

HOW LEGAL RITUALS

MAKE AND

UNMAKE PERSONS

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THE LAW
IS A
WHITE
DOG

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intentional conduct or negligence). Yet a public zoo is different. Some courts, aware that the abnormally dangerous activity of keeping a tiger is in this instance normally and socially sanctioned, have been unwilling to use strict liability against zoos. In the case of Tatiana, however, Mark Geragos, the lawyer for the Dhaliwal brothers, argues a strict liability analysis. "One who possesses or harbors a dangerous animal, whether wild or domesticated, is absolutely liable for injuries inflicted by it, where he or she knows or should know of its dangerous propensities."⁶²

By looking at the most extreme cases of outrage, as well as trifling antisocial acts, committed either deliberately or carelessly, we begin to understand the expectations of civil and the coercions of social life. The language of torts and its fittest locales are commentaries on prejudice, justice, and the way humans act toward other species, as well as toward their own kind. The sometimes inconspicuous little rituals of daily life harbor the threat of damage, as well as the legal personifications through which recompense can be made. No matter how amorphous the language of tort—its chains of wide-ranging adjectives such as *willful*, *wanton*, or *malicious*; *reckless*, *oppressive*, or *fraudulent*—it prevents, courts, and inspires violence. The domain of justice and injustice, dependent as these are on each other, inevitably leads to judgments about civilization and barbarism. No matter how general, predictable, or objective the law's standards are—or perhaps because they aim not to be value judgments—they judge defects and capacity, and supply the terms for inclusion and ostracism.



SKIN OF THE DOG

It is the judges (as we have seen) that make the common law. Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait till he does it, and then beat him for it. This is the way you make laws for your dog; and this is the way the judges make law for you and me. They won't tell a man beforehand what it is he *should not do*—they won't so much as allow of his being told: they lie by till he has done something which they say he should not *have done*, and then they hang him for it.

—Jeremy Bentham, *Truth versus Ashhurst,
Or Law As It Is* (1792)

A DOG IS BEING STOLEN

NOT ALL LAWS COMMAND THE SAME ASSUMPTIONS ABOUT PERSONHOOD and property, nor can we be sure how far case law can be understood to offer insight into worth and insignificance. If we were challenged to write a legal history of dispossession, we could find no better examples, both profound and ancient, than in the taxonomies of personhood when bounded and enlivened by the dog kind. Only with dogs before us and beside us can we understand the making or unmaking of *the idea of persons*.

Does ownership mean the same thing for all citizens? Perhaps one way to approach questions of value is to consider the

position of dogs in the law of property. History offers an exemplum. In the story of Katrina dogs, many left behind in New Orleans or taken from the arms of their possessors, we see how the fate of dogs entangles with the treatment of the poor, the persons desperate to escape catastrophe. Out of the rags and flotsam of civil life came images of loss. An old man perished on a chaise longue in the middle of the road. Around the corner, outside the Convention Center in New Orleans, an elderly woman lay dead in her wheelchair, covered by a blanket. Another corpse was beside her wrapped in a sheet. "I don't treat my dog like that," forty-seven-year-old Daniel Edwards remarked. "I buried my dog. But we're out here like animals. We don't have help."

The sight of citizens turned refugees in their own country made me think about abandoned dogs. Not because I want to equate people with dogs, but because the proximity between them helps us to grasp the relationship between legal status and proprietary interests. Like homeless dogs, later shot or dying in the streets of New Orleans, these persons had no names, they could seek no reprieve. They were alone, although they were surrounded by people. They had claims on our sympathy, but nonetheless remained powerless, prey to the vagaries of coercion, legality, and control.

The nature and status of dogs as defined by law are crucial to understanding the limits of restitution and the uneven application of remedy to persons who must answer to or reckon with the law. Old-time forfeiture, the guilt and surrender of inanimate or nonhuman objects, lives on in narratives of dogs seized and dispatched. The imputed guilt of the deodand lives on in the treatment of dogs deemed expendable. Though hurricane Katrina was an emergency, separating humans from dogs and owners from their property seemed harsh as officers led distressed citizens to safety and left their dogs to drown or starve.

In legal judgments, an obsolete justice is repackaged in unexpected ways. One of the more vexing issues in prosecutions for larceny is whether dogs are subjects of property. If they are

not, then their loss through thievery cannot be a cause for restitution in law. I return to the history of criminal and civil law in order to extend the fate of Katrina dogs—and their owners' loss—to larger questions of judicial interpretation and its consequences. Actions against or unconcern with dogs are related to the giving or withholding of legal personality from human animals.

Dogs were once subject to the legal fiction that they had no value. They were judged to be either ignoble or trivial, kept only for pleasure and caprice and not for sustenance or service. Blackstone explains that "a man may have a base property therein, and maintain a civil action for the loss of them, yet they are not of such estimation, as that the crime of stealing them amounts to larceny." The ambiguous identity of dogs—sources of indulgence and delight but otherwise useless or wild—was institutionalized in the common law.¹

Filow's case (1520), heard in the Court of Common Pleas during the reign of Henry VIII, decided for the first time that dog stealing can be judged wrongful. William Filow, a knight, brought an action of trespass ("brief de Transgressioun") against J——, who had beaten his servant and taken his bloodhound. Several of the judges who voted in the majority argued that if a dog is private property, its owner can maintain trespass for the loss of it, since its utility for the owner's pleasure is an adequate element of value. Though "this dog is a thing of pleasure, still he is profitable for hunting or recreation," argued John Newport and John Newdigate. But John Roe preferred the outlawry of dogs to the punishment of thieves: "[F]or the taking of a dog one will not have an appeal of felony, though it be taken with felonious intent, since there is no reason why one should have judgment of life or limb for a dog which is of no value." In other words, a man should not hang for a dog. This singular antipathy to dogs was supported by the Church. The dissenting judge Richard Eliot distinguished beasts that were once "savage" and "now docile," such as sheep, cattle, and horses, from dogs. Dogs were so contemptible that he equated them with "vermin," along with

“apes and monkeys.” Hence, “dogs and cats are not tithable; for the spiritual law does not desire that vermin should be tithable.” And the owner’s pleasure? Nothing but a trifling concern. If “a lady who has a little dog is unwilling to sell this for a great sum of money, and if I take it, there is no reason why she shall have an action for the pleasure that she had in it.”²

Justice Richard Brooke’s argument acknowledged the propriety of possession and gave value to the dog as long as he bore proof of his master’s training. Once tamed, a dog gains legal value, even if not the status of *absolute* property. Brooke analyzes the appropriation of animals as nothing less than Edenic dispensation, which he renders in terms of rebellion and submission.

For at the commencement of the world all the beasts were obedient to our first father Adam, and all the four elements were obedient to him; but after that he broke the commandment of our Lord God, all the beasts commenced to rebel and become savage; and this was for the punishment of his crime, and now they are in common and belong to the occupant, as fowls in the air and fish in the sea and beasts of the land. When I have taken a wild fowl and by my industry have tamed him and deprived him of his liberty, now I have a special property in him, because he has become obedient to me by my labor.

In thus invoking the glories of property and possession, another justice, Lewis Pollard, waxes poetic: “[M]y hound is my treasure, for he takes game for my pleasure.” The rigors of affectionate appropriation have a domino effect. His transformative sweep moves from “this hound” in “my possession” to this hound in “the possession of my servant,” concluding the paean to control with “then here this possession of my servant is my possession.” Even when praised as docile and devoted, and hence rising in status, dogs are prized not for themselves but as proofs of their owners’ right to possess.³

The human dominion over things became fixed in law as the criterion of civilization. Although early legal historians, most notably Theodore Plucknett, reasoned that “the institution of

slavery . . . left little mark on our law,” in fact the common law of personal property laid out the terms for reducing human chattels to things worth possessing.⁴ The terminology of occupation (rather than ownership) made what had been the property of no one—*res nullius*—the framework for the conversion of persons into things, reclaimed out of wildness into obedience, whether by restraint or cultivation. These reflections on industrious appropriation demonstrate the juridical creation of a servile order. What makes the worthless worthy of being possessed—and its loss recoverable in damages—is the labor of the person who acquires, subdues, and enhances for himself what was nugatory.

To be owned, then, is to be special. For certain entities, held as property, there is a status to be reckoned with, from high to low. The question is *how* you are owned, the success of domestication. In the matter of ownership alone lies your fate. If labor has been expended, then the entity is reclaimed from the wild. Once you have turned an animal from wild to docile, from misbehavior to obedience, you gain the right to claim it as personal property. The fact of this discipline in *Filow’s* case made the theft a trespass.

Glanville Williams argues in his *Liability for Animals* (1939) that by the nineteenth century, the rules of law put “the dog upon a much higher level in the scale of ownership.” Law began to recognize property in dogs, and criminal action as well as civil remedies could be sought against someone convicted of dog stealing. Yet if dogs were no longer as legally insignificant as before, they continued to be subject to the rigor of civil law: judged as either harmless or dangerous, accused of damage or injury, impounded or killed. They became worthless insofar as they lapsed from their servile status. To be no longer obedient was to be no longer special, not worth keeping and easily disposed of. Their representation and treatment—whether stolen, cared for, beaten, or ignored—are limit cases in the extravagance of status-making in law: at what point are dogs legally recognizable, and when do they cease to count?⁵

At common law, as we have seen, a human could not be punished for stealing a dog, and archaic fictions held that "it had no intrinsic value" and that "it was not fully domesticated,—but by nature base."⁶ Implied here is an obligation to assess a dog's value and usefulness, an obligation that was maintained in American legal practice. In this intermediate, imperfect state, dogs are neither wild nor domesticated, neither profitable nor worthless. In the absolute sense, they were simply not property as were other chattels, including slaves. This legal representation of ambivalent status is distinct from that of the slave. As numerous southern courts decreed, it was legally impossible that human chattels occupy a state in between freedom and servitude or between worth and uselessness. If they had no value as instruments of labor or procreation, then they literally had no reason for being and no legal protections against neglect or mutilation, maiming or death.

Slaves had no legal personality in civil law but gained it in criminal law. Dogs, on the other hand, had no property value in criminal law but were granted it in civil law. What both dogs and slaves have in common, however, is their standing outside the concerns of civil life. Let us recall the striking example of *Bailey v. Poindexter* (1858). A master's last will and testament requesting that his slaves be given the option to elect freedom was judged null and void because slaves had no legal capacity to choose. Although the court granted value to the individual slave who performs a job well, this performance was not considered a "civil" act. The rationale depended on an analogy with a dog: only if the service of a "well-trained and sagacious dog," in bringing his owner meat in a basket from a butcher, could "in a legal sense" be understood as "a civil act of the dog" could a slave's services be considered a civil act.⁷

The involvement of dogs in the lives of humans was questioned, documented, and parsed by the law, though dogs were usually entitled to less legal regard and protection than other animals. Dogs became the center of cases of slander, assault, tres-

pass, negligence, or nuisance. In *Findlay v. Bear* (1822), the Supreme Court of Pennsylvania decided that there could be no action of slander for the words "Daniel Bear pilfered a dog, and peddled the dog through the county, and then sold him to John Levingood for five dollars." Even if Bear stole the dog, even if he sold the dog, the law privileges fiction over fact. Since the dog cannot be stolen in law, the words are not slander. Though they might have a basis in reality, they have none in law.⁸

As law became more concerned with dogs, the applicable field of legal ritual expanded. The processes that created the legal personalities of ghosts and humans—either as endowed with rights or as slaves and convicts and other categories of deprivation and undesirability—now extended to dogs.

In some later cases, legal considerations of value granted dogs their status as property. Two opinions by Judge Robert Earl of the New York Court of Appeals exemplify how these rituals could be variously applied to people and dogs in the construction of legal personalities. We have already encountered one, *Avery v. Everett* (1888), in which Earl would enter the fogs and fictions of civil death and advocate its strict application in the case of a prisoner held for life by the state. He was severe in his dissent, pronouncing the litany of dispossession that applied not only to rights and duties but also to the fact of a legal oblivion that knew no exceptions and brooked no compromise.

Seven years earlier, in *Mullaly v. The People of the State of New York* (1881), Earl considered whether a prisoner convicted of stealing a dog worth less than \$25 was rightly condemned. Showing far greater sympathy to dogs than to convicts, he sought to reexamine the common-law precedent that "[w]hile it was not larceny to steal a dog, it was larceny to steal the skin of a dead dog." He countered claims of dogs' baseness and their use as things kept "for the mere whim and pleasure of their owners" with stories that illustrate how "inapplicable to modern society" is the "artificial reasoning" upon which old common-law rules are based:

When we call to mind the small spaniel that saved the life of William of Orange and thus probably changed the current of modern history ... and the faithful St. Bernards, which after a storm has swept over the crests and sides of the Alps, start out in search of lost travelers, the claim that the nature of a dog is essentially base and that he should be left a prey to every vagabond who chooses to steal him will not now receive ready assent.

