPERTOIRE DE JURISPRUDENCE 128 ("Solon, seeing that the Athenians gave themselves up to the chase, to the neglect of the mechanical arts, forbade the killing of game.")). Immediately after, the Court claimed that "[t]he writer of a learned article in the Repertoire of the Journal du Palais mentions the fact that the law of Athens forbade the killing of game." *Geer*, 161 U.S. at 522 (citation omitted). That this was ever the law of Athens is dubious.

[414] *Geer*, 161 U.S. at 529. But in granting *dominium* to Connecticut, the Court contradicted its plan to adhere to ancient principles of Roman law, as it confused Roman *imperium*, or the power of the sovereign to regulate the use of wild nonhuman animals, with Roman *dominium*, or the power of the sovereign actually to own them. However,

> the development of free institutions has led to the recognition of the fact that the power or control lodged in the State, resulting from this common ownership, is to be exercised, like all other powers of government, as a trust for the benefit of the people, and not as a prerogative for the advantage of the government, as distinct from the people, or for the benefit of private individuals as distinguished from the public good.

Id.

> common, rests the right of an individual to reduce a part of this common property to possession, and thus acquire a qualified ownership in it, on no other or different principle from that upon which the civilians based such right.[415]

As the "owner" of the birds on behalf of its citizens, Connecticut was permitted to keep the birds within state boundaries, even though it did not occupy them.[416]

Justice Field dissented:

> [a] state does not stand in the same position as the owner of a private game preserve and it is pure fantasy to talk of "owning" wild fish, birds, or animals. Neither the States nor the Federal Government, any more than a hopeful fisherman or hunter, has title to these creatures until they are reduced to possession by skillful capture. . . .[417]

Eighty-three years later, *Geer* was overruled on the reasoning of Field's dissent, its "ownership" language having come to "be understood as no more than a nineteenth-century legal fiction expressing 'the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.'"[418]

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[415] *Id.* at 526 (citing BLACKSTONE, *supra* note 359, at *1, *12, *526–*27) (Blackstone, indeed, supports this proposition, but not on the pages the Court referenced). Kent was said to state that "the ownership of animals *ferae naturae* to be only that of a qualified property." *Geer*, 161 U.S. at 528 (citing KENT, *supra* note 383, at *348).

[416] *Geer*, 161 U.S. at 529–30. *Hughes v. Oklahoma* concluded that "challenges under the Commerce Clause to state regulations of wild animals should be considered according to the same general rule applied to state regulations of other natural resources," such as natural gas. Hughes v. Oklahoma, 441 U.S. 322, 335 (1979). This appears to mean that, for Commerce Clause purposes only, *res communes* and *res nullius* will be treated alike, not that wild nonhuman animals are *res communes*.

[417] *Geer*, 161 U.S. at 539–40 (Field, J., dissenting). Field argued that until wild nonhuman animals

> are brought into subjection or use by the labor or skill of man, they are not the property of anyone, and that they only become the property of man according to the extent to which they are subjected by his labor or skill to his use and benefit. When man by his labor or skill brings any such animals under his control and subject to his use, he acquires to that extent a right of property in them, and the ownership of others in the animals is limited by the extent and right thus acquired. This is a generally recognized doctrine, acknowledged by all States of Christendom. It is the doctrine of law, both positive and natural.

Id. at 539 (Field, J., dissenting). Field agreed that the section of the *Digest* quoted by the majority—"[t]hat which belongs to nobody is acquired by the natural law by the person who first possesses it"—was an accurate statement of the law. *Id.* at 540.

[418] *Hughes*, 441 U.S. at 335 (quoting Toomer v. Witsell, 334 U.S. 385, 402 (1947)). Roscoe Pound summed up the situation:

With extremely limited exceptions, such as those based on long-standing custom,[419] the common law of every American state whose appellate courts have discussed the matter recognizes wild nonhuman animals as belonging either to no one or to everyone in common, making them the property of the first human who possesses them.[420] In all ways relevant,[421] American common law follows Roman law through (1) citing Justinian's *Digest* or *Institutes*,[422] (2) citing such common law writers as Bracton,[423] Blackstone,[424] and Kent[425] who adopted

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> while in form our courts and legislatures seem thus to have reduced everything but the air and the high seas to ownership, in fact the so-called state ownership of *res communes* and *res nullius* is only a sort of guardianship for social purposes. It is *imperium*, not *dominium*. The state as a corporation does not own a river as it owns the furniture in the state house. It does not own wild game as it owns the cash in the vaults of the treasury.

POUND, *supra* note 22, at 111.

[419] Holmes notes that three different customs of first possession in the whaling industry had been upheld by the English and American courts. In the Greenland whaling industry, if the first striker lost his hold on the whale and the whale was killed by another, the whale belonged to the person who killed her. In the Galapagos, each was entitled to half the whale. A third custom was that whoever's harpoon remained stuck within the whale was entitled to her. HOLMES, *supra* note 14, at 212 (citing Swift v. Gifford, 2 Lowell 110, 23 F. Cas. 558 (D. Mass. 1872) (No. 13,696)). The customs of the whaling industry actually may constitute the sole exception by custom to the normal common law rule. Arnold, *supra* note 378, at 400.

[420] Sterling v. Jackson, 37 N.W. 845, 859 (1888) (Campbell, J., dissenting on other grounds). *See generally Rights, title, and remedies of hunter in respect of game which he is pursuing or has killed or wounded*, 49 A.L.R. 1498 (1927). The issue appears not to have been discussed in the appellate decisions of just two states, Utah and North Dakota.

