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CASS SUNSTEIN, NEW YORK TIMES BOOK REVIEW

Rattling



the Cage

TOWARD LEGAL RIGHTS FOR ANIMALS

STEVEN M. WISE

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STEVEN M. WISE
FOREWORD BY JANE GOODALL



A Merloyd Lawrence Book



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For Jerom
a person, not a thing

FOREWORD

by Jane Goodall

Rattling the Cage is an important book, an exciting book. It will be welcomed by everyone who is concerned about the well-being of animals, by those who are, as I am, kept awake by grim mental images of the abuse inflicted on other animals by humans. I was honoured when Steve Wise asked me to write this introduction, for I believe that *Rattling the Cage*, thanks to all the long years of research that went into the writing, will make an impact, and leave its mark on the process of law. I see it as a major stepping-stone along a road that is gradually leading to a new legal relationship between humans and other sentient, sapient life forms.

Steve Wise is a law school professor. He is also an accomplished animal-rights legal scholar and one of the world's most prominent animal-rights lawyers. Steve and his wife, Debi, defend a variety of animal species across the United States and advise those who defend animals around the world. In writing *Rattling the Cage*, Steve has used his experience in both science and law to great advantage, and he has a trial lawyer's knack for telling a good story. He explains, for example, why it matters so much today whether an ox who gored a passerby on a road in the Middle East four thousand years ago was Babylonian or Hebrew. And why, four hundred years ago, an early animal advocate stood up for barleyeating rats in a French courtroom. And, most surprisingly, why John Quincy Adams would thunder on the floor of the U.S. House of Representatives that he would present petitions to the Congress from horses or dogs if they asked him to.

In many ways this book can be seen as the animals' Magna Carta, Declaration of Independence and Universal Declaration of Rights all in one. And it is timely. Twenty—even ten—years ago, Steve would have been out on a limb, ridiculed by his colleagues and largely ignored by the lay public. But attitudes toward animals have changed. Very few scientists today believe that nonhuman animals are simply mindless machines, collections of stimuli and responses. Of course, it would be convenient to believe that this was true, that there was a basic and fundamental difference between ourselves and the rest of the animal kingdom. Then we could do unpleasant things to them without any feelings of guilt. But this is scarcely an option today, when there have been so many descriptions of incredibly complex social behavior and so many examples of intelligent behavior from so many careful field studies on a whole variety of animal species. Our thirty-nine years with wild chimpanzees at Gombe, for example, has taught us much about these relatives of ours, each with his or her own unique personality. They share so many of our behaviors. They form close affectionate bonds with each other that may persist through a life of sixty or more years; they feel joy and sorrow and despair, mental as well as physical suffering; they show many of the intellectual skills that until recently we believed unique to ourselves; they look into mirrors and see themselves as individuals—they have consciousness of "self." Admittedly, chimpanzees are capable, as are we, of acts of brutality. But they also demonstrate empathy, compassion, altruism, and love. Should not beings of this sort have the same kind of legal rights as those we grant to human infants or the mentally disabled, who also cannot speak for themselves?

This book outlines how legal changes for animals, once thought impossible (and there were very few who even bothered to consider this at all), can actually happen. Then we shall have another way of fighting the injustice that is still perpetuated on animals of all kinds—by science, agribusiness, the pharmaceutical industry, the live-animal traders, and so on. If only such a change in law could have happened in time to save Jojo, Jade, and Dick.

Jojo was the first adult male chimpanzee whom I met in a medical research laboratory—which was, of course, in the basement, with no windows. JoJo was, like the other nine adult males who shared space with him, confined in a five-foot by five-foot cage. There were thick steel bars between JoJo and me. And there were bars on either side of him, and above and below. His view of the world was utterly distorted by thick steel bars. He had one motor tyre in his cell, and a drinking spout. He had been born in the African forest; he had spent more than ten years in the lab. Then there was Jade. For more than seven years she had earned her living by attending up-market birthday parties, and other such social events. When I met her, she was about eight years old and her teeth had been pulled. She was dressed in human clothes. She had been brought, as an “ambassador for her species,” to a fund-raising dinner. When we met, I greeted her in chimp style, and after that, from the opposite end of the very large table, she gave her toothless grin every time I caught her eye. I knew she wanted to come over; I knew she had been disciplined to remain in her place, slurping soft foods. I desperately avoided looking at her, filled with anger that she was thus exploited. At the end of the meal, she was allowed to come and clamp her arms around me and breathe her sadness into my neck. And there was Dick. When I met him he lived in a small zoo cage with a cement floor. He had a female with him, but clearly had little time for her. He sat in the corner endlessly tapping each finger of his left hand in turn with the index finger of his right hand, in time to the rhythmic opening and shutting of his mouth. In the cage next to him, a lone male gorilla endlessly vomited into his hand and reingested the vomit. Dick was the first captive chimpanzee to whom I made a commitment—I would work to try to better his condition, and that of countless other captive apes around the world.

Since I met Dick in 1956, ethical concerns about our treatment of animals are surfacing everywhere; there are, for example, groups of physicians, surgeons, psychologists, veterinarians—and lawyers—who protest abuse of animals and lobby for change. There are more than seven thousand different animal rights/welfare groups in the United States alone, and there are increasing numbers of people speaking out against intensive or factory farming of food animals, against trapping, hunting, and exotic animals in circuses, movies and advertising, puppy mills—and on and on. And there is growing concern for animal welfare in all parts of the world, including the developing world.

The trouble is, while those guilty of cruelty may be prosecuted, often successfully—Steve has saved hundreds of animals’ lives in the courtrooms—in the legal sense, animals are regarded as “things,” as mere objects that can be bought, sold, discarded, or destroyed at an owner’s whim. Only when animals can be regarded as “persons” in the eyes of the law will it be possible to give teeth to the often-fuzzy laws protecting animals from abuse. *Rattling the Cage* explains how legal rights for animals can help to stop so much of the abuse that, today, goes unpunished.

As Steve hints in his last chapter, this book represents a first step toward seeking legal rights for other animal species, rights modified in appropriate ways for different kinds of animals. Chimpanzees along with bonobos are our closest living relatives, differing from us in structure of DNA by only just over 1 percent. This makes these apes “our sibling species”—thus it is fitting that they should be the first to acquire rights, as surely they will—in the eyes of the law. In 1996, Steve and I made a presentation to the Senior Lawyers’ Division of the American Bar Association, explaining just why justice demands that we extend fundamental legal rights to chimpanzees. This book makes the same

point, in huge detail and in clear language, so that lawyers and judges and law professors—indeed everyone everywhere—will be able to follow the argument. So that in the end the machinery of the law can be changed in favour of the great apes.