Ultimately, he held that dogs were "personal property" as defined in the New York Revised Statutes.⁹

Though Earl's opinions were very different in these two cases—in *Avery* he negated legal personality, while in *Mullaly* he brought a creature into legal existence—in each he demonstrated the law's extraordinary power to define and the wide field of existence over which it could be exercised. The law makes things on its own terms, terms that may or may not be accountable to experience depending on the whim and prejudice of a jurist.

Law thus became an influential element in shaping a new understanding of the relation between dogs and humans. In *Hamby v. Samson* (1898), Judge C. J. Deemer of the Supreme Court of Iowa also relates the history of canine law in order to rule that dogs can be the subject of larceny. Were dogs to be included within the definition of chattels, or were they simply imperfect or qualified property, he asked. Dogs were in fact to be deemed "chattels," he argued, in contrast to strict common-law rules. So the dog thief before him was guilty of larceny. Deemer reversed the district court decision that had wrongly discharged the thief. In considering the evolution of property in dogs, he recognized them as ownable: they are taxed, owners are liable for damages they cause, and civil proceedings recognize them as property. And though these regulations could be considered simply as part of the police power of the states and not a legal dispensation, Judge Deemer concludes: "Surely, it was not the intent of the legislature to recognize dogs as property

for the purposes of taxation, and yet leave them to the mercy of thieves."¹⁰

Should a person die for stealing dogs? Sir Edward Coke, chief judge of the Common Pleas (1606–13), aware that death was punishment for taking property worth twelve pence, suggested that such a punishment was inappropriate. But "those ancient law-givers," Earl continues in *Mullaly v. People*, "thought it not unfit that a person should die for stealing a tame hawk or falcon." Past artifices of law that pitch falcons and hawks, once reclaimed, into the service "of princes and of noble and generous persons" are relinquished in favor of a new paradigm of nobility: the bestowing of property status on dogs.

In nearly every household in the land can be found chattels kept for the mere whim and pleasure of the owner, a source of solace after serious labor, exercising a refining and elevating influence, and yet they are as much under the protection of the law as chattels purely useful and absolutely essential.

In this argument on behalf of the negligible but delightful, the salutary if useless dogs find a home in lawfully ordained servility.¹¹

WHY DOGS?

If a dog goes missing, she must be found. In Nashville you drive to a place that houses both criminals and dogs. The large concrete sign at the entrance announces "Sheriff's Correctional Complex." Below is the emblem of a sheriff's badge and in bold black letters the words "OFFENDER RE-ENTRY CENTER." Underneath in equally prominent letters it reads "METRO ANIMAL CONTROL." The juxtaposition marks the precarious status of two kinds of being: dogs being sheltered until claimed or euthanized and humans being welcomed back into the restraints of law. Whereas dogs were surrendered to the chance of being reclaimed or the certainty of death, offenders were being sheltered during incarceration so that they could get help finding jobs and housing. A

promise of reclamation in counterpoint to the threat of disposal. In both cases, this is the place where the lost can be found, but there is always the risk of surrender to the state.

No country kills more dogs or imprisons more people than the United States. Inmates and dogs find themselves together in situations that are matters of life and death—and the ambiguous space in between. After Katrina, the Humane Society in Gonzales, Louisiana, sent more than two hundred dogs to temporary quarters on the grounds of two prisons there, where inmates cared for them. The correspondence between dogs and prisoners, however, is not always as heartening.

At the height of the move to “get tough on prisoners” in 2000, the infamous Sheriff Joe Arpaio of Maricopa County, Arizona, converted a section of the First Avenue Jail in Phoenix into a kennel for abused and neglected animals. He understood the trade-off between dignity and degradation. Ten dogs who were victims of abuse remained in the jailhouse kennel while a criminal investigation of their owners was conducted. Cared for by inmates, the dogs lived in air-conditioned cells, slept on blankets, and, as one news story reported, were “treated to good food and music specially designed to have a calming effect on animals.” Arpaio contrasted his treatment of human inmates—tent cities, posses, “last chance chain gangs,” foul green bologna, pink underwear, bread and water diets—and his care of abused dogs. In the many e-mail exchanges following what one critic called Arpaio’s “dog and pony show,” some writers reflected on “poor dogs” versus “the dregs of society,” others emphasized the abuse of prisoners versus the benevolence toward dogs.¹²

Dogs take their place alongside persons targeted for coercion, control, or worse. A young soldier smiles into the camera in the corridor of Abu Ghraib. In the background are two army dog handlers in camouflage combat gear restraining two German shepherds. The dogs bark at a man. It is difficult to see, since the soldier partially blocks our view. Another image shows the naked Iraqi prisoner. He leans against the cell door, hands clasped behind his neck, crouching in terror. The dogs bark just a few feet

away. In another, taken a few minutes later, the prisoner lies on the ground, writhing in pain. A soldier sits on top of him and presses his knee to his back. Blood streams from the prisoner’s leg. The final shot in these photos of incremental degradation is a close-up of the naked prisoner lying on the floor, just his waist to his ankles in sight. A bite or deep scratch is on his right thigh. There is a larger wound on his left leg covered in blood.

The use of unmuzzled military working dogs, sometimes called “war dogs,” to intimidate prisoners during interrogation at Abu Ghraib was approved by military intelligence officers at the prison. They received instructions from Army Major General Geoffrey D. Miller, who had also told the guards that “you’re treating the prisoners too well. You have to treat prisoners like dogs.” Miller later denied that he ever discussed using dogs during interrogations, acknowledging only that he knew “there’s a cultural fear of dogs in the Arab culture.” He claimed that their use was limited to the custody and control of detainees.¹³

But though the media focus on the use of dogs in prisons like Abu Ghraib and Guantánamo, they have generally ignored the common practice of using dogs to conduct cell extractions in U.S. prisons. In October 2006, Human Rights Watch published the report “Cruel and Degrading: The Use of Dogs for Cell Extractions in U.S. Prisons.” “The use of a fierce animal to control an imprisoned person is inherently humiliating, denying an inmate’s personhood. Terrifying an inmate into compliance also denies his personal integrity. It reduces the inmate himself to an animal crouched in fear in the face of an attack.” In Arizona, Terry Stewart, then director of the Department of Corrections, started the practice of “dog frights” in order to protect staff, or so he testified to the Arizona legislature. The training video *Open Pod Extractions* was made in 1998. Unseen dogs bark in the background, as the voiceover advises no more force than is “reasonable and necessary.” Then, with upbeat music playing, we see the German shepherd held on a long leash, straining toward the cell, as his handler restrains him. We hear the order, “Cuff up or I’ll release my dog, and he will bite you.” The dog pants, the

"inmate" refuses to obey. The cell door is opened, the dog charges toward the dummy of a prisoner, jumps on him, and takes hold of his leg with his teeth. When the handler pulls the dog's leash, the prisoner is pulled out with him, like a bone. As a correctional officer later told me, "It's pretty funny to see the prisoner pee on himself. I think even the dog can't stand the smell. Between the foam on his mouth and the pee on the floor, you can't tell which one's the dog."¹⁴

Something about dogs makes them the subject of jokes as well as a source of terror, not only in sites of torture or abuse but also in cases of law. Dogs are sometimes amusing, sometimes ferocious. In 1856 in the Supreme Court of New York, Judge W. F. Allen responded vigorously to an appeal of a judgment that had awarded damages to the plaintiff whose trespassing dog had died from injuries sustained in a fight with the defendant's dogs and the defendant's subsequent blows. In *Wiley v. Slater*, Allen admits that he has never been asked before to apply the law to the vicissitudes of dog life, certainly not to judge the legal effects of a "pure dog fight."

I am constrained to admit total ignorance of the code duello among dogs, or what constitutes a just cause of offense and justifies a resort to the *ultima ratio regem* [sic], a resort to arms, or rather to teeth, for redress; whether jealousy is a just cause of war, or what different degrees and kinds of insult or slight, or what violation of the rules of etiquette entitle the injured or offended beast to insist upon prompt and appropriate satisfaction, I know not.

He argues that fighting—settling scores and taking revenge—is one of the few privileges left to these animals in their domesticated state. Given this "semi-divine right of dogs to fight," there is no law "human or divine, moral or ceremonial, common or statute" that has ever regulated barking and biting. No rule exists that gives the owner of the losing dog satisfaction from the owner of the victor. Allen reversed the judgment of the county court that had awarded damages to the plaintiff whose dog had

died, but not without a final quip: "The owner of the dead dog would, I think, be very clearly entitled to the skin, although some, less liberal, would be disposed to award it as a trophy to the victor."¹⁵

The English common law, especially when reinvigorated in the United States in the nineteenth century, was hard-pressed to find classifications for dogs as they lived in and were evaluated by human society. Old law conceits about dogs were repeated in modern judgments on dog stealing. *State v. Langford* (1899) in the Supreme Court of South Carolina, in considering an indictment for stealing a dog from a doghouse, recalls the Statute of 10 George III and "the reasoning satisfactory at that day": "[I]t was larceny to steal a tame hawk, but not larceny to steal a tame dog, although it was larceny to steal the hide of a dead dog." Why would a dead dog's skin be worth more than the dog alive? The labor of tanning the skin, making goods from it, and the possibility of profit from their sale—all make something out of nothing. But the South Carolina court decided that a stolen dog should be included in the law of larceny, as well as provided for in civil remedies.¹⁶

By the 1890s, tort cases began to describe, evaluate, and judge the limits of canine injury and death. In the courtrooms of America, dog owners sued for damages when their dogs were wrongfully killed. Going beyond the rule that dogs were imperfect property, as in earlier common-law examples, bereft owners described and judged their dogs' uniqueness. Some argued their dogs were special, indeed irreplaceable, so that recovery in damages could not be limited by their actual market value. Though the vast majority of appellate courts held property in dogs to be restricted, if not negligible, sometimes jurists took account of a dog's inestimable worth. Testimonies of admirable qualities and lineage were recounted in ways that tested the patience of defendants—carriers, railroad and street car companies, and individuals. In *Citizens' Rapid Transit Co. v. Dew* (1898), the Supreme Court of Tennessee held that a street railway company may be liable in damages for negligently running over and killing

a dog. A valuable retriever was running along the turnpike in front of his owner's vehicle when "little birds flying up" attracted his attention. He stopped to "set" or "point them," and the street-car ran over him. Seeing that his dog was fatally injured, the owner shot him to put him out of his suffering.¹⁷

In his decision, the judge affirmed that dogs were now personal property, subject to larceny, with an elevated standing before the law.

Large amounts of money are now invested in dogs, and they are extensively the subjects of trade and traffic. They are the negro's associates, and often his only property, the poor man's friend, and the rich man's companion, and the protection of women and children, hearthstones and henroosts.

Then he referred to the dog's pedigree. A "blue blood," belonging "to the inner circles of the four hundred, a member of the F.F.T., or first families of Tennessee ... of English descent." He also accepted as testimony the dog's reputation as trusted house dog and wide ranger, "thoroughly broken" and "a fine retriever from land or water." Anticipating complaints from those who described the intricacies of dog law as gibberish, he explained: "In the earlier law books it was said that 'dog law' was as hard to define as was 'dog Latin.' But that day has passed, and dogs have now a distinct and well established status in the eyes of the law."¹⁸

A COMMON NUISANCE

In spite of evidence throughout the nineteenth century of concern for dogs and compensation to their owners, in the towns and cities of the United States dogs still walked at great risk. A dog without a collar could be killed with impunity. A dog without a license faced death by gunshot or beating not just from the police, who were entitled to destroy any threat to public welfare, but from anyone else. Dogs knew adversity, rejection, and scorn. Their disposability was enshrined in legal judgments. A

festering odor, smoke from a chimney, the screeching of cockrels or dogs barking in the night—all could be considered a nuisance at common law.¹⁹

In the case of dogs howling, the English cases are significantly less harsh than the American. In *Street v. Tugwell* (1800), Lord Kenyon held that while six or seven pointers howling in a kennel night and day caused a disturbance, their owner could not be held liable for nuisance. Accordingly, though no evidence was given in support of the owner, the jury declined to order him to pay damages. Kenyon refused the distraught neighbor's motion for a new trial. American dogs (and their owners) were less fortunate. Forty years later in *Brill v. Flagler* (1840), the Supreme Court of New York reversed a similar verdict by a lower court in favor of a dog owner. A neighbor, desperate to silence an English setter that had been wandering outside his home incessantly "barking and howling," shot and killed the dog. Though the dog's owner "was fully advised of this mischievous propensity of the animal," he "willfully neglected to confine him." The dog's market value and the possibility of restitution for its loss were wholly irrelevant in "a case of serious and intolerable nuisance."²⁰