[421] One Claim that the legal thinghood of nonhuman animals allows them legal rights and "excellent treatment" is partly based upon the misunderstanding that it commenced in the 11th century rather than many hundreds of years before. Tannenbaum, *supra* note 8, at 540, 546, 549. One major difference between the modern common law and Roman law is that even a trespasser who reduced a wild nonhuman animal to possession obtained ownership in Roman law, while the modern common law requires that the occupation be lawful. NICHOLAS, *supra* note 210, at 131.

[422] State v. Mallory, 83 S.W. 955, 956 (Ark. 1904); Gillet v. Mason, 7 Johns. 15, 16 (N.Y. 1810); Wallis v. Mease, 3 Binn. 546, 552–53 (Pa. 1811).

[423] Dapson v. Daly, 153 N.E. 454, 455 (Mass. 1926); *Gillet*, 7 Johns. at 16; *see* Charlebois v. Raymond, 12 Lower Can. Jur. 55 (1867) (The rule of physical possession was a rule both of Roman law and of the common law.).

[424] *In re* Oriental Republic Uruguay, 821 F. Supp. 950, 953 (D. Del. 1993); Javins v. United States, 11 D.C. App. 345, 347 (D.C. Cir. 1897); *Mallory*, 83 S.W. at 957; Ulery v. Jones, 81 Ill. 403, 405 (1876); State v. Murphy, 8 Blackf. 498, 499 (Ind. 1847); State v. Repp, 73 N.W. 829, 829 (Iowa 1898); Hughes v. Reese, 109 So. 731, 732 (Miss. 1926); *Gillet*, 7 Johns. at 16; Rexroth v. Coon, 15 R.I. 35, 37–38 (1885); Peters v. State, 36 S.W. 399, 400 (Tenn. 1896); Wiley v. Baker, 597 S.W.2d 3, 5, 6 (Tex. Civ. App. 1980); Payne v. Sheets, 55 A. 656, 657, 659 (Vt. 1903); State v. Theriault, 41 A. 1,030, 1,032 (Vt. 1898); Graves v. Dunlap, 152 P. 532, 533–44 (Wash. 1915); State v. Lipinske, 249 N.W. 289, 291 (Wis. 1933). *See generally Law of Bees*, 39 A.L.R. 352 (1925).

[425] James v. Wood, 19 A. 160, 161 (Me. 1889); *Rexroth*, 15 R.I. at 37–38; *Graves*, 152 P. at 533–34.

the essentials of Roman law, (3) citing such leading cases as *The Case of Swans*,[426] *Pierson v. Post*,[427] *Geer v. Connecticut*,[428] *Blades v. Higgs*,[429] or others that adopted the essentials of Roman law,[430] (4) simply calling Roman law the common law,[431] or (5) stating a rule similar to the Roman rule.[432]

Virtually the only time that courts have sought to abandon the principle of occupation upon which both the common law and Roman law were based occurred when a defendant recaptured an escaped nonindigenous wild nonhuman animal whom the plaintiff previously had captured.[433] Predictably, some courts held that the escaped non-

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[426] 7 Coke Rep. 16, 77 Eng. Rep. 435 (K.B. 1592); *see also James*, 19 A. at 161; *Wiley*, 597 S.W.2d at 6.

[427] *E.g.*, Idaho *ex rel* Evans v. Oregon, 462 U.S. 1017, 1,030 (1982) (O'Connor, J., dissenting); Clajon Prod. Corp. v. Petera, 854 F. Supp. 843, 852 (D. Wyo. 1994); *In re Oriental Republic Uruguay*, 821 F. Supp. at 953; Knighton v. Texaco Producing, Inc., 762 F. Supp. 686, 689 (W.D. La. 1991); Beltway Mgmt. Co. v. Lexington-Landmark Ins., 746 F. Supp. 1145, 1152 n.14 (D.D.C. 1990); *Dapson*, 153 N.E. at 455; Dycus v. Sillers, 557 So.2d 486, 502 (Miss. 1990).

[428] *E.g.*, Hyde v. State, 46 So. 489, 490 (Ala. 1908); Owsichek v. State, Guide Licensing, 763 P.2d 488, 494; *Mallory*, 83 S.W. at 957; Hornbeke v. White, 76 P. 926, 928 (Colo. 1904); Maddox v. State, 312 S.E.2d 325, 327 (Ga.), *cert. denied*, 469 U.S. 820 (1984); Sherwood v. Stephens, 90 P. 345, 346–47 (Idaho 1907); State v. McCullagh, 153 P. 557, 559 (Kan. 1915); Stevens v. State, 43 A. 929, 931 (Md. 1899); Kirk v. State Bd. of Irrigation, 134 N.W. 167, 168 (Neb. 1912); *Ex Parte* Crosby, 149 P. 989, 991 (Nev. 1915); K.S.B. Technical Sales v. North Jersey Dist. Water Supply, 381 A.2d 774, 781 (N.J. 1977); Dunlap v. Jackson, 219 P. 314, 320 (Okla. 1923); *Payne*, 55 A. at 659; State v. Southern Coal & Transp. Co., 76 S.E. 970, 971 (W. Va. 1912). *Cf.* State v. Kemp, 44 N.W.2d 214, 216 (S.D. 1950).

[429] *Mallory*, 83 S.W. at 958; *James*, 19 A. at 161; Commonwealth v. Worth, 23 N.E.2d 891, 892 (Mass. 1939); *Rexroth*, 15 R.I. at 37; *Payne*, 55 A. at 657.

