

From the Ganges to the English Bench: The Unexamined Choice Behind the Property Status of Animals

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Introduction

Across the Indian traditions, the line between a person and an animal was not a wall but a door, and a soul could pass through it in either direction. The creature in the field might be working off the deeds of a former human life, or making its way toward the next one.¹ To harm it was to harm a being on the same journey as oneself, and the refusal to do so, *ahiṃsā*, became one of the highest duties a person could observe. This was not a sentimental fondness for animals. It was a considered position about what animals are and what is owed to them, worked out over centuries in the Vedas and the Upaniṣads, in the Vaiṣṇava traditions, and in Jain and Buddhist thought.²

Nor was the idea confined to India. The same conviction ran through early Greek philosophy. Pythagoras taught that souls pass across bodies, human and animal alike, and on that ground he and his followers refused to eat the flesh of animals and treated them as kin.³ Porphyry, centuries later, devoted an entire treatise to the argument that killing animals for food was an injustice.⁴ The view that an animal shares in the soul, or is a sentient creature that feels pain and joy, and in either case shares in the moral standing that follows, was not foreign to the Western mind.⁵ It stood at the beginning of Western thought, as one of two answers the Greeks gave to the question of what an animal is.

¹ Julius Lipner, *Hindus: Their Religious Beliefs and Practices* 254–60 (2d ed. 2010) (describing saṃsāra and the transmigration of the individual soul across the boundaries of species).

² Chāndogya Upaniṣad 3.17.4, in *The Early Upaniṣads: Annotated Text and Translation* (Patrick Olivelle trans., Oxford Univ. Press 1998) (listing ahiṃsā among the cardinal virtues); see also *infra* Parts II–V.

³ Diogenes Laertius, *Lives of the Eminent Philosophers* bk. 8 (R.D. Hicks trans., Harvard Univ. Press 1925) (life of Pythagoras and the doctrine of metempsychosis); see also Porphyry, *Life of Pythagoras* (Kenneth Sylvan Guthrie trans., Platonist Press 1920).

⁴ Porphyry, *On Abstinence from Killing Animals* (Gillian Clark trans., Bloomsbury 2014) (c. 268–70 CE) (arguing that animals possess rationality and are therefore owed justice, and that killing them for food is morally impermissible).

⁵ Plutarch, *On the Eating of Flesh* 1.4–6, in 12 *Plutarch's Moralia* (Harold Cherniss & William C. Helmbold trans., Harvard Univ. Press 1957) (arguing from the capacity of animals to suffer).

The common law took the other answer. Following Aristotle rather than Pythagoras, it held that moral standing belongs to rational beings and that animals, having no reason, fall outside it.⁶ Given theological form by Aquinas and written into English law by Blackstone, that conclusion hardened into doctrine, and it presents itself today as a plain fact about the world. An animal is a thing. It is property, something a person may own, sell, or kill, and it holds no interest that a court will hear.⁷ But this was never a fact. It was a choice of one contested position over its rivals, made as though the rivals did not exist. Across two and a half millennia the same question had been worked through in tradition after tradition, in India and in Greece alike, and answered more than one way. What the law encoded was not the answer to the question of humanity's obligations to animals. It was one tradition's answer, mistaken for the only one.

"Animal rights" is often described as a product of the late twentieth century, launched by Peter Singer's *Animal Liberation*⁸ in 1975 and given philosophical architecture by Tom Regan's *The Case for Animal Rights*⁹ in 1983. This narrative, while useful for charting the modern movement, is historically incomplete.¹⁰ It mistakes the terminology for the debate. The question of how human beings ought to treat animals, what ethical weight, if any, their pain, interests, and lives carry, has engaged serious thinkers in virtually every major intellectual tradition for at least two and a half millennia.¹¹

⁶ Aristotle, *Politics* 1.8, 1256b15–22 (H. Rackham trans., Harvard Univ. Press 1944) (asserting that nature has made all animals for the sake of human beings).

⁷ Thomas Aquinas, *Summa Theologiae II-II* Q.64 art.1 (Fathers of the English Dominican Province trans., 2d rev. ed. Benziger Bros. 1920); 2 William Blackstone, *Commentaries* *2–3 (1766) (grounding man's dominion over external things in the biblical grant of Genesis 1:28).

⁸ Peter Singer, *Animal Liberation* (1975).

⁹ Tom Regan, *The Case for Animal Rights* (1983).

¹⁰ Richard Sorabji, *Animal Minds and Human Morals: The Origins of the Western Debate* 1 (1993) (observing that Western scholarship has systematically underestimated the antiquity and cross-cultural breadth of the debate); see also Paul Waldau, *Animal Rights: What Everyone Needs to Know* 3 (2011).

¹¹ See generally Sorabji, *supra* note 10, at 2; Waldau, *supra* note 10, at 3.

The terminological gap is significant, but should not be mistaken for a substantive one. The phrase "animal rights" does not commonly appear in historical texts. Yet, its absence does not signal the absence of the underlying inquiry. The Upaniṣads spoke of ahiṃsā, the duty of non-harm toward all sentient beings, as among the highest of virtues, linking its practice to liberation from the cycle of rebirth.¹² The Stoics denied justice to animals on grounds of their irrationality,¹³ while Porphyry devoted an entire treatise to the injustice of killing animals for food.¹⁴ Montaigne wondered at the human presumption to exclude other species from moral consideration.¹⁵ Bentham brought the suffering criterion into Western moral and legal philosophy, asking not whether animals could reason but whether they could suffer: a question the Buddhist tradition had answered two millennia earlier.¹⁶ Each of these contributions is, in substance, a serious philosophical engagement with what we now call the "animal rights" debate, and each rests on a distinct philosophical foundation.¹⁷

From the Sanskrit texts of ancient India and the philosophical schools of classical Greece, through medieval Christian theology and Enlightenment moral philosophy, to the reform movements of the nineteenth century and the legal arguments of the twentieth, the question of humanity's moral obligation to animals has never been far from the center of serious ethical

¹² Chāndogya Upaniṣad 3.17.4, in *The Early Upaniṣads*, *supra* note 2 (listing ahiṃsā alongside truthfulness and compassion as cardinal virtues).

¹³ See Cicero, *De Finibus Bonorum et Malorum* 3.67 (H. Rackham trans., Harvard Univ. Press 1914); see also Diogenes Laertius, *supra* note 3, at 7.129 (reporting Chrysippus's position that justice cannot obtain between humans and irrational animals due to their dissimilarity); Sorabji, *supra* note 10, at 124–25.

¹⁴ See generally Porphyry, *On Abstinence from Killing Animals*, *supra* note 4.

¹⁵ Michel de Montaigne, *Apology for Raymond Sebond*, in *The Complete Essays of Montaigne* 318 (Donald M. Frame trans., Stanford Univ. Press 1958) (1580) (attacking human "presumption" in placing man above other animals and arbitrarily denying them reason and moral standing).

¹⁶ Compare Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation* 283 (J.H. Burns & H.L.A. Hart eds., Athlone Press 1970) (1789) ("The question is not, Can they reason? nor, Can they talk? but, Can they suffer?"), with *Dhammapada* 129–30 (Buddharakkhita trans., Buddhist Publ. Soc. 1985) (c. 3d century BCE) (teaching that all beings fear death and feel pain, and that one who sees this will neither kill nor cause another to kill).

¹⁷ See Waldau, *supra* note 10, at 3 (noting that the phrase "animal rights" is a modern coinage and that pre-modern traditions addressed the same underlying questions under different vocabulary).

thought. What differs across traditions is not whether the question was taken seriously, but the philosophical ground on which each tradition's answer rests, whether the soul, *karma* (cause and effect), rationality, suffering, natural order, or divine command.¹⁸

The classification of animals as property is not a neutral fact about what animals are. It is the residue of a single contested answer to the question of what a human being owes an animal, one the common law adopted without ever weighing it against the traditions that answered otherwise, each on its own philosophical ground.¹⁹ So long as an animal remains property, its interests carry no weight the law will recognize, and the premise that put it there has never been defended.²⁰ Whether that premise can be justified, rather than merely assumed, is a question the law has never faced.