When can a dog offensive to humankind be legally killed? And what is the nature of the offense? Defendants are justified in killing a dangerous dog that the owner knowingly allows to run at large. As the court decided in *Putnam v. Payne* (1816) in the Supreme Court of New York, the owner's negligence could be punished by destroying the nuisance: "Such negligence was wanton and cruel, and fully justified the defendant in killing the dog as a nuisance," but judges were careful to note that "killing more useful and less dangerous animals"—such as sheep or cattle—was not acceptable. In *Brown v. Carpenter* (1854), the Supreme Court of Vermont decided that there was no remedy for the killing of a dog known to growl, jump on and bite people, for "such a dog is *hostis communis*, the common enemy, and may be killed by any one." The court, citing previous cases in New York, argued that such a dog must be treated "as an outlaw and a common nuisance, liable to destruction." Later, a Kentucky

appellate court refused to spare even harmless dogs that happened to wander into a neighbor's yard unattended—"even though it be for the propagation of his species, his innocence is no protection to him ... his life is forfeited, if the owner of the premises on which he is found will exact the penalty, and chooses to execute the sentence."²¹

In *Woolf v. Chalker* (1862), the Supreme Court of Connecticut awarded damages to a traveling peddler who came, unannounced and uninvited, into a customer's sitting room and was bitten by the family dog. Though the dog was protecting his owner's wife and children, the court based its judgment on findings of the dog's ferocity: "A man may not, in this country, use dangerous or unnecessary *instruments* for the protection of his property against trespassers. Such instruments may be used in England, but the principles on which their decisions purport to rest are not sustainable or applicable here." The court's language was especially severe when it came to arguing about the dog's propensities: "Thus a ferocious dog accustomed to bite mankind is a common nuisance, and may be destroyed by any one." Admitted to biting mankind, and suffered to run at large, a dog could be killed, even if there was no evidence that it was doing or threatening injury at the time of the killing. The definition of actionable nuisance was broad enough to accommodate barkers as well as biters: "The dog is a *noisy* animal, and may in that way become a nuisance and be destroyed."²²

In these judgments of wrongs, dogs not only act but live *at their peril*. For who is to judge ferocity? How violent must a dog be to cause enough alarm to be labeled "dangerous"? Are evil propensities known by a bite or the apparent desire to injure? Does a single bite justify liquidation? Some later decisions questioned the necessity of such legalized violence against dogs and their owners. In August 1894, William Shand asked the Supreme Court of New York to prevent James G. Tighe, a police justice, from enforcing the fine he had placed on Shand for refusing to kill his dog after it bit a man. In an article entitled "Dogs Must Be Respected," the *New York Times* reported that "Justice Wil-

liam J. Gaynor ... yesterday rendered a unique decision in a dog case, which should endear to him every dog-owner in Brooklyn. He lays down the rule that a dog is property, and as such is entitled to the same consideration as any other kind of property."²³

In the course of an accomplished though now forgotten life, William Gaynor (1849–1913) reshaped New York law, as well as politics, crusading for reform as a journalist, attorney, judge, and ultimately mayor of New York City from 1910 to 1913. During his first year as mayor, he was shot by a disgruntled city employee, the only New York mayor to be the target of an assassination attempt. The bullet remained lodged in his throat until his death three years later. He referred to the injury when he wanted to avoid discussing a sensitive issue: "Sorry, can't talk today. This fish hook in my throat is bothering me." For three years he fought patronage and the machinations of Tammany Hall and rooted out corruption from the police department. He pushed for the construction of a citywide subway and condemned arbitrary government wherever he found it. Gaynor had two mottos: "Ours is a government of laws not man" and "The world does not grow better by force or by the policeman's club."²⁴

Written by "an intimate who knew him," the *New York Times* obituary praises Gaynor, "a farmer's boy," and his "unyielding commitment to civil liberties." "To Mayor Gaynor there were no outlaws. Even the vilest man and woman had rights under the Constitution and the laws." A later biographer described how police oppression moved Gaynor to fury, recalling his words: "Human liberty never was so cheap. The charge of vagrancy was trumped up... If such outrages are to pass quietly, it will come to pass, that no citizen is safe at the hands of the police." Gaynor condemned outlawry as the barbaric relic of an earlier, rude history. He knew that deprivation, taint, and incapacity lived on. Let us recall that as slavery was gradually abolished in New York, civil death for felons stirred to new life in harsher statutes. Speaking about "distributive justice," he cautioned his audience: "[S]o look to it that your own calling does not dwarf

your minds. . . . An animal lives in a little circle, as I know every time I look at my dog, or my horse or my cow or my pig, or even my goose, and within that horizon that animal knows more than we do."²⁵

Not only humans but also dogs were entitled to something more than summary execution. Gaynor's opinion in *People v. Tighe* exemplified its author's warm sensitivity to dogs that bore the brunt of prejudice and police power. Gaynor begins his opinion with the ordinance passed by the common council of Brooklyn:

If any dog shall "attack a person" at any place except on the premises of his owner, upon a complaint being made to the mayor, or a police justice, he shall inquire into the complaint, "and if satisfied of its truth, and that such dog is dangerous, he shall order the owner or possessor of such dog to kill him immediately;" and if the owner refuses to obey the order within forty-eight hours he shall forfeit ten dollars, and also five dollars more every forty-eight hours thereafter until the dog is killed.

Gaynor proceeds to demolish the complaint of the bitten man, Thomas Croke. The dog had not attacked, Gaynor said. Instead, reading Croke's complaint, Gaynor saw that Croke had sworn the dog was on the street with "the owner's boy," and "that (to use his exact words) 'I got hold of the boy and the dog bit me,' so that instead of the dog making an attack, Croke seems to have attacked the boy and the dog defended him." Gaynor therefore not only invalidated Tighe's order that Shand's collie be killed but also granted a writ that prevented enforcement of the fine. In doing so, he vindicated dogs from their degraded status, making potent reference to the common-law rule that "a dog was not property. It was no larceny to steal a dog, though it was larceny to steal a dead dog's hide."²⁶

Repudiating the rule, Gaynor opined: "But the world moves and these crudities no longer exist, and in this state a dog is property," as was decided thirteen years earlier in *Mullaly v. People*. Gaynor described the dog "from the beginning" as "the friend

and solace of man." "The law," he wrote, "has only recognized the testimony of human nature, history and poetry in withdrawing [dogs] from outlawry." The opinion draws upon Motley's *Rise and Fall of the Dutch Republic*, Thomas Moore's *Life of Byron*, and Homer's *Odyssey*. In making the dog full and absolute property, Gaynor demanded that any order to kill a dog must give the dog's owner due process: "Property may not be taken, affected or destroyed except by due process of law, which requires notice of hearing to the owner and opportunity to be heard." Dismissing such "oddities" as valuing a dog's hide or a tame hawk more than a living dog, he attacks the Brooklyn ordinance as "one of those absurdities which we often encounter." But he goes further. He singles out the interference of the police justice as unwarranted. "This ordinance is a fair sample of too much law and government, like many others enacted in Brooklyn, one of which is that no householder shall allow his chimney to take fire."²⁷

We must recognize that Gaynor's enthusiasm for dogs is rare in that particular domain of justice and injustice we think of as law. The necessity of subordinating both humans and dogs to external authority and its rules varied from state to state, but most courts and legislatures came to see dogs increasingly as disturbances or threats. Tougher regulations began to demonstrate the peculiar vigilance of the modern era. In response to this severity, organizations were formed to "protect" and "care for" dogs.

In 1866 the state legislature of New York passed the country's first anticruelty law. In the same year, it issued An Act to Incorporate the Society for the Prevention of Cruelty to Animals and granted it power in vague terms: "An Act for the prevention of cruelty to animals, and empowering certain societies for the prevention of cruelty to animals to do certain things."

These "certain things" creditably included arresting anyone who tortured, tormented, deprived of necessary sustenance, or beat, mutilated, or killed "any living creature." But that was not all. In 1894 a new law gave the ASPCA in New York control over

stray and unwanted animals. Along with this responsibility, it was granted the power to order a license tax on dogs and the right to seize and dispose of dogs it had not licensed. A few years later, a New York court in *Fox v. Mohawk and Hudson River Humane Society* ruled against this authority, since no state could delegate a private corporation to levy or collect taxes. The statute at issue was thus unconstitutional “so far as it requires the owner of a dog to pay a license fee to the defendant for its own use.” Such a requirement—and the profits that followed—gave the Society a special immunity and privilege not granted to others.

But on appeal the court upheld the statute. Though recognized as a private organization, this humane society was now legally authorized to enforce the law, to levy canine taxes, and to impound and destroy unlicensed dogs without notice to the owner and without any judicial proceeding.²⁸

The state’s power over dogs expanded in tandem with its empowerment of the newly established societies for “humane treatment.” Anticruelty statutes came to operate like the flip side of police measures. They worked together. Even today, in Humane Society protocol, dogs labeled as “dangerous” are subject to disposal without a hearing, despite the recognition that they are property. There is also the “potentially dangerous” dog that “chases or approaches a person . . . in a menacing fashion or apparent attitude of attack” or that has “a known propensity, tendency or disposition to attack unprovoked.” In her analysis of these Humane Society instructions, poet, philosopher, and dog trainer Vicki Hearne, who spent the last years of her life writing against breed bans, explained: “The phrase ‘otherwise threaten the safety of human beings or domestic animals’ does a magnificent job of including any dog alive in the category ‘dangerous,’ since existence itself is bound to be a nuisance to someone.”²⁹

To untangle the philosophy of personhood embedded in the rules of law, we must let the legal force of canine disposal speak for itself. In these cases of discrimination and damage, the potent rituals of law come to light. Pushed to define value, prop-

erty, and process when judging dogs in human society, the law goes to great lengths to enshrine the ferocity and mischief that turns them from “high-status animal to low-status person.”³⁰

CANINE FICTIONS

What a load dogs must bear. In the Old Testament, dogs are always hungry. They feast on Jezebel. They devour meat mangled by beasts in the field. They lick up the blood of evildoers or devour the kin of Jeroboam and Baasha. In one of Jeremiah’s many curses, the Lord selects four kinds of destroyers: “the sword to slay, and the dogs to tear, and the fowls of the heaven, and the beasts of the earth, to devour and destroy” (Jeremiah 15:3).

Matthew (15:21–28) tells a dog story that has not received much attention. It is found with some changes in Mark (7:24–30). Here, for the only time in the Old or New Testament, dogs have something to do with salvation. They are the most ignoble thing, at the opposite extreme from holiness, so they wait. Their stillness leads the way, thus becoming the medium for a new kind of sanctity. A parable it is not, for it sets dogs in a precise and imaginable relation to salvation.

A Canaanite woman from the district of Tyre and Sidon, in other words a Gentile, shouts: “Have mercy on me, O Lord, thou Son of David; my daughter is grievously vexed with a devil.” As is often the case, Jesus refuses to recognize the source of recognition. The Canaanite comes and kneels at his feet, “Lord, help me.” Instead of immediately answering her plea, he responds: “It is not meet to take the children’s bread, and cast it to the dogs.”

“Truth, Lord,” she replies, “yet the dogs eat of the crumbs which fall from their masters’ table.” (In Mark the dogs are positioned explicitly “under the table.”) We confront the delicacy of submission, that of both the woman and her dogs. Jesus answers her: “O woman, great is thy faith: be it unto thee even as thou wilt,” and her daughter is healed, no longer possessed. How did her answer prove her faith? According to Matthew Henry in his *Commentary on the Whole Bible* (1828), those whom Christ

means most to honor, he first humbles. The Gentiles, unlike the chosen, the children of Israel, come forth as unworthy as dogs. But so satiated are God's privileged children that they throw away both meat and sweetness, leaving the refuse as crumbs for those ready to receive, and be redeemed.³¹

The Church did not follow this merciful lead. In medieval France and Germany, Jews were suspended by their feet "together with a dog (or dogs) who, depending on local custom, may have been either dead or alive." In the later Middle Ages, Christians called Jews dogs, as Marlowe knew. In *The Jew of Malta*, Barabas confesses, "We Jews can fawn like spaniels when we please / And when we grin, we bite." In Shakespeare, both Shylock and Othello's circumcised Turk are dismissed as dogs; and Shylock in *The Merchant of Venice* warns: "Since I am a dog, beware my fangs."³²

Powerful metaphors for the extremities of abuse, adoration, and prejudice, dogs define the possibilities of fantasy and madness, but in a way that is not altogether inconceivable. Out of the accursed islands of the Encantadas, where tortoises drag under a weight of sun, Melville tells two stories of dogs and their owners: the Chola Widow and the Dog-King. In both stories the dogs die. The action takes place in lands so wrecked that they must be enchanted: "In no world but a fallen one could such lands exist." The Chola Widow Hunila lives alone, stranded on Norfolk Island since her husband's death with "ten small, soft-haired, ringleted dogs, of a beautiful breed." Helped by mariners, she plans to return to her native Payta in Peru. Since all the dogs cannot board the ship, she takes only two and leaves the rest behind on the shore to die. "They did not howl, or whine; they all but spoke." When the Creole, whom Melville names "the Dog-King," takes over St. Charles's Island, he is accompanied by a "cavalry of large grim dogs." A mutiny occurs, and the rabble who had been kept in check by the "cavalry body-guard of dogs" fight them to the death. The mutineers are victors, and "the dead dogs ignominiously thrown into the sea."³³

In Pliny's *Naturalis Historia*, "dog-soldiers" inhabit what is now Libya, and on the Canary Islands "Dog-People" have a dog for a king. But Melville probably brings these legends closer to home. The Dog-King could be Melville's rendering of Donatien Marie Joseph de Vimeur, vicomte de Rochambeau, who arrived in Saint-Domingue with a pack of dogs in February 1802 to become the brutal commander of a French army in tatters. Though Melville's "adventurer from Cuba" remains unnamed ("—I forget his name—," he writes), his dogs become the crux of Melville's fiction. They are reborn as the Dog-King's "canine regiment." Though "of a singularly ferocious character" and possessed of "severe training," the dogs are docile.