[430] *E.g.*, *Ex Parte* Maier, 37 P. 402, 403–04 (Cal. 1894); Harper v. Galloway, 51 So. 226, 228 (Fla. 1910); State v. Repp, 73 N.W. 829, 829 (Iowa 1898); State v. Hume, 95 P. 808, 810 (Or. 1908); Harvey v. Commonwealth, 64 Va. (1 Gratt.) 941, 943–44 (1873).

[431] *E.g.*, Javins v. United States, 11 App. D.C. 345, 347–49 (D.C. Cir. 1897); Begay v. Sawtelle, 88 P.2d 999, 1,000 (Ariz. 1939).

[432] *E.g.*, Merrils v. Goodwin, 1 Root 209, 209 (Conn. 1790); Manning v. Mitcherson, 69 Ga. 447, 450 (1882); Davis v. Green, 2 Haw. 367, 374 (1861); Schulte v. Warren, 75 N.E. 783, 786 (Ill. 1905); Hammonds v. Central Ky. Natural Gas Co., 75 S.W.2d 204, 206 (Ky. 1934), *overruled in part by* Texas Am. Energy Corp. v. Citizens Fidelity Bank & Trust Co., 736 S.W.2d 25 (Ky. 1987); State v. Clement, 178 So. 493, 495 (La. 1938) (interpreting a codification of Roman law); Sterling v. Jackson, 37 N.W. 845, 851 (Mich. 1888); State v. Rodman, 59 N.W. 1,098, 1,099 (Minn. 1894); State v. Ward, 40 S.W.2d 1,074, 1,077 (Mo. 1931); Rosenfeld v. Jakways, 216 P. 776, 778 (Mont. 1923); Fisher v. Steward, 1 Smith 60, 60–62 (N.H. 1804); State v. Heffernan, 67 P.2d 240, 243–45 (N.M. 1936); State v. House, 65 N.C. 315, 316 (1871); State v. Shaw, 65 N.E. 875, 876 (Ohio 1902); Wallis v. Mease, 3 Binn. 546, 549, 551–52 (Pa. 1811); Seaboard Air Line R.R. Co. v. Richmond-Petersburg Turnpike Auth., 121 S.E.2d 499, 502 (Va. 1961); State v. Lipinske, 249 N.W. 289, 291 (Wis. 1933). *Cf.* Rice Hope Plantation v. South Carolina Pub. Serv. Auth., 59 S.E.2d 132, 142 (S.C. 1950).

[433] Conti v. ASPCA, 353 N.Y.S.2d 288, 290–91 (1974); Hughes v. Reese, 109 So. 731, 732 (Miss. 1926); Mullet v. Bradley, 53 N.Y.S. 781, 782–83 (1898) (Pacific sea lion found in the Atlantic);

human animal was to be treated as would any other wild nonhuman animal who had escaped with no intention of return and with no likelihood of immediate recapture.[434] The wild nonhuman animal was said to have regained her "natural liberty" and was therefore eligible to become the property of the next human being who captured, or otherwise occupied, her.[435]

Interestingly, several courts have held that the fact that a nonhuman animal was nonindigenous placed any subsequent human captor on notice that she had escaped from her owner and belonged to someone else.[436] If a principle can be discerned from this handful of unusual cases, it appears to be either the Lockean idea that the mixing of labor, and not mere occupation, is what entitles one to ownership of a wild nonhuman animal, or that a fully tamed individual of a wild species is the equivalent of a domesticated nonhuman animal.[437]

In sum, excluding the inevitable quibbles over when possession occurs,[438] *Pierson v. Post* and *Geer v. Connecticut*, as modified by *Hughes v. Oklahoma*, fairly state the common law of every American

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Campbell v. Hedley, 39 O.R. 528, 529 (1917) (nonindigenous fox). *Cf.* State v. Crenshaw, 22 Mo. 457, 458–59 (1856) (tamed buffalo calf not considered cattle within its statutory meaning, as courts "must look to the general state of things," and not to the individual nonhuman animal).

[434] *Conti*, 353 N.Y.S.2d at 290–91; Hughes v. Reese, 109 So. 731, 732 (Miss. 1926); *Mullet*, 53 N.Y.S. at 782–83; *Campbell*, 39 O.R. at 528. *Cf. Crenshaw*, 22 Mo. at 458–59.

[435] *Conti*, 353 N.Y.S.2d at 290–91; *Hughes*, 109 So. at 732; *Mullet*, 53 N.Y.S. at 782–83; *Campbell*, 39 O.R. at 528. *Cf. Crenshaw*, 22 Mo. at 458–59.

[436] *See* E.A. Stephens & Co. v. Albers, 256 P. 15, 18 (Colo. 1927).

[437] The pelt of a nonindigenous silver fox who had escaped from a ranch belonged not to the man who shot him, but to the ranch owner. *Id.* There, the Supreme Court of Colorado stated:

> [w]e are loathe to believe that a man may capture a grizzly bear in the environs of New York or Chicago, or a seal in a millpond in Massachusetts, or an elephant in a cornfield in Iowa, or a silver fox on a ranch in Morgan County, Colo. and snap his fingers in the face of the former owner whose title had been acquired by a considerable expenditure of time, labor, and money.

Id.; *see* Manning v. Mitcherson, 69 Ga. 447, 450 (1882) (returning an escaped canary to plaintiff who had possessed her for two years); Ulery v. Jones, 81 Ill. 403, 405 (1876) (buffalo calf that had been "completely tamed" so that he was "no longer of a wild nature" prevented defendant from shooting him when he wandered onto defendant's pasture); Kesler v. Jones, 296 P. 773, 774 (Idaho 1931) ("Rather it would seem that the courts would be constrained to hold that they had not so sufficiently or completely regained their original state of natural liberty as completely to destroy their status as property."); Amory v. Flynn, 10 Johns. 102, 102–03 (N.Y. Sup. Ct. 1813) (holding wild geese that had been completely tamed were not restored to their natural liberty upon escape because of their complete domestication).