I. The Property Classification Is Load-Bearing Doctrine, Not a Neutral Given

The question is not whether animals hold rights in the strong, Hohfeldian sense, in which a right in one party correlates with a duty in another.²¹ It is a prior and narrower one: on what ground does the law's classification of animals as property actually rest, and is that ground one the law has ever examined?

¹⁸ See Sorabji, *supra* note 10, at 1 (observing that the ancient debate about animal minds and human morals is "large, and largely uncharted," spanning every major philosophical school across two and a half millennia).

¹⁹ See generally *infra* Parts II–VII (surveying the distinct philosophical foundations on which the several traditions ground their positions: soul-equality in Jainism, the capacity to suffer in Buddhism, teleological hierarchy in Aristotle, theological sanction in Augustine and Aquinas, mechanism in Descartes, the rejection of the rationality criterion in Montaigne, and sentience in Bentham).

²⁰ Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* xv–xix (2000) (arguing that animals' status as property systematically forecloses their moral consideration).

²¹ Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917). On the broader question of moral status, see Lori Gruen, *The Moral Status of Animals*, in *Stanford Encyclopedia of Philosophy* (Edward N. Zalta & Uri Nodelman eds., 2024), <https://plato.stanford.edu/entries/moral-animal/> (on file with author); see also Francione, *Introduction to Animal Rights*, *supra* note 20, at xv–xix.

The question is prior because the property classification sits underneath the rights debate and settles much of it in advance. It is legal, not merely philosophical, because the classification is load-bearing doctrine rather than background scenery. It determines standing, because whether an animal can appear as a plaintiff at all turns on whether the law treats it as a holder of interests or as a thing.²² It shapes the reading of anti-cruelty statutes, because whether those laws protect an animal's interest or only the sensibilities of the humans around it depends on what the animal is taken to be. It is also the pressure point in the personhood and habeas litigation now reaching appellate courts, where the classification is asked, for the first time in centuries, to justify itself.²³

In that litigation the premise shows how little it has ever been defended. Asked why an animal cannot be a legal person, the courts have not rested on its status as property alone. They have supplied a criterion, that legal personhood belongs to those who can bear legal duties, and have added that animals have never been persons under the law.²⁴ Part VIII takes up both. The criterion is one more contested position offered without the defense it needs, and the appeal to history invokes the very status under challenge. Pressed to justify itself, the classification still has not been justified.

What has never been examined is the premise itself. The property classification is not a neutral starting point. It is the inherited residue of one position in a debate among the oldest in intellectual history, running from the Sanskrit traditions of ancient India through the classical Mediterranean, medieval Christendom, and the Enlightenment, to the courtroom. That history is

²² *Cetacean Cmty. v. Bush*, 386 F.3d 1169 (9th Cir. 2004) (holding that animals lack standing to sue in their own name absent a clear congressional grant).

²³ *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 31 N.Y.3d 1054 (2018) (Fahey, J., concurring).

²⁴ See *People ex rel. Nonhuman Rights Project, Inc. v. Lavery*, 124 A.D.3d 148 (3d Dep't 2014); *Matter of Nonhuman Rights Project, Inc. v. Breheny*, 38 N.Y.3d 555 (2022) (grounding the denial of legal personhood in the animal's asserted incapacity to bear legal duties and in the claim that animals have never been persons under the law).

evidence: it shows what the law's premise is, where it came from, and how many serious traditions grounded the moral status of animals on foundations the common law never considered. A premise contested at every stage of that history and examined at none of it cannot keep presenting itself as a given.

II. Ancient India: Grounding Moral Status in the Self, the Soul, and Sentience

A. The Upaniṣads Ground Moral Status in the Self Every Creature Possesses

The Upaniṣads locate a single self, the *ātman*, at the ground of every living being. One who has understood this, the Īśā Upaniṣad teaches, sees all beings in the self and the self in all beings, and so hates no creature.²⁵ The Chāndogya Upaniṣad presses the same identity in its instruction to Śvetaketu, *tat tvam asi*, which on the reading of recent scholarship shows that Śvetaketu shares in the same finest essence as every other creature rather than standing apart from it.²⁶ The animal, on this account, is not a separate order of being but a bearer of the same self that animates the human.

Non-injury follows as a cardinal virtue, not a mere restraint. The Chāndogya names *ahiṃsā* among the virtues it lists alongside austerity, almsgiving, and truthfulness,²⁷ and elsewhere it ties non-violence toward all living beings to liberation and release from the cycle of rebirth.²⁸ Harm withheld from an animal is, in this tradition, bound up with the highest human end.

²⁵ Īśā Upaniṣad 6, in *The Early Upaniṣads*, *supra* note 2 (teaching that one who sees all beings in the self and the self in all beings hates no creature).

²⁶ Chāndogya Upaniṣad 6.8.7, in *The Early Upaniṣads*, *supra* note 2 (the instruction to Śvetaketu, *tat tvam asi*).

²⁷ Chāndogya Upaniṣad 3.17.4, in *The Early Upaniṣads*, *supra* note 2, at 229 (listing *ahiṃsā* alongside austerity, almsgiving, and truthfulness among the cardinal virtues).

²⁸ Chāndogya Upaniṣad 8.15.1, in *The Early Upaniṣads*, *supra* note 2 (tightening non-violence toward all living beings to liberation and release from the cycle of rebirth).

These commitments name a metaphysical ground for the animal's moral status, the self it shares with the human, even as the ritual culture around it continued to sanction the killing of animals.²⁹ The Vedic sacrifice turned on animal offering, and the *dharmasāstra* permitted slaughter in the settings of sacrifice, ancestral rite, and hospitality rather than forbidding it.³⁰ The ideal of non-harm and the practice of ritual killing sat side by side. What the Upaniṣads fix is the premise, the presence of one self in every creature, on which a fuller ethic of non-harm could later be built; the devotional traditions that follow would press that premise toward *ahiṃsā* and away from the altar.

B. Jainism Grounds It in the Equality of Souls and Pushes Non-Harm to Its Limit

Jainism, systematized by the Tīrthaṅkara Mahāvīra in the 6th century BCE, and building on the earlier tradition of Pārśvanātha,³¹ offers the most comprehensive and demanding ancient articulation of moral duties toward animals.³² *Ahiṃsā* is the first and foundational vow of Jain ethics, *ahiṃsā paramo dharmah* (non-violence is the highest duty), and it extends to all forms of life, including microorganisms.³³

The Tattvārtha Sūtra, a canonical Jain text by Umāsvāti (c. 2nd to 5th century CE), systematizes the principle: every act of violence, whether direct, indirect, or merely approved,

²⁹ See Gavin Flood, *An Introduction to Hinduism* 198–204 (1996); Christopher Key Chapple, *Nonviolence to Animals, Earth, and Self in Asian Traditions* 3–15 (1993).

³⁰ Manusmṛti 5.31, 5.41, in Patrick Olivelle, *The Law Code of Manu* (Oxford Univ. Press 2004) (regulating the slaughter of animals contextually rather than prohibiting it categorically, and confining the permitted occasions to sacrifice, ancestral rites, and the honoring of guests); see also Flood, *supra* note 29, at 198–204.

³¹ Paul Dundas, *The Jains* 20–25 (2d ed. 2002) (discussing Mahāvīra's relationship to the earlier tradition associated with Pārśvanātha); Padmanabh S. Jaini, *The Jaina Path of Purification* 6–9 (1979) (situating Mahāvīra within the longer Jain *tīrthaṅkara* tradition and describing his relationship to Pārśvanātha's earlier community).

³² Dundas, *supra* note 31, at 160–63.