According to some historians, what became known as "Rochambeau's dogs" had been brought from Havana by the genteel aristocrat Louis Marie, vicomte de Noailles. When they appeared on the scene, they sported silks, ribbons, and feathered headdresses. In the arena set up in the courtyard of an old Jesuit monastery, Rochambeau used these dogs to torment, mutilate, and kill his enemies. Starved and forced to eat black males, these dogs, most probably mastiffs, did not always perform appropriately. Sometimes the French unleashed the dogs, only to be attacked by them. Other stories recount how these very dogs became food for starving French soldiers.³⁴

The dog becomes absolutely necessary to the demands of servitude. In "Benito Cereno," Captain Delano meditates on benign "naked nature" and the servant Babo, who is as loyal and affectionate as a Newfoundland dog. Melville's dogs also bear witness to the devious taxonomies of natural histories, supported as they are by cultural fantasies. They lay bare the pressures of personhood. In *The Confidence-Man*, Melville extends his comparison. Here the dog is not so much personified as materially bound but not subordinate to the human. Der Black Guinea's crippled legs not only give him "the stature of a Newfoundland dog," but the man's "knotted black fleece" literally becomes the dog itself, no longer someone else's icon of "good-natured" and

"honest" affection. George Orwell also gets into the fray. In "A Hanging," only the dog described as "half Airedale half pariah" has the range of emotions we would identify with persons. His responses, from excitement, joy, and compassion to shame, sorrow, and guilt (it is "conscious of having misbehaved itself"), track the progress of the narrative. Orwell's dog, its response to the hanging, marks the limits of the inhuman, for it is the consummate person.

This iconography has a logic that can easily turn worth into rubbish. Bearing the brunt of the most extreme denigration and at the same time enjoying the greatest affection, dogs are in a precarious space—so ignoble that they are the least cared for and so good that they are the most loved. In the law, this seeming paradox becomes the working definition of dog: so empty of substance that it can accrue to itself all kinds of projections. The excesses of sentiment are as dangerous to the lives of dogs as their cruel treatment by humans.

This double-sided meaning is rendered, undercut, and exceeded in J. M. Coetzee's *Disgrace* (1999), his dark and uncompromising novel about post-apartheid South Africa. Here is the conversation between David Lurie and his daughter Lucy, who has put herself outside the bounds of civil life. She chooses to live "with nothing. Not with nothing but. With nothing. No cards, no weapons, no property, no rights, no dignity." "Like a dog," her father, David Lurie, says. "Yes," she agrees, "like a dog." When she is raped, her dogs are killed. But what counts in this story of brutalization is Lurie's dedication to the shelter dogs that are to be euthanized. To the dogs, especially the dead, Lurie gives dignity, putting them in garbage bags with a solemnity that turns bags into shrouds. He gives these dog bodies, which otherwise might be broken, thrown away like refuse, another kind of burial, something that approaches holiness. That is his salvation, though Coetzee is too wise to present it as such. It is not salvation but grace when he quietly surrenders his favorite dog to death. "Bearing him in his arms like a lamb," Lurie gives up the last sweet thing he might have possessed.³⁵

Literary fictions of dogs are increasingly the center of our attention. And the fictions connected to dogs' sensibility and their often unimaginable torment by humans put them in relation to the habits of law. Because dogs are vessels for the most ardent outpourings of human emotion, when the subject is a dog, questions of good and evil, blame and fault are brought to life in the sharpest relief: a drama of vested interests, conflicts, and affiliations with a long history.

DOG LAW

In early criminal law the thing doing the damage was liable, and through the thing the owner was made accountable. Under the name of deodand, as we have seen, the offending object was forfeited to the victim's kin or the Crown: surrendered for retribution. But this order of things changed radically in modern law. The progress from thing-liability to human responsibility meant that law, as Holmes put it, "is becoming more refined by the increased attention to the culpability of the person charged." If the thing that caused death or injury happened to be a dog, for example, both owner and dog suffered blame and answered for the deed. But the form this justice took must be understood as part of the history of legally induced forfeiture and dispossession.³⁶

Indiscriminate liability belonged, as the legal scholar John H. Wigmore assured his readers, to "primitive times." It "stands for an instinctive impulse," he explained, "guided by superstition, to visit with vengeance the visible source, whatever it be,—human or animal, witting or unwitting,—of the evil result." This confusion about or unconcern with innocence or guilt, which he allied with archaic beliefs or the "irrational spirit" that inspired "the jural doings of primitive society," was for Wigmore a remnant of what Holmes also saw as an early stage in the progress of law "from barbarism to civilization." Although it is comforting to imagine that the "path of law" has moved out of darkness into the light, I have been suggesting that the claims of reason

have never proved enlightenment. Rules of evidence, judicial enquiry, and legal reasoning have not prevented even torture.³⁷

The power of law to sustain, or, rather, summon up archaic debris emerges clearly in what we might call *dog law*: the standards of larceny, liability, and cruelty that apply to dogs in human society. The legal fictions associated with dogs recall an enchanted world where voiceless and presumably mindless things were first personified and then surrendered, forfeited, or exterminated. When it comes to dogs, the instinct of vengeance lingers still. And in their treatment we also see how the law's understanding of tortious acts is an assumption about status.

If proof of a crime depends on establishing mens rea—a criminal intent that was also granted animals in ancient criminal law—an owner's liability for his animal's wrongdoing also came to depend on a strange and, for some legal historians, absurd mode of proof called *scienter* (knowingly). It is a procedure not entirely unconnected to the archaic belief in thing-liability. To recover for injuries caused by a domestic animal, the plaintiff had to prove not only that the animal had a vicious propensity to do the injury, but also that the owner *knew* of this dangerous or mischievous propensity, that he *knowingly* kept or harbored such a creature.

In *The Law Relating to Dogs* (1888), Frederick Lupton thought this rule "consonant neither with moral justice or common sense," and hoped that the law of England might soon adopt the "more reasonable doctrine" of other countries.³⁸ At the time he wrote, only injuries to sheep and cattle made an owner liable without having to prove *scienter*. Glanville Williams was less critical of the *scienter* action.

The general principle in present-day English law is that, apart from cases in cattle-trespass and the ordinary torts of nuisance, negligence, and so on, liability for damage caused by one's animal depends on previous knowledge of its vicious nature. Such knowledge had originally to be proved in all cases, but in modern law it is presumed if the animal in question is one of the

dangerous class. The principle is known as the scienter principle (from the words scienter retinuit in the old form of the writ), and proof of knowledge is called, somewhat ungrammatically, proof of scienter.

Williams admits that such a rule "may at first sight be thought over-refined," since it calls upon us "to examine the mental state of animals, and to pass judgment upon its transgressions in accordance with the ethical standards of human beings." Reasonable ground must be shown by the plaintiff that the dog's ferocious character is known to the owner. Yet in practice, he argues, this "vice," "viciousness," or "malevolence" was not difficult to apply. It did mean, however, that a certain understanding was assumed between owners and dogs, and recognition of that intimate relationship by law. Liability thus determined meant awareness from previous observation or evidence that the animal is "accustomed to bite mankind," as pleading ran in the case of dogs.³⁹

As in other legal issues, however, the dog becomes the exception to the normal assumptions about this proof. In recent American law, knowledge goes out the window when assumptions of ferocity come into play. And under the harsh measures of contemporary statutes, an owner is held strictly liable for his dog's actions with no regard for knowledge or evidence of viciousness. Instead of asking whether or not the owner knew of a dog's propensity to bite, for example, it is enough to presume that a dog had a bad nature, or manifested a threatening attitude or intended to attack. And this intuition or good-faith belief is enough. No proof of *scienter* is necessary. Once a dog is labeled "dangerous"—not by the owner, but by neighbors, police, or anyone else—the owner can be liable for damages and the dog killed without redress.

Numerous cases in the late nineteenth and early twentieth centuries give us examples of the extremity of rhetoric used in judging character but not necessarily behavior: "a threat to mankind," "a fierce and mischievous nature," "a vicious disposition

toward mankind." Let us return briefly to *Woolf v. Chalker*. Here, dogs are deemed "'base,' inferior, and entitled to less regard and protection than property in other domestic animals." Any dog suspected of being mad, liable to become mischievous—"noisy, and a *private nuisance*"—ferocious, or a biter may be destroyed by anyone, at any time. This "discrimination against dogs," the court writes, "results legitimately from their proneness to mischief, their uselessness and liability to hydrophobia, and the consequent base character of property in them."⁴⁰

What constitutes knowledge of an animal's vicious propensity? Statutes making the owners of dogs liable regardless of *scienter* or of negligence, though quite commonplace, varied greatly in detail. Depending on the circumstances, canine characteristics veered between the poles of domestic and wild. Ferocity could at any time break through what some courts judged as nothing more than the veneer of tameness. A great range of dog regulations were considered the legitimate exercises of the state's police power. Immediate, indefinite, and absolute, the police power depended on the control and coercion of alleged threats to civil order—to the safety, welfare, or morality of citizens—whether animal or human. In all the slaveholding states, for example, "a body of men" called "the patrol" exercised "certain police powers, conferred by statute, for the better government of the slave, and the protection of the master."⁴¹ The actions of these patrols, described so powerfully by Bryan Wagner, were concerned "with the slave, first and foremost, as potential threat." The historical range of the police power is immense. Granting virtually unlimited power to state governments, this preemptive justice, the disposal of threats to public welfare "by any means necessary," was to have unfortunate implications in canine-control laws.⁴²

Appeals courts upheld canine-control ordinances based on the principle that the state's police power to manage, sequester, and dispatch dogs was virtually unlimited. The act "to regulate and license the keeping of dogs" was "an exercise of the police, and not of the taxing power of the state" and was "constitutional," a

Wisconsin court ruled in *Carter v. Dow* (1862). The financial and social consequences of such police regulations—a tax on dogs to remunerate sheep owners that could just as easily become a license to ban dogs entirely—were recognized and sustained in *McGlone v. Womack* (1908). The Kentucky appellate court upheld a statute making *everyone* who owns dogs pay a tax for the benefit of those whose sheep had been killed. Thus, in order "to promote the sheep industry," dogs and their owners were held responsible for any canine predator:

[T]he regulation of dogs is within the police power of the State, and ... it is competent for the Legislature to prohibit the keeping of dogs entirely, or, if it is necessary for the public welfare, any other regulation may be adopted which to the Legislature may seem most expedient for the promotion of that end.⁴³

The question of canine outlawry focused on injury or killing, especially when the dog's victims were moneymaking sheep or cattle. In 1855 Lord Cockburn observed in a manner that betokened a generosity mostly lacking from American assessments of injury: "[E]very dog is entitled to have at least one worry." Under early common law, every dog was entitled to "one free bite."⁴⁴ Yet the one-bite or first-bite rule at common law was more complicated than the term might suggest. On one hand, the rule was an absolving principle that required a prior bite to prove knowledge of a dog's aberrant habits. On the other, the law based liability not only on the owner's knowledge but also on his culpability. In other words, liability did not relate to the number of bites allowed before punishment became due, but rather depended on both *culpa* and *scientia*. "Blame can only attach to the owner," Lord Cranworth argued, "when, after having ascertained that the animal has propensities not generally belonging to his race he omits to take proper precautions. ... [T]he culpa or negligence of the owner is the foundation on which the right of action against him rests."⁴⁵