[438] *Compare* Liesner v. Wanie, 145 N.W. 374, 376 (Wis. 1914) (a "vested property interest" in a wild nonhuman animal accrues when actual possession "is practically inevitable") *with* Young v. Hichens, 115 Eng. Rep. 228, 230 (1844) (rejecting argument that "all but reducing into possession is the same as reducing into possession"). This difference, of course, mirrored the differences between republican and imperial Roman law itself.

jurisdiction.[439] Few today would care to challenge Holmes's claim that "we have adopted the Roman law as to animals *ferae naturae*,"[440] at least in the United States.[441]

The modern common law rule regarding domesticated nonhuman animals is even more straight-forward: "[g]enerally, all domestic animals are regarded as property, and an owner thereof has a property right therein as absolute as that in inanimate objects."[442] However, a few older authorities have continued to treat the human property interests in domestic nonhuman animals with no intrinsic value, who are kept merely for amusement, such as dogs, cats, ferrets, apes, monkeys, and parrots, as imperfect and therefore not subject to the protections of the criminal law, and perhaps certain common law actions.[443]

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[439] Pierson v. Post, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805); Geer v. Connecticut, 161 U.S. 519, 534–35 (1896); Hughes v. Oklahoma, 441 U.S. 322, 338–39 (1979).

[440] HOLMES, *supra* note 14, at 237. Citing *Kent's Commentaries*, which themselves cited to *Pierson*, 3 Cai. R. at 175, Holmes said:

> [t]he Roman law and the common law agree that, in general, fresh pursuit of wild animals does not give the pursuer the rights of possession. Until escape has been made impossible by some other means, another may step in and kill or catch or carry off the game if he can.

HOLMES, *supra* note 14, at 217; *see also* Epstein, *supra* note 394, at 107 ("As is familiar, the single rule for initial acquisition of ownership of land or chattels at common law is the rule of first possession. That rule holds that anything in the initial position [that is, something that no one possesses or owns] is a *res nullius*—a thing owned by no one."). Moreover, this rule has been applied to the capture of such inanimate resources considered either *res nullius* or *res communes* as oil, gas, groundwater, and to property interests in outer space. Rose, *supra* note 394, at 75.

[441] Either the fact that "American writers have been far readier to concede Roman influence than their English counterparts," Stein, *supra* note 290, at 152, or because of the strong influence of strict English Game laws that never were adopted in the United States may explain Holdsworth's singular opinions that "it is clear that very little is left . . . of the Roman principle that animals ferae naturae are res nullius," and that "[t]he Roman rules have been followed only so far as to allow that possession of such animals is in no one; but, in so far as these rules assert that the property in such animals is in no one, they have been decisively rejected." HOLDSWORTH, *supra* note 300, at 494.

[442] 3A *C.J.S. Animals*, § 4, at 475 (1973). "Domestic animals are, as you would expect, as much subject to property rights and ownership as an inanimate object such as a chair or ring." WALTER B. RAUSHENBUSH, THE LAW OF PERSONAL PROPERTY BY RAY ANDREWS BROWN 13 (3d ed. 1975); *see also* EARL OF HALSBURY, *supra* note 378, § 913, at 531. The Texas Court of Criminal Appeals went further: not only were domestic nonhuman animals property, but "the right of property in domestic animals is not open to question." Cinadr v. Texas, 300 S.W. 64, 64 (Tex. Crim. App. 1927). The fourth article of this series shall demonstrate that both in theory and practice, there is little, if anything, that is not open to question in a common law court.

[443] Sentell v. New Orleans & Carrollton R.R. Co., 166 U.S. 698, 700–01 (1897); Chernick v. Department of Health of the City of New York, 330 N.Y.S.2d 910, 913 (N.Y. Sup. Ct. 1972) ("From time immemorial these animals have been considered as holding their lives at the will

D. *Statutory Legal Thinghood of Nonhuman Animals*

The human ownership of both nonhuman animals and human slaves long has subjected both to ruthless exploitation.[444] Yet it was no crime at common law to abuse nonhuman animals in any way.[445] The Puritans of the Massachusetts Bay Colony enacted the 1641 Body of Liberties to declare and protect the colonists' fundamental rights.[446] Alongside unique protections for women, children, and servants,[447] were the world's first animal protection laws.[448] Article 92 stated that "[n]o man shall exercise any Tirranny or Crueltie towards any bruite Creatures which are usuallie kept for man's use."[449] Article 93 made it lawful to those leading or driving "Cattel" to rest them if they were weary, hungry, sick, or lame "in any open place that is not Corne, meadow, or inclosed for some peculiar use."[450]

Puritan law and society often were guided by the Old Testament, while Puritan courts were expected to rule in harmony with it.[451] The

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of the legislative power." (quoting MCQUILLEN, 7 MUNICIPAL CORPORATIONS, § 24.289)); Haywood v. State, 41 Ark. 479, 482–83 (1883); Blair v. Forehand, 100 Mass. 136, 140–41 (1868); Norton v. Ladd, 5 N.H. 203, 204 (1830); The Case of Swans, 7 Coke Rep. 16, 18a, 77 Eng. Rep. 435 (K.B. 1592); *see also* BLACKSTONE, *supra* note 359, at *391; EARL OF HALSBURY, *supra* note 378, § 920, at 534–35.