It will be too late for JoJo, Jade, and Dick—they are gone. Yet still I think of them, and I feel deep shame; shame that we, with our more sophisticated intellect, with our greater capacity for understanding and compassion, deprived them of freedom, stole from them the dim greens and browns; the soft gray light of that African forest, the peace of afternoon; when the sun flecks through the canopy and small creatures rustle and flit and creep among the leaves. Deprived them of the freedom to choose, each day, how they would spend their time, and where and with whom. Deprived them of the sounds of nature, the gurgling of streams, murmuring wind in the branches, of chimpanzee calls that ring out so clear, and rise up through the tree tops and drift away in the hills. Deprived them of their comforts, the soft leafy floor of the forest, the springy, leafy branches from which sleeping nests can be made. But it is not too late for hundreds of others who are, as this book goes to press, languishing in man-made prisons.

Steve Wise has marshaled the facts and presented them at a crucial point in Western history—the end of a millennium. Let us hope that as we enter the twenty-first century, the new and more enlightened attitude concerning our own moral relationship with the rest of the animal kingdom will be reflected in appropriate changes in the legal system. Certainly this book *Rattling the Cage*, will give the process a mighty shove. Thank you, Steve.

ACKNOWLEDGMENTS

Anyone who writes a book that tries to sweep across 4,000 years then burrow deeply into the minds of two species of nonhuman animals requires a lot of help. That is why I owe a debt to the law professors, lawyers, judges, and philosophers who were kind enough to review portions of this book or earlier articles, or to debate issues that helped me to clarify my thinking: Taimie Bryant, David Favre, Thomas G. Kelch, Sarah Luick, Richard Posner, Stuart Shanker, Peter Singer, Eliot Sober, L.W. Sumner, Paul Waldau, Carl Wellman, and David Wolfson. I warmly thank Daniel Coquillette, who put me on speaking terms with legal history almost 25 years ago and gave me a model for how a great teacher teaches while he was doing it.

My debt is enormous to the many scientists from whom it has been my rare privilege to learn. Despite having never met a lawyer of the species, *jus animal*, and sometimes suspicious of the entire genus, they quickly realized that I wanted to learn as much as possible about the magnificent apes with whom they share their lives or study with such interest and empathy. Some opened their laboratories, read drafts of chapters on the minds of chimpanzees and bonobos, good-naturedly put up with pestering for the results of their latest research, and welcomed me as friend: Sally Boysen, Roger Fouts, Sue Savage-Rumbaugh and Duane Rumbaugh. Others fortunate enough not to have to endure my visits to their laboratories sent me reprints of their articles, patiently answered my unending questions about the cognition of chimpanzees, bonobos, and human children, and gently pointed out my most egregious errors: Juan Carlos Gómez, Donald R. Griffin, Marc D. Hauser, Michael A. Huffman, Evangeline Lillard, Tetsuro Matsuzawa, David Premack, Daniel Shillito, Michael Tomasello, Frans de Waal, and Richard Wrangham. The master himself, Morris Goodman, enthusiastically gave me a primer on primate taxonomy. Charles Sedgwick, D.V.M. kindly relayed the story of the accidental death of Jamal at the Chimpanzees of Mahale Mountains exhibit at the Los Angeles Zoo, while Deborah Blum, who knows every primate-tologist in the world, graciously reviewed several chapters with her sharp journalist's eye. My friend, Jane Goodall, whose path-breaking work and immunity to jet lag has allowed the wonders of the chimpanzee to be revealed to humankind, penned an overly-generous Foreword. Thanks, Jane, whichever continent you might be on. And special thanks to Rachel Weiss, who made me understand what it was like for Jerom to wither and perish at the Yerkes Regional Primate Research Center; at least he did not die alone or unloved.

I am fortunate to have Merloyd Lawrence as my friend and editor at Perseus Books. Her personal commitment to attaining rights for chimpanzees and bonobos rivals my own. As an editor, she cut without wounding. I thank my agent, Charles Everitt, experienced in every possible aspect of book publishing, who thought he saw the potential for a good book then tirelessly doubled as a second editor to try to realize it.

My greatest debt is, of course, to my wife and law partner, Debi Slater-Wise. At work she is the scourge of anyone who dares try harm a nonhuman animal and a merciless editor of her husband's work. At home hers is the hand that guides the family rudder, steering three children, Roma and those twin soldiers of entropy, Siena and Christopher, towards secure, happy, and productive lives. *Nun scio quid sit amor.*

Finally, my deepest thanks to Fred Gates, who made everything possible.

The Problem with Being a Thing

It is difficult, to handle simply as property, a creature possessing human passions and human feelings . . . while on the other hand, the absolute necessity of dealing with property as a thing, greatly embarrasses a man in any attempt to treat it as a person.

—Frederick Law Olmsted, traveling in the American South before the Civil War¹

JEROM'S STORY

Jerom died on February 13, 1996, ten days shy of his fourteenth birthday. The teenager was dull, bloated, depressed, sapped, anemic, and plagued by diarrhea. He had not played in fresh air for eleven years. As a thirty-month-old infant, he had been intentionally infected with HIV virus SF2. At the age of four, he had been infected with another HIV strain, LAV-1. A month short of five, he was infected with yet a third strain, NDK. Throughout the IranContra hearings, almost to the brink of the Gulf War, he sat in the small, windowless, cinder-block Infectious Disease Building. Then he was moved a short distance to a large, windowless, gray concrete box, one of eleven bleak steel-and-concrete cells 9 feet by 11 feet by 8.5 feet. Throughout the war and into Bill Clinton's campaign for a second term as president, he languished in his cell. This was the Chimpanzee Infectious Disease Building. It stood on the Yerkes Regional Primate Research Center near grassy tree-lined Emory University, minutes from the bustle of downtown Atlanta, Georgia.

Entrance to the chimpanzee cell room was through a tiny, cramped, and dirty anteroom bursting with supplies from ceiling to floor. Inside, five cells lined the left wall of the cell room, six lined the right. The front and ceiling of each cell were a checkerboard of steel bars, criss-crossed in three-inch squares. The rear wall was the same gray concrete. A sliding door was set into the eight-inch-thick concrete side walls. Each door was punctured by a one-half-inch hole, through which a chimpanzee could catch glimpses of his neighbors. Each cell was flushed by a red rubber fire hose twice a day and was regularly scrubbed with deck brushes and disinfected with chemicals. Incandescent bulbs hanging from the dropped ceiling provided the only light. Sometimes the cold overstrained the box's inadequate heating units, and the temperature would sink below 50°F.

