ALL THE LIZARDS STAND AND SAY "YES, YES, YES."[1]

THE ELEMENT OF PLAY IN LEGAL ACTIONS AGAINST ANIMALS AND INANIMATE OBJECTS

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[1] The answer to an Akamba riddle. Lee Haring, On Knowing the Answer Vol. 87, No. 345 The Journal of American Folklore, 197, 203 (Jul. - Sep., 1974).

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Abstract: Legal actions against non-humans (whether animals or objects) were once widespread. They were viewed seriously and undoubtedly served important social functions. This article considers the possibility that some of these actions may have been playful as well. Certain aspects of legal actions against animals and objects-- occasional moments of levity, a preoccupation with formal rules, and a strong emphasis on imaginative transformation-- suggest that these actions had elements of play. The possibility is worth considering for two reasons. First, it may shed some light on a practice that has perplexed and disturbed commentators for centuries. Second, an examination of play in the trials of animals and objects may serve as a starting point for examining our own attitudes towards our legal system.

PART I: BACKGROUND

In 17th Century Germany, non-clerical matters were decided in courts of customary law by the *Schoffen*, groups of respected laymen who worked part-time, favored oral procedures and handed down decisions without explaining how they had reached them. Litigants who were involved in complex cases, however, often preferred to use written pleadings, which their lawyers would adorn with elaborate arguments and innumerable citations to Roman law. As a result, written pleadings were sometimes difficult for the *Schoffen* to follow. When the *Schoffen* could not follow the pleadings, they were required by law to send the entire written record to professors in the law faculty of a reputable university and abide by whatever decision the professors made. The practice, known as *Aktenversendung*, ate up much of the law professors' time—there were periods in German history when writing opinions was the major activity of certain law faculties.[1] When one reads about "complex cases" and German professors, one imagines multi-party contract disputes and convoluted wills, not the question of what to do with an unruly cow. Yet in July of 1621 the Law Faculty of Leipzig handed down a decision condemning a cow to death for killing a woman named Catharina Fritzchen. The professors ordered that the "homicidal cow" be transported to a "remote, desolate location," executed, and buried on the spot.[2]

It seems an inefficient way to put down an animal that has killed a human being. A trial consumes time and energy. The animal, presumably a menace to the community and undoubtedly a distressing reminder of someone's death, must be kept alive until the final verdict is handed down. In cases where the *Schoffen* court resorted to *Aktenversendung*, the final verdict might be delayed for many months. The court's use of the same formal procedure that one would use to prosecute a human seems ridiculous. Someone coming across the

Leipzig decision in an obscure archive might well be tempted to dismiss the incident as a freak occurrence. However, the Leipzig trial was not an aberration; it was not even unusual. Records indicate that legal actions against non-humans (whether animals or objects) were once wide-spread.

In 1906, historian E.P. Evans gathered together an extensive collection of primary documents (mostly fragments of court records) describing actions against animals and inanimate objects. He also attempted to catalogue everything anyone ever wrote about these proceedings. His *Criminal Prosecution and Capital Punishment of Animals* has become the standard reference on the subject and includes descriptions of actions against dozens of different kinds of animals: "asses, beetles, bloodsuckers, bulls, caterpillars, cockchafers[3], cocks, cows, dogs, dolphins, eels, field mice, flies, goats, grasshoppers, horses, locusts, mice, moles, rats, serpents, sheep, slugs, snails, swine, termites, turtledoves, weevils[4], wolves, worms and non-descript vermin."[5] The majority of cases involved pigs, however, for pigs ran freely through the streets of European towns for centuries and "were frequently involved in altercations, particularly with small children."[6]

It is unknown exactly how many animals were formally tried and subjected to capital punishment in Europe, but E. P. Evans provided hundreds of examples. In addition, legal actions against animals and inanimate objects occurred in other societies as well, though the proceedings took radically different forms.

The Athenians had a special building, called the Prytaneum, dedicated to hearing cases where—(1) the murderer was unknown, (2) a human death was caused by an inanimate object, or (3) an animal had caused the death of a human. These trials were ceremonial in character. The Athenians had a general notion that any time someone was killed, whether on purpose or by accident, his *Erinys* or avenging spirit had to be appeased. The trials held in the Prytaneum were supposed to accomplish this goal. Nevertheless, the trials followed ordinary procedural rules.[7]

The Bible explicitly required that animals who had harmed a human being be put to death: "if an ox gores a man or a woman, that they die; then the ox shall be stoned, and his flesh shall not be eaten; but the owner of the ox shall be acquitted."[8] According to the Talmud, the ox was not merely put to death; it actually underwent a trial, in the presence of twenty-three judges of the Sanhedrin, and a sentencing procedure. Furthermore, its body could not be eaten.[9] European Christians invariably cited this passage from Exodus as justification for their own animal trials. Secular courts in modern-day France began hearing trials of individual animals accused of specific crimes as early as the beginning of the 12th century.[10] Ecclesiastical trials of pests and vermin trace even further

back, to the 9th century[11] Pests being tried in ecclesiastical courts were usually accused of being a public nuisance, tried in absentia and anathematized or ex-communicated.[12]

England developed an institution called the deodand—under this law, which traces back to the 12th century and possibly even earlier, any personal chattel which was found by a jury to have caused the death of a person was forfeit to the king.[13] These trials were different from the Athenian ones because the outcome was not pre-determined. Rather, it hinged on a jury's findings regarding the motion of the object. If they found that the motion of the object was the cause of death, the object was a deodand and was forfeited to the king; if the motion of the object was not the cause of death, the object was left alone.[14] In the Lord of the Manor of Hampstead Case, for example, "a cart met a wagon loaded upon the road, and the cart endeavouring to pass by… overturned, and threw the person that was in the cart just before the wheels of the wagon." The jury in that case decided that cart, wagon, loadings and horses were deodands because they had "moved unto death."[15] In another case, a man riding upon a horse was trying to ford a river, was swept into the water and drowned. The horse was not found a deodand "for the water, and not the horse was the cause of his death."[16]

In 17the and 18th century Russia, trials were held whenever there was a crime, whether or not a human defendant was available. Sometimes, corpses were dragged into the courtroom and, if they were found guilty, were later hanged. If there was no body, an effigy was used. Sometimes objects that had some connection to the crime were tried and executed. For example, papers and notebooks containing treacherous or heretical material were routinely tried and burned at the stake. In Kazan' in 1775, the local authorities tried and executed a portrait of Pugachev, the late leader of a rebellion under Catherine the Great.[17]

The custom of trying animals and objects has survived into the 20th century and beyond, albeit in a highly attenuated form. In a recent state appellate court case, the court refused certiorari, mandamus and habeas corpus relief from a trial court's order directing the destruction of a dog under Tex. Health & Safety Code §§ 822.001-822.004 on jurisdictional grounds: no criminal law matter was at issue. Counsel for the dog argued that the case was functionally a criminal case, pointing out that the statutory procedure outlined in Tex. Health & Safety Code §§ 822.001-822.004 provides for the filing of a "complaint," the issuance of a "warrant" for seizure of the dog, and a due process hearing. In this particular case, the defendant was seized with several other suspects and later identified by the victim in a "doggie line-up"[18]