Let us consider the legal evolution of the "one-bite rule," now seen as outmoded and hence absent from the dog-bite or "strict

liability” statutes of most states in America.⁴⁶ Is this an advance in justice? An injured person does not have to prove *scienter* or that the dog owner did anything wrong. In a state with “vicious dog” or “dangerous dog” laws, which are often enforced arbitrarily, a dog sometimes has little chance to survive a wrong. In “Fault and Liability: Two Views of Legal Development” (1918), Nathan Isaacs questioned the divide between absolute liability in the archaic law of injuries and a measure of culpability based on the culprit’s intention. The best example he found for instances of strict liability without fault is a dog owner’s liability. He argued that the law instead of moving forward appears to slip backward into the absolute liability of an allegedly more vengeful time. “Statutes and ordinances raising a presumption of negligence, sometimes ‘conclusive’ in law as well as in fact ... are creeping into the books.”⁴⁷

These surviving fictions are “mere euphemisms for ‘liability without fault’”: “The liability of the owner of a dog is being placed by statute squarely on the ground of ownership independently of negligence even to a greater extent than it was in King Alfred’s day.” In his note, Isaacs contrasted the graduated punishments of a biting or killing dog in Alfred’s *Ancient Laws and Institutes of England*—for the first “misdeed” of biting or killing, six shillings; for the second twelve shillings; for the third thirty shillings—with the summary killing and strict liability in the General Code of Ohio, 1910: “A dog that chases, worries, injures or kills a sheep, lamb, goat, kid, domestic fowl, domestic animal or person, can be killed at any time or place.” And whereas the keeper of the dog in Alfred’s Code must pay the money or give up the dog, as well as pay compensation proportionate to the damage inflicted, the Ohio law reads: “The owner or harbinger of such dog shall be liable to a person damaged for the injury done.”⁴⁸

As others have argued in writing about the deodand or thing-liability, summary executions of dogs by the state and their more considered euthanasia by owners demonstrate, in William Ewald’s words, not that we are “more humane” nor that we have “a greater underlying kindness, or a greater respect for the moral

personality of animals,” but rather “a greater indifference and a shift in metaphysics.”⁴⁹

The regulatory politics of the state and the legal categories emerging from it provided the tacit motive for claims of humanitarian enlightenment. A restructuring of categories of stigma and subjugation occurred at the same time as private property was enmeshed in the idea of the public good. As we have seen, dogs help us to understand how old forms of brutality were transfigured. They were recast through judicial fictions that led to arbitrary discrimination. Owners had no recourse to constitutional rights of due process, and dogs were abandoned to the subterfuges of the state. Usually, courts did not interfere with the carrying out of the police power and the statutes that enforced the law.

The aftereffects of slavery cast a long shadow over dog law. In the late 1890s, courts witnessed a dramatic increase in legal actions against or on behalf of dogs. Landmark cases redefining the state’s power over dogs, their regulation, disposal, and licensing by newly established humane societies were decided alongside constitutional challenges to African Americans’ right to equality of accommodations and integration on railroads. The Supreme Court’s decision in *The Civil Rights Cases* in 1883 marked the end to federal intervention in the ongoing racial discrimination of southern states while creating a new figurative entity: “a mere citizen.” The act of an innkeeper or a common carrier in refusing equal accommodation, the Court argued, did not impose “onerous disabilities and burdens” nor a “badge of slavery or servitude” but instead involved only “an ordinary civil injury.”⁵⁰

In 1896 a case on appeal from the court of appeals in the Parish of Orleans in the State of Louisiana reached the U.S. Supreme Court. *Sentell v. New Orleans and Carrollton Railroad Company* (1897) is unique, since it began with a dog—a “Newfoundland bitch” known as Countess Lona, killed by a streetcar in New Orleans—but soon involved the owner who sought damages for her death. By the time he delivered his opinion in

1897, Justice Henry Billings Brown felt it necessary to supplement his decision in favor of the railroad with a formidable disquisition on dogs' standing as property and their necessary control by the state. The modern conception of the dog as personal property did very little to advance its position in law, since cases such as this not only promoted the ancient view that dogs are imperfect property but also subjected dogs to the repressive classification and discrimination of a subjugated population.⁵¹

Justice Brown delivered this striking opinion on April 26, 1897, nearly a year after his decision in *Plessy v. Ferguson*. In *Plessy* the Supreme Court upheld the constitutionality of racial segregation, mandating separate but equal accommodations for blacks and whites in public facilities—especially railroads. Rejecting Homer Plessy's claim that the East Louisiana Railroad had denied him his rights under the Thirteenth and Fourteenth amendments, the Court denied that "the enforced separation of the two races stamps the colored race with a badge of inferiority." Instead, stigma existed "solely because the colored race chooses to put that construction upon it." State-sanctioned segregation, once joined with the stubborn residues of scientific racism, gave birth to a newly vacuous legal person. Once recognized as citizens, blacks were dispossessed of any personal claim they might have to that very citizenship. Nominal civil and political equality brought with it social ostracism and personal insult. Individuals could thus practice discrimination behind the mask of constitutional guarantees, while state power remained free to enforce racial mandates with increasing violence. The Fourteenth Amendment, Judge Brown argued, had nothing to do with social equality, private choices, even bad conduct, which were beyond the power of law, but only with political and legal equality.⁵²

Although arguing for the new dispensation of freedom, Justice Brown reinforced the allegedly superseded badges and incidents of involuntary servitude. The legal historian Rebecca Scott has engaged with the deviousness of his argument: "The damage thus done was both practical and doctrinal, formalizing the sleight of hand that portrayed an aggressive program of state-imposed

caste distinctions as the mere ratification of custom."⁵³ The exclusionary language of *Plessy*, necessary for the degradation of blacks, gains additional impact and heft when Brown turns to the subject of property, the limits of redress, and the uncertain status of dogs.

Read together, *Sentell* and *Plessy* mark the convertibility between species usually considered distinct. I do not suggest that what happens to dogs is an injustice equal to segregation, but that law can be used to make men dogs and dogs trash. Although the connection might appear simply provocative, Brown's ruling on segregation, harmful property, and strays bears out that link. Such a near wonder occurs when for one reason or another the benefits and privileges usually reserved for persons are extinguished, and a new understanding of personhood is required.

On the morning of March 15, 1893, Mr. George W. Sentell's purebred Countess Lona, registered in the American Kennel Stud Book, followed him on a walk through the streets of New Orleans. Bred to the stud "Young Malcolm" two months before, she was to give birth a week or so later. Sentell had already booked orders for the puppies from that litter. When she stopped "to relieve herself" on the track of a streetcar, "heavy with young" and "not possessed of her usual agility," she was "caught by the car and instantly killed." Sentell sued the railroad for wanton negligence and carelessness in the Civil District Court, and the jury awarded him damages in the amount of \$250. He also challenged the Louisiana statute, Act 107 of 1882, which among other things, conditioned recognition of dogs as personal property upon registration of their value with and payment of taxes to the local government. The district court agreed that this statute was unconstitutional. The dog was property, and both the Fifth and Fourteenth amendments prohibit the government from depriving anyone of "life, liberty, or property, without due process of law."⁵⁴

The Court of Appeals, however, reversed the decision, claiming on one hand that the accident was largely caused by the

owner's lack of prudence and due care. He should have known that her condition made it risky to take her on a busy thoroughfare "without exercising the greatest care and vigilance." The court also argued that Sentell had not complied with state law, which required that his dog be recorded on the assessment rolls. She was due no consideration as property and no legal protection in civil law. Therefore, Sentell was not entitled to damages for his loss. The court also ruled that the Louisiana statute was not in conflict with the Fourteenth Amendment.⁵⁵

When *Sentell v. New Orleans and Carrollton Railroad Company* reached the Supreme Court, Justice Brown argued that constitutional liberties such as due process can be suspended for the public good without in any way harming core principles of liberty and justice. State directives in this class of cases trumped the Constitution. If a dog was a stray, a person a vagrant, then the state had the responsibility to unleash familiar practices of discrimination and control in the name of a newly dispensed equality. This dispensation was undercut by a threat that depended on "legislation of a drastic nature," as Brown put it, as well as the redefinition of property and persons that came along with it.

... in determining what is due process of law we are bound to consider the nature of the property, the necessity for its sacrifice, and the extent to which it has heretofore been regarded as within the police power. So far as property is inoffensive or harmless, it can only be condemned or destroyed by legal proceedings, with due notice to the owner; but so far as it is dangerous to the safety or health of the community, due process of law may authorize its summary destruction.

He returns to the old common-law precedent that dogs are unprotected by criminal laws, since "property in dogs is of an imperfect or qualified nature." Dogs stand between wild animals in which there is no property right and those in which the property right is complete, such as economically useful farm animals. But once money is paid for a license and a tag put on the dog's

collar, the right to property is granted. The dog gains value—and protection—and recompense can be made for her death.⁵⁶

Legalized violence against animals for the benefit of public welfare relies on the same legal calisthenics that produced legalized segregation. Brown's analysis testifies to the pervasive prejudice of the 1890s, since the categories of exclusion necessary to legalize Plessy's assignment to a separate railroad car also applied to dogs. The competition between private and public interests—or individual satisfaction and communal good—became the legal form through which slavery could be reconstructed and the curse of color reinvigorated. In both cases, it was as if the proof of an industrializing world, the railroad, became the instrument for moral disaster. Something harmful, bad, and shocking occurred in both cases, and their judgments depended on the compelling if dubious trade-off between persons and property.

Attorneys for the state of Louisiana in both *Plessy* and *Sentell* presented discrimination as a mere exercise of the state's legitimate police power. Justice Brown not only agreed, but he also provided the logic behind which this injustice could hide. In *Sentell* he countered the claim of property and the desire for recognition with a rationale for valuation, marking, and expense that separates bad dogs from good, worthy from disposable, errant from law-abiding. In Brown's holding, birth and rank are exquisitely applied to dogs, but in a way that echoed, reaffirmed, and ultimately perpetuated other kinds of subjugation, such as those experienced by persons deemed racially inferior. It has never been specifically overruled.

... dogs are not considered as being upon the same plane with horses, cattle, sheep and other domesticated animals, but rather in the category of cats, monkeys, parrots, singing birds and similar animals kept for pleasure, curiosity or caprice. . . . Unlike other domestic animals, they are useful neither as beasts of burden, for draught (except to a limited extent), nor for food. They are peculiar in the fact that they differ among themselves more widely than any other class of animals, and can hardly be said to have a

characteristic common to the entire race. While the higher breeds rank among the noblest representatives of the animal kingdom, and are justly esteemed for their intelligence, sagacity, fidelity, watchfulness, affection, and, above all for their natural companionship with man, others are afflicted with such serious infirmities of temper as to be little better than a public nuisance. All are more or less subject to attacks of hydrophobic madness.

Even those of good breeding can become threats. No one can be sure about dogs, since it is difficult to distinguish among them. They must be registered. They cannot stray. They must be claimed or owned. Brown summarizes at length previous cases that affirmed the right of *any* person at *any* time to kill *any* dog found without a collar or seen without a license. He also relies on a Nantucket statute of 1743, which guaranteed the right to kill "any dog or bitch whatsoever that shall at any time be found there."⁵⁷

He goes further. Even if dogs are considered property in "the fullest sense of the word"—and, he implies, even if they are licensed—they can be destroyed if necessary for public protection. In this instance, dogs are comparable to rotten "meats, fruits, and vegetables." If decayed, he writes, they "do not cease to become private property," but "it is clearly within the power of the State to order their destruction in times of epidemic, or whenever they are so exposed as to be deleterious to the public health." What counts as disposable, and when can due process be surrendered? Disposables can be simply "rags and clothing," which must be destroyed if "they become infected and dangerous," or quite literally society's cast-offs, "vicious, noisy and pestilent" dogs, and—we can surmise—persons dressed in rags, reduced to pauperism, without a home, without work or known means of livelihood. They are liable to extermination if their very destitution signals danger.⁵⁸

Dogs thus legally disabled take their place along with vagrants and criminals. Who or what can be permitted to roam the

streets? Around 1900, courts rallied to support legislative acts that led not only to reenslavement through convict lease and chain gangs, but also to vigilante justice. Police departments used tramp acts or loitering and vagrancy laws to control persons that the public viewed as nuisances. A vagrant was defined as one without visible means of support: in other words, anyone who could not afford to pay the licensing tax—in this case for themselves, not their dogs. And the language of what would become excuses for legal terror against the allegedly noxious was the same whether the subject was human or animal. The suspicion against racial or ethnic minorities was legitimated and exercised through ever more stringent police regulations against dogs.