Although Jerom lived alone in his cell for the last four months of his life, others were nearby. Twelve other chimpanzees—Buster, Manuel, Arctica, Betsie, Joye, Sara, Nathan, Marc, Jonathan, Roberta, Hallie, and Tika—filled the bleak cells, living in twos and threes, each with access to two of the cells. But none of them had any regular sense of changes in weather or the turn of the seasons. None of them knew whether it was day or night. Each slowly rotted in that humid and sunless gray concrete box. Nearly all had been intentionally infected with HIV. Just five months before Jerom died of AIDS born of an amalgam of two of the three HIV strains injected into his blood, Nathan was injected with 40 ml of Jerom's HIV-infested blood.² Nathan's level of CD4 cells, the white blood cells that HIV destroys, has plummeted. He will probably sicken and die.

SALES TAX FOR LOULIS

The biologist Vincent Sarich has pointed out that from the standpoint of immunology, humans are

chimpanzees are as similar as “two subspecies of gophers living on opposite sides of the Colorado River.”³ Rachel Weiss, a young Yerkes “care-tech” who watched Nathan being injected with Jerom’s dirty blood and saw Jerom himself waste away and die, wrote about what she had seen. During the time she cared for the chimpanzees of the Yerkes Chimpanzee Infectious Disease Building, Rachel learned firsthand that chimpanzees possess “passions” and “feelings” that, if not human, are certainly humanlike. It made them no less “difficult to handle simply as property.” She stopped thinking of them as “property” and resigned from Yerkes shortly after Jerom’s death.

Seventeen years before Jerom’s death, the primatologist Roger Fouts encountered Loulis staring at him through the bars of another Yerkes cage. Loulis’s mother was huddled in a corner. Four metal bolts jutted from her head. Fouts doubted that the brain research she had endured allowed her even to know that Loulis was her son. He plucked up the ten-month-old, signed the necessary loan papers, and drove Loulis halfway across the United States to his adopted mother.

Washoe was a signing chimpanzee who lived on an island in a pond at the Institute for Primate Studies in Norman, Oklahoma. Loulis did not want to sleep in Washoe’s arms that first night and curled up instead on a metal bench. At four o’clock in the morning, Washoe suddenly awakened and loudly signed “*Come, baby.*” The sound jerked Loulis awake, and he jumped into Washoe’s arms. Within eight days, he had learned his first sign. Eight weeks later, he was signing to humans and to the other chimpanzees in Washoe’s family. In five months, Loulis, by now an accepted family member, was using combinations of signs. At the end of five years, he was regularly using fifty-one signs; he had initiated thousands of chimpanzee conversations and had participated in thousands more. He had learned everything he knew from the other chimpanzees, for no human ever signed to him.

As years passed, Fouts realized that Yerkes could call in its loan and put Loulis to the knife, as his mother had been. When Loulis was seventeen years old, Fouts sought to buy him outright. Yerkes agreed to sell for \$10,000, which Fouts didn’t have. After strenuous efforts, he raised that amount. But at the last second, a hitch developed. Ten thousand dollars was Loulis’s purchase price. As if Yerkes were selling Fouts a desk or chair, Fouts was charged another 7.5 percent in Georgia sales tax.⁵

The scientists who injected Jerom and Nathan kept the baker’s dozen chimps imprisoned in a dungeon, and invaded the brain of Loulis’s mother and the administrators who collected sales tax for Loulis believed that chimpanzees are things. But they didn’t know why. Rachel Weiss and Roger Fouts show that we can come to believe—as they do—that chimpanzees are persons and not just things.

DEMOLISHING A WALL

For four thousand years, a thick and impenetrable legal wall has separated all human from all nonhuman animals. On one side, even the most trivial interests of a single species—ours—are jealously guarded. We have assigned ourselves, alone among the million animal species, the status of “legal persons.” On the other side of that wall lies the legal refuse of an entire kingdom, not just chimpanzees and bonobos but also gorillas, orangutans, and monkeys, dogs, elephants, and dolphins. They are “legal things.” Their most basic and fundamental interests—their pains, their lives, their freedoms—are intentionally ignored, often maliciously trampled, and routinely abused. Ancient philosophers claimed that all nonhuman animals had been designed and placed on this earth just for human beings. Ancient jurists declared that law had been created just for human beings. Although philosophy and science have long since recanted, the law has not.

This book demands legal personhood for chimpanzees and bonobos. Legal personhood establish

one's legal right to be "recognized as a potential bearer of legal rights."⁶ That is why the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, and the American Convention on Human Rights nearly identically state that "[e]veryone has the right to recognition everywhere as a person before the law."⁷ Intended to prevent a recurrence of one of the worst excesses of Nazi law, this guarantee is "often deemed to be rather trivial and self-evident" because no state today denies legal personhood to human beings. But its importance cannot be overemphasized. Without legal personhood, one is invisible to civil law. One has no civil rights. One might as well be dead.

Thronges of Romans scoot past the gaping Coliseum every day without giving it a glance. Athenians rarely squint up at their Parthenon perched high on its Acropolis. In the same way, when we encounter this legal wall, it is so tall, its stones are so thick, and it has been standing for so long that we do not see it. Even after litigating for many years on behalf of nonhuman animals, I did not see it. I saved a handful from death or misery, but for most, there was nothing I could do. I was powerless to represent them directly. They were things, not persons, ignored by judges. But I was butting into something. Finally I saw that wall.

In [Chapters 2](#) through [4](#), we will see how it was built by the Babylonians four thousand years ago, then strengthened by the Israelites, Greeks, and Romans, and buttressed again by early Christians and medieval Europeans. As one might expect, its mortar is now cracked and stones are missing. It may appear firm and sturdy, but its intellectual foundations are so unprincipled and arbitrary, so unfair and unjust, that it is crumbling. It has some years left, but it is so weak that one good book could topple it. This is meant to be that book.

In [Chapters 5](#), [6](#), and [7](#), I hope to convince you that equality and liberty, the two most powerful legal principles and values of which Western law can boast, demand the destruction of that wall. But there are about 1 million species of animals. Many of them, say, beetles and ants, should never have these rights. So the wall must be rebuilt. But how? In [Chapter 8](#), I will show you that the hallmark of the common law, which is the judge-made law of English-speaking peoples, is flexibility. It abhors thick high legal walls, except when they bulwark such fundamental interests as bodily integrity and bodily liberty, and prefers sturdy dividers that can be dismantled and re-erected as new discoveries of morality, and public policy dictate.

WHY CHIMPANZEES AND BONOBOS?