In England and the United States, proceedings are still held "against the vessel" in maritime cases. As recently as 2001, the 11th Circuit cited The Palmyra, an 1827 admiralty case, for the proposition that "the thing is here primarily considered as the offender, or rather the offense is attached primarily to the thing."[19] Our civil forfeiture schemes allow the government to confiscate property that has been used in the commission of a crime by bringing an action against the property itself.[20] Courts have referred to such property as "the respondent" and "the appellant"[21] and have even gone so far as to use the active voice (saying, for example, that an automobile "facilitated criminal activity" instead of simply saying that it was "used to transport narcotics").[22]

It should be clear from these examples that actions against animals and inanimate objects operated in completely different ways at different times and in different places, but they also shared important commonalities. First and foremost, scholars agree that legal actions against animals and objects were taken seriously by all participants. Humphrey, who wrote the forward to the latest edition of E.P. Evan's collection, surveyed the relatively meager scholarship on legal actions against non-humans and concluded that this was the one focal point of consensus: legal actions against non-humans were not games.[23] As one historian put it, the trials of animals and inanimate objects were "tragically real."[24] Paul Schiff Berman, the only scholar to have written extensively about animal trials in the 20 years since Humphrey wrote the Forward to *The Criminal Prosecution and Capital Punishment of Animals*, agrees. Every paper he has written on the subject starts with the observation that the trials were viewed seriously:

> "Historical evidence indicates that communities viewed these trials seriously." [25]
> "There is no indication that these proceedings were actually conceptualized as fictions."[26]
> "…the trial of an animal was not a game."[27]

Considerable evidence supports these propositions. In Athens, animals and objects were tried in a separate courthouse, but in Europe animals were subjected to the same treatment as human beings.[28] We know that animals were represented by the same lawyers. They were tried in the same courts. The judges heard witnesses and allowed evidence to be presented. The outcome of these trials was not assured; some animals were acquitted. In 1457, for example, a sow was convicted of "murder flagrantly committed on the person of Jehan Martin, aged 5 years," and sentenced to be "hanged by the hind feet to a gallows." Her six piglets, found stained with the boy's blood, were included in the indictment as accomplices, but were restored to their owner "in lack of any positive proof that they had assisted in mangling the deceased."[29] Appeals were

sometimes made to higher tribunals, and the judgments of the lower courts were overturned or remanded for re-trial. In one instance a pig and an ass were condemned to be hung. On appeal, and after a new trial, they were sentenced to be simply knocked on the head.[30] Those convicted and sentenced to death were hung from the same gallows as humans, and if an animal managed to escape, it would be burned in effigy, just like a human being.[31]

When an executioner took it upon himself to hang a pig that had been arrested and detained for mauling a small child at Schweinfurt in 1576, he was driven from the community for usurping judiciary powers.[32] Apparently, the people of Schweinfurt felt that performing an execution without a judicial decision was a "disgrace and detriment" to their town.[33] This commitment to formal procedures suggests that a desire to observe every one of the forms prescribed by law, rather than sheer perverseness, drove judges and jurors to seemingly absurd extremes of anthropomorphism-- like torturing animals to extract confessions.[34]

An even stronger indication that the trials were taken seriously is the way in which they were discussed by contemporary observers.[35] Plato, Demosthenes, and Aristotle all discussed the trials of animals and objects in a matter of fact way.[36] Plutarch did not think it strange that Pericles and Protagoras would spend a whole day debating the particulars of a legal case against an object that had caused the death of a young man.[37] In Europe, proceedings against animals and objects were criticized from their inception[38] but never on the ground that the participants, thinking to have some fun, were in fact making a mockery of their own judicial system. Medieval discussions were either theological (as when clergymen argued that if animals were harming a community it was the Devil's work and so the proper course of action was to repent)[39] or proto-utilitarian (as when Joducus Damhouder questioned the educational efficacy of trying a "dumb animal" with "no discrimination of good and evil", or when Pierre Ayrault debated the pros and cons of treating objects as "juridical persons" following a case in which a Frenchman had attempted to bequeath his property to his own corpse.)[40]

When it comes to modern examples of proceedings against non-humans, there is no question that we take them seriously ourselves. There has been some debate about the propriety of exercising *in rem* jurisdiction over ships, but no-one would confuse an *in rem* proceeding in Admiralty with a practical joke perpetrated by the government or a performance piece exploring some bizarre nautical theme.

In this paper, I suggest a second commonality shared by legal actions against animals and objects (in addition to seriousness): legal actions against animals and objects from various places, eras, and cultures

exhibited many characteristics of play. In my discussion of the playfulness of deodand trials and animal prosecutions, I draw heavily on *Homo Ludens;* Huizinga's seminal study of the play element in human culture.[41] According to Huizinga, play can be identified by means of certain characteristics even though it cannot be defined. Huizinga believed that seriousness and play exist in conjunction with one another, and that identifying the play elements of various "serious" activities such as war, science, poetry, philosophy, and art would give some hint as to the centrality of play in the development of "serious" human culture.

The paper is organized roughly as follows: In Part II, I summarize Huizinga's theory of play and show how legal proceedings against animals and objects exhibited play characteristics. In Part III, I explore some of the ramifications of viewing legal actions against non-humans as a form of play. First, I consider what light it may shed on animal trials, a practice that has perplexed and disturbed commentators for centuries. Second, I use the examination of play in the trials of animals and objects as a starting point for examining our own attitudes toward play and the law.

PART II: PLAY, LAW, AND NON-HUMAN DEFENDANTS

A. HUIZINGA'S THEORIES ABOUT PLAY AND SOCIETY

Huizinga declared that play is an "irreducible phenomenon", a fundamental quality that cannot be defined by reference to anything else.[42] In rejecting the conception that play can be defined by reference to its various functions (i.e. that play is a method of reaching some other ultimate goal, such as learning,[43]) Huizinga was not saying that play was useless. Huizinga main point was that any useful function play may serve is an *effect* and *not a primary cause*.

Play does not "serve any master other than itself," Huizinga argued, because the many social, psychological and biological explanations for why we play fail to address the "primordial quality" of play, it's true essence: fun. The "fun of playing," he insisted, "resists all analysis and logical interpretation, which is why the play-concept must always remain distinct from all other forms of thought in which we express the structure of mental and social life."[44]

Instead of concluding that play, because it cannot be defined, is nothing more than a fuzzy metaphor for a collection of inscrutable activities, Huizinga decided to observe different forms of play and describe the main characteristics of play as best he could. Since his theme was the relation of play to culture he restricted himself to its social manifestations.[45] Huizinga succeeded in identifying a number of features, but he never claimed that he had produced a comprehensive checklist or that the presence or absence of any particular feature was decisive. He admitted that his collection was "tolerable" at best.[46] He used the list to identify playful elements of other activities.

In terms of methodology, Huizinga[47] prefigured Wittgenstein,[48] who wrote *the Philosophical Investigations* shortly after *homo Ludens* was published.[49] In *the Philosophical Investigations*, Wittgenstein took issue with the philosophical practice of striving to formulate the "essence" of a thing or concept, just as Huizinga took issue with everyone's attempt to formulate the "essence" of play.[50] Wittgenstein also argued that the only way to understand a word or concept was to look at different examples of the thing or different manifestations of the concept and try to identify the various resemblances between them. Once a list of resemblances has been compiled, it is possible to use it to determine whether a new thing

or new concept belongs to the same "family." Wittgenstein even used games[51] to illustrate his most famous point.