³³ Nathmal Tatia trans., *That Which Is: Tattvārtha Sūtra* 7.1–7.8 (HarperCollins 1994) (c. 2d–5th century CE); see also Jaini, *supra* note 31, at 107–10.

generates karmic consequence.³⁴ Jain scripture specifies five particular transgressions of ahimsā in relation to living beings: binding, beating, mutilating, overloading, and withholding food and drink.³⁵ Notably, the Jain rationale for ahimsā is not purely consequentialist. Rather, it proceeds from the premise that all living beings possess a *jīva* (soul), that all souls are spiritually equal, and that violence injures the perpetrator's own soul by binding it with karma in the cycle of birth and death.³⁶

Jain metaphysics ranks living beings with unusual precision. Every *jīva* is classified by the number of senses it possesses, from one-sensed beings, which have only touch and include the bodies of earth, water, fire, air, and plants, up through beings of two, three, and four senses, to the five-sensed beings that include animals and human beings.³⁷ The scheme reaches life the eye cannot see, so that harm to the smallest organism registers as violence.³⁸

The gradation is one of embodiment, not of worth. Beneath the differing sensory capacities, every *jīva* is equal in its essential nature, and the soul lodged in an animal or an insect is of the same kind as the soul lodged in a human being.³⁹ The ranking sorts bodies; it does not rank the selves within them.

This premise yields the most exacting ethic of non-harm in the ancient world. Jain mendicants sweep the ground before they step, strain their water, cover the mouth to spare the organisms of the air, and refuse food after dark, each practice a guard against injury to beings most traditions never considered.⁴⁰ The moral standing of an animal, on this view, needs no

³⁴ Dundas, *supra* note 31, at 160–63.

³⁵ Tatia, *supra* note 33, at 7.25; see also Kristi L. Wiley, *Ahimsa and Compassion in Jainism*, in *Studies in Jaina History and Culture* 438, 438–48 (Peter Flügel ed., Routledge 2006).

³⁶ Jaini, *supra* note 31, at 107–10.

³⁷ Nathmal Tatia trans., *That Which Is: Tattvārtha Sūtra* ch. 2 (HarperCollins 1994) (classifying every *jīva* by the number of senses it possesses, from one-sensed beings up through five-sensed beings).

³⁸ Dundas, *supra* note 31, at 93–97.

³⁹ Jaini, *supra* note 31, at 107–11.

⁴⁰ Dundas, *supra* note 31, at 176–80.

argument from its intelligence; it follows from the animal's possession of a soul equal to one's own, and the duty of non-harm that possession commands.⁴¹

C. Rebirth Across Species Makes the Animal Kin

Across the Indian traditions runs a further ground for regarding the animal, one that turns not on a single self shared by all creatures but on the individual soul each creature possesses. The doctrine of *saṃsāra* (rebirth) holds that the same individual soul passes from one body to the next across the boundaries of species, human in one life and animal in another, according to the workings of karma.⁴² The moral consequence is immediate. An animal is not a stranger of a lower order but a fellow traveler on the same passage, one who may have been a parent or a child in a former life and may be kin again in a life to come.⁴³ Cruelty to an animal is, on this view, cruelty to a being that may be bound to oneself across lifetimes, or at the least shares in the same eternal reality; the kinship the doctrine describes is literal rather than figurative. The point holds even for a reader who sets the metaphysics aside: a tradition that pictures the human and the animal as the same soul in successive forms cannot draw between them the categorical line the common law treats as fundamental.⁴⁴

D. The Vaiṣṇava Tradition Grounds It in an Individual Soul That Is Part of God

The Vaiṣṇava traditions ground the moral status of animals in a claim not about what animals can do but about what they are. On this account the living self, the *jīva* or *ātman*, is the same in kind in every creature.⁴⁵ The body differs from one being to the next; the self within is of

⁴¹ Chapple, *supra* note 29, at 9–15.

⁴² Flood, *supra* note 29, at 86–89; Lipner, *supra* note 1, at 254–60.

⁴³ Chapple, *supra* note 29, at 3–15.

⁴⁴ Chapple, *supra* note 29, at 3–15.

⁴⁵ *Bhagavad Gītā* 15.7, in *The Bhagavadgītā in the Mahābhārata* (J.A.B. van Buitenen trans., Univ. of Chicago Press 1981).

the same kind in each.⁴⁶ An animal is therefore not a lesser sort of entity but the same sort of self, wearing a different form. On this view, the rationality criterion the West would later adopt misses the point. The self that carries moral weight is present in the animal as fully as in the human being.

This metaphysics yields the tradition's characteristic ethical posture: wisdom means looking past outward form to the self of the same kind present in every creature, human and animal alike.⁴⁷ The regard this commands is not sentiment extended downward; it is the practical consequence of the underlying claim about the self. This understanding makes nonviolence toward living beings a required virtue rather than an optional mercy,⁴⁸ and, in the devotional register of *bhakti*, makes compassion toward all creatures intrinsic to devotion itself.⁴⁹

The *ahiṃsā* this tradition commands is demanding but not absolute. It carries the Upaniṣadic premise away from the Vedic altar and toward the protection of animal life, yet it stops short of the Jain vow to guard every one-sensed being, and it grants that duty may still require violence, as the *Gītā* requires it of Arjuna.⁵⁰ The animal's moral status is real, grounded in the soul it possesses, of the same kind as the human's, and the harm owed to it is to be reduced to what life demands rather than licensed or abolished.

These elements make the Vaiṣṇava contribution a worked-out foundation rather than a pious sentiment. It grounds the moral standing of animals in a developed claim about the self,

⁴⁶ *Bhagavad Gītā* 2.22, in *The Bhagavadgītā in the Mahābhārata*, *supra* note 45.

⁴⁷ *Bhagavad Gītā* 5.18, in *The Bhagavadgītā in the Mahābhārata*, *supra* note 45 (the wise see the same self in a learned brahmin, a cow, an elephant, a dog, and an outcaste).

⁴⁸ *Bhagavad Gītā* 16.2, in *The Bhagavadgītā in the Mahābhārata*, *supra* note 45 (listing non-violence toward living beings among the marks of one born to a divine estate).

⁴⁹ *Bhāgavata Purāṇa* 11.2.45, in *The Bhāgavata-Purāṇa* (G.V. Tagare trans., Motilal Banarsidass 1976); see also Edwin F. Bryant, *Krishna: The Beautiful Legend of God* (Penguin Books 2003).

⁵⁰ *Bhagavad Gītā* 16.2, in *The Bhagavadgītā in the Mahābhārata*, *supra* note 45 (setting the duty of non-violence within the *Gītā*'s frame of Arjuna's obligation to act); see also Ravi M. Gupta & Kenneth R. Valpey eds., *The Bhāgavata Purāṇa: Sacred Text and Living Tradition* (Columbia Univ. Press 2013).

distinct from the Jain ground of soul-equality and the Buddhist ground of shared sentiency, and it was elaborated by serious thinkers over centuries.⁵¹ It is a fully articulated alternative to the rationality criterion, and one of the positions whose opposite the common law encoded without ever examining.

None of this claims that animals stand equal to human beings in every respect, or that the tradition would grant every creature the rights the law reserves for persons; the cosmology remains hierarchical, with the human birth marked out as distinct.⁵² The claim is narrower. A soul of the same kind dwells in the animal, so how a person treats it is not a self-contained act but one that returns to the actor through the workings of karma, a reciprocity grounded in the animal's real nature rather than in any effect on human character.⁵³ Above all, the tradition holds the agent's free choice paramount: the moral consequence follows from what one freely chooses to do.⁵⁴

E. Buddhism Grounds It in the Capacity to Suffer

Buddhism's First Precept, abstaining from taking life, applies to all sentient beings, not only humans.⁵⁵ The Buddha's foundational teachings in the Pali Canon emphasize *karuṇā* (compassion) and *metta* (loving-kindness) toward all life;⁵⁶ where Jainism grounds animal

⁵¹ See generally Gupta & Valpey, *supra* note 50.

⁵² Flood, *supra* note 29, at 86–89 (describing the hierarchical cosmology in which the human birth is marked out as distinct).

⁵³ Chapple, *supra* note 29, at 3–15.

⁵⁴ *Bhagavad Gītā* 18.63, in *The Bhagavadgītā in the Mahābhārata*, *supra* note 45 (the teaching that, having heard the counsel, Arjuna is to act as he freely chooses).