Chimpanzees and bonobos (sometimes referred to as "pygmy chimpanzees") are kidnapped for use as biomedical research subjects or as pets or in entertainment. They are massacred for their meat to feed "the growing fad for 'bush meat' on the tables of the elite in Cameroon, Gabon, the Congo, the Central African Republic, and other countries," so that their hands, feet, and skulls can be displayed as trophies, and for their babies.⁹ Thousands are jailed around the world in biomedical research institutions like Yerkes or are imprisoned in decrepit roadside zoos or chained alone and lonely in private dwellings. When the last century turned, there were 5 million wild chimpanzees in Africa. We don't know the number of bonobos because they weren't then considered a species separate from chimpanzees. But it was probably about half a million. By 1998, only 200,000 chimpanzees remained, perhaps as few as 120,000, and maybe 20,000 bonobos.¹¹ One of the world's most prominent bonobo experts, Takayoshi Kano, believes that less than 10,000 bonobos may have survived.¹² Thousands of chimpanzees and bonobos are slaughtered every year. They are nearing annihilation.¹³

In [Chapters 9](#) and [10](#), you will get a close look at the kinds of creatures these apes are and how similar their genes and brain structures are to ours. You will learn about the scientific revolt that has broken out as an increasing number of scientists demand they be tucked into the genus *Homo* with us. We will peel back the layers of their minds and try to understand what is known about how they feel and what they think; why they are conscious and self-conscious; how they understand cause and effect, relationships among objects, and even relationships among relationships; how they use and make tools; how they can live in societies so complex and fluid that they have been dubbed “Machiavellian”; how they deceive and empathize, count simple numbers and add fractions, treat the illnesses with medicinal plants, communicate with symbols, understand English and use sign language, lexigram languages, and how they might know what others think. We will compare what we think we know about their minds with what we think we know about ours.

I didn’t choose to describe the plights of Jerom and Nathan and the rest of the Yerkes chimpanzees because they are not the worst known examples of legal chimpanzee abuse. That dubious prize probably goes to the notorious SEMA, Inc., renamed Diagon, located in Rockville, Maryland. Sometime in 1986, a nauseated employee tipped off the True Friends, a band of animal-rights activists, who broke into the lab and videotaped what was happening inside. AIDS-infected baby chimpanzees were housed alone in what SEMA called “isolettes,” metal cubes 40 inches high, 30 inches deep, and 26 inches wide, each of which contained a small window. Inside, the babies rocked and rocked as would the emotionally starved or the mentally ill.¹⁴

I hope you will conclude, as I do in [Chapter 11](#), that justice entitles chimpanzees and bonobos to legal personhood and to the fundamental legal rights of bodily integrity and bodily liberty—no kidnapping them, selling them, imprisoning them, and vivisectioning them must stop—now. Their abuse and their murder must be forbidden for what they are: genocide.

Trapped in a Universe That No Longer Exists

A PECULIAR UNIVERSE

The ocean tides were designed to move our ships in and out of ports. Horses and oxen exist just to work our fields. Apes and parrots were produced to entertain us. Pigs were created for us to eat. Slaves live for the sake of their masters. The human races were placed on separate continents so they would not mix. Nature has marked Chinese as inferior to whites. Women are made for men. Blacks lie so far below whites on the scale of created beings that they have no rights that whites are bound to respect. Each of these claims has been made.

More than 2,300 years ago, Aristotle wrote that men were by nature superior to women and that slaves lived for the sake of their masters.¹ A century later, the Greek Stoic Chrysippus claimed that horses and oxen existed so they could labor for us and that “as for the pig, that most appetizing delicacies, it was created for no other purpose than slaughter, and god, in furnishing our cuisine, mixed soul in with its flesh like salt.”² Unfortunately, most of these opinions cannot be ascribed to the Ancients. It was said in 1582 that apes and parrots were put on earth just to make us laugh.³ The Abbé Pluche instructed us on the purpose of the tides in 1732.⁴ Half a decade before the American Civil War, the California Supreme Court barred Chinese witnesses from testifying against whites in court because they were a race “whom nature has marked as inferior and who are incapable of progress or intellectual development beyond a certain point.”⁵ Two years later, the U.S. Supreme Court wrote in the infamous *Dred Scott* case that at the time of the American Revolution, blacks were thought to exist so far below whites in the scale of created beings that they had no rights that whites were bound to respect.⁶ In 1965, a Virginia judge upheld a statute that forbade marriages between people of different races because “Almighty God created the races white, black, yellow, malay, and red, and he placed them on separate continents . . . The fact that He separated the races shows that he did not intend for the races to mix.”⁷

These beliefs about the purposes of horses and oxen, women and races, ocean tides and pigs, parrots, slaves, and apes may appear to be unconnected. But they are not. Each believer hears the universe tick in a particular unchanging way. The ancient Greeks heard one sound. Medieval Christians heard the same. But virtually no modern scientist or philosopher does. No evidence supports the existence of this peculiar universe. Yet the belief that nonhuman animals are somehow made for us lies at the root of what the law says we can do to them today. How did nonhuman animals become trapped in this obsolete universe?

“MEN CAN MAKE USE OF THE BEASTS FOR THEIR OWN PURPOSES WITHOUT INJUSTICE”

Archaeologists tell us that humans first exploited nonhuman animals thousands of years before they knew how to record it. How they justified this, whether they felt they had to, or whether they had the mental capacities to understand what they were doing is unknown. But we do know that thousands of years ago our use of nonhuman animals came to be seen, as everything came to be seen, as part of the

sacred and thereby subject to the will of the gods. Thus, in blind Homer's *Iliad*, "the will of Zeus was done" the moment that Agamemnon and Achilles began to quarrel.⁸ Nothing happened by accident.⁹

The Greek poet Hesiod, an eighth-century B.C. contemporary of Homer, sang that animals devoured each other because they had not been given the sense of right and wrong. Zeus had given the law of justice to humans alone.¹⁰ This world began to shift thanks to a trio of early- to mid-sixth-century B.C. Milesian philosophers, Thales, Anaximander, and Anaximenes, who made most of the Nobel Prizes and almost all of Western technology possible. They invented science and philosophy. And so the first faint glimmerings of a universe that danced not on divine strings but to the tune of the cause and effect of physical laws began to emerge.

Our story begins to get interesting, as many stories do, when we encounter a second trio of Greek philosophers, Socrates, Plato, and Aristotle, who often passed ideas from one to the next like Tinker and Evers to Chance.¹² Hardly any Greeks of their time thought anything happened by accident. Socrates' friend Xenophon tells us that the old philosopher believed that nonhuman animals existed just for us; even the sun crossed the heavens for our sake.¹⁴ Plato invented a "principle of plenitude" by which every conceivable form that could exist in the universe did.¹⁵ Aristotle envisioned all nature as having been designed like a ladder.