> Consider, for example, the proceedings we call "games." I mean board games, card games, ball games, Olympic games, etc. What is common to all these? Don't say "They *have* to have something in common or they would not be called 'games' –but rather *look and see* if there is something common to all… For if you look at them you will not see something that is common to all, but similarities, relationships, and a whole series of them at that . . . . we see a complicated network of similarities overlapping and cries-crossing: sometimes overall similarities.
>
> I can think of no better expression to characterize these similarities than "family resemblances"; for the various resemblances between members of a family: build, features, eye color, gait, temperament, etc. etc. overlap and criss-cross in the same way.-And I shall say: 'games' form a family.[52]

Huizinga started with similar premises: first, he looked at many kinds of playful behavior and began noticing patterns. He proceeded to examine social behaviors that exhibited these same patterns and gradually assembled a list of "play characteristics." Finally, he used these characteristics to evaluate previously unexamined social phenomena.

Wittgenstein's familiar precepts may be helpful for getting a handle on Huizinga's methodology, which I follow, more or less, in this paper. Essentially, I examine the extent to which legal actions against animals and inanimate objects exhibited Huizinga's characteristics of play.

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Huizinga identified two basic ways in which society manifests the various characteristics of play. "The function of play in the… forms which concern us here can largely be derived from the two basic aspects under which we meet it: as a contest *for* something or a representation *of* something."[53] A game of chess is an example of competitive (or "agonistic") play. A couple of children pretending to play chess by taking turns moving the pieces around at random are engaged in representational play. Many of the formal characteristics of play are common to both types of play; but some apply only to one or the other.[54]

The most salient characteristic of both competitive and representational play is the attitude and mood of the players.[55] On the one hand, (1) they are *on some level* aware that they are only pretending. At the very least, they know that the activity they are engaged in stands quite outside of ordinary life.[56] On the other hand, (2) they are absorbed intensely and utterly. (3) The "play mood" is labile—at any moment, ordinary life may reassert its rights and the players snap out of their absorption. (4) The essence of the play-mood is fun. It is a source of amusement and pleasure.

(5) Order is another positive feature of play. It brings a temporary, limited perfection into an imperfect world and into the confusion of life. This is not to say that play is incompatible with the moral disorder inherent in human cruelty. Huizinga took pains to point out that play lies outside good and evil. "It has no moral function," he wrote in his characteristically categorical style. "The valuations of vice and virtue do not apply here."[57] Arguably, good sportsmanship and valor are analogous to virtue in certain circumscribed contexts, but I think it is safe to assume that Huizinga was no moral relativist and would have shrunk from the suggestion that play has a "special" morality all to its own.

After all, it is possible to imagine a playful maiming. An allusion to the "playfulness" of a torture may seem dilettante and superficial, betraying a profound divorce from the reality of genuine life and death concerns. For Huizinga, however, an activity that shares enough characteristics with other activities we have already accepted as playful is playful as well (at least to some extent), however unpleasant or counterintuitive such a conclusion may feel.

We have seen that play proceeds within its own proper boundaries of time and space according to fixed rules and in an orderly manner, yet somehow it manages to combine strict rules with genuine freedom. (6) Genuine play is free, a voluntary and spontaneous activity. After all, when someone puts a gun to your head and tells you to "have fun" the best they can hope for is a strained imitation.

(7) Play is not connected to any material interests. A common response to this observation is that there are many playful activities, professional organized sports being the most obvious example, that are connected to a number of material interests. This, again, brings us back to the point that play and seriousness may be intermingled. To the extent that a player exhibits the play characteristics, he is at play, to the extent that he is driven by material interests he is at work. (8) Play also promotes the formation of social groupings which tend to surround themselves with

secrecy and to stress their difference from the common world by disguise or other means.

Some features of play are primarily characteristic of contests and competitions. (9) Contests are characterized by tension—not knowing whether you will "pull it off". (10) The mood is one of wanting to excel above others

Representational play, on the other hand, is characterized by (11) exhibition and (12) imaginative transformation. Transformation is not so much the creation of a "sham reality" but rather a new reality—a transformation of one object into another that seems perfectly real. Are Christians taking communion engaged in representational play? Huizinga never addressed this question directly, but he did admit that there was a close connection between ritual and play. Nevertheless, he refused to conflate the two. Genuine play, he argued, possesses an essential feature that may well be incompatible with ritual acts and sacred rites—the consciousness, *however latent*, of "only pretending" (characteristic (1)). Thus, according to Huizinga's theory, the Catholic who takes communion with the firm belief that the wine has turned into the blood of Christ is not playing, at least not by Huizinga's definition, but rather participating in a religious ritual. The Catholic who does not believe in transubstantiation, on the other hand, may well be "playing along" rather than participating in the Eucharist. Whether or not the latent consciousness of only pretending is *actually* incompatible with ritual is a question Huizinga leaves open, and is certainly beyond the scope of this paper.

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Huizinga's goal in *Homo Ludens* was to demonstrate that play is a structure that manifests itself in all spheres of human culture. "My object is not to define the place of play among all other manifestations of culture," he wrote in the forward, "but rather to ascertain how far culture itself bears the character of play." Thus, he used his list of "formal characteristics" as a model, trying to show how far various forms of culture (law, war, science, poetry, philosophy, and art) manifest those characteristics.

In his chapter on the law, he argued that legal proceedings manifest a great number of play characteristics.[58] To some extent, legal proceedings are characterized by a playful, "I'm only pretending" mood (feature 1). There is usually a collective sense of standing apart from everyday life, which contributes to this sensation. Justice often takes place in a court of law, a spot cut off from the rest of the world.

Order is another feature of play (feature 2), and legal proceedings have always been subject to a system of restrictive, inward-looking rules (consider the Rule against Perpetuities or the exceptions to the hearsay rule in the Federal Rules of Evidence). Like games, trials bring a temporary, limited perfection into an imperfect world. Even the ugliest child custody battle imposes a perfectly symmetrical structure on a story teeming with confused and chaotic human emotions.

Huizinga characterized legal proceedings as almost purely competitive. He pointed out that judicial contests were characterized by tension and uncertainty as to the outcome (feature 9). In fact, justice has been associated with games of chance for hundreds of years[59] In addition, judicial contests are not about domination; the primary thing is to excel above others, to be first, to be honored (feature 10).

Huizinga also went to great pains to describe the existence of practices (past and present) in which the cultural function of jurisprudence is barely separate from the sphere of play, where there is a clear consciousness of playing or "just pretending."[60] He described the drumming contests still being used by Greenland Eskimos to resolve disputes and the *haberfeldtreiben*, satirical and comic sessions that used to be held in peasant courts, particularly in Germanic countries, where all sorts of relatively minor sexual offenses were judged and punished.[61]

B. How Legal Actions Against Animals and Objects Manifest the Character of Play.[62]

Trials of animals and objects exhibited many of Huizinga's characteristics of play. There was, however, a major difference between non-human trials and "normal" trials: they were less competitive and more representational. Trials of animals and objects were less like baseball and more like playing house.

We have seen that most salient characteristic of both competitive and representational play is the attitude and mood of the players. In dealing with actions against animals and objects, what is tricky to establish is the presence or absence of a "play mood." There's no way to tell what the participants were thinking, in part because of the paucity of records related to this subject. There are, however, suggestions or glimmers of levity, or rather an odd mix of levity and *gravitas*. Interestingly, Huizinga saw this kind of lability as a hallmark of the play attitude (feature #3). "The "play mood" is labile," Huizinga wrote. "At any moment, ordinary life may reassert its rights and the players snap out of their absorption."