The law made little effort to suppress righteous wrath. Instead, it tried to regulate it, to use it against those singled out for repression and hate. Brown argued that "a ferocious dog" is looked upon as an outlaw that must be banished from society, with "no right to his life which man is bound to respect." So dogs alleged to be bad were granted legal personality but were not the subject of rights. The familiar argument of reasonableness and necessity was made whenever the argument concerned a risk to society: those entities put outside its protection. The phrase "no right to his life" was repeated countless times when justice was called upon to guard a community against the depredations of vagabonds, paupers, drunkards, prostitutes, or criminals.⁵⁹

Though it may seem odd, even problematic, that I suggest a connection between dogs and persons, or more particularly a Newfoundland dog and an African American—as does Melville's benighted and dangerous Captain Delano in *Benito Cereno*—I want to push this analogy. Perhaps Bryan Wagner's discernment is useful: what matters "is not the idea that the negro is an animal. It does not matter whether the negro is human or animal; that is the racism."⁶⁰ In other words, we can no longer avoid the historical cohabitation of the dog-kind and humans thought too base to be part of civil community. Whether blacks or other

persons imaginatively tarred with the same brush, they are dehumanized and excluded. And once put outside the valuable discriminations of personhood, their claims become nugatory, insignificant, unreal.

Legal language makes possible such a compulsion for analogy: its choice of images, its reiterated terms and punishing effects. It is through the law that persons gain or lose definition, become victims of discrimination or inheritors of privilege. So a report for the West Virginia Bar Association wondered about the reason for the *Sentell* court's relapse into medieval judgments about dogs. Wondering why the court argued for "a maimed right of property in a dog," the writer reflects on places where dogs are eaten or dogs drag sleds, and decides:

The only partially valid reason for refusing to dogs such proud equality as might come from ranging them with thoroughly domesticated animals, like common pigs and "setting" hens, has never been urged by any lawyer or court. Dogs are so humanly intelligent that to give their owners full right of property in regard to them might seem too much like a revival of slavery.⁶¹

In legal rationales, realities are created. As we have seen, old inequalities and racial discrimination are repackaged in unexpected forms. And these inventions succeed only because they reflect "the emotional approval of the community."⁶² Brown makes the link between unidentifiable dogs and their derelict owners. Both are anonymous as they wander the streets under cover of darkness: "As their depredations are often committed at night, it is usually impossible to identify the dog or to fix the liability upon the owner, who, moreover, is likely to be pecuniarily irresponsible."⁶³ Such rationalizations, bound up as they are with "the existence of social control and valuation," are very much part of the pretense of law's objectivity. Whether the subject is human, animal, or an "imagined spirit," and "whether or not it possesses a personality," law can either make an entity the subject of rights or deprive it of the right to have rights.⁶⁴

AFFECTIONATE APPROPRIATION

If it is necessary to correct a wayward animal, then it can be beaten, overworked, mutilated, and killed. Though slavery had ended, its legal rhetoric of protection and allowable injury had not. It is in the treatment of dogs that we see how easily a disquisition on personhood—individual qualities and propensities—and even the consideration of status can not only sustain prejudicial harm but lead to an order for extermination.

When dogs became pets, the law was quick to make amends for previous judgments about their character. The modern conception of dogs as personal property is embodied in both legislative enactments and judicial decisions. A miniature dachshund named Heidi, tethered in her owner's yard, was killed when a garbage collector wantonly threw the emptied trash can at her, laughing as he departed. In *La Porte v. Associated Independents, Inc.* (1964), the Supreme Court of Florida awarded damages for this intentional harming of the dog. "Without indulging in a discussion of the affinity between 'sentimental value' and 'mental suffering,'" the opinion read, "we feel that the affection of a master for his dog is a very real thing." To have human qualities like attachment or devotion, however, is not to be granted legal consideration. While the offending garbage collector and the bereft owner are recognized by the court, the dead dog exists only in so far as it elicits human feeling. When not suspected of ferocity or baseness, therefore, dogs rise in legal estimation but only as a form of "sentimental" property. They thus take their place somewhere between legal personality and domestic chattel. But what kind of creature is this? We read stories about dogs drugged, dressed up, overbred, cloned, or made monstrous as popular hybrid breeds. At some point, too much care becomes cruel.⁶⁵

Once ordained as domesticated and objects of love, dogs are recognized as deserving protection. But their ambiguous status remains, even if reconfigured. Theirs is always an uneven

disposition of privilege. "A pet is not just a thing but occupies a special place somewhere in between a person and a piece of personal property," the Civil Court of the City of New York, Queens County, writes in *Corso v. Crawford Dog and Cat Hospital* (1979). Inhabiting this intermediate space between person and property, between the most loved and the most disdained, the dog exists nowhere in itself. In the law this seeming paradox becomes the working definition of dog: so empty of substance that it can accrue to itself all kinds of properties, no matter that they are paradoxical, even nonsensical. The flesh-and-blood dog that cares, suffers, reacts, and remembers no longer exists. In Port-au-Prince I often heard the proverbial "This is Haiti, where even the dogs commit suicide." As friends explained, "Here dogs jump out of windows, run under cars, and walk into the sea."⁶⁶

Perhaps the more a dog is loved, the more it is perceived as higher in rank or pedigree, the more excessive and immediate the reaction when its fierceness breaks through. Or the more necessary becomes the distinction between beloved, high-status pets and mistreated, lowborn dogs. As we see in bite laws and breed bans, the laws against dogs—even if admired and seen as full property, or perhaps because of this—are repressive, and the label "dangerous" becomes equivalent to proof. And as in early modern inquisitorial procedure, which depended on testimonies about character, not evidence, the current jural doings are pervaded by an essentially superstitious and irrational spirit. Without evidence of wrong done, hunches about the essence, nature, or type of creature result in statutes that condemn them to death and criminalize their owners.

The much-publicized "dog bite epidemic" demonstrates society in the act of turning specific breeds of dogs into what their labels proclaim. With dogs subject to breed-specific legislation, condemned as inherently dangerous or vicious, we see how much the law impinges on and transforms our expectations of what life has to offer. Though legal classifications vary from one city to the next, the police power, as we saw in turn-of-the-century

cases, determines how dogs become victims of exemplary punishment: summarily seized and exterminated when considered threats to public welfare. In May 2005, to take just one example, animal control units in Denver began to round up all pit bulls within city limits. Dogs were taken from their homes and killed without regard to their disposition or demeanor. Pit bull ordinances in other states, though they do not dispose automatically of such dogs, nevertheless single out this breed as objects of stringent control.⁶⁷

Today's pit bull bans tell us more about ourselves than about the breed: about the rituals and the illusions that have become necessary to our survival. The drive to label, condemn, and exterminate has become a moral enterprise. No wonder the stories about pit bulls—at once labeled "vicious" and brutalized by those who so label them—confound the ability to know right from wrong, to judge injury, to discriminate between victims and predators, cruelty and care.

The classification of dogs as "dangerous," like that of prisoners as "security threat" or detainees in the ongoing "war on terror" as "terrorist," is a situation-oriented, highly arbitrary, legislative act. Evidence for the legality of political action loses significance in relation to a general presumption of dangerousness. What is decisive is the status the dog possesses in society: its suspected "innate character" or "vicious propensity" replaces objective characteristics, and even evidence of wrongdoing, thus making the uncertain boundaries between legal and illegal, necessary and arbitrary still more indeterminate.⁶⁸

Severe dog bite laws and breed bans now coexist also with the promotion of kinder, gentler training methods. As police measures against dogs have increased, Americans have eagerly embraced the proof of their affectionate appropriation: pet loss hotlines, pet grief homilies, pet memorial gardens, and pet cemeteries. The yoking together of ruthlessness and kindness, gentleness and brutality, is made effective through the blurring of the distinction between human and nonhuman.

THE LAWS

Let us think about the special world created by law's ritual, which means asking how dogs, so meaty and substantial, became spectralized—the palpable but ghostly fictions of law, as well as the idealized objects of human affection. Though dogs in common law seemed to be the exceptions to every rule, they also prove how the exception becomes commonplace, ever extendable to the disabled, outlawed, civilly dead. Dogs are the vessels that hold the substance of the ancient law. The residues of its history surface intermittently through their bodies.

Gradations of personhood are articulated in law—whether stigmatized bodies or stolen minds. Though the master's dominion judged otherwise, law was not beyond the ken of slaves or their descendants, but something that obsessed them. Nor do its artifices escape the understanding of persons most oppressed by legal narratives. They understand its power and know that the elements of law had a great deal to do with the making of gods and spirits—and political authority. To say that law uses and represents history is to know how it becomes a site of commemoration. How does law materialize memory? As a locus of embodied history, laws become crucial to understanding what it meant when slaves, formerly property, were freed into another kind of status that simply exchanged one kind of bondage for another.

The skin of the civil was assumed to be white, the material envelope that allowed access to respect, rights, and sometimes even life. Since in the old days dogs had no legal value while their skins did, the physical envelope gained precedence and attention over the substance. The laws thus created entities in their own image. In the minds of some, these dogs without skin return. They roam in the night. Recognized as rapacious, predatory, or mischievous, the dogs seek vengeance and push to the limits the meaning of inhuman.

The summary justice of the police power regulates the keeping of dogs, as it once did the possession of slaves and, after emancipation, the criminalization of indigents, derelicts, and other dis-

enfranchised individuals. The move from nuisance to predator was easy and assured. Preventive measures never ceased. The amorphous fear of outsiders always found new bodies of residence. Statutes historically allowed the immediate destruction of dogs, as we have seen, if owners had not licensed, tagged, or muzzled them. The "base nature" or ferocity of dogs though legally condemned easily became instrumental in hunting down errant slaves, even as they remained subject to the inequities of the police power. At the mercy of the very forces that turned them into tools of terror, dogs were an ambiguous force in the law's arsenal.

The Black Code of Georgia (1732–1899), assembled by W.E.B. DuBois for the Negro exhibit of the American section of the Exposition Universelle in Paris in 1900, includes in the list of prohibited acts of cruelty against slaves: "cruelly and unnecessarily biting or tearing with dogs." No mutilation or death that occurred during the canine capture of fugitive slaves was judged illegal if it was unintended and necessary.

How in de name of de Lawd could slaves run away to de North wid dem Nigger dogs on their heels? I never knowed any one to run away. Patterollers never runned me none, but dey did git after some of de other slaves a whole lot.⁶⁹

When it came to disposing of threats, dogs embodied swift, necessary action: whether the dogs that accompanied the "paterollers" in hunting down slaves, or later those tracking down all manner of vagrants or suspected criminals. Even today, blue-tick hounds and redbone hounds, the best tracking dogs in Arizona, scent out escapees—and never lose a quarry.

What is the common terror of peaceable citizens? Not one dog but all dogs, and the persons who return in their bodies seeking vengeance. Noxious creatures, they incarnate the judgment that held them perverse and dangerous. They take chances. They appear in the form of the enemy, in the skin of whiteness, the envelope of the civil, and haunt the communities of the unsuspecting. They give flesh and blood to the law, but

without the rationalization, the veneer of justice or claims of civilization.

When I grew up in Atlanta, the police were known as "the laws." I grew up hearing about the "meat that takes directions from someone." The laws were as terrifying and unknowable as evil spirits. They controlled and judged. I heard stories of the paterollers who could get you if you were found walking outside at night.

The law was angry
 The law was rabid
 It came upon you in the night
 The paterollers
 Seeking you out
 They always came with a white dog
 They were white dogs
 With their white cone hoods
 And their white capes
 Ghosts in the night .

No pateroller caught you as long as you stayed at home. But the paterollers helped along by their dogs soon merged into them, reinforcing an old history of intimacy and threat. So I was warned not to walk alone at night, to beware of the flash of white, the dog that could devour, its fiery eyes fixing you in place. The white dog, I was told, "steals your soul, tears at your flesh, and thieves your mind."

The ghosts of the ancestors always return. What is abused and damaged rises up to haunt. Persons judged outside the law's protection and marked as enemies of the community resort to an alternative understanding of law. Degraded and socially excluded, they interpret legal precepts and proscriptions for themselves and reconceive the rules: not the opposite of law but its haunting. So out of the grit and press of death comes the white dog. Both lawful and spectral, this dog is the lure, putting law squarely in the courts of sorcery and permitting magic to find itself in the temple of law.

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THIS BOOK BEGAN WHEN I SAW CHAIN GANGS ON THE ROADS AND IN the prisons of Tucson, Arizona in May 1995. I was fortunate to meet Michael A. Arra, at that time the spokesperson for the Arizona Department of Corrections. He made possible my initial visits to the death house, death row, Cell Block 2 in the Arizona State Prison Complex-Florence, and later, to Special Management Units 1 and 2 in the Arizona State Prison Complex-Eyman. In the prisons there I owe an immense debt to the inmates I interviewed and to those who wrote letters to me under conditions that became increasingly difficult and risky. In particular, I thank Mark Koch for his legal acuity and courage. The officials who were part of the punitive regime I would soon devote myself to exposing granted me both time and access. For that, I thank those who were very much a part of my initial research: Terry Stewart, at the time the director of the Arizona Department of Corrections; Charles ("Chuck") Ryan, then senior warden of the Arizona State Prison Complex-Florence/Eyman; and James McFadden, who granted me interviews when he was the deputy warden of Special Management Unit 2.