These ideas fused into the "Great Chain of Being." It became, in Professor Owen Lovejoy's words, "one of the half-dozen most potent and persistent presuppositions in Western thought. It was, until not much more than a century ago, probably the most widely familiar conception of the general *scheme* of things, of the constitutive pattern of the universe."¹⁶ It worked like this: An infinite number of finely graded forms were arranged along the ladder. Creatures who were barely alive occupied the lower rungs. Above them ranged the sentient beings, conscious, perhaps able to experience. Rational beings inhabited higher rungs, with the most rational human beings on the highest rungs that could be assigned to beings with physical bodies. Above them, looming incredibly high, dwelled an infinite number of spiritual and divine beings.¹⁷ The lower-rung dwellers were designed to serve the higher-rung dwellers, for they generated more heat, had souls made from better stuff, and were more perfect.¹⁸

Plato identified three kinds of souls. Animals and plants had the primitive one that lay below the navel. The mortal soul that was located in the chest and belly of animals listened to reason and passion. It was irrational, though it allowed nonhuman animals and slaves—those humans who were most like beasts—the ability to comprehend simple things like "my master is coming toward me." The immortal soul, however, resided only in human heads. This was the seat of reason and our connection to the divine.¹⁹ But not all humans had it. Children lacked it. Slaves lacked it. Certainly nonhuman animals lacked it. Some adults received it late, others never at all.²⁰ Aristotle thought there were five souls. Plants and animals shared the simple nutritive soul. All animals shared the appetitive, locomotive, and sensory souls. But only humans possessed the rational soul that allowed them to reason, listen to reason, think, and believe. And virtually all of them had it.²¹

But classical Greece was not revolutionary Philadelphia and Aristotle was no Thomas Jefferson. All "men" were most emphatically *not* created equal. Aristotle thought that one portion of the rational soul was actually used to reason. Greek men, who had it in full, occupied the topmost possible rung. Greek women were a bit colder, slightly deficient in reason and in the sense of justice, and so a little less perfect.²² Children had it, though they couldn't reason even as well as their mothers.²³ But another part of the rational soul only appreciated how others reasoned.²⁴ The natural slave (general

non-Greeks) had this part. He had some sense of reason, in that he could appreciate how his master reasoned. But he could not reason himself.²⁵ “[T]he slave is a living tool and the tool is a lifeless slave,” Aristotle said, and he advised his most famous student, Alexander the Great, “to be a hegemon [leader] to the Greeks and a despot to the barbarians [anyone not Greek], to look after the former as if they were after friends and relatives, and to deal with the latter as with beasts and plants.”²⁶ Justice, law, and even friendship reasoning beings owed only to each other. Considering how the Greeks dealt with “beasts and plants,” it was advisable to have others believe that you could reason.

The great thing about being more perfect was that the less perfect always acted “for the sake of you. In Aristotle’s world, rain didn’t just fall. It fell “for the sake of” the corn. Corn grew “for the sake of” nonhuman animals. In turn,

animals existed for the sake of man, the tame for use and food, the wild, if not all, at least the greater part of them, for food and the provisions of clothing and various instruments. Now if nature makes nothing incomplete, and nothing in vain, the inference must be that she has made all animals for the sake of man.²⁷

This was “teleological anthropocentrism.”²⁸ The “teleological” part means that everything in nature was imbued with a purpose. Everything had a goal. “Anthropocentrism” means that the world was designed for us.

The Great Chain of Being prescribed an unchanging and tidy universe in which each form occupied its appropriate, necessary, and permanent place that had been designed just for it in the natural hierarchy.²⁹ It was, in the words of Harvard paleontologist Stephen Jay Gould “explicitly and vehemently antievolutionary.”³⁰ Nothing progressed, nothing regressed, nothing shifted rungs. No species ever went extinct; none could be created.

Aristotle forged many intellectual molds in science, ethics, taxonomy, politics, psychology, and philosophy. Some were not broken for hundreds, even thousands, of years. One of them was the syllogism. He virtually invented it (“Socrates is a man; all men are mortal; therefore Socrates is mortal”). Whether intentional or not, Aristotle’s own place on the Great Chain of Being illustrated the syllogism. It was this: “Greek males occupy the top rung of the Great Chain of Being; I am a Greek male; therefore I occupy the top rung.” Over the centuries, it generalized to this: “Only groups to which I belong occupy the top rung; I belong to those groups; therefore I occupy the top rung.” It has remained in constant use in determining who has what rights. We’ll call it “Aristotle’s Axiom,” and it is an axiom because no one ever, *ever*, assigns a group to which he or she belongs to any place in the hierarchy of rights other than the top. Mel Brooks nicely summarized Aristotle’s Axiom in his movie *The History of the World, Part One*: “It’s great to be the king!”

These hierarchies are created in two ways. One group either pushes every other group below by force or threat of force or persuades the others that they belong on the lower rungs. Soldiers like the first way; philosophers, legal writers, taxonomists, and priests prefer the second. The problem for nonhuman animals is that they can neither fight nor write. Well, they can fight a little, and sometimes do very well one-on-one. But they are uniformly terrible at organized warfare against humans and we are excellent at slaughtering them. That is why until humans learn to fight for them or write for them, nonhuman animals will never have any rights.

Although blinded by teleological anthropocentrism, the Greeks were not blind. They could see that nonhuman animals (and slaves) were not literally “lifeless tools.” They were alive. They had sens

and could perceive. But Aristotle compared them to “automatic puppets.”³¹ He said they did not know *that* they perceived or, contradicting Plato, they did not believe *what* they perceived. So while both human and nonhuman animals could *perceive* the sun as being small, only humans could *believe* that it was large. Nonhuman animals could also feel pleasure and pain. They could learn, remember, and have experiences, for experiences were just a chain of memories.³² In short, Aristotle denied them the abilities to reason, to possess intellect, thought, and belief.³³ Because they lacked these abilities, they had no emotions, even if they sometimes acted as if they did. They were oblivious to justice and injustice, to good and bad, even to their own welfare.³⁴ Both nonhuman animals and rebellious slaves could be hunted in a “just war.” Aristotle wrote that “the art of war is a natural art of acquisition, for the art of acquisition includes hunting, an art which we ought to practice against wild beasts, and against men who, though intended by nature to be governed, will not submit; for war of such a kind is naturally just.”³⁵

Shortly after Aristotle died, a third trio of Greek philosophers began to take the stage. Zeno, and later Cleanthes and Chrysippus, taught in the famous “Painted Stoa” on the north side of the Athenian agora. Their “Stoic” philosophy penetrated deeply into Greek, then Roman, thought and exerted tremendous influence upon ethics, science, and law for more than five hundred years.³⁶ The Stoics sometimes disagreed with Aristotle. They took the first important steps toward equality by widening some of the rungs on the Great Chain. A natural equality among humans existed, they insisted. Everyone could reason enough to understand natural law. Human masters were not superior to slaves, nor was a husband superior to his wife.³⁷ Justice was owed to both.