An example of a trial in which the participants seemed to be aware that they were only pretending is a famous Russian trial of a church bell, which was built almost entirely around an elaborate pun. The bell had been rung to warn the inhabitants of the towns that invaders were coming. Once the invaders had taken over the town, they brought an action against the bell for treason, for which the traditional punishment was to tear out the perpetrator's tongue. Once the bell had been convicted, they proceeded to punish it by removing its clapper, which is called a "tongue" in Russian.[63]

Another example of a trial glimmering with suggestions of playfulness is the trial of the rats of Autun. These rats were tried before an ecclesiastical court for wanton destruction of barley crops in 1522. When the rats failed to appear in court, their appointed counsel, Chassenee, argued that the original writ of summons failed to give the rats appropriate notice. The defendants, he pointed out, were dispersed over a large tract of countryside—a single summons was inadequate to notify them all. The summons was also grammatically defective. The court ordered a second summons to be read from the pulpit of every local parish church, but the rats failed to appear again. Chassenee then made a long, grandiloquent speech. His main point was that if a person is cited to appear in a place but cannot do so safely, he may lawfully refuse to obey the writ. Since the rats were likely to be attacked by cats if they attempted to comply with the summons, they did not have to appear in court either.[64]

An example of jocular language can be found in a fourteenth century Swiss case brought against a swarm of Spanish flies. In that case, the judge ordered the appointment of counsel to represent the flies "in consideration of their small size and the fact that they had not yet reached their majority."[65] The order seems like a joke—the judge clearly intended to appoint counsel, but perhaps he did not take his order as seriously as an excommunication. The hints of playfulness are even more pronounced in a 1519 trial against some field-mice in Western Tyrol. At the conclusion of the case, an agreement was reached whereby the mice would be moved to a new tract of land. The defense lawyer argued that they should be provided with safe conduct, to protect them from the danger of cat attacks. The judge agreed to the safe conduct, but only for the "weakest and most vulnerable" field-mice: those "with young" and those "yet in their infancy".

No-one will ever know what it is like to be another person. Speculating as to other people's subjective experiences is fraught with danger, for there is always the chance that you will inadvertently attribute your own ideas, perceptions and emotions to someone else, revealing nothing about your subject and everything about yourself. At the same time, it would be

wrong to go to the opposite extreme and assume that the 17th century Europeans were so different from us that they did not have anything resembling a sense of humor. If we are amused at the thought of parish priests reading aloud to the vermin, there is no reason for us to assume that the ecclesiastical tribunal that came up with the suggestion could not have been amused also. I admit that we can never know for sure-- the record of the trial of the rats of Autun provides no explicit information about anybody's mood or mind-set—but under the circumstances, it seems likely that a degree of playfulness and levity characterized those proceedings.

Paul Rubin, Esq., a partner at the DC law firm of Mayer, Brown, Rowe & Maw who represented a couple of dogs accused of mauling some ostriches in 1999, hinted at the combination of seriousness and play that probably characterized some trials of animals and objects. One the one hand, he found the case personally amusing. On the other hand, he felt badly for the dogs and for the dogs' innocent owners and worked hard on the case. He joked about the dogs in the office and was surprised when the court reacted to his opening joke with stony silence. On the other hand, he was entirely un-amused when the canine defendants were banished to a state "not bordering Virginia," a detail I found particularly absurd.[66]

A preoccupation with order was another important characteristic of play (feature #5), and the people who participated in actions against animals and inanimate objects were often concerned with maintaining order and symmetry by adhering to formal rules.

For example, judges who wanted to be lenient with homicidal animals sometimes adhered to the letter of the law, allowing the executioners to strangle animals who had been sentenced to be burned alive only after the animal had been ceremoniously singed.[67] When Stephen VI became pope in 896, one of his first acts was to cause the body of his predecessor, Formossus, to be exhumed. His putrid corpse was handed a writ of summons and the new pope waited patiently until Formossus failed to arrive on the appointed day. He was then dragged to the council hall of St. Peters, arrayed in full pontificals and tried for having "unlawfully and sacrilegiously usurped the papal dignity."[68]

Ecclesiastical trials of pests and vermin were perhaps even more formalistic. In Valence in 1585, a prosecution against caterpillars argued by secular and canon jurists involved so many motions and dragged on for so long that the caterpillars entered a new stage of their lepidopterous cycle, causing unknowable complications. A proceeding against some snout beetles involved such a large number of procedural motions that it lasted for well over a year.[69]

In England, the law of deodand was inordinately convoluted, almost as though the jurists were taking a perverse pleasure in coming up with the most abstruse rules. For example, no deodand was due if a child fell from a cart or a horse, so long as the cart or horse was not in motion. If an adult fell and was killed, however, the cart was forfeit. If a cart or horse ran over a human being of its own motion, it would be a deodand irrespective of the victim's age. If a thing that was not in motion causes a person's death, only the part that is the immediate cause of the death was forfeited. However, if a man fell from a part of a boat (for example, the mizzen-top) and was drowned, the entire ship and cargo are deodand. But only if the accident occurred in fresh water-- no deodands are due for accidents on the high seas. And so on.[70]

Finally, legal actions against animals and inanimate objects exhibited both of Huizinga's characteristics of representational play. Representational play is characterized by exhibition (feature #11) and imaginative transformation (feature #12). Transformation is not so much the creation of a "sham reality" but rather a new reality—a transformation of one object into another that seems perfectly real.

Often the trials and executions of animals were exhibitions. (Feature #11). Trials of objects were exhibitions as well. Like all trials and executions at the time, these proceedings were public spectacles in the sense that they were conducted with the active participation of the community. Hearings of any sort were usually held "in the open air, at the gate of the castle or at the public meeting-place of the town." [71]

Legal actions against non-humans also involved imaginative transformation, for they were characterized by intense anthropomorphism (feature #12)– almost invariably, the animals and objects were transformed into person-like beings. Consider the example of the pig of Falaise, strung up from the gallows in the market square in 1386.[72] Records indicate that the pig had been formally tried and convicted of infanticide, "having torn off the face and arm of a child that later died from his injuries." The pig was sentenced to be mangled about the head and forelegs, strangled, and hanged, but for some reason, it was dressed up in a jacket and breeches prior to being mutilated and strangled up in the public square.[73]

Another example of intense anthropomorphism can be found in the joint trial of Jacques Feron and his donkey—the two were caught in *flagrante delicto* in 1750 in small town in France. Feron himself was sentenced to death, but the animal was acquitted, after due process of law, on the ground that she was the victim of violence and had not participated in her master's crime of her own free will. The key piece of evidence in the

donkey's trial was a certificate that had been drawn up by the parish priest. The document described the donkey's personality as though it were a human being. The priest vouched for the fact that she had always been "virtuous and well-behaved" and a "most honest creature in word and deed and in all her habits of life."

Even objects have been personified. Consider the Lord of the Manor of Hampstead Case I discussed in section I: "a cart met a wagon loaded upon the road, and the cart endeavouring to pass by… overturned, and threw the person that was in the cart just before the wheels of the wagon." There are no references to human actors in the entire case, and all the objects are referred to in the active voice.[74]

It would be a mistake to suggest that all trials of animals and objects exhibited play characteristics. Nevertheless, a sufficient number of Huizinga's characteristics were apparent in a sufficient number of trials to suggest that play was an important element in these proceedings.

PART III: SO WHAT?

So far, I have been exploring the possibility that legal actions against non-humans (whether animals or objects) may have been playful as well as serious. The possibility is worth considering for two reasons. First, it may shed some light on a practice that has perplexed and disturbed commentators for centuries. Second, an examination of play in the trials of animals and objects may serve as a starting point for examining our own attitudes toward the law.