⁵⁵ *Pañcasīla* (Five Precepts), in Bhikkhu Bodhi trans., *The Numerical Discourses of the Buddha: A Translation of the Aṅguttara Nikāya* 1271–73 (Wisdom Publications 2012).

⁵⁶ Karaṇīya Metta Sutta, Suttanipāta 1.8, in K.R. Norman trans., *The Group of Discourses (Sutta-Nipāta)* 17–18 (2d ed. Pali Text Soc. 2001); Mettanisamsa Sutta, Aṅguttara Nikāya 11.15, in Bhikkhu Bodhi trans., *The Numerical Discourses of the Buddha*, *supra* note 55, at 1596–97; *Dhammapada* 129–30 (Buddharakkhita trans., Buddhist Publ. Soc. 1985) (teaching that all beings fear death and feel pain, and that one who sees this will neither kill nor cause another to kill).

protection in the equality of the soul, Buddhism grounds it in sentience and the universality of suffering.⁵⁷

Where the Jain grounds moral regard in the equal soul and the Vaiṣṇava in the individual soul that is part of God, the Buddhist grounds it in sentience. The First Precept, the undertaking to abstain from taking life, reaches every being that can feel, for the reason that such a being can suffer.⁵⁸ The capacity that matters is not reason but the capacity to be harmed, a criterion that places the animal on the same footing as the human. The same criterion would surface in the West only with Bentham, who asked not whether animals can reason but whether they can suffer, a question this tradition had answered two millennia before.⁵⁹

The tradition dramatizes the closeness of human and animal in the birth stories of the Buddha himself. In the Jātaka tales the Buddha, in his lives before awakening, is born again and again as an animal, as a deer, a monkey, an elephant, and in those forms performs the very acts of compassion and self-sacrifice that mark the path to enlightenment.⁶⁰ An animal, on this telling, is not a lesser order of creature incapable of virtue but a being that can embody the highest virtue, and the Buddha-to-be passed through animal lives on the way to buddhahood. A tradition in which the Buddha himself lived as an animal draws no firm line between the human person and the animal thing, the very line the common law treats as fundamental.⁶¹

⁵⁷ Compare Jaini, *supra* note 31, at 107–09 (Jain grounding in soul-equality), with *Dhammapada* 129–30, *supra* note 16 (Buddhist grounding in the shared capacity of all beings to suffer).

⁵⁸ Bhikkhu Bodhi trans., *The Numerical Discourses of the Buddha*, *supra* note 55, at 1271–73; Peter Harvey, *An Introduction to Buddhist Ethics* 150–55 (2000) (grounding the First Precept in the shared capacity of sentient beings to suffer).

⁵⁹ See *supra* note 16 and accompanying text (Bentham’s suffering criterion).

⁶⁰ Sarah Shaw trans., *The Jātakas: Birth Stories of the Bodhisatta* (Penguin Books 2006) (recounting the Buddha’s births as a deer, a monkey, and an elephant, and the acts of compassion and self-sacrifice performed in those forms).

⁶¹ Shaw, *supra* note 60; Harvey, *supra* note 58, at 150–55; Chapple, *supra* note 29, at 22–30; see also *infra* Parts VIII–IX.

As with the Vaiṣṇava tradition, the demand is real but not absolute. The early monastic rule forbade a monk the flesh of an animal killed for him yet allowed what was freely offered, a practical accommodation to a life lived among others.⁶² The regard owed the animal was to be honored within the necessities of that life, not pressed to the Jain limit.

F. Ancient India Put the Obligation into Practice and Law

That the ethic was lived, and not merely written down, we know from a foreign eyewitness. Megasthenes, the Greek ambassador resident at the court of Chandragupta around 300 BCE, reported that Indians abstained from animal food as a matter of principle understood as moral obligation rather than custom, and that the state itself kept and tended the king's elephants and horses through officials appointed for the purpose.⁶³ The commitments the Sanskrit texts had argued were, in his account, already woven into Indian practice and administration.

Two generations later Ashoka, Chandragupta's grandson, wrote the obligation into public law.⁶⁴ His rock and pillar edicts, carved across the subcontinent, banned animal sacrifice at the capital, set out a long list of species that were not to be killed, from parrots and geese to tortoises, porcupines, and every four-footed creature that is neither useful nor eaten, protected the young and their nursing mothers, and forbade the burning of forests that sheltered living things.⁶⁵

The same emperor made the care of animals a charge of the state. One edict records the provision of medical treatment for human beings and for animals alike, along with the planting

⁶² Harvey, *supra* note 58, at 156–65 (discussing the monastic rule permitting freely offered meat while forbidding flesh from an animal killed for the monk); Jīvaka Sutta, Majjhima Nikāya 55.

⁶³ Richard Stoneman, *Megasthenes' Indica: A New Translation of the Fragments with Commentary* (2022); cf. Megasthenes, *Indica*, in J.W. McCrindle trans., *Ancient India as Described by Megasthenes and Arrian* 30–32, 98–99 (Thacker, Spink & Co. 1877).

⁶⁴ Romila Thapar, *Ashoka and the Decline of the Mauryas* 254–58 (rev. ed. 1997); Upinder Singh, *A History of Ancient and Early Medieval India: From the Stone Age to the Twelfth Century* 331–34 (2008).

⁶⁵ Pillar Edict V, in *The Edicts of Asoka* 66–68 (N.A. Nikam & Richard McKeon trans., Univ. of Chicago Press 1959); *id.*, Rock Edict I, at 28–29; Thapar, *supra* note 64, at 254–60.

of medicinal herbs and the digging of wells for their use.⁶⁶ A sovereign was administering something close to a public system of animal welfare more than two thousand years before Richard Martin's Act of 1822, the statute usually named as the first of its kind.⁶⁷ The notion that law for animals begins in nineteenth-century Britain mistakes a recovery for an origin.

III. The Classical Mediterranean: The Rationality Criterion and Its Critics

A. Pythagoras Draws No Categorical Boundary Between Human and Animal

The Western philosophical engagement with humanity's moral conduct toward animals begins not with Enlightenment utilitarianism but with Pythagoras of Samos in the sixth century BCE.⁶⁸ The doctrine of metempsychosis held that the soul is immortal and migrates after death into a new body, human or animal, until it achieves moral purification.⁶⁹ The moral consequence is direct: if the soul inhabiting an animal body may be the same soul that once inhabited, or will again inhabit, a human body, then the categorical boundary between human and animal life dissolves.⁷⁰ To harm an animal is not merely to harm a different kind of being;⁷¹ it may be to harm a soul that was once a person.⁷² What Pythagoras opened in the West, though, the Indian traditions surveyed above had already worked out: the transmigration of the soul across species, and the kinship with animals it carries, were set out in the Upaniṣads before his lifetime and

⁶⁶ *The Edicts of Asoka*, Rock Edict II, *supra* note 65, at 30–31; Thapar, *supra* note 64, at 256–58.

⁶⁷ Ivan Kreilkamp, *The Ass Got a Verdict: Martin's Act and the Founding of the Society for the Prevention of Cruelty to Animals*, 1822, in *BRANCH: Britain, Representation and Nineteenth-Century History* (Dino Franco Felluga ed., 2012), https://branchcollective.org/?ps_articles=ivan-kreilkamp-the-ass-got-a-verdict-martins-act-and-the-founding-of-the-society-for-the-prevention-of-cruelty-to-animals-1822 (on file with author); see also Kathryn Shevelow, *For the Love of Animals: The Rise of the Animal Protection Movement* 268–69 (2008).

⁶⁸ See generally Diogenes Laertius, *supra* note 3, bk. 8 (life of Pythagoras); Porphyry, *Life of Pythagoras*, *supra* note 3.

⁶⁹ Diogenes Laertius, *supra* note 3, 8.36.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

elaborated by the Jain and Buddhist traditions of the same age. What begins with Pythagoras is the Western engagement with the idea, not the idea itself.