But the Stoics shared Aristotle’s belief that the universe operated according to a divine plan and that some had been created to benefit others, for example, “plants for the support of animals, animals for the support and service of man, the world for the benefit of gods and men.”³⁸ And though Chrysippus argued that “[n]o human is a slave by nature,” he said that “irrational animals take the place of slaves.”³⁹ In the first century B.C., the Roman Stoic Cicero wrote that

as Chrysippus cleverly put it, just as a shield-case is made for the sake of a shield and a sheath for the sake of a sword, so everything else except the world was created for the sake of some other thing; thus the corn and fruits produced by the earth were created for the sake of animals, and animals for the sake of man: for example the horse for riding, the ox for ploughing, the dog for hunting and keeping guard.⁴⁰

Stoic fleas existed just to awaken slumbering humans, asses lived to bear human burdens, horses had the purpose of carrying humans, sheep provided human clothing, dogs guarded and protected humans, and mice stimulated human tidiness.⁴¹ The modern way in which we use the word “stoic” to mean “unemotional” and “passionless” honors the Stoic belief that everything existed for the sake of the rational. As the most important part of the universe was the human being, so the most important capacity of the human being was the ability to reason. Irrational nonhuman animals were contemptible, beneath notice, and Stoic writers accordingly ignored them.⁴²

Didn’t nonhuman animals have even the tiniest drop of sweet reason? Not to Aristotle and not to the Stoic. Nonhuman animals were alive. They could perceive through their senses.⁴³ They could act on impulse. But they could do almost nothing more. The Stoics denied them many of the few capacities that Aristotle had granted them—every ability to perceive, conceive, reason, remember, believe, even

experience—as we would deny those abilities to a computer.⁴⁴ Nonhuman animals could know nothing of the future. They could know nothing of the past. The Roman Stoic Seneca wrote that

[t]he dumb animal grasps what is present by its sense. It is reminded of the past when it encounters something that alerts its senses. Thus the horse is reminded of the road when it is brought to where it starts. But in its stable, it has no memory of it, however often it has been trodden. As for the third time, the future, that does not concern dumb animals.⁴⁵

The Stoics thought that the ability to “assent” was necessary for beings to know that they perceived, as well as for memory, emotions, beliefs, and reason (though some Stoics later conceded the possibility that nonhuman animals might possess some very limited instinctual, self-conscious understanding of their own bodies that allowed them to know what could harm or help them). Humans could assent. Nonhuman animals, limited to life, sensation, and impulse, could not.⁴⁷ Nonhuman animals could not desire, know good, or learn from experience.⁴⁸ Their very voices were merely air struck by an “impulse,” whereas human voices were directed by the mind.⁴⁹ One of Cicero’s characters made plain that nonhuman animals fared no better in the Stoic world than in the world of Aristotle.

[N]o right exists between man and beast. For Chrysippus well said, that all other things were created for the sake of men and gods, but that these exist for their own mutual fellowship and society, so that men can make use of the beasts for their own purposes without injustice.⁵⁰

They existed apart from the community of reasoning beings. They were not entitled to Stoic justice.⁵¹

We leave the Greeks with a mention of one final and exceedingly influential Stoic idea. The Greeks had long believed that the workings of the universe betrayed a moral significance.⁵² Stoics sought to live as closely as possible to nature, because it embodied universal, immutable, natural justice, and law.⁵³ As we will see in [Chapter 6](#), natural law and its close cousin, natural rights, insist that the moral is inseparable from the legal. The Stoics, and especially Cicero, fashioned this idea in something close to how we understand it today. Cicero’s writings about natural law were so crisp and timeless—“there will not be different laws at Rome as at Athens, or different law now and in the future, but one eternal and unchangeable law will be valid for all nations and at all times”—that they helped catalyze the development of important Western political institutions and law.⁵⁴ Nearly two thousand years later, these ideas influenced the American Declaration of Independence, the French Declaration of the Rights of Man, every American federal and state constitution, and numerous other national constitutions and international human rights declarations and treaties.

THE LONG REIGN OF THE GREAT CHAIN

The Great Chain resonated in a Judeo-Christian world suckled on Genesis.⁵⁵ God had originally granted humans dominion “over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.”⁵⁶ But the Flood was a turning point, for God had apparently changed His mind. He had forbidden the killing of nonhuman animals for food.⁵⁷ Now He drowned every animal not bobbing on the Ark. Rashi, a medieval Jewish scholar, explained why innocents

nonhuman animals were drowned along with evil humanity: “[S]ince animals exist for the sake of man, their survival without man would be pointless.”⁵⁸ After the Flood, God told Noah and his sons that

the fear of you and the dread of you shall be upon every beast of the earth, and upon every fowl of the air, upon all that moveth upon the earth, and upon all the fishes of the sea; into your hand are they delivered, every moving thing that liveth shall be meat for you; even as the green herb have I given you all things.⁵⁹

The rest, as they say, was history, but history sired by bad philosophy and dreadful science. It remained only for Christianity to absorb Greek teaching. It didn't seem an animal-friendly religion. In the Gospel of Mark, Jesus cast devils from a man into a herd of two thousand swine who ran “violently down a steep place into the sea . . . and were choked in the sea.”⁶⁰ Saint Paul emphasized that God did not care for oxen.⁶¹ It was Paul who stitched Stoic natural law into the fabric of Christianity.⁶²

In the second century, the Catholic church Father Clement used the Great Chain of Being to help explain grades of evil. The lower a being was on the chain, “the least real, least good, least spiritual, most deprived of being, and consequently most evil” it was.⁶³ In the third century, the Christian theologian Origen tried to develop a Christian doctrine that animals were created for the use of humans.⁶⁴ But it was the earthy and practical Saint Augustine of Hippo (Lord, “Give me chastity . . . but not yet”) who, in the fifth century, diverted the nearly parallel Christian and Stoic streams into a single flow.⁶⁵ With his teacher, Saint Ambrose, Augustine, “took natural law from Cicero, baptised it, and handed it on for preservation in the Church.”⁶⁶ According to the “order of nature,” the sentient animals rank higher than that which lacks sensation, the intelligent rank above the mass without intelligence, and the immortal rank above the mortal.⁶⁷ The Sixth Commandment, “Thou shalt not kill,” protected only humans.