A ALL THE LIZARDS STAND AND SAY "YES, YES, YES."[75] AN ALTERNATIVE TO EXPLANATION

Explanations of legal actions against objects and animals are as varied as they are contradictory. The most obvious explanations dismiss the trials of animals and objects as throwbacks to a "less advanced" past. Either the trials were manifestations of mindless retaliation (like kicking the chair you just fell off of) and or they were proof that human beings once stupid enough to attribute anthropomorphic and demonic qualities to animals and objects.[76]

According to Esther Cohen, such interpretations come up against a major stumbling-block:

> All sources clearly indicate that animal trials, both secular and ecclesiastical, became common practice in the later middle-ages, reaching their peak of frequency and greatest geographic scope during the fifteenth, sixteenth and seventeenth centuries… Those facts were difficult to square with the picture of humanity advancing in linear progression from the superstitious middle ages to the rational nineteenth century…. Indeed, [Evans] announced that "strangely enough, it was in the latter half of the seventeenth century, an age of comparative enlightenment, that this cruel penalty seems to have been most frequently inflicted." Most of his colleagues, though, were content to telescope the entire European past into one static era of irrationality, thus neatly shelving the problem.[77]

Many commentators have taken a different tack, attempting to identify a logical, self-interested explanation for the behavior of the participants. For example, some people have suggested that animal trials might have served to deter negligence on the part of the animal's owner.[78] Of course, in virtually all cases, the animal would be tried and executed even after it had been sold to an unwitting owner. Others have argued that the trials were meant to instill horror in other animals. Leibniz, who toyed with

this argument, noted that African lions were crucified to drive away other lions, that wolves were hanged for the same reason, and that peasants nail birds of prey to the doors of their houses.[79] But then, there is nothing particularly mysterious about the desire to put down a dangerous animal. The mystery is why the animal ought to be tried in a court of law first.

Other commentators were more cynical. And according to Philippe de Beaumanoir (the author of a 13th century customal, a collection of the customs of the province where he lived) the only justification for animal trials lay in the cupidity of seigneurial authorities reluctant to relinquish a profitable source of income. He argued that the practice was juridically meaningless and invalid, for all crime presupposed intent, and beasts possessing neither a knowledge of good and evil nor malicious intentions could not be held responsible for their actions.[80]

The law of deodands was also supposed to have survived because if the financial benefits that accrued to the crown. It is not at all clear, however, that this was the case. Many deodands were off little value, and presumably more resources were expended during the trial than the deodand itself was worth.[81] Furthermore, deodand trials sometimes occurred even when the owner of the deodand was destitute and there was a tacit understanding that the property would not actually be confiscated. In colonial Virginia, for example, deodands were returned to the rightful owners if they alleged in a special petition that they were destitute, but only after they had passed, symbolically, outside the realm of private property.[82]

Blackstone's attempts to determine some logical explanation for the institution of the deodand are particularly amusing.[83] Culling through examples of deodand trials, Blackstone noticed some curious distinctions, which I have already described in the section on how legal actions against animals and objects manifest the character of play. Recall that no deodand is due if a child falls from a cart or a horse, so long as the cart or horse is not in motion; but if an adult falls and is killed, the thing is forfeit. Sir Mathew Hale had attempted to explain this by observing that children cannot take care of themselves. Blackstone attempted to improve upon this explanation, suggesting that since the institution of the deodand was originally intended to pay for masses for those who died suddenly and in sin, they were not necessary for children, who were incapable of sin. Inconveniently, if a cart or horse runs over a human being of its own motion, it shall be a deodand irrespective of the victim's age. Blackstone valiantly addressed this point, conjecturing that since the accidents involving moving objects were more likely to have been caused by the owner's negligence, forfeiture was necessary to encourage vigilance. But then Blackstone noted that negligence played no part in

the jury's determination of whether an object was a deodand or not. If a thing that is not in motion causes a person's death, only the part that is the immediate cause of the death is forfeited. For example, if a man tries to climb onto a wagon and falls off, only the part that he stepped on is forfeit. If he is run over by a cart, the whole thing is forfeit, including the load. Blackstone may have exhausted his energies at this point of the discussion, for he does not attempt to explain this rule. He relates that if a man falls from a boat in fresh water and is drowned, the ship and cargo are deodand, but no deodands are due for accidents on the high seas. This Blackstone dismisses as "a simple matter of jurisdiction" at which point he abruptly shifts to a different topic. The entire discussion, measured by Blackstone's usual standard, is remarkably incoherent; he struggles, but is unable to make rational sense of the existing rules. [84]

Probably the most convincing explanations are psychological. Gratian, the first man to gather he canon law into an intelligible form at the beginning of the 12th century was also the first to propose that animals were being executed in order that the hateful act might be forgotten.[85] This echos a Jewish explanation: "that the animal should not pass through the streets and people say, 'This is the animal on account of which so-and-so was stoned.'"[86]

Modern explanations are more nuanced. Evans suggested that the benefits of such trials might be more indirect. For example, he remarked that it was in the interest of ecclesiastical dignitaries to keep up the trials because it strengthened their influence and extended their authority to be seen subjecting even the caterpillar and the canker-worm to their dominion and control.[87] Humphrey has suggested that "the whole purpose of the legal actions was to establish cognitive control. In other words, the job of the courts was to domesticate chaos, to impose order on a world of accidents – and specifically to make sense of certain seemingly inexplicable events by *redefining them as crimes*."[88] Jacob Finkelstein proposed that people were extremely conscious of the fact that animals existed on a lower level in the hierarchy of creation. By killing a human being, the animal infringed that order and was subject to punishment.[89] Esther Cohen has agued that the secular trials re-affirmed society's self-image as universally just, while the ecclesiastical trials provided the setting for a communal ritual of self and environmental purification from inimical forces.[90]

Paul Schiff Berman has recently resurrected some of these theories and expressed them in modern anthropological terms. In a series of law review articles, he has argued that that the trials of animals and inanimate objects allowed the participants to create "cleansing"

narratives. The trials, he has written, were "cultural performances" that "provided a ritual mechanism for healing the community."[91]

I do not mean to rebut these various contentions. Many, as I have mentioned, are perfectly plausible. Nevertheless, I am not entirely satisfied. And I am not alone. The practice of trying animals and objects has perplexed and disturbed commentators for centuries. As far as I can tell, every author to write on the subject has expressed some degree of discomfort, regardless of how plausible their own explanations have been.

Consider Humphrey's statement: "I do not know the explanation, and can only leave it for historians to answer for themselves," followed by several pages of speculation. "I dare say that the one reason [for the reticence of historians] has been the lack, at the level of theory, of anything sensible to say."

"What were they up to, these punishers of animals? What was the point?" asks Ewald. "I am not sure; and the longer I dwell on the question, the more uneasy and uncertain I become." In the following paragraph, Ewald seems to be speaking for everyone who felt compelled to delve into the history of these proceedings:

> If we could gather together in a single room all the great thinkers who have written about animal trials -- Moses, Plato, Gratian, Aquinas, Leibniz, Blackstone -- and ask them to explain themselves, what would they say? What would they say to the others? What would they think to themselves? Perhaps -- the possibility is not farfetched -- they would have nothing at all to say. Perhaps they would find the infliction of punishment as mysterious as we do. Perhaps even Chassenee, for all his deep learning on the subject, never really understood the animal trials -- nobody knows what they were for, and nobody has ever known.[92]

If for no other reason, my account of legal proceedings against animals and inanimate objects may offer such commentators some degree of relief by suggesting that a satisfying explanation for animal trials has not been found because an explanation does not exist. Huizinga proposed that play is an "irreducible phenomena", a fundamental quality that cannot be defined by reference to anything else.[93] If he is right, it follows that if these trials had a playful element, they had an un-definable element.