B. Aristotle Grounds the Exclusion in the Rational Hierarchy

Aristotle represents the decisive countermovement in the ancient Mediterranean tradition.⁷³ His *Politics*⁷⁴ states the position in terms from which the Western legal tradition has never fully departed: plants exist for the sake of animals, and other animals exist for the good of man; since nature makes nothing without purpose and nothing in vain, it follows that nature has made all animals for the sake of human beings.⁷⁵ This claim is grounded in Aristotle's teleological cosmology: every natural being has a function, a *telos*, and the hierarchy of functions places rational deliberation at the summit.⁷⁶ As animals possess perception and desire, but lack rational deliberation, they occupy a lower rung in the natural order and have no standing before the community of justice.⁷⁷

C. The Stoics Restrict Justice to Rational Beings

The Stoics elaborated on Aristotle's position and gave it systematic philosophical form.⁷⁸ Justice, for the Stoics, is possible only between rational beings who share in *logos*; animals, lacking rational souls, lie outside the community of justice entirely.⁷⁹ Chrysippus, the third head of the Stoic school, held that all other animals were created for the sake of human beings, who

⁷³ Aristotle, *Politics*, *supra* note 6, 1.8, 1256b15–22.

⁷⁴ *Id.*; see also Aristotle, *Nicomachean Ethics* 1.7, 1097b24–1098a20 (W.D. Ross trans., Oxford Univ. Press 1998).

⁷⁵ Aristotle, *Politics*, *supra* note 6, 1256b15–22.

⁷⁶ Aristotle, *History of Animals* 8.1, 588a18–31 (A.L. Peck trans., Harvard Univ. Press 1965).

⁷⁷ Aristotle, *Nicomachean Ethics*, *supra* note 74, 8.11, 1161b2–8.

⁷⁸ See Cicero, *De Finibus Bonorum et Malorum*, *supra* note 13, at 3.16; see also Ilaria Ramelli trans., *Hierocles the Stoic: Elements of Ethics, Fragments, and Excerpts* (Soc. of Biblical Lit. 2009).

⁷⁹ Cicero, *De Finibus Bonorum et Malorum*, *supra* note 13, at 3.67.

could accordingly use them without moral constraint.⁸⁰ Cicero preserves this doctrine in *De Finibus*: justice requires the capacity for reasoned reciprocity, which animals do not possess, and therefore no code of law binds humans and animals together.⁸¹

D. Plutarch and Porphyry Contest the Exclusion from Within

The Stoic consensus did not go unchallenged within the classical tradition itself. Plutarch of Chaeronea (c. 46–120 CE) argued that animals possess reason, memory, and emotion, and that differences between human and animal cognition are differences of degree, not kind: directly undermining the Stoic premise on which the exclusion of animals from justice rested.⁸² Porphyry of Tyre (c. 234–305 CE) devoted an entire treatise, *On Abstinence from Killing Animals*, to the argument that justice must extend to all beings capable of perception, and that the Stoic restriction of justice to rational human beings represents a philosophical error, not a settled truth.⁸³ Taken together, Plutarch and Porphyry demonstrate that the Aristotelian and Stoic exclusion of animals from moral consideration was contested within the ancient world itself, by thinkers of serious philosophical standing, on grounds that anticipate the modern debate by nearly two millennia.⁸⁴

IV. The Christian Synthesis: The Rationality Criterion Given Divine Authority

A. Augustine Gives the Exclusion Theological Authority

Augustine of Hippo received the Stoic exclusion of animals from the moral community, and gave it theological form. In *The City of God*, Augustine addresses directly the question of

⁸⁰ Cicero, *De Natura Deorum* 2.160 (H. Rackham trans., Harvard Univ. Press 1933); see also Sorabji, *supra* note 10, at 196–98.

⁸¹ Cicero, *De Finibus Bonorum et Malorum*, *supra* note 13, at 3.67.

⁸² Plutarch, *On the Eating of Flesh*, *supra* note 5, at 1.4–6; Plutarch, *Whether Land or Sea Animals Are Cleverer*, in 12 *Plutarch's Moralia* (Cherniss & Helmbold trans.).

⁸³ Porphyry, *On Abstinence from Killing Animals*, *supra* note 4, at bks. 1, 3.

⁸⁴ Sorabji, *supra* note 10, at 170–80.

whether the commandment “Thou shalt not kill” extends to animals.⁸⁵ His answer is unequivocal: it does not.⁸⁶ Irrational animals 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.”⁸⁷ The philosophical grounding is the same as the Stoic position, but its authority is now divine rather than natural: the hierarchy placing humans above animals is not merely a feature of the natural order, but an ordinance of the Creator.⁸⁸

B. Aquinas Fuses the Rational Hierarchy with Christian Doctrine

Thomas Aquinas completed the work Augustine had begun. In the *Summa Theologiae* and *Summa Contra Gentiles*, Aquinas integrates Aristotle’s teleological hierarchy with Augustine’s theological framework to produce the most systematic and influential account of the human relationship to animals in the Western tradition.⁸⁹ The central claim is stated plainly in the *Summa Theologiae*: “According to the Divine ordinance the life of animals and plants is preserved not for themselves but for man”; animals are ordered by divine and natural law to human use, and their killing requires no moral justification beyond that order.⁹⁰ Aquinas acknowledges that animals can feel pain, but prohibitions on cruelty are grounded not in any duty owed to the animal, but in the risk that cruelty corrupts the perpetrator’s character toward human beings.⁹¹ As he states in the *Summa Contra Gentiles*, such prohibitions are issued “in order to remove man’s thoughts from being cruel to other men.”⁹² The animal has no standing;

⁸⁵ Augustine, *The City of God* 1.20 (Marcus Dods trans., T&T Clark 1871).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.* at 11.16.

⁸⁹ Thomas Aquinas, *Summa Theologiae*, *supra* note 7, II-II Q.64 art.1; Thomas Aquinas, *Summa Contra Gentiles* III.112 (Vernon J. Bourke trans., Univ. of Notre Dame Press 1975).

⁹⁰ Aquinas, *Summa Theologiae*, *supra* note 7, II-II Q.64 art.1 (quoting Augustine, *The City of God*, *supra* note 85, at 1.20).

⁹¹ Aquinas, *Summa Theologiae*, *supra* note 7, II-II Q.64 art.1; Aquinas, *Summa Contra Gentiles*, *supra* note 89, at III.112.

⁹² Aquinas, *Summa Contra Gentiles*, *supra* note 89, at III.112.

the duty runs not from human to animal but from human to human, mediated by the effects of cruelty on character.⁹³

V. Early Modern Europe: Descartes Denies Animals Feeling; Montaigne Answers

A. Descartes Reduces Animals to Machines Without Feeling

The early modern period produces the most radical Western articulation of the anti-animal position: René Descartes' doctrine of animal automatism. In *Discourse on Method* (1637), Descartes argues that the bodies of animals are best understood as machines made by the hands of God, incomparably better arranged than any mechanism produced by human art, but machines nonetheless.⁹⁴ As animals lack language and the capacity for rational response to novel situations, and because the possession of an immaterial rational soul is the criterion for consciousness, animals fall entirely outside the realm of thought and, by implication, of suffering in any morally relevant sense.⁹⁵ The crying of an animal that is struck is, on this account, no different from the chiming of a clock: both can be fully explained by the mechanical arrangement of the body without recourse to any inner experience.⁹⁶ The moral consequence is explicit: Descartes' view is "not so much cruel to beasts but respectful to human beings . . . whom it absolves from any suspicion of crime whenever they kill or eat animals."⁹⁷

This doctrine does not merely describe animals as machines: it performs a moral function. It removes the human agent from any possible moral relationship with the animal.

⁹³ *Id.*

⁹⁴ René Descartes, *Discourse on Method* pt. V, in 1 *The Philosophical Works of Descartes* 116 (E.S. Haldane & G.R.T. Ross trans., Cambridge Univ. Press 1911) (1637).

⁹⁵ *Id.*; see also John Cottingham, *A Brute to the Brutes?: Descartes' Treatment of Animals*, 53 *Phil.* 551, 552 (1978).