[S]ome attempt to extend this command even to beasts and cattle, as if it forbade us to take the life from any creature. But if so why not extend it also to the plants, and all that is rooted and nourished by the earth? For though this class of creatures have no sensation, yet they also are said to live, and consequently they can die; and therefore, if violence be done them, can be killed . . . Must we therefore reckon it a breaking of this Commandment, “Thou shalt not kill,” to pull a flower? . . . when we say, Thou shalt not kill, we do not understand this of the plants, since they have no sensation, nor of the irrational animals that fly, swim, walk, or creep, since they are dissociated from us by their want of reason, and are therefore by the just appointment of the Creator subjected to us to kill or keep alive for our own uses; if so then it remains that we understand that commandment simply of man.⁶⁸

Not only did Augustine accept Aristotle's five souls, but he dressed Jesus in the dogma of Chrysippus.⁶⁹ Augustine thought that mind, intelligence, language, ethics, and understanding lodged only in the rational soul and that existed only in humans.⁷⁰ Humans alone could memorize, deliberately recall, imagine, or know whether that what they perceived was true.⁷¹ Nonhuman animals

could recognize, remember, even instinctively understand what gave them pleasure and pain.⁷² But they could “know” nothing.⁷³ They had no emotions. They could not reason or assent.⁷⁴ Humans and nonhuman animals could equally perceive what their senses transmitted, but only humans were conscious that they were actually perceiving.⁷⁵ Not only had Jesus driven devils into swine, but when he cursed the barren fig tree,

Christ himself shows that to refrain from the killing of animals and the destroying of plants is the height of superstition, for judging that there are no common rights between us and the beasts and trees, he sent the devils into a herd of swine and with a curse withered the tree on which he found no fruit.⁷⁶

Unlike Aristotle, Augustine, and later, in the thirteenth century, Saint Thomas Aquinas even argued that wild animals were not entitled to be hunted only in a just war. In a “just war,” human “right intention insists that charity and love exist even among enemies. Enemies must be treated as human beings with rights.”⁷⁷ But nonhuman animals did not rise to the dignity of human enemies. They could therefore be the targets of unrestricted, merciless, perpetual war. The perceived irrationality of nonhuman animals, which had excluded them from Greek justice and Stoic justice, now excluded them from Christian justice.⁷⁹ It still does.

“HOW EXTREMELY STUPID NOT TO HAVE THOUGHT OF THAT!”

Professor Robert Brumbaugh has written that “(f)rom Xenophon through Aristotle through the Stoic school, the preposterous idea of a world designed for human exploitation diffused quite thoroughly into Western common sense.”⁸⁰ Professor Lovejoy believed it “one of the most curious movements of human imbecility.”⁸¹ Preposterous as it may be, imbecilic as it may now appear, it buried itself so deeply into philosophy, science, political science, and finally, the law, that it has proven exceedingly resistant to change.⁸² It became a commonplace in the Middle Ages. Aquinas accepted it almost exactly the way Aristotle had proposed it seventeen centuries before.

Now all animals are naturally subject to man. This can be proved in three ways. First, from the order observed by nature. For just as in the generation of things we perceive a certain order of procession from the imperfect (thus matter is for the sake of form; and the imperfect form for the sake of the perfect), so also is there order in the use of natural things. For the imperfect are for the use of the perfect: as the plants make use of the earth for their nourishment, animals make use of plants, and man makes use of both plants and animals.

Therefore it is in keeping with the order of nature, that man should be master over animals. Hence the philosopher [Aristotle] says that the hunting of wild animals is just and natural, because man thereby exercises a natural right. Secondly, this is proved from the order of divine providence which always governs inferior things by the superior. Wherefore, since man, being made to the image of God, is above other animals, these are rightly governed by him . . . ⁸³

The Renaissance whirlwind dispersed many ancient conceptions of the physical world. Its fiercest squalls blew through astronomy and physics. In 1543, Copernicus said that the sun and not the earth was the center of the universe. Galileo demanded we consider that “[w]e abrogate too much of ourselves if we suppose that the care of us is the adequate work of God, the end beyond which the divine wisdom and power do not extend . . . ”⁸⁴ By the end of the seventeenth century, the universe was commonly thought to be without boundaries, even populated by creatures who lived on other worlds.⁸⁵ At the same time, European explorers were regularly chancing upon vast areas bursting with strange new plants and animals that had adapted to lands in which humans had never lived.⁸⁶ The Dutch naturalist Antonie van Leeuwenhoek discovered an unknown microscopic world teeming with uncountable numbers of immensely tiny organisms.⁸⁷ To the mind of Descartes,

[i]t is not probable that all things have been created for us in such a manner that God has no other end in creating them . . . Such a supposition would, I think, be very inept in reasoning about physical questions; for we cannot doubt that an infinite of things exist, or did exist though they have now ceased to do so, which have never been beheld or comprehended by man, and have never been of any use to him.⁸⁸

Scientists began to think about physical phenomena as natural processes and to explain them in mechanical terms. Galileo’s student Evangelista Toricelli described the physics of a suction pump not in Aristotelian terms of the water finding its “proper place” but as due to the weight of air. Geological evidence steadily accumulated that the earth was vastly older than the few thousand years many had presumed and was discovered to have suffered violent upheavals.⁹⁰

When fossils were discovered, it became obvious that species had lived and died long before human consciousness had awakened. Worse breaches so compromised the Great Chain of Being—beauty, symmetry, and equilibrium—that they threatened to collapse the entire system. Valiant rearguard actions ensued. The eighteenth-century taxonomist Linnaeus devised an antievolutionary system of classification.⁹¹ Eventually forced by facts to include some mechanism for natural change, he concluded that existing species merely formed hybrids but clung to the ancient idea that new species could never arise.⁹² Others tried to salvage the Great Chain by “temporalizing” it to allow for the movement and progress of species.⁹³ Thus, the Chain of Being temporarily became an “Escalator of Being,” upon which species could ascend.⁹⁴ But even this dodge caved in under the weight of the growing mass of contradictory facts.

Standing on the shoulders of Copernicus, Kepler, Galileo, and Newton, whose methods and insights into astronomy, physics, and chemistry made his discoveries possible, Darwin delivered the coup de grâce in *The Origin of Species*.⁹⁵ His theory of evolution by natural selection operated through a process of gradual change. Species multiplied either by splitting or evolving into new species when populations became isolated.⁹⁶ This idea struck many as simplicity itself. “How extremely stupid not to have thought of that!” the English biologist Thomas Huxley exclaimed.⁹⁷

So the world had been designed not by God, but by Greeks. The universe was not static; it ceaselessly fluctuated. The structure of every creature could be explained as the gradual adaptation of species to change. Creatures were neither “higher” nor “lower.” Instead, each adapted to his or her environment. Life had evolved not as rungs on a ladder but as a bristling bush. Biology had no more purpose than did chemistry or physics and didn’t need one.⁹⁸ Darwin’s world had no Design; it needed

no Designer.⁹⁹ Today, 95 percent of the biologists within the elite National Academy of Sciences claim either to be atheists or agnostics.¹⁰⁰ Because all organisms had descended from a common ancestor, the Great Chain could not possibly exist.¹⁰¹ The “grand master metaphor (that had dominated, perverted, and obstructed European efforts to discover man’s place in nature” was so thoroughly demolished that its proponents today are confined to a small number of fundamentalist theologies.¹⁰²

Darwin’s earthquake rumbled through not just science but also theology, philosophy, sociology, and, inevitably, political science and law. For hundreds of years, the privileged had used the Great Chain against agitators for human rights and “especially against all equalitarian movements.”¹⁰³ Inequality had for so long been thought to be a cornerstone of nature that demands for equality could be powerfully criticized as subverting the laws of nature and of God.¹⁰⁴ The destruction of the Great Chain of Being kicked open the door to the acceptance of human equality. It also opened the human mind to the idea of the nonhuman mind.