B LAW AND PLAY IN THE HERE AND NOW

Huizinga did not end his inquiry regarding play with the observation that play was irreducible. Likewise, there is no reason to end the inquiry regarding legal actions against animals and objects with the observation that if these trials had a playful element, they necessarily had an un-definable element as well. After pasting some photos into the family album, we can continue to look for new family members. A comprehensive search is beyond the scope of this paper, but I would like to conclude with a few remarks.

First, you do not need to read Huizinga or learn the word "illinex" to see that American life is replete with games. We are obsessed with playing and watching sports. Baseball is not just the national game; it is the national pastime. Soldiers train for their missions using modified video games. Computers (which can now be found in 53% of American homes) come with pre-installed games like Minesweeper and Freecell.[94] State-run lotteries have exploded, as have casinos and internet gambling sites.

What you do with your time affects how you look at the world. Life for us is a game that produces "winners" and "losers," terms that have no precise equivalent in any language I can think of. Science is now a game-- Consider the "space race." Elections are "races" also. When the Gore-Lieberman ticket was defeated in the notorious 2000 presidential election, republicans displayed Sore-Loserman posters on TV.[95]

It is a small wonder that scholars and judges have filled reams of paper with discussion of the many characteristics shared by modern American legal proceedings and competitive games. Arthur Leff has argued that neither the adversary structure nor the winner-take-all format of the American trial is designed to elicit truth and justice, these things make sense only as products of larger cultural themes in which agonistic games dominate daily life.[96] American trials, Leff observed, are an enactment of a deeply held cultural aesthetic. Bart Giamatti, whose life included time spent as president of Yale and as Commissioner of Baseball, articulates this "aesthetic" in his explanation of how the practice of law resembles baseball: "law--defined as a complex of formal rules, agreed-upon boundaries, authoritative arbiters, custom, and a set of symmetrical opportunities and demands--is enshrined in baseball . . . . (S)ymmetrical surfaces, deep arithmetical patterns, and a vast, stable body of rules ensure competitive balance in both games…" [97] The similarities have not been lost on practitioners. Hundreds of judges have found the relationship between law and baseball substantial enough to mention in their written opinions, suggesting that they perceive a fundamental similarity between the two.[98]

Recollect any scene from any television court show-- Judge Judy excoriating an adulterer, for example. Like the *haberfeldtreiben,* Judge Judy's trials are partly serious, partly an exhibition and a joke. And that's not even considering the situation in England, where most barristers continue to wear wigs, as do their counterparts in at least 20 countries of the former empire. [99] According to Huizinga, there is no single article of clothing that "illustrates more aptly the playfulness of the cultural impulse."[100] Our casual acceptance of legal goofiness suggests there is a collective tolerance for and awareness of the play elements of legal culture.

A second general observation is that given the context of playfulness in our judicial system, and given the possibility that the element of play has always been a part of proceedings against animals and objects, it may well be that *in rem* forfeitures are a further example of this general phenomenon.

Like trials of animals and deodands, the guilty property fiction underlying certain *in rem* actions has survived a great deal of academic criticism and innumerable constitutional challenges. Critics of civil forfeiture have argued that the ancient fiction was never discarded because it allowed the government to profit economically by seizing property that would not otherwise be within its constitutional reach.[101] Other scholars have argued that discarding the guilty property fiction would have disrupted too many other legal doctrines.[102]

Berman has tried to zero in on the social function of civil forfeitures, arguing that these forfeitures are a method for "healing the community." This argument makes sense in certain contexts.[103] For example, in early1995, two policemen happened upon Mr. Bennis while he was engaged in a grossly indecent activity with a local prostitute in the back of the family car. Mr. Bennis's indiscretion made its way to the Supreme Court, which held in Bennis v. Michigan that the state had not violated Mrs. Bennis's constitutional rights when it seized her car, an 11-year-old Pontiac sedan she had just purchased for $600. The Court justified the seizure of Mrs. Bennis's property on the grounds that the government was acting against the car itself, not against the car's innocent owner. Since the car had been used to violate Michigan's indecency laws, it was "guilty" of being a public nuisance, and thus forfeit to the state. Berman arguing that the 1977 Pontiac could be seen as a symbol of the breakdown of the community's moral order. Thus the authorities might wish to remove the object as a sort of symbolic "banishment." [104] It is unclear, however, who is healed by an action against $405,089.23 U.S. Currency.[105]

The entire debate is highly reminiscent of the debates of the past: interminable, marked by moments of plausibility, yet somehow unsatisfying. Perhaps the *tenacity* of the guilty property fiction is another phenomenon that cannot be "explained", is merely a manifestation of the playfulness inherent in the legal system.

[1] Peter Stein, *Roman Law in European History* 89-90 (2001).
[2] Extract from the parish-register of Machern, printed in *Anzeiger fur Kunde der deutschen* Vorzeit No. 4, April 1880, col. 102. The extract is reprinted in full as Appendix S in E.P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* 313 (1906).
[3] A cockchafer (now usually called a Maybug) is a stout broad insect of comparatively large size and grayish brown color; it flies with a loud whirring sound and is very destructive to vegetation. See http://dictionary.oed.com.
[4] A weevil is a type of beetle. It has a downward-curving snout and is very destructive to nuts, fruits, stems, and roots. See http://dictionary.oed.com.
[5] Alphabetical list compiled by Walter Woodburn Hyde, The Prosecution of and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times, 64 U. Pa. L. Rev. 696, 708 (1916).
[6] Paul Schiff Berman, Rats, Pigs and Statues On Trial: The Creation Of Cultural Narratives In The Prosecution Of Animals And Inanimate Objects, 69 N.Y.U. L. Rev. 288, 298 (1994).
[7] Hyde, Supra Note 5 at 696-698. See also J.J. Finkelstein, The Ox That Gored, 71 Am. Phil. Soc'y 5, 48-73 (1981).

[8] Exodus 21:28.
[9] Nosson Slifkin, Animal Trials Jewish Law Commentary Explaining Halacha, Jewish Issues and Secular Law http://www.jlaw.com/Commentary/animalt.html.
[10] E.P. Evans, Bugs and Beasts Before the Law 10 Green Bag 544 (1898).
[11] As far as I can tell, the earliest such proceeding occurred in 824, when the church excommunicated a group of moles. See Evans Supra Note 2 at 265.
[12] Paul Schiff Berman, "An Anthropological Approach To Modern Forfeiture Law: The Symbolic Function Of Legal Actions Against Objects" 11 YJLH 1, FN 214.
[13] The term deodand derives from the Latin phrase “deo dandum” and means “given to God.” The deodand was given to God in the sense that the profit derived from the sale of the object causing the accidental death was supposed to pay for a mass for the victim. It appears, however that the practice of paying for masses died out much earlier than the deodand, which was only abolished in 1846. Lord Campbell remarked that it was a “wonder that a law so extremely absurd and inconvenient should have remained a force down to the middle of the nineteenth century.” Leonard Levy, *A License to Steal* (1996) at 7, 12. See also Oliver Wendell Holmes Jr., *The Common Law*, 7, 24-26 (Dover Publications, 1991).
[14] See Holmes, Supra Note 13 at 25. (Quoting Bracton, folio 136 b.)
[15] Lord of the Manor of Hampstead Case 1 Salkeld 220, 91 ER 195.
[16] The same term in the same court as Mingie’s Case Popham 135, 79 ER 1237. (1618)