⁹⁶ Descartes, *Discourse on Method*, *supra* note 94, pt. V; see also Colin Allen & Michael Trestman, *Animal Consciousness*, in *Stanford Encyclopedia of Philosophy* (Edward N. Zalta & Uri Nodelman eds., Fall 2025 ed.), <https://plato.stanford.edu/archives/fall2025/entries/consciousness-animal/>.

⁹⁷ Letter from René Descartes to Henry More (Feb. 5, 1649), reprinted in René Descartes, *Meditations and Other Metaphysical Writings* (Desmond M. Clarke trans., Penguin Books 1998).

Where Aquinas had acknowledged pain in animals while grounding the prohibition on cruelty in human character, Descartes removes even the acknowledgment of pain.⁹⁸ The common law's classification of animals as property, in which an animal can be killed, consumed, or subjected to suffering without any inherent legal constraint, finds its clearest philosophical warrant in this position.⁹⁹ Scholars have noted that Descartes' own writings were inconsistent with the rigors of his doctrine: he spoke of animals having sensations and emotions.¹⁰⁰ Philosophers highlight the strict implications of his dualism,¹⁰¹ and identify this as a significant tension in Descartes's account, arguing that Descartes could not fully maintain the claim that animals are wholly without sensation.¹⁰²

B. Montaigne Rejects the Rationality Criterion as Presumption

Montaigne precedes Descartes by a generation and anticipates precisely the position Descartes would later entrench. In the *Apology for Raymond Sebond*, Montaigne mounts a sustained attack on human presumption in placing itself categorically above the animal world.¹⁰³ Montaigne's argument is rooted in skepticism about the reliability of human reason as a criterion for moral standing: if reason is our basis for excluding animals from moral consideration, and if reason is itself uncertain, fallible, and often inferior in practice to the cognitive capacities of animals, the exclusion fails.¹⁰⁴

Montaigne catalogues at length the evidence of animal cognition: the reasoning of dogs, the architectural intelligence of swallows, the communication between species.¹⁰⁵ His conclusion

⁹⁸ See *supra* Part IV.B (Aquinas acknowledging animal pain while grounding the prohibition on cruelty in the corruption of human character).

⁹⁹ See Sorabji, *supra* note 10, at 196–98.

¹⁰⁰ Cottingham, *supra* note 95, at 555–56.

¹⁰¹ Cottingham, *supra* note 95, at 557–58.

¹⁰² *Id.* at 553–55.

¹⁰³ Montaigne, *supra* note 15, at 318.

¹⁰⁴ *Id.* at 330–34.

¹⁰⁵ *Id.* at 331–43.

is pointed: the same defect that prevents communication between humans and animals, why is it not as much our fault as theirs?¹⁰⁶ The difference between human and animal cognition, Montaigne insists, is one of degree, not kind, and it is observed “under the aspect of one and the same nature.”¹⁰⁷ Presumption, the attribution of special dignity to human reason without examining its foundations, is, for Montaigne, the central intellectual vice.¹⁰⁸

The fact that this challenge came from Montaigne, one of the most celebrated writers in the Western tradition, demonstrates that the rationality criterion was far from settled before Descartes arrived. More precisely, Montaigne identifies the move that the common law would later make without examination: the assumption that the difference between human and animal is categorical, rather than gradational, and that this categorical difference has moral and legal consequences. Montaigne refuses both assumptions.¹⁰⁹

VI. The Enlightenment: The Suffering Criterion Enters English Law

A. Bentham Displaces Reason with Suffering

In *An Introduction to the Principles of Morals and Legislation*, written in 1780 and first published in 1789, Jeremy Bentham displaced the rationality criterion that had governed Western thought since Aristotle, and replaced it with a criterion of sentience.¹¹⁰ The question, Bentham states, “is not, Can they reason? nor, Can they talk? but, Can they suffer?”¹¹¹ The argument is grounded in Bentham’s utilitarian framework: if the capacity for suffering is what makes a being’s interests morally considerable, and if animals plainly suffer, then the Aristotelian and

¹⁰⁶ *Id.* at 331.

¹⁰⁷ *Id.* at 334; see also Sorabji, *supra* note 10, at 206–08.

¹⁰⁸ Montaigne, *supra* note 15, at 330.

¹⁰⁹ See Sorabji, *supra* note 10, at 206–08.

¹¹⁰ Bentham, *supra* note 16, at 283.

¹¹¹ *Id.*

Stoic exclusion of animals from the moral community rests on the wrong criterion entirely.¹¹²

The criterion was old, not new. The Buddhist tradition had grounded moral regard in the capacity to suffer, rather than the capacity to reason, two millennia before Bentham brought it to the West.¹¹³

Bentham identifies with striking directness the legal problem this creates. Animals, he writes, have been “on account of their interests having been neglected by the insensibility of the ancient jurists, degraded into the class of things,” and draws the parallel to race-based slavery deliberately: just as the French had recognized that skin color is no reason to deny legal protection to a person, so too would the law eventually be compelled to recognize that species membership is no reason to deny protection to a sentient being.¹¹⁴

B. Kant Preserves the Exclusion as an Indirect Duty

Immanuel Kant, Bentham’s precise contemporary, reached a directly opposite conclusion from the same Enlightenment premises. In the *Lectures on Ethics* and the *Metaphysics of Morals*, Kant argues that animals, lacking rational self-consciousness, cannot be direct objects of moral duties, as animals “exist merely as means, and not for their own sakes,” and accordingly “we have no immediate duties to animals; our duties towards them are indirect duties to humanity.”¹¹⁵ Cruelty to animals is wrong not because it wrongs the animal but because the person who practices cruelty cultivates dispositions that will harden them toward human beings. This is the indirect duty position, and structurally it is the argument Aquinas had already made, now shorn

¹¹² *Id.*; see also Johannes Kniess, *Bentham on Animal Welfare*, 27 *Brit. J. Hist. Phil.* 556, 557 (2019).

¹¹³ See *supra* Part II.E (the Buddhist grounding of moral regard in the capacity to suffer).

¹¹⁴ Bentham, *supra* note 16, at 283.

¹¹⁵ See Gary L. Francione, *Animals, Property, and the Law* 35–50 (1995) (arguing that anti-cruelty statutes are structurally indirect-duty instruments, protecting human moral sensibility rather than animal interests); see also Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 *J. Animal L. & Ethics* 175, 179–80 (2006).

of its theology: where Aquinas forbade cruelty lest it corrupt a man's disposition toward other men, Kant forbids it lest it corrupt the rational agent's disposition toward humanity.¹¹⁶ Its legal significance is decisive: the Anglo-American common law's treatment of anti-cruelty statutes is structurally Kantian, prohibiting gratuitous harm not because the animal has legally cognizable interests, but because inflicting suffering corrodes social morality.¹¹⁷ In this way, the animal remains property; it is the human community's moral character, not the animal's interest in not suffering, that the law protects.

C. Martin's Act Made It Law but Left Animals Property

The philosophical shift Bentham catalyzed found its first legislative expression in Britain within a generation. On July 22, 1822, the British Parliament enacted the Cruel Treatment of Cattle Act, sponsored by Richard Martin and generally recognized as the world's first animal welfare legislation.¹¹⁸ Martin, who became known as "Humanity Dick," brought the first prosecution under the Act himself, famously bringing a donkey into court to demonstrate the injuries it had suffered.¹¹⁹ Two years later, Martin joined with William Wilberforce and the Reverend Arthur Broome to found the SPCA, the first organized animal welfare institution in history, whose founding purpose was enforcement.¹²⁰ The connection between the two men is philosophically significant: Bentham had drawn the parallel between species-based exclusion and race-based slavery, and the reformers who turned that philosophy into law drew on the same moral inheritance.¹²¹ Martin's Act marks a significant moment in which the philosophical debate

¹¹⁶ See *supra* Part IV.B (Aquinas's grounding of the prohibition on cruelty in the corruption of human character).