On my first visit to Florence, Arizona, I met the late Della Meadows. Working at the Arizona State Prison-Florence, from March 1, 1948, until her retirement on December 31, 1983, she introduced me to a kinder, gentler time before the retributive practices of the nineties. Not only did she make available necessary archival materials, but her great good warmth softened my encounter with hard labor, lockdown, and chain.

54. G. Edward White in *Tort Law in America: An Intellectual History* (1980; repr., New York: Oxford University Press, 2003), opens his book by announcing: "Torts was not considered a discrete branch of law until the late nineteenth century. The first American treatise on Torts appeared in 1859; Torts was first taught as a separate law school subject in 1870; the first Torts casebook was published in 1874"(3). "'Tortious' wrongs were, in their early history, merely wrongs not arising out of contract and giving rise to civil liability" (14). There is disagreement about the origin of crime and tort and the relationship between them: it depends on how one defines criminal law. If defined as a law that imposes a fine or punishment, this is not distinct from wrongs, broadly defined. If, however, criminal law is defined as imposed by the state or society at large, this is a later development. See, especially, John H. Wigmore, "Responsibility for Tortious Acts," *Harvard Law Review* 7, nos. 6-8 (1893-94): 315-43, 383-405, 441-63; and Paul Hyams, "Does It Matter When the English Began to Distinguish between Crime and Tort?" in *Violence in Medieval Society*, ed. Richard W. Kaeuper (Woodbridge, Suffolk: Boydell Press, 2000), 107-29. On torts generally, see Holmes, *Common Law*, 77-163; Frederick Pollock, *The Law of Torts: A Treatise on the Principles Arising from Civil Wrongs in the Common Law* (1886; repr., Philadelphia: Blackstone, 1887); Plucknett, *Concise History of the Common Law*, 397-99, 428-34; Lawrence Friedman, *History of American Law* (New York: Simon and Schuster, 1973), 410, 428-34; Morton Horwitz, *The Transformation of American Law, 1870-1960*, vol. 2 (New York: Oxford University Press, 1992); and more recently, Barbara Welke's extraordinary *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865-1920* (New York: Cambridge University Press, 2001).
55. In *Ancient Law: Its Connection with the Early History of Society and Its Relation to Modern Ideas* (1861; repr., Boston: Beacon Press, 1963), Henry Sumner Maine explains that "the penal Law of ancient communities is not the law of Crimes," but "the law of Wrongs, or, to use the English technical word, of Torts." Although, he says, the person not the state is addressed as the object of wrong, "it is not to be supposed that a conception so simple and elementary as that of wrong done to the State was wanting in any primitive society." For the fascinating elucidation of the "ancient conception of crime," see Maine, *Ancient Law*, 359-62. Joseph W. Glannon in *The Law of Torts*, 3rd ed. (New York: Aspen, 2005), 74-76, in discussing the "fictitious construct" of the reasonable person, discusses the refusal to consider individual personality in the judgment of the mentally ill, who are held to the same standard as everyone else.
56. Holmes, *Common Law*, 108.
57. *Moses Trauerman v. M.V. Lippincott*, 39 Mo. App. 478, 488 (1890); Holmes, *Common Law*, 79, 110. In civil action, as opposed to criminal, fault was not generally equated with the subjective intent to cause harm.

58. In *The Hidden Holmes: His Theory of Torts in History* (Cambridge, MA: Harvard University Press, 1995), 4, David Rosenberg argues against the description of Holmes as a legal formalist who favored a universal negligence rule instead of strict liability, which protected damages done by industry. In *History of American Law*, Friedman explains that though new tort law in the Gilded Age favored industry over workers, as sympathy for labor increased, tort law was "never a perfect engine of oppression" (416-17).
59. White, *Tort Law in America*, 291-92.
60. Plucknett, *Concise History of the Common Law*, 422. Holmes, *Common Law*, 22-23. See also Thomas Chambers, *A Course of Lectures on the English Law, 1767-1773*, ed. Thomas M. Curley, 2 vols. (Oxford: Clarendon Press, 1987), 2:190, for a discussion of the "several gradations" of animals as property: "some being naturally more susceptible of appropriation than others."
61. W. M. Geldart, *Elements of English Law* (1911; repr., Oxford: Oxford University Press, 1938), 168.
62. See Restatement, 2nd, Torts 507, 509, 6 Witkin Summary of California Law, ch. 9, sec. 1403, quoted in Geragos's letter to Dennis Harara and James Hannawalt, Office of the City Attorney, January 6, 2008. On May 29, 2009, the San Francisco Zoo resolved the Dhaliwal brothers' claims against the city, the zoo, and Sam Singer, the public relations spokesperson. The Dhaliwals were awarded \$900,000.

CHAPTER 7. SKIN OF THE DOG

1. Blackstone, *Commentaries*, 4:236.
2. *Filow's case*, Year Book, Trinity Term, 12 Henry VIII, plea number 3, trans. Theodore W. Dwight in *The Columbia Jurist* 2, no. 23 (March 4, 1886): 266-68, and cited in Glanville L. Williams, *Liability for Animals: An Account of the Development and Present Law of Tortious Liability for Animals, Distress Damage Feasant and The Duty to Fence, In Great Britain, Northern Ireland and the Common-Law Dominions* (Cambridge: Cambridge University Press, 1939), 138-40, and 138, n. 7. *Filow's case* also available at Boston University School of Law, "Legal History: The Year Books; Report #1520.003ss." <http://www.bu.edu/phpbin/lawyearbooks/display.php?id=22103>. See also Theodore William Dwight, *Commentaries on the Law of Persons and Personal Property*, ed. Edward F. Dwight (Boston: Little, Brown, 1894), 450 n. 3.
3. *Filow*, trans. Dwight, 267, 268. In the First Treatise [1680] of his *Two Treatises of Government*, ed. Peter Laslett (1689; repr., Cambridge: Cambridge University Press, 1988), 9.92:209, Locke includes animate beings—animals—as the first item in his list of kinds of personal property; indeed, the "original" property right is the "right a man has to use any of the inferior creatures, for the subsistence and comfort of his life."

4. Plucknett, *Concise History of the Common Law*, 443.
5. Williams, *Liability for Animals*, 140. See also Chambers, *A Course of Lectures on the English Law, 1767–1773* (Oxford: Clarendon Press, 1986), 2 vols., 2.3.15:190–91.
6. *Hamby v. Samson*, 105 Iowa 112 (1898).
7. *Bailey v. Poindexter*, 55 Va. 132, 23 (1858).
8. *Findlay v. Bear*, 8 Serg. & Rawle 571, 1 (1822), available at 1822 WL 1966, 1.
9. *Avery v. Everett* 110 N.Y. 317 (1888). *Mullaly v. The People of the State of New York* 86 N.Y. 365, 367, 368 (1881).
10. *Hamby v. Samson*, 105 Iowa 112, 115 (1898). Deemer's recognition of dogs as chattels refers to the opinion in *Commonwealth v. Hazelwood*, 84 Ky. 681 (1887) in the Court of Appeals of Kentucky, which recognized dogs as chattel and therefore the subject of larceny.
11. *Mullaly*, 367.
12. Since 2007, Arpaio's no-kill animal shelter, MASH, has housed and cared for animals that have been abused or neglected by their caretakers. Rescued by the Animal Cruelty Investigative Unit and taken to what was once the First Avenue Jail, the dogs and cats are fed and cared for by prisoners. Lindsay Isaacs, "Q&A: Unorthodox Management Defines Maricopa Jail," *American City and County*, October 1, 2001, http://americacityandcounty.com/mag/government_qaunorthodox_management_defines/: "It costs \$1.15 a day to feed the dogs and only forty cents a day to feed the inmates, but that's the way it goes around here."

Arpaio's kindness to animals contrasts with his brutal treatment of prisoners. From 2004 through November 2007, he was the target of 2,150 lawsuits in U.S. District Court. See John Dickerson, "Inhumanity Has a Price," *Phoenix New Times*, December 20, 2007, <http://www.phoenixnewtimes.com/2007-12-20/news/inhumanity-has-a-price/1>. The harsh treatment of pretrial detainees and the injuries and deaths in Arpaio's jails have been criticized by the ACLU and Amnesty International. See "Ill-Treatment of Inmates in Maricopa County Jails, Arizona," Amnesty International, August 1, 1997, <http://web.amnesty.org/library/index/engAMR510511997?open&of=eng-2am>. See my early account of Arpaio's packaging of spectacles of punishment and his depersonalization through terror, as well as an account of my visits to Phoenix and interviews with him in 1995 and 1996 in "From the Plantation to the Penitentiary: Chain, Classification, and Codes of Deterrence," in Doris Y. Kadish, ed., *Slavery in the Caribbean Francophone World: Distant Voices, Forgotten Acts, Forged Identities* (Athens: University of Georgia Press, 2000), 198–208. See also William Finnegan's profile, "Sheriff Joe," *New Yorker*, July 20, 2009, 42–48.
13. See "Abu Ghraib Dog Use 'Lacked Rules,'" *BBC News*, March 16, 2006, <http://news.bbc.co.uk/1/hi/world/americas/4812366.stm>; Peter Spiegel, "General Testifies at Abu Ghraib Trial," *Latimes.com*, May 25, 2006, <http://articles.latimes.com/2006/ma/25/nation/na-abuse25>; Eric Schmitt, "Army

- Dog Handler Is Convicted in Detainee Abuse at Abu Ghraib," *New York Times*, March 22, 2006. See also Thom Shanker, "General in Abu Ghraib Case Retires after Forced Delay," *New York Times*, August 1, 2006.
14. "Cruel and Degrading: The Use of Dogs for Cell Extractions in U.S. Prisons," Human Rights Watch, October 2006. Also at the Human Rights Watch website, see "How Dogs Are Used in Cell Extractions," <http://hrw.org/reports/2006/us1006/3.htm>; "Policy and Practice in Seven States," <http://hrw.org/reports/2006/us1006/4.htm>; "Views of Corrections Professionals and Experts," <http://hrw.org/reports/2006/us1006/5.htm>; "Standards Governing Use of Force in Prisons," <http://hrw.org/reports/2006/us1006/6.htm>. In March 2006, the new director of the Arizona Department of Corrections, Dora Schriro, prohibited the practice of using dogs for cell extractions. The Arizona training video is no longer available on the web. Conversation (name withheld), May 28, 1998.
15. *Wiley v. Slater*, 22 Barb. 506 n.p. (1856).
16. *State v. Langford*, 55 S.C. 322, 324 (1899). In this light, dogs are seen as *ferae naturae* like tigers, who are not considered subjects of property until they are killed or subdued.
17. *Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317, 319 (1898).
18. *Citizens' Rapid Transit Co. v. Dew*, 323–24, 326, 327, 324. See also *McCallister v. Sappingfield*, 72 Ore. 422 (1914).
19. *Bradford v. McKibben*, 67 Ky. 545 (1868). In *Commonwealth v. Markham*, 70 Ky. 486, 487 (1870), an owner was forced to pay a fine for the lack of "a brass collar, duly stamped" on a dog, who, ultimately, was executed. At the turn of the century, many states authorized "any person to kill a dog which had no collar on, even though licensed" (*Fox v. Mohawk and Hudson River Humane Society*, 165 N.Y. 517, 521 [1901]), referring to *Morewood v. Wakefield*, 133 Mass. 240 (1882); see also *Morey v. Brown*, 42 N.H. 373 (1861); *Tenney v. Lenz*, 16 Wis. 566 (1863); *Mitchell v. Williams*, 27 Ind. 62 (1866); *Ex parte Cooper*, 3 Tex. App. 489 (1878); and *Jenkins v. Ballantyne* 8 Utah 245 (1892).
20. *Street v. Tugwell* (1800) 2 Selw. N.P. (9th ed. 1838) 1138; *Brill v. Flagler*, 23 Wend. 354, 357, 359 (1840).
21. *Putnam v. Payne*, 13 Johns. 312, 313 (1816). *Brown v. Carpenter*, 26 Vt. 638, 642, 643 (1854). *Bradford v. McKibben*, 546.
22. *Woolf v. Chalker*, 31 Conn. 121, 131, 130, 129 (1862).
23. "Dogs Must Be Respected: Justice Gaynor Rules That They Are Property," *New York Times*, September 2, 1894, discusses the case *The People ex rel. Shand v. Tighe* 9 Misc. 607 (1894).
24. Henry Mann, "William Jay Gaynor as an Intimate Knew Him: The Lawyer, the Judge, the Mayor, and the Man, Described by a Noted Editor-Author Whose Friendship with Him Covered a Long Period," *New York Times*, September 21, 1913; C. J. Sullivan, "William Jay Gaynor, NYC Mayor 1910 to 1913, Has Been Forgotten, Along with His Statue," *New York Press*, July 24, 2001, <http://www.nypress.com/article-4511-william>