[444] RICHARD A. EPSTEIN, SIMPLE RULES FOR A COMPLEX WORLD 55 (1995).

[445] "The right to take their life, and to make property of them, includes all other rights; so that the common law recognizes as indictable no wrong, and punishes no act of cruelty, which they may suffer, however wanton or unnecessary." BISHOP, *supra* note 6; *see, e.g.*, DAVID S. FAVRE & MURRAY LORING, ANIMAL LAW 122 (1983); Charles E. Friend, *Animal Cruelty Laws: The Case for Reform*, 8 U. RICH. L. REV. 201, 201–02 (1974).

[446] SAMUEL E. MORRISON, BUILDERS OF THE BAY COLONY 232 (1930); Daniel R. Coquillette, *Radical Lawmakers in Colonial Massachusetts: The "Countenance of Authoritie" and* The Lawes and Liberties, NEW ENG. Q. 179, 189, 191 (1994). Morrison cites "an interesting case of condemnation for cruelty to an ox, in Records of Quarterly Courts of Essex County III, 305." MORRISON, *supra*, at 232.

[447] For example, servants could "flee from the Tirranny and Crueltie" of their masters and a male involved in sodomy was exempted from death if he either was raped or under the age of 14 years. THE COLONIAL LAWS OF MASSACHUSETTS, REPRINTED FROM THE EDITION OF 1672, WITH THE SUPPLEMENTS THROUGH 1686 105, § 6; 15, § 8 (William H. Whitmore ed., 1887); *see* BISHOP, *supra* note 6, at 192. Most of these humanitarian protections, including those for nonhuman domestic animals, altered the common law and were incorporated in some form into the 1648 *Lawes and Liberties*. Coquillette, *supra* note 446, at 191–92.

[448] Coquillette, *supra* note 446, at 192.

[449] THE COLONIAL LAWS OF MASSACHUSETTS, *supra* note 447, at 52.

[450] *Id.* at 54; Emily S. Leavitt & Diane Halverson, *The Evolution of Anti-Cruelty Laws in the United States*, *in* ANIMALS AND THEIR LEGAL RIGHTS 1 (4th ed. 1990).

[451] In 1636, the General Court (the Legislature) ordered the courts to follow the Bible in the absence of positive law. GEORGE L. HASKINS, LAW AND AUTHORITY IN EARLY MASSACHUSETTS—A STUDY IN TRADITION AND DESIGN 141 (1960). In Haskins's view, the Bible "was not so much binding precedent as enormously persuasive authority." *Id.* at 162. In the opinion of

biblical influence upon Puritan law is most clearly demonstrated by Liberty 94, the "Capitall Laws," which frequently were annotated to specific biblical provisions. One prohibition was that if any man or woman "shall lye with any beaste or bruite creature by Carnall Copulation," the human would be put to death.[452] But the "beast" victim also was to "be slaine and buried and not eaten."[453] These two parts constituted an express invocation of the biblical law of the goring ox.[454]

As important as the Puritans' decision to expand the protections of the downtrodden was their failure to alter their fundamental predicament. To the Supreme Court of Arkansas, the Puritan laws seemed "to recognize and attempt to protect some abstract rights in all that animate creation, *made subject to man by the creation*, from the largest and noblest to the smallest and most insignificant."[455] Puritan pity, however, never rippled through the Puritan belief in the absolute divinely granted superiority of human beings over creation.[456]

Nothing changed when, in 1809, the English House of Lords debated the merits of a criminal nonhuman animal protection bill, the first legislative body to do so.[457] The bill's sponsor, Lord Erskine, repeatedly referred both to a designed Chain of Being and to the moral trust implied by the biblical grant of dominion over nonhuman animals.[458] Passed by the House of Lords, the bill stalled in the House of Commons.[459] Thirteen years later, Martin's Act, which prohibited

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the Supreme Court of Arkansas, these colonial laws sprung from an attempt "to enforce imperfect but well recognized moral obligations." Grise v. State, 37 Ark. 456, 458 (1881).

[452] THE COLONIAL LAWS OF MASSACHUSETTS, *supra* note 447, at 14, § 7. William Ewald describes the fate of young Thomas Granger and the nonhuman animals he sodomized in the Colony of Plymouth in 1642. Ewald, *supra* note 228, at 1905 n.28.

[453] THE COLONIAL LAWS OF MASSACHUSETTS, *supra* note 447, at 14, § 7.

[454] *Grise*, 37 Ark. at 458.

[455] *Id.* (emphasis added); *see also* The Stage Horse Cases, 15 Abb. Pr. (n.s.) 51, 77 (N.Y. Comm. Pleas 1873).

[456] John Locke provides an excellent example of one who can believe that nonhuman animals were divinely created for humanity's use, but that they should not be used cruelly. Locke advised that children "be bred up in an abhorrence of killing and tormenting any living creature . . . . And indeed, I think people from their cradles should be tender to all sensible [i.e., sentient] creatures." JAMES TURNER, RECKONING WITH THE BEAST 7 (1980).

[457] David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, DET. C.L. REV. 1, 3–4 (1993).

[458] The intended beneficiaries were "every animal which comes in contact with man, and whose powers, and qualities, and instincts, are obviously constructed for his use" and its enactment would "consecrate, perhaps in all nations, and in all ages, that just and eternal principle which binds the whole living world in one harmonious chain, under the dominion of enlightened man, the lord and governor of all." Lord Erskine, *Speech to the House of Lords*, PARLIAMENTARY DEBATES columns 555, 557 (May 15, 1809).