¹¹⁷ See Bentham, *supra* note 16, at 283; Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, 31 N.Y.3d 1054, 1058 (2018) (Fahey, J., concurring).

¹¹⁸ Cruel Treatment of Cattle Act 1822, 3 Geo. 4, c. 71 (Eng.); see also Kreilkamp, *supra* note 67.

¹¹⁹ Kreilkamp, *supra* note 67.

¹²⁰ *Id.*; see also Shevelow, *supra* note 67, at 268–69.

¹²¹ See Bentham, *supra* note 16, at 283 (drawing the explicit parallel between the exclusion of animals and the exclusion of human beings on account of race).

about animals produced direct legal consequences, and its limitations are as revealing as its reach, as it prohibited cruelty but did not disturb the property classification, leaving animals as things whose suffering now carried some, but not determinative, legal weight.¹²²

VII. The Twentieth Century: Sentience and Inherent Value

A. Singer Grounds It in Sentience

The publication of Peter Singer's *Animal Liberation* in 1975 marked the opening of the contemporary phase of the debate.¹²³ Singer's argument is that the principle of equal consideration of interests requires that the comparable suffering of any sentient being receive the same moral weight as the comparable suffering of any other,¹²⁴ and to discount animal suffering on the sole ground of species is speciesism, a bias no more defensible than racism or sexism.¹²⁵

B. Regan Grounds It in Inherent Value

Tom Regan's *The Case for Animal Rights* (1983) offered a different and, for legal purposes, more directly applicable foundation:¹²⁶ any being that has beliefs, desires, perception, memory, a sense of its own future, and an emotional life possesses inherent value that cannot be traded away for the benefit of others.¹²⁷ That is a stronger claim than Singer's. Where Singer's utilitarianism weighs suffering and could in principle sacrifice an individual to a greater aggregate good, Regan's inherent value functions as a trump the benefit of others cannot

¹²² See Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* 4 (2000) (noting that anti-cruelty laws, while prohibiting needless suffering, do not disturb the underlying property classification of animals).

¹²³ Singer, *supra* note 8.

¹²⁴ *Id.* at 7–9 (stating the principle of equal consideration of interests and grounding it in the capacity for suffering).

¹²⁵ *Id.* at 7 (defining speciesism as "a prejudice or attitude of bias in favor of the interests of members of one's own species and against those of members of other species"); see also Richard D. Ryder, *Victims of Science: The Use of Animals in Research* (1975) (coining the term "speciesism").

¹²⁶ Regan, *supra* note 9.

¹²⁷ *Id.* at 243–48 (setting out the subject-of-a-life criterion and the concept of inherent value).

override, a right in the strict sense.¹²⁸ Regan's framework maps directly onto the structure of legal rights, and it is Regan's argument that animates the personhood claims that would eventually reach the courts.¹²⁹

VIII. The Common Law Encoded the Criterion as Property, and Never Examined It

The common law did not reason its way to the property status of animals. It inherited a conclusion. The classification that makes an animal a thing rather than a person is usually treated as a fixed starting point, the neutral ground on which animal law is built. It is neither fixed nor neutral. It is the downstream expression of one position in the debate traced above, adopted without the examination the question has always invited.

A. As a Thing, the Animal Has No Standing to Assert Its Interest

Property is not a description of an animal. It is an answer to a prior question: who holds legal interests, and who is merely the object of them. Persons hold; things are held. An animal, classified as property, falls on the object side of that line, and the consequences follow from the classification rather than from anything about the animal. A thing cannot sue. It cannot hold a right. Its interests cannot be weighed in its own name. When an animal's interest meets a human's, the two do not compete on a scale, because only one of them is on the scale at all. The animal's interest enters the law only through a human proxy, an owner's interest in the property or a state's interest in regulating conduct, and never as the animal's own. As Gary Francione has shown, this structure decides the outcome before the balancing begins.¹³⁰ Standing doctrine

¹²⁸ See *supra* Part VII.A (Singer's utilitarian grounding of equal consideration in sentience).

¹²⁹ See Wise, *supra* note 122, at 29–35 (drawing on Regan's concept of inherent value and the subject-of-a-life criterion as the philosophical basis for extending legal personhood to nonhuman animals); see also Sorabji, *supra* note 10, at 1–3 (observing that the history of the Western debate about animal minds and human morals demonstrates that the modern controversy has deep ancient roots); Allen & Trestman, *supra* note 96.

¹³⁰ Francione, *Animals, Property, and the Law*, *supra* note 115, at 35–50.

confirms the point from the other side, as courts have declined to treat animals as plaintiffs capable of asserting their own injuries.¹³¹

B. Anti-Cruelty Statutes Protect Human Sensibility, Not the Animal's Interest

Anti-cruelty statutes appear to cut against this account. They do less than they appear to. Such a statute restricts how an owner may treat property; it does not give the animal a claim. Its structure is the one Aquinas supplied and Kant secularized, as Parts IV and VI traced: the wrong lies in the human being and the coarsening of human character, not in a duty owed to the animal.¹³² Welfare regulation and rights differ in kind, not in degree. A statute can forbid gratuitous cruelty and still leave the animal a thing. Its suffering then carries some legal weight, but never enough to become an interest the law protects as the animal's own. Martin's Act drew that line in 1822, and it has held.¹³³

C. Blackstone Encodes the Premise as Property Without Defending It

Blackstone grounded man's dominion over the external world in the Creator's grant, quoting Genesis that dominion over every living thing is "the only true and solid foundation of man's dominion over external things."¹³⁴ From that foundation he classified animals as property, absolute in tame and domestic animals and qualified in animals *ferae naturae*.¹³⁵ What Blackstone did not do is defend the premise. He assumed it, and in assuming it he carried the Aristotelian and Thomistic conclusion into the law without the reasoning, or the dissent, that had surrounded it. The American common law received the classification and preserves it, so that an

¹³¹ *Cetacean Cmty.*, 386 F.3d 1169.

¹³² See *supra* Part VI.B; Francione, *Animals, Property, and the Law*, *supra* note 115, at 35–50.

¹³³ Cruel Treatment of Cattle Act 1822, 3 Geo. 4, c. 71 (Eng.).

¹³⁴ 2 William Blackstone, *Commentaries*, *supra* note 7, at *2–3 (identifying the biblical grant of dominion in Genesis 1:28 as "the only true and solid foundation of man's dominion over external things").

¹³⁵ *Id.* at *389–93 (classifying tame and domestic animals as personal property subject to absolute ownership, and animals *ferae naturae* as subject to qualified property rights).

animal today is chattel by inheritance.¹³⁶ The premise the structure rests on was never relitigated. It was received.

The common law does not always let such an inheritance stand. When a classification has rested on an inherited premise and that premise is examined, the law has demanded a justification the premise cannot itself supply. Coverture is the closest example. Blackstone set it out in the same Commentaries: by marriage, husband and wife became “one person in law,” so that the very being or legal existence of the wife was suspended during the marriage.¹³⁷ The premise was never defended against the obvious objection that a wife is a person in her own right; it was assumed, as the property premise is assumed for animals. When that objection was finally pressed, the Married Women’s Property Acts dismantled coverture across the American states, the inherited premise unable to answer it.¹³⁸ The property status of animals has not yet been made to answer the parallel objection.

D. The Courts Defend the Classification with Criteria They Cannot Justify

The classification is now under visible strain, and the courts that have upheld it show how much it rests on an unexamined premise. Asked to recognize first a chimpanzee and later an elephant as a legal person entitled to habeas corpus, the New York courts declined, and they did so not by resting on the animal’s status as property but by supplying a criterion.¹³⁹ Legal personhood, the Appellate Division held in *Lavery*, belongs to those who can bear legal duties: “unlike human beings, chimpanzees cannot bear any legal duties, submit to societal

¹³⁶ See Francione, *Animals, Property, and the Law*, *supra* note 115, at 35–50 (describing the American common law’s reception and preservation of the property classification).

¹³⁷ 1 William Blackstone, *Commentaries* *430 (stating that by marriage “the husband and wife are one person in law” and that “the very being or legal existence of the woman is suspended during the marriage”).