[17] Evgenij Anisimov, Dyba i Knut. Politicheskij Sysk i Russkoe Obshchestvo v XVIII Veke. (Moskva Novoe Literaturnoe Obozrenie. 1999) 529-530.
[18] Timmons v. Pecorino, 977 S.W.2d 603 (Tex. Crim. Appeals. 1998).
[19] The Palmyra, 25 U.S., (12 Wheat.) 1, 14 (1827). For an example of a more recent case, see Cargill Ferrous International V. Sea Phoenix Mv, her engines, tackle, apparel, etc., in rem. --- F.3d ----, (5th Cir. 2003). The standard rationale (that if owners were required to have knowledge of their officer's behavior, it would open the door for perpetual evasion) is no longer applicable given modern laws regarding vicarious liability.
[20] For example, the proceeding against the gun used to assassinate John F. Kennedy: U.S. v One 6.5 mm. Mannlicher-Carcano Military Rifle, 250 F. Supp. 410 (1964). See also Various Items of Personal Property v. U.S., 282 U.S. 577 (1931),
U.S. v. One 1957 Rockwell Aero Commander 680 Aircraft, 671 F.2d 414 (1982), and U.S. v. A Single Family Residence, 803 F.2d 625 (1986).U.S v $405,089.23 U.S. Currency, 33 F.3d 1210, 1221-22 (9th Cir. 1994).
[21] 2,174 Obscene Devices v. the State of Texas 33 S.W. 3rd 904(2000).
[22] Bennis v. Michigan, 516 U.S. 442 (1996).
[23] Nicholas Humphrey, Forward to Evans, Supra Note 2 at 4.
[24] Walter Woodburn Hyde, Supra Note 5 at 734.
[25] Berman, Supra Note 6 at 290.
[26] Berman, Supra Note 12 at 20.
[27] Berman, Paul Schiff, An Observation and a Strange but True "Tale": What Might The Historical Trials Of Animals Tell Us About The Transformative Potential Of Law In American Culture, 52 HSTLJ 123, 128 (2000).
[28] See generally Berman, Supra Note 6 at 299-304, (paraphrasing Evans, Supra Note 2)
[29] Evans, Supra Note 2 at 153.
[30] Evans, Supra Note 2 at 140.
[31] Evans, Supra Note 2 at 139-140.
[32] Evans, Supra Note 2 at 147. Schweinfurt's name suggests the town was founded at a shallow place in a river or other body of water, where man or beast (presumably pig) could cross by wading. This attests to the importance of swine in that particular area, which may explain the Bavarian villagers' seeming concern for the pig's "due process" rights.
[33] Id. at 147.
[34] Arthur Mangin wrote that the cries which they uttered under torture were received as confessions of guilt. *L'Homme et la Bete* Paris, 1872 p.344. Evans disagreed, arguing that "it is not to be supposed that, in such cases [where animals were racked to extort confessions], the judge had the slightest expectation that any confessions would be made; he wished merely to observe all forms prescribed by law, and to set in motion the whole machinery of justice before pronouncing judgment." Evans, Supra Note 2 at 139-140.

[36] Plato, The Laws of Plato, Book IX 263-264 (A.E. Taylor translation, J.M. Dent and Sons Ltd. 1934), Deomsthenes, Aspects of Athenian Society in the Fourth Century B.C. : a historical introduction to and commentary on the paragraph-speeches and the speech Against Dionysodorus in the Corpus Demosthenicum (XXXII-XXXVIII and LVI) /

[edited by] Signe Isager, Mogens Herman Hansen ; translated by Judith Hsiang Rosenmeier. Odense University Classical Studies. v. 5 (1975) 20, 158; Aristotle, Constitution of Athens and Related Texts, §57.4, 135 (Kurt von Fritz translation, Hafner 1974).

[37] Hyde, Supra Note 5 at 698.

[38] Berman, Supra Note 6 at 305.

[39] Gerald Carson, Bugs And Beasts Before The Law: From The Middle Ages To The Present Century (New York? 1968) at 10. The title is rather misleading; at least three other articles have appeared under the same title, all by E.P. Evans: Bugs and Beasts Before the Law. Atlantic Monthly, 54, 235-246 (1884); Bugs and Beasts Before the Law, 10 Green Bag 540 (1898); and Bugs and Beats Before the Law 11 Green Bag 33 (1899).

[40] Evans, Supra Note 2 at 110.

[41] Huizinga, *Home Ludens: A Study of the Play Element in Culture* 7 (1950).

[42] Id. at 11.

[43] See generally Jean Piaget, *The Psychology Of The Child* (1969).

[44] Huizinga, Supra Note 41 at 7. Huizinga's initial argument, that play is a fundamental category because the *essence* of play resists analysis, appears rather circular. A thing or concept whose essence resists analysis, which cannot be broken down into component parts, is the actual *definition* of a fundamental category. It would be more correct to call Huizinga's statement that play is a fundamental category an "assertion" rather than an argument. Nevertheless, I believe it deserves to be judged by its ultimate productivity.

[45] Id.

[46] Id. At 28.

[47] 1873-1947

[48] 1889-1951

[49] See generally Joachim Schulte, *Wittgenstein: An Introduction*,Translated by William H. Brenner and John F. Holley Albany: State University of New York Press, 1992.

[50] Wittgenstein, *Philosophical Investigations* §3 (Macmillan, 1958).

[51] This is particularly significant because the same word is used in German to signify both "game" and "play".

[52] Wittgenstein, Supra Note 50 §66.

[53] Huizinga, Supra Note 41 at 13.

[54] Caillois, one of Huizinga's most influential critics, took issue with this division, claiming that competitions should not be grouped together with games of chance and adding another category, named "ilinix", for vertiginous forms of play such as whirling, roller coaster rides or "Dionysian revelries." See Roger Caillois, *Man, Play and Games* 44 (Meyer Barash trans., 1961). The criticism is typical in that it incorporates much of Huizinga's theory while purporting to reject it. See, generally, Robert Anchor, History and Play: Johan Huizinga and His Critics, History and Theory, Vol. 17, No. 1. (Feb., 1978), pp. 63-93.

[55] Huizinga does not number them; I have chosen to do so for convenience. See Huizinga, Supra Note 41 at 6-13.

[56] Id. at 8

[57] Id. at 50.