[459] Favre & Tsang, *supra* note 457, at 4.

any person from wantonly and cruelly beating or ill-treating any "horse, mare, gelding, mule, ass, ox, cow, heifer, steer, sheep or other cattle," finally succeeded.[460]

All American jurisdictions subsequently enacted anti-cruelty statutes of varying breadths.[461] While no records of the legislative debates exist, the early construing courts generally assumed human transcendence over nonhuman animals and commonly understood the statutes' purposes in such terms as being "directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or who have knowledge of these acts."[462] To be sure, the infliction of pain with *no* colorable justification would no longer be tolerated, but as only the palest shades were required, the effect of anti-cruelty statutes was minimal.[463]

The scope of the new statutes generally was limited to those rare situations in which humans harmed nonhuman animals merely "for the gratification of a malignant or vindictive temper,"[464] and not in the pursuit of some legitimate benefit for which human beings had long been entitled to use them.[465] The new statutes bequeathed no rights.[466] The Indiana Appellate Court, in *Hunt v. State*, observed that its state anti-cruelty statute

> was evidently designed to inculcate a humane regard for the rights and feelings of the brute creation by reproving evil and indifferent tendencies in human nature in its intercourse with animals, but not to limit man's proper dominion "over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth."[467]

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[460] 3 Geo.4 c. 71(1822).

[461] Leavitt & Halverson, *supra* note 450, at 1–47. The first anti-cruelty statute passed in the United States, Me. Laws ch. IV, § 7 (1821), actually predated Martin's Act by one year. Favre & Tsang, *supra* note 457, at 8.

[462] Knox v. Massachusetts Soc'y for the Prevention of Cruelty to Animals, 425 N.E.2d 393, 396 (Mass. App. Ct. 1981) (quoting Commonwealth v. Higgins, 178 N.E. 536, 538 (Mass. 1931)).

[463] *See generally* TURNER, *supra* note 456.

[464] Commonwealth v. Lufkin, 89 Mass. (7 Allen) 579, 581 (1863).

[465] *See* FRANCIONE, *supra* note 11, at 134–56; Richard F. McCarthy & Richard E. Bennett, *Statutory Protection for Farm Animals*, 3 PACE ENVTL. L. REV. 229, 235 (1986); Annotation, *What Constitutes Statutory Offense of Cruelty to Animals*, 82 A.L.R.2d 794, 799 (1962).

[466] JOHN PASSMORE, MAN'S RESPONSIBILITY FOR NATURE—ECOLOGICAL PROBLEMS AND WESTERN TRADITIONS 117 (1974).

[467] Hunt v. State, 3 Ind. App. 383, 385 (1892); *see* People *ex rel.* Freel v. Downs, 136 N.Y.S. 440, 445 (Mag. Ct. 1911) ("Man is superior to animals, and some of them he uses for food and is permitted to slaughter them. Many are the means he employs for such purpose, and in such cases the incidental pain and suffering is treated as necessary and justifiable.").

A Missouri Court of Appeals, in *State v. Bogardus*, reversing the cruelty conviction of a marksman who tossed pigeons in the air, then shotgunned them to demonstrate his skill, concluded that:

> [t]he universal love of so-called "sports" which involve the destruction of animal life cannot now be ignored in a search after the legislative meaning in the act before us. Such diversions are not always resorted to for needs of human sustenance. Yet they are not considered "needless" for man's enjoyment of his legitimate dominion over the brute creation.[468]

Perhaps the Mississippi Supreme Court in *Stephens v. State* most eloquently summarized the purposes of the anti-cruelty statutes, declaring that humans may hold nonhuman animals in a kind of "moral trust":

> [s]uch statutes were not intended to interfere, and do not interfere, with the necessary discipline and government of such animals, or place any unreasonable restriction on their use or the enjoyment to be derived from their possession. The common law recognized no rights in such animals, and punished no cruelty to them, except in so far as it affected the rights of individuals to such property. Such statutes remedy this defect, and exhibit the spirit of that divine law which is so mindful of dumb brutes as to teach and command, not to muzzle the ox when he treadeth out the corn; not to plow with an ox and an ass together; not to take the bird that sitteth on its young or its eggs; and not to seethe a kid in its mother's milk. To disregard the rights and feelings of equals, is unjust and ungenerous, but to willfully or wantonly injure or oppress the weak and helpless, is mean and cowardly. Human beings have at least some means of protecting themselves against the inhumanity of man . . . but dumb brutes have none. Cruelty to them manifests a vicious and degraded nature, and it tends inevitably to cruelty to men. Animals whose lives are devoted to our use and pleasure, and which are capable, perhaps, of feeling as great physical pain or pleasure as ourselves, deserve, for these considerations alone, kindly treatment. The dominance of man over them, if not a moral trust, has a better significance than the development of malignant passions and cruel instincts. Often their beauty, gentleness, and fidelity suggest the reflection that it may have been one of the purposes of their creation and subordination to enlarge the sympathies and expand the better feelings of our race. But, however this may be, human beings should be kind and just to dumb brutes; if for no other reason that to learn how to be kind and just to each other.[469]

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[468] State v. Bogardus, 4 Mo. App. 215, 219 (Mo. Ct. App. 1877).