But the Great Chain did not disappear. The heart of the curious and imaginary world of the Ancients that spurred its invention remains beating within the breasts of judges, animating the common law that regulates the modern relationships between human and nonhuman animals. Its intellectual foundations rotted away long ago. Yet, as we will see, it undermines the living common law’s most fundamental principles.¹⁰⁵ How could one of the world’s greatest revolutions have bypassed the common law? In [Chapter 3](#), I will show how the Great Chain wormed into Roman law, then fixed itself first into English, then into American, common law. Understanding that it is there is the first step toward digging it out, freeing nonhuman animals from their outdated universe, and recognizing the long-delayed fundamental legal rights to which at least some of them have long been entitled.

The Legal Thinghood of Nonhuman Animals

THE OX THAT GORED

A yoked ox plows a Near Eastern field in the late afternoon of a spring day three—no, let's say four thousand years ago. Light rain has been falling on and off since mid morning. Thunder rumbles from deep within a huge bank of clouds that has blackened the western sky. It's quitting time. The farmer turns the ox toward home. Suddenly a blinding bolt of lightning sizzles, followed by a terrific clap of thunder. Deafened and surprised, the farmer pitches to the ground. The normally placid ox begins to lumber in panic toward the dirt road that passes the edge of the field. The farmer, after finally regaining his wits, yells to the ox to stop. To no avail. Large raindrops begin to pound the road, raising small cloudlets of dust. A passerby sizes up the situation and tries to stop the frightened animal. Nearly blinded by the rain, he fails to see the ox lower his head and is gored in the abdomen. By the time the breathless farmer arrives, the ox is calm and the rain has nearly stopped. But the passerby lies motionless, blood seeping into the mud. The farmer's head sinks into his two brown hands.

What did this tragedy mean for the farmer? What did it mean for the goring ox? What does it mean for the rights of nonhuman animals today? Some of the thousands of clay tablets that have been found record actual ancient Near Eastern lawsuits, but none mentions a goring ox.¹ Neither does the Old Testament. Nevertheless, differing ancient Near Eastern solutions to the theoretical problem of the ox that gored will help us understand the modern law of nonhuman animals and why change is overdue.

“All Law Was Established for Men's Sake”

After reading [Chapter 2](#), we should not be surprised to learn that ancient worlds marinated in the belief that everything in the universe was created for the sake of human beings also hatched the idea that, in the words of the Roman jurist Hermogenianus, “*Hominum causa omne jus constitutum*” (“All law was established for men's sake”).² But why should we care what an obscure Roman jurist said sixteen or seventeen centuries ago? Because the idea is very much with us today. A respected modern treatise on jurisprudence contains the identical words “*Hominum causa omne jus constitutum*,” followed by an explanation: “The law is made for men and allows no fellowship or bonds of obligation between them and the lower animals.”³

Law—good, mediocre, and bad—tends to survive, borrowed from one age by another. The borrowing of law, whether consciously or unconsciously (as Oliver Wendell Holmes, Jr., the great American judge believed), has long been the primary workaday business of lawmakers.⁴ Professor Alan Watson, an expert in comparing the law of different legal systems in different ages, tells us that “to a truly astounding degree the law is rooted in the past.”⁵ This makes sense. Borrowing law is simpler than constantly beginning anew. It provides continuity and stability. But when we borrow past law, we borrow the past. The law of a modern society often springs from a different time and place

perhaps even from a culture that may have believed in an entirely different cosmology or belief about how the universe works.⁶ Legal rules that may have made good sense when fashioned may make little sense when transplanted to a vastly different time, place, and culture. Raised by age to the status of self-evident truths, ancient legal rules mindlessly borrowed may perpetrate ancient injustices that may once have been less unjust because we knew no better. But they may no longer reflect shared values and often constitute little more than evidence for the extraordinary respect that lawmakers have for the past.⁷

Early this century, the philosopher George Santayana famously claimed, “Those who cannot remember the past are condemned to repeat it.”⁸ Every legal rule has its tangled history. Sometimes that history has nothing to do with whether a borrowed law is just in a new and different context. Holmes explained that often “(s)ome ground of policy is thought of that which seems to explain it and to reconcile it with the present state of things: and then the rule adapts itself to the new reasons which have been found for it, and enters on a new career.”⁹ But this is not always so. Sometimes a rule does not embark upon a new career at all but becomes an anachronism stubbornly holding out in defiance of modern sensibilities. Whole books about these leftover laws have been written to amuse us. We think it’s funny when a law enacted at the turn of the last century still requires someone to walk in front of an automobile with a lantern to warn unwary horsemen of its approach. We may be less amused to learn that other laws demand a belief in God in order to hold public office. Few legal rules are as doddering, or as unjust, as the legal thinghood of every nonhuman animal. Some untangling will be necessary to spur its overdue reconsideration.¹⁰ Like Theseus in the palace of the Minotaur, we will follow its winding thread through the labyrinth of legal history. It will lead us to the most ancient legal systems known.

“The Ox Shall Be Stoned to Death”

The oldest known laws were written in cuneiform on Mesopotamian—specifically Sumerian—clay tablets about 3000 B.C.¹¹ Law may have existed earlier, but we know nothing of it. The Sumerians were the first to emerge from prehistory, because they invented writing. Mesopotamian judicial and legislative power was concentrated in the hands of a single ruler who enacted the law.¹² But its source was neither the ruler nor the gods but rather a “transcendent primordial force” that outranked the gods.¹³ The gods did not so much reveal the law to the ruler as allow him to understand its source and enable him to make laws that harmonized with it.¹⁴ The outstanding Near Eastern exception was the Old Testament law of the Israelites. They believed that law was written by the One God. Not even their king could escape it.¹⁵

All Near Eastern law, Mesopotamian and Israelite, recognized that humans could own nonhuman animals.¹⁶ Cuneiform tablets refer to the ownership, express or implied, of sheep, donkeys, oxen, asses, pigs, goats, cattle, bees, and dogs. The earliest known “law codes” are the Laws of Ur-Nammu, king of Sumer and Akkad, of the third dynasty of Ur, dating from about 2100 B.C.,¹⁷ the Lipit-Ishtar Law Code, of which only a portion is known, probably dating from the first half of the nineteenth century B.C.,¹⁸ the Laws of Eshnunna, created about 1920 B.C.,¹⁹ and the Laws of Hammurabi, the Babylonian king whose reign probably began about 1728 B.C.²⁰ These were likely not “law codes” in the modern sense of a compilation of statutes, and we do not know for certain to what degree they actually reflected existing law.²¹ Their paragraphs generally began in the style of “If, Given that” and

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