[58] Id. at 76
[59] Consider Francois Rabelais' depiction of Judge Bridlegoose. Having confessed that he made all his decisions by tossing a set of dice (after an elaborate process for deciding which dice to use), he is defended by Pantagruel on the grounds that his "demeanours had been evenly balanced in the scales of uprightness." Francois Rabelais, *Gargantua and Pantagruel* Parts 139, 143. The story, which as written over 400 years ago, is still amusing today, which suggests it is still relevant as a critique of the judicial decision-making process.
[60] It seems significant that just as some trials take the form of games, some games take the form of trials. Consider H'Angus the Monkey, mascot of the Hartepool United FC and recent mayor-elect of Hartepool, England. Prior to electing a mascot as mayor, Hartepool was famous for just one thing: The Hartepool Monkey Trial. During the Napoleonic Wars a ship was said to have wrecked off the coast of what was then a small fishing village. The local fishermen allegedly examined the wreckage that had washed ashore and discovered the lone survivor - the ship's pet monkey, dressed in a French military-style uniform. According to local legend, the fishermen decided to hold an impromptu trial right there on the beach. Quite possibly under the influence, the legend goes, the fishermen interrogated the monkey and decided he was in fact a spy. The unfortunate simian was then shaved, tortured and hanged. See, http://thisishartlepool.co.uk/monkey.shtml for more information. You can also download the song.
[61] Huizinga, Supra Note 41 at 76.
[62] Huizinga never considered the play element of trials against animals and objects. He may not have been aware of animal trials at all.
[63] Nikolaĭ Mikhaĭlovich Karamzin, *Istoria Gosudarstva Rossiĭskago* 314 *(*1892).
[64] The ecclesiastical tribunal found this argument compelling and debated whether or not to issue an order enjoining the subjects to restrain their cats. Eventually, the record indicates, they lost interest in the discussion, adjourned the question, and judgment for the rats was eventually granted by default. The success apparently launched Chassennee's career as a defense attorney. He went on to become a successful lawyer and contributed influentially to legal scholarship. His most famous book is his commentary on the customary laws of Burgundy, the *Commentaria super consuetudinibus Burgundiae*. He also published A Treatise on the Excommunication of Insects, which seems to have filled a legal need. The treatise was reprinted at least twice: in 1581 and again in 1588. "No doubt," one scholar has observed, "his commentary on the customs of Burgundy contributed more to his legal eminence than did his treatise on the excommunication of insects; but the two works display the same erudition and the same tone of learned seriousness." See William Ewald, "Comparative Jurisprudence (1): What Was It Like To Try A Rat? 143 Penn. L. Rev. 1889 (1995)
[65] Evans, Supra Note 2 at 113.
[66] Interview with Paul Rubin, July 20, 2003. See also Commonwealth v. Park, 49 Va. Cir. 239, 1999 WL 797041 (1999)
[67] Evans, Bugs and Beasts Before the Law, 33 11 Green Bag 33 (1899)
[68] Evans, Supra Note 2 at 198. Once the corpse of Formossus was convicted, it was stripped of the pontificals and thrown in the Tiber river. Id.

[69] Carson, Supra Note 39 at 12.
[70] Holmes, Supra Note 13 at 24-26.
[71] Esmein, *A History of Continental Criminal Procedure*, 201-202 Translated by John Simpson Translation (1913)
[72] Charange: *Dictionaire des Titres Originaux*. Paris, 1764. Tome 11. p. 72. Also, *Statistique de Falaise*, 1827. Tome 1. p. 63. Reproduced in full as Appendix G, Evans, Supra Note 2 at 287.
[73] The records also indicates that the executioner (literally, the "master of high works") was paid ten sous tournois to buy new gloves, standard practice in executions of human beings. Evans, Supra Note 2 at 123-124. According to Evans, new gloves enabled an executioner to "come from the discharge of his duty… with clean hands, thus indicating that, as a minister of justice, he has incurred no guilt in shedding blood." Id. Such measures apparently did little good. By the 17th Century, "hang-dog" was a common term for a "despicable or degraded fellow fit only to hang a dog." Meanwhile, a "hang-dog look" was one "befitting, or characteristic of a hang-dog; low, degraded; having a base or sneaking appearance;" a "squinting, meager… countenance." http://dictionary.oed.com
[74] Lord of the Manor of Hampstead Case 1 Salkeld 220, 91 ER 195
[75] The answer to an Akamba riddle. The so-called "question" is: "I may fall down on the stones." According to folklorist G. Lindblom, who collected riddles among the Akamba of Kenya in the 1910's and 1920's, the Akamba had two sorts of riddles. One was capable of solution by hard thinking, the other insoluble. This riddle was given as an example of the latter sort. Lee Haring, On Knowing the Answer Vol. 87, No. 345 The Journal of American Folklore, 197, 203 (Jul. - Sep., 1974).
[76] Esther Cohen, Law, Folklore and Animal Lore, Past and Present, No. 110 (Feb., 1986), at 16. See also Frank A. Beach, Beasts Before the Bar, 59 Natural History 356 (1950); Joseph P. McNamara, Animals at the Bar, 3 Notre Dame Law. 30 (1927-28); And James G. Frazer, Folklore in the Old Testament 415-45 (1918).
[77] Cohen, Supra Note 76 at 17.
[78] Berman, Supra Note 27 at 157. See also Slifkin, Supra Note 9, (citing Rambam, Moreh Nevuchim 3:40): "The killing of the ox is not done to exact judgment from the ox, but rather to exact judgment from its owner, such that he should be more careful in looking after it. And if he does not take care of it, he now knows that he will lose his property. This is the simple explanation."
[79] Ewald, Supra Note 64 at 1906.
[80] Cohen, Supra Note 76 at 20.
[81] Holmes, Supra Note 13, at 24.
[82] Cyrus H. Karraker, Deodands in Colonial Virginia and Maryland, The American Historical Review, Vol. 37, No. 4 (Jul., 1932), 712-717.
[83] See generally Ewald, Supra Note 64 at 1908-1911
[84] Ewald, Supra Note 64 at 1911
[85] The list of various explanations that have been offered for this phenomena is from Ewald's article. See Ewald, Supra Note 64.
[86] See Sifkin, Supra Note 9.
[87] Evans, Supra Note 2 at 165.

[88] Humphreys, Supra Note 2 at 4.
[89] Berman, Supra Note 12, FN99 paraphrasing Finkelstein, Supra Note 7 at 73.
[90] Cohen, Supra Note 76 at 37.
[91] Berman, Supra Note 6 at 292.
[92] Ewald, Supra Note 64 at 1900.
[93] Huizinga Supra Note 41 at 11.
[94] See "Helpful Action for Internet and Game Addiction" at http://www.selfpsychology.org/_forum/000002d2.htm to get some idea of just how many computer owners find themselves compulsively playing such games.
[95] Steven L. Winter, When Self-Governance Is a Game 67 Brook. L. Rev. 1171 Summer 2002.
[96] Arthur A. Leff, Law and, 87 Yale L.J. 989, 999-1000 (1978).
[97] A. Bartlett Giamatti, Foreword to *The Armchair Book of Baseball* II ix, x-xi (John Thorn ed., 1987) (quoted in Pamela Karlan, Throwing Out the First Pitch, 15 Va. L. School Rep. (No. 2) 23, 23 (1991) (comparing law school to baseball)). See also part III.
[98] Part I of Justice Blackmun's opinion in Flood v. Kuhn, 407 U.S. 258 (1972) is perhaps the most infamous incorporation of baseball into judicial opinion. Blackmun traces the history of the game, provides a lengthy list of the game's most gifted players, and relates a wide variety of baseball legends. Id. at 264.
[99] According to the latest polls, the majority of English men and women believe that wigs should be phased out, but (curiously) they would make an exception in criminal cases.
[100] Huizinga, Supra Note 41 at 183.
[101] Leonard Levy, Supra Note X at 11; Eric and Eva Nilsen, Policing For Profit: The Drug War's Hidden Economic Agenda 65 U. Chi. L. Rev. 35 University (1998)
[102] See, for example Richard H. Seamon "Not Now" Does Not Necessarily Mean "Not Ever", 48 S.C.L. Rev. 389. This article was written by the lawyer who represented the state in Bennis v Michigan.
[103] See generally Berman, Supra Note 12.
[104] Bennis v. Michigan, 516 U.S. 442 (1996).
[105] See U.S v $405,089.23 U.S. Currency, 33 F.3d 1210, 1221-22 (9th Cir. 1994).