[469] Stephens v. State, 3 So. 458, 458–59 (Miss. 1888). As Marilyn Katz explains, such Old Testament commandments towards nonhuman animals

V. CONCLUSION

The legal thinghood of nonhuman animals has existed continuously since the dawn of law in Near Eastern and Western legal systems. It has cumbered nonhuman animals for so long because even the most fundamental legal rights of beings will go unrecognized by a society that accepts a hierarchical cosmology in which those beings are seen as inherently inferior or that fails to connect law to the values of liberty and equality. Though grounded in a horizontal cosmology, Mesopotamian law was divine power and not justice. Both aspects of Mesopotamian law were overthrown nearly 2,000 years ago, the former by the vertical cosmologies of the Hebrews, Greeks, and Romans, and the latter by the Greco-Roman idea of law as justice, and not merely divine power.

It was only in the eighteenth century that Western legal philosophy commenced its long separation from a theology that was seen as the ultimate source of law and posited the inherent and immutable superiority of human over nonhuman animals.[470] The vertical cosmologies that created the legal thinghood of nonhuman animals in Hebrew, Greek, Roman, and finally Western law were only scientifically discredited in the nineteenth century.[471] Their ruin spurred demands for human equality and opened the possibility for judges at last to consider that nonhuman animals might transcend legal thinghood under the proper circumstances as a matter of logic.[472]

However, logic, while an important element of judicial decisionmaking, is not enough. Normative principles, which include both objective and subject considerations, also must be applied.[473] Law's differentia-

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are sometimes understood as examples of a general injunction of kindness towards animals. The spirit of the text is probably better reflected, however, when interpretation emphasizes the benefits which accrue directly to human beings from such regulations. Nachmanides, for example, explains that these commandments are not a matter of extending mercy to animals, "but they are decrees upon us to guide us and to teach us traits of good character." Similarly, Maimonides (d.1204) explains that the object of the law requiring us to raise up a tired animal is "to make us perfect; that we should not form cruel habits; and that we should not uselessly cause pain to others; that on the contrary, we should be prepared to show pity and mercy to all living creatures, except when necessity [to eat] demands the contrary [i.e. sacrifice]."

Katz, *supra* note 7, at 276.

[470] *See* Harold J. Berman, *Toward an Integrative Jurisprudence: Politics, Morality, History*, 76 CAL. L. REV. 779, 782 (1988).

[471] *See generally* Wise, *supra* note 3.

[472] *Id.* at 41–42.

[473] For example, human slavery "may be an abomination, but it is not a contradiction in terms." Richard A. Epstein, *Property as a Fundamental Civil Right*, 29 CAL. W. L. REV. 187, 190 (1992);

tion from an anthropocentric theology coincided with the fall of natural law and natural rights and the rapid rise of analytical jurisprudence and other forms of legal positivism. Much of modern domestic and international human rights law, however, rests upon various nonpositivist legal theories.[474] Thus, only now has the theoretical recognition of the fundamental legal rights of nonhuman animals been possible as matter both of logic and of law.

The twentieth century also has witnessed the birth of scientific disciplines and discoveries that have powerfully supported Darwin's notion of evolution by natural selection and have steadily and more truly revealed the natures of both human and nonhuman animals.[475] Yet scientific facts that contradict beliefs so old and cherished that they appear self-evident may take a long time to illuminate judicial decisions.[476] The ancient idea of the legal thinghood of nonhuman animals will continue to grip the common law to the degree that judges are either affected by the disproven cosmologies upon which it rests or value precedent over justice. While many Americans still reject Darwinism and embrace primitive hierarchical cosmologies, few modern judges consciously rest their decisions upon them.[477] Numerous twentieth-century judicial decisions have characterized non-

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see also RICHARD A. POSNER, OVERCOMING LAW 18 (1995) ("[T]he decision to make economics the logic of the law could not itself be derived from economics any more than the decision to be scientific can be derived from science."). John C. Gray noted that while nonhuman animals had no legal rights, they "may conceivably be legal persons" either by "possessing legal rights" or "because subject to legal duties." JOHN C. GRAY, THE NATURE AND SOURCES OF LAW 42, 43, 44 (2d ed. 1931). The inevitable and necessary place of subjective elements in scientific nonhumans was identified by Thomas S. Kohn in *The Structure of Scientific Nonhumans. See generally* KOHN, *supra* note 19. Values in general and in legal decisionmaking in particular will be discussed in the third article in this series.

[474] Jerome J. Shestack, *The Jurisprudence of Human Rights*, *in* 1 HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 78 (Thomas Meron, ed., 1984); *see also* Susan L. Goodkin, *The Evolution of Animal Rights*, 18 COLUM. HUM. RTS. L. REV. 259, 276–81 (1987) (noting that many modern human rights theorists have rejected pure legal positivist rights theories and have focused instead on rights derived from human nature).

[475] Anyone who still believes that evolution by natural selection is merely an unprovable "theory" should examine Jonathan Weiner's, *The Beak of the Finch—A Story of Evolution in Our Time*, a well-written account of one painstaking and extraordinary, but by no means isolated, study and documentation of evolution by natural selection as it occurred on the island of Daphne Major in the Galapagos Islands. *See generally* JONATHAN WEINER, THE BEAK OF THE FINCH—A STORY OF EVOLUTION IN OUR TIME (1995).

[476] Even theories of legal history published by prominent legal historians may take many years to filter into the consciousness of judges. R.H. Helmholz, *Harold Berman's Accomplishment as a Legal Historian*, 42 EMORY L.J. 475, 480–81 (1993).