¹³⁸ Act of Apr. 7, 1848, ch. 200, 1848 N.Y. Laws 307; *see also* Richard H. Chused, *Married Women’s Property Law: 1800–1850*, 71 Geo. L.J. 1359 (1983).

¹³⁹ *Lavery*, 124 A.D.3d 148; *Breheny*, 38 N.Y.3d 555.

responsibilities or be held legally accountable for their actions,” and it is that incapacity that makes it inappropriate to extend to them the right to liberty.¹⁴⁰ The Court of Appeals took the same view of Happy the elephant, adding that a corporation can be a person because it bears duties in exchange for its rights, while an animal cannot.¹⁴¹

The criterion does not hold. Human infants cannot bear legal duties, and neither can adults in a coma or in the grip of advanced dementia, yet no one doubts that they are persons who may seek the writ.¹⁴² A test that excludes the animal excludes them too, which means the capacity to bear duties cannot be the real ground of legal personhood. The courts have reached for one more capacity, duty-bearing in place of rational deliberation, and it is one more contested philosophical position, drawn from the same family as the criterion the common law inherited and presented once again as though it were simply how things are.

Where the criterion falters, the courts fall back on history: animals, the Court of Appeals wrote, “are not, and never have been” persons under the law.¹⁴³ That is an appeal to the very classification under challenge, not a defense of it. The one criterion the courts do not weigh is the one the law already half-recognizes. The capacity to suffer, the ground the Buddhist tradition gave two millennia before Bentham gave it to the West, is secular, needs no metaphysics, and is the premise of every anti-cruelty statute on the books.¹⁴⁴ It offers a live alternative to the duty-bearing test, and the courts pass it by.

¹⁴⁰ *Lavery*, 124 A.D.3d 148.

¹⁴¹ *Breheny*, 38 N.Y.3d 555.

¹⁴² See Bentham, *supra* note 16, at 283 (the suffering criterion); cf. Wise, *supra* note 122, at 4–10 (marginal-cases objection to the rationality criterion).

¹⁴³ *Breheny*, 38 N.Y.3d 555.

¹⁴⁴ See *supra* Part II.E (the Buddhist grounding of moral status in the capacity to suffer); see also Francione, *Animals, Property, and the Law*, *supra* note 115, at 35–50 (the capacity to suffer as the premise of anti-cruelty statutes).

The difficulty has registered even with the judges who denied relief. Concurring in the denial of leave to appeal in the chimpanzee case, Judge Fahey wrote that while a chimpanzee may not be a person, “there is no doubt that it is not merely a thing,” and questioned whether confining such a being as a legal thing could be justified.¹⁴⁵ The property classification is no longer the neutral background it is taken to be. It is a contested position, defended by criteria the courts have not examined and by an appeal to the past that begs the question, and the contest behind it runs back two and a half millennia.

IX. The Law Must Justify the Property Classification, Not Assume It

The property classification owes a justification it has never paid. The courts, pressed to say why an animal cannot be a legal person, have offered a criterion they do not defend and an appeal to the very status under challenge, as the last section showed.¹⁴⁶ What the classification owes is the thing neither of those supplies: an examined, defended reason why the capacity for rational deliberation, rather than the capacity to suffer or any of the other grounds traced here, should mark the line between a holder of legal interests and a thing. Until that reason is given, the classification rests on inheritance alone.

The demand is for examination, not for a particular result. The age and reach of the debate do not tell a court how to decide; a tradition of long standing can still be wrong, and the fact that serious traditions grounded the moral status of animals elsewhere, in an individual soul of equal standing, in the equality of souls, and in the shared capacity to suffer, does not by itself make an animal a person. A premise this contested cannot be treated as a settled background fact. A court remains free, having examined the premise, to keep the property classification. What it cannot do is keep it unexamined.

¹⁴⁵ *Lavery*, 31 N.Y.3d 1054 (Fahey, J., concurring).

¹⁴⁶ *See supra* Part VIII.D.

That demand sets this position apart from the reforms usually proposed. Steven Wise has argued that cognitively complex animals should be recognized as legal persons, entitled through habeas corpus to bodily liberty.¹⁴⁷ Angela Fernandez has proposed a middle status, quasi-property and quasi-person, that secures some protections without discarding the property category.¹⁴⁸ Each asks the law to adopt a new status. The demand here is prior: that the law justify the status it already has. Neither reform can be fairly weighed while the property classification is treated as a neutral default, because that treatment settles the question against them before it is asked. Requiring the classification to justify itself is the predicate that makes their debates reachable on the merits.

Two objections meet this demand, and neither defeats it. The first holds that no workable criterion stands ready to replace rationality, and that pressing the question invites absurd claims on behalf of oysters and insects.¹⁴⁹ Replacing the criterion is not required; defending the inherited one rather than assuming it is, and a court that cannot defend it has learned something worth knowing. The one criterion the law already half-recognizes, the capacity to suffer, needs no metaphysics and underwrites every anti-cruelty statute on the books, which is reason to doubt that the question is unanswerable. The second objection holds that the property classification is administrable, and that its long service is reason enough to keep it.¹⁵⁰ Workability is not

¹⁴⁷ Wise, *supra* note 122.

¹⁴⁸ Angela Fernandez, *Not Quite Property, Not Quite Persons: A “Quasi” Approach for Nonhuman Animals*, 5 Can. J. Comp. & Contemp. L. 155 (2019).

¹⁴⁹ See, e.g., Carl Cohen, *The Case for the Use of Animals in Biomedical Research*, 315 New Eng. J. Med. 865 (1986) (arguing that rights require a capacity for moral agency that animals lack); Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in *Animal Rights: Current Debates and New Directions* 51 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (pressing pragmatic, line-drawing objections).

¹⁵⁰ See, e.g., Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in *Animal Rights: Current Debates and New Directions* 143 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (defending retention of animals’ property status on functional grounds and against transforming the institution).

justification. A rule can be easy to apply and still rest on a premise no one will defend, as coverture was, and the ease of applying it is no answer to the being it fails.

The question of humanity's moral obligation to animals has outlived every answer meant to settle it. The common law has treated the question as closed, not by answering it but by never opening it. Reopening it commits the law to no particular answer. It commits the law only to admitting that it has long lived with an answer it never gave.

Conclusion

To the common law, an animal is a thing. To much of the world, for much of its history, it was a soul on the same journey as the human being, a fellow traveler in another form. Between those two answers runs one of the oldest debates in intellectual history, and every major tradition took part, each on its own philosophical ground. The common law inherited one of these grounds, the Aristotelian and Thomistic criterion of rational deliberation, and encoded it as the property classification of animals without recognizing it as a position at all. The grounds it never examined include the earliest and most fully developed: the individual soul of equal standing that the Upaniṣadic and Vaiṣṇava traditions found in every creature, the equality of souls in Jainism, and the shared capacity to suffer in Buddhism. None of them has been considered or answered by the law.

The law's failure is not that it adopted one position rather than another. It is that it adopted a position without knowing it had, and has treated a contested philosophical claim as a fact of nature ever since. Pressed to defend it, the courts have offered criteria they have never justified, and have leaned on the bare fact that animals have never been counted as persons, which is to invoke the status under challenge rather than to examine it.

Bentham gave the fault its legal name in 1789, writing that animals had been degraded into the class of things by the insensibility of the ancient jurists.¹⁵¹ He was late to it: the Indian traditions had refused the exclusion two millennia before him, and the Greek dissenters after them. The insensibility he named is now a matter of inheritance rather than insight, but it is insensibility still. The question has followed humanity from the Ganges to the English bench, and it will follow the law wherever the law goes next.

¹⁵¹ See Bentham, *supra* note 16, at 283 (stating that animals have been "degraded into the class of things" on account of the "insensibility of the ancient jurists"); Francione, *Animals, Property, and the Law*, *supra* note 115, at 35 (arguing that the property classification is not philosophically neutral but reflects a choice, never examined, to treat animal interests as legally weightless).