[477] *See* FRANCIONE, *supra* note 11, at 36–37. This is why assertions that

> [i]n Western legal systems, there are two types of justifications that are usually given for the status of animals as property . . . the theological justification found in Genesis [1:20–28, and] . . . the notion that animals ought to be exploited by humans because

human animals as property, and continue to do so. The reason that an exceedingly small number of decisions actually have sought to justify the status of nonhuman animals as human property is that judges normally fail to perceive that it requires justification. As human slavery once was, the legal thinghood of nonhuman animals is accepted as a first principle.[478]

As highly educated men and women, modern judges probably accept Darwinism, but in a form that has, in the words of the biologist and historian of science, Stephen Jay Gould, "been so spin doctored that we have managed to retain an interpretation of human importance scarcely different, in many crucial ways, from the exalted state we occupied as the supposed products of direct creation in God's image."[479] Because law values the past merely for having been, and because judges routinely misconstrue humanity's place in Darwin's world, judges routinely rely upon the prior judicial decisions and jurisprudential writings of those who lacked any modern scientific knowledge.[480] By mechanically citing to earlier cases and other sources of law that cite to still earlier cases and sources, and so on to the ancients, judges have no way to realize that the foundations have rotted away.

The first article in this series demonstrated how scientific discovery has created new views of life and of nature and decisively undermined

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> animals possess some "defect" that makes them qualitatively different from humans and thereby deserving of subjugation by humans,

id., are misleading, for such judicial reasoning is exceedingly rare. For a unique modern example, see *Vivisection Investigation League v. American Soc'y for the Prevention of Cruelty to Animals*. 203 N.Y.S.2d 313, 315 (N.Y Sup. Ct. 1959), *aff'd*, 207 N.Y.S.2d 425 (N.Y. App. Div. 1960). See also Judge Richard Posner's extra-judicial opinion that,

> [t]he main "reason" why the "philosophical" idea that . . . talking apes might have more rights than newborn or profoundly retarded children seems outlandish or repulsive may simply be that our genes force us to distinguish between our own and other species and that in this instance disembodied rational reflection will not overcome feelings rooted in our biology.

RICHARD A. POSNER, THE PROBLEMS OF JURISPRUDENCE 347–48 (1990). Posner's view is unusual for a judge, as it assumes aspects of a secular version of teleological anthropocentrism and of the naturalistic fallacy.

[478] *See* Bush, *supra* note 13, at 420–21.

> To nineteenth-century Southern judges as well as Northern abolitionists, it was a commonplace that slavery, in legal contemplation, had never been created. Historians today agree. Slavery had instead simply evolved in practice, as a custom, and then received statutory recognition. Actually, the process of "recognition" was implicit, involving no [extant] legislative debates or articulation of first principles . . . . Almost from the outset, slavery was assumed . . . *ex nihilo*, but it was nowhere justified, explained, or systematically described.

Id.

[479] Stephen J. Gould, *Spin Doctoring Darwin*, 104 NATURAL HIST. 6, 6 (July 1995).

[480] *See* Anthony T. Kronman, *Precedent and Tradition*, 99 YALE L.J. 1029, 1032–33 (1990).

the hierarchical cosmologies that once underpinned the transcendence of human over nonhuman animals.[481] This second Article has shown how these false cosmologies produced and nourished the legal thinghood of nonhuman animals. The third article will discuss the nature of legal change and the sources of such fundamental legal values and principles as liberty, equality, bodily integrity, and bodily liberty, from which devolve specific legal rights that accrue to human beings by virtue of their legal personhood. It will be argued that these legal values, principles, and rights are not inherently limited to human beings, but entitle at least some nonhuman animals to transcend their historical legal thinghood and to draw equally upon these sources for legal personhood, to at least a limited degree. Otherwise, what Moses Finley described as the "final paradox" of the ancient Greeks—the rise of both liberty and slavery—shall remain our paradox too, as those nonhuman animals who deserve fundamental rights shall be denied them in a world in which the fundamental rights of human beings are everywhere on the rise.[482] Perhaps the judicial stage for resolving this modern paradox is even now being set.[483]

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[481] Wise, *supra* note 3, at 15, 17–18. Early in the history of the environmental movement the Judeo-Christian idea of transcendence of humans over not just nonhuman animals, but over all of nonhumanity itself, was proclaimed as the root of humanity's ongoing ecological assault. Lynn White, *The Historical Roots of our Ecological Crisis*, 155 SCIENCE 1203–05 (1967); *see also* RODERICK F. NASH, THE RIGHTS OF NATURE—A HISTORY OF ENVIRONMENTAL ETHICS 88–92 (1989). White's description of Westerners as believing themselves "superior to nature, contemptuous of it, willing to use it for our slightest whim," accurately describes the Western legal thinghood of nonhuman animals. White, *supra*, at 1204.

[482] *See* MOSES I. FINLEY, THE ANCIENT GREEKS—AN INTRODUCTION TO THEIR LIFE AND THOUGHT 30 (1963).

[483] In the context of a discussion of the value of slain dogs to their owners, one Texas appellate judge recently said that,

> simple property concepts cannot reflect the complex reality of the relationship between humans and their pets. Because of the characteristics of animals in general and of domestic pets in particular, I consider them to belong to a unique category of "property" that neither statutory law nor caselaw has yet recognized .... Scientific research has provided a wealth of understanding to us that we cannot rightly ignore. We know that mammals share with us a great many emotive and cognitive characteristics, and that the higher primates are very similar to humans neurologically and genetically .... The law must be informed by evolving knowledge and attitudes .... Society has long since moved beyond the untenable Cartesian view that animals are unfeeling automatons and, hence, *mere* property. The law should reflect society's recognition that animals are sentient and emotive beings that are capable of providing companionship to the humans with whom they live.

Bueckner v. Hamel, 886 S.W.2d 368, 377–78 (Tex. Ct. App. 1994) (Andell, J., concurring) (emphasis in original).