- jay-gaynor-nyc-mayor-1910-to-1913-has-been-forgotten-along-with-his-statue.html; The Bowery Boys: New York City History, "Know Your Mayors: William Jay Gaynor," March 4, 2008, <http://theboweryboys.blogspot.com/2008/03/know-your-mayors-william-jay-gaynor.html>.
25. Lately Thomas, *The Mayor Who Mastered New York: The Life and Opinions of William J. Gaynor* (New York: William Morrow, 1969), 92–95.
 26. *The People ex rel. Shand v. Tighe*, 9 Misc. 607, 608, 609 (1894).
 27. *People v. Tighe*, 609, 610.
 28. *Fox v. Mohawk and Hudson River Humane Society*, 165 N.Y. 517 (1901). This extraordinary sequence of cases—from the Supreme Court of New York, Albany County (trial court), to the Supreme Court, Appellate Division, New York (intermediate court), to Court of Appeals of New York (high court)—tests a group of dog owners' right to due process, as well as the right of a private corporation to exercise the power of taxation and dispose of those owners' canine property without due process of law. *Fox v. Mohawk and Hudson River Humane Society* (March 1897); *Fox v. Mohawk and Hudson River Humane Society* (January 1898); *Fox v. Mohawk and Hudson River Humane Society* (February 1901).
 29. Vicki Hearne, *Bandit: The Heart-Warming True Story of One Dog's Rescue from Death Row* (1991; repr., New York: Skyhorse, 2007), 159. See also Colin Dayan, "Dead Dogs: Breed Bans, Euthanasia, and Preemptive Justice," *Boston Review*, March–April 2010.
 30. James Serpell, ed., *The Domestic Dog: Its Evolution, Behaviour and Interactions with People* (Cambridge: Cambridge University Press, 1995), 254.
 31. Matthew Henry, *Commentary on the Whole Bible*, 6 vols. (1828; repr., Peabody, MA: Hendrickson, 1991), 5:177–78.
 32. I am indebted here to Elliott Horowitz's review essay, "Circumcised Dogs from Matthew to Marlowe," *Prooftexts* 27, no. 3 (2007): 531–45.
 33. Herman Melville, "The Encantadas, or Enchanted Isles," in *Piazza Tales*, 148–49, 160–62.
 34. See White, *Myths of the Dog-Man*, 51–53 and 59, for a discussion of these dog warriors, as well as others. For an account of the dogs' arrival in Saint-Domingue, see Thomas Madiou, *Histoire d'Haïti (1492–1846)*, 8 vols. (Port-au-Prince: Editions Henri Deschamps, 1989), 2:506; and Beaubrun Ardouin, *Etudes sur l'histoire d'Haïti*, 2nd ed. (1853–60; repr., Port-au-Prince: Chez l'éditeur, Francois Dalencour, 1958), 5:84–85. See Sir James Barskett, *History of St. Domingo* (London: Frank Cass, 1972), for his account of the bloodhounds the French were forced to eat in the last months of 1803.
 35. J. M. Coetzee, *Disgrace* (New York: Penguin Books, 1999), 205, 220.
 36. Oliver Wendell Holmes, "Primitive Notions in Modern Law," no. 1 (1876) in *The Collected Works of Justice Holmes: Complete Public Writings and Selected Judicial Opinions of Oliver Wendell Holmes*, ed. Sheldon M. Novick (Chicago: University of Chicago Press, 1995), 3:10.

37. Wigmore, "Responsibility for Tortious Acts," 316–17, part 1 of three-part article; Holmes, *Common Law*, 5.
38. Frederick Lupton, *The Law Relating to Dogs* (London: Stevens and Sons, 119 Chancery Lane, 1888), 4–5, 7–13. The Dog Act of 1865 (28 & 29 Vict. C. 60), held the owner strictly liable for injury to sheep and cattle, but not to humans.
39. Williams, *Liability for Animals*, 273.
40. *Woolf v. Chalker*, 127, 128, 129.
41. Cobb, *Inquiry into the Law of Negro Slavery*, 107.
42. See Wagner, *Disturbing the Peace*, 7–20. The "police power," as Wagner argues, was coined by Chief Justice John Marshall in *Brown v. Maryland*, 25 U.S. 419 (1827), but was critically delineated in *Mayor, Alderman, and State of New York v. Miln*, 36 U.S. 102 (1837), and *Commonwealth v. Alger*, 61 Mass. 53 (1851). For a discussion of how the legal definition of police power increased in the late nineteenth century as state governments regulated a great number of public institutions, see Gary Gerstle, "The Resilient Power of the States Across the Long Nineteenth Century: An Inquiry into a Pattern of American Governance," in *The Unsustainable American State* (New York: Oxford University Press, 2009), 61–88.
43. *Carter v. Dow*, 16 Wisc. 298, 303 (1862); *McGlone v. Womack & Co.*, 129 Ky. 274, 277, 284 (1908).
44. Lord Cockburn in the Scottish appeal of *Fleeming v. Orr*, 2 Macq. 14 (1855). Most dangerous-dog laws are local, and they differ significantly from state to state.
45. Lord Cranworth in *Fleeming v. Orr*, discussed in E.O.S., "Injuries by Domestic Animals," *Journal of the Society of Comparative Legislation* 1, no. 1 (March 1899): 54–61, 57–58.
46. Although a majority of states have some form of strict liability rule for harm caused by pet dogs, not all states have eliminated the scienter doctrine, or some modern version of it. See J. Hoult Verkerke, "Notice Liability in Employment Discrimination Law," *Virginia Law Review* 81, no. 21 (1995): 278 n. 10. Approximately thirty-four states and the District of Columbia apply the strict liability standard for dog bites or other personal injury done by dogs. See Animal Legal and Historical Center at Michigan State University College of Law, "Quick Overview of Dog Bite Strict Liability Statutes," <http://www.animallaw.info/articles/qvusdogbiteslstatutes.htm>.
47. Nathan Isaacs, "Fault and Liability: Two Views of Legal Development," *Harvard Law Review* 31, no. 7 (1918): 961. Melville M. Bigelow, *Leading Cases on the Law of Torts: Determined by the Courts of America and England* (Boston: Little, Brown, 1875), 491. These states alone maintain the "one-bite rule": Alaska, Arkansas, Colorado, Delaware, Georgia, Idaho, Kansas, Maryland, Mississippi, Missouri, Nevada, New Mexico, New York, North Carolina, North Dakota, Oregon, South Dakota, Tennessee, Texas, Vermont,

- Virginia, and Wyoming. See Mary Randolph, *Every Dog's Legal Guide: A Must-Have Book for Your Owner*, 6th ed. (Berkeley, CA: Nolo, 2007), 235.
48. Nathan Isaacs, "Fault and Liability," 961 and 961 n. 15. See also Wigmore, "Responsibility for Tortious Acts," part 1, 325–26; Bigelow, *Leading Cases on the Law of Torts*, 491. Some legal historians have argued that no one in Anglo-Saxon times would have thought a dog worth even six shillings. "A choice between giving up the animal and paying for its damage would thus have been no choice at all." So Alfred's largesse was moot.
 49. Williams, *Liability for Animals*, 271–73. Isaacs, "Fault and Liability," 961 n. 5. Ewald, "What Was It Like to Try a Rat?" 1889–2149, 1915, esp. 1891–975. See Piers Beirne, "The Law Is an Ass: Reading E. P. Evans, 'The Medieval Prosecution and Capital Punishment of Animals,'" *Society and Animals: Journal of Human-Animal Studies* 2, no. 1 (1994): 27–46; Marilyn Katz, "Ox-Slaughter and Goring Oxen: Homicide, Animal Sacrifice, and Judicial Process," *Yale Journal of Law and the Humanities* 4, no. 2 (Summer 1992): 249–78; Jen Girgen, "The Historical and Contemporary Prosecution and Punishment of Animals," *Animal Law* 9 (2003): 97–133, part 3, 122–33.
 50. *Civil Rights Cases*, 109 U.S. 3, 25, 37 (Harlan dissenting), 24 (1883).
 51. *Sentell v. New Orleans and Carrollton Railroad Company*, 166 U.S. 698, 700 (1897).
 52. *Plessy v. Ferguson*, 163 U.S. 537, 551 (1896).
 53. Rebecca J. Scott, "The Atlantic World and the Road to *Plessy v. Ferguson*," *Journal of American History* 94, no. 3 (December 2007): 726–33, 731. For Scott's later analysis, see "Public Rights, Social Equality, and the Conceptual Roots of the *Plessy* Challenge," *Michigan Law Review* 106, no. 5 (March 2008): 777–804, 800: "The language of the majority decision thus incorporated a key tenet of white supremacist ideology—the sleight of hand through which *public rights* were re-characterized as importunate *social claims*." For two other recent analyses of the legal discrimination of *Plessy v. Ferguson*, see Saidiya Hartman, *Scenes of Subjection: Terror, Slavery, and Self-Making in Nineteenth-Century America* (New York: Oxford University Press, 1997), 193–26; and Barbara Young Welke's analysis of *Plessy* within the ever-widening law of racial segregation and railroads in *Recasting American Liberty: Gender, Race, Law, and the Railroad Revolution, 1865–1920* (New York: Cambridge University Press, 2001), 323–75.
 54. *Sentell v. New Orleans and Carrollton Railroad Company* (decided April 26, 1897), 700, 705. The quotations are also taken from the transcript of record, Supreme Court of the United States, October term, 1896, with briefs for defendant and plaintiff in *U.S. Supreme Court Records and Briefs*. Act 107 is the Rev. St. La. § 1201 as amended July 5, 1882.
 55. *Sentell* (decided April 26, 1897), 700. After the passage of the Fourteenth Amendment (1868), cases such as *Slaughter-House* (1873) and *The Civil*

- Rights Cases* (1883) whittled away at due process by attacking equal access to "life, liberty, or property."
56. *Sentell*, 706, 705, 701.
 57. *Sentell*, 701, 703.
 58. *Sentell*, 704, 705.
 59. *Sentell*, 702. See *Ruffin v. Commonwealth*, 62 Va. 790 (1871).
 60. Wagner, *Disturbing the Peace*, 20.
 61. West Virginia Bar Association, Executive Council, "The Legal Disabilities of Dogs," *West Virginia Bar Association* 4, no. 7 (1897): 131. Opening the discussion of the case with "On Monday the Supreme Court of the United States gave a decision . . ." the report bears the date 1896, presumably a misprint.
 62. Alexander Nékám in *The Personality Conception of the Legal Entity* (Cambridge, MA: Harvard University Press, 1938), 9–10, 25–26, discusses how anything "can become a subject—a potential center—of rights, whether a plant or an animal, a human being or an imagined spirit" (29). He should be read in conjunction with Christopher Stone's "Should Trees Have Legal Standing?" in *Should Trees Have Standing? And Other Essays on Law, Morals and the Environment* (Dobbs Ferry, New York: Oceana, 1996), 1–49.
 63. *Sentell*, 705–6.
 64. Nékám, *Personality Conception*, 10, 26.
 65. *La Porte v. Associated Independents, Inc.*, 163 So. 2d 267, 269 (1964). The phrase "sentimental property" is coined in *El Tribunal Supremo de Puerto Rico in Infante v. Leith*, 85 D.P.R. 26 (1962), a particularly gruesome case of dogs in Puerto Rico seized from their owners and thrown off bridges to their deaths. In "The Legal Status of Animals Under Animal Welfare Law," *Environmental and Planning Law Journal* 9 (February 1992): 20–30, Philip Jamieson describes the excess of care as oblivious to the suffering or death of the animal while privileging the human: attending either to the "guilty mind" of the offender or to the monetary loss and mental distress of the master. On drugged cats and dogs, see James Vlahos, "Pill-Popping Pets," *New York Times Magazine*, July 13, 2008, 38–45, 54. On legal responses to such anthropomorphic biases, see Lynn A. Epstein, "Resolving Confusion in Pet Owner Tort Cases: Recognizing Pets' Anthropomorphic Qualities Under a Property Classification," *Southern Illinois University Law Journal* 26, no. 1 (Fall 2001): 31–52; Jerrold Tannenbaum, "Animals and the Law: Property, Cruelty, Rights," *Social Research* 62, no. 3 (Fall 1995): 539–607; Eric W. Neilsen, "Is the Law of Acquisition of Property by Find Going to the Dogs?" *Thomas M. Cooley Law Review* 15 (1998): 479–516. See also the Animal Welfare Act at U.S. Department of Agriculture, National Agricultural Library, <http://www.nal.usda.gov/awic/legislat/awa.htm>. For a daring redefinition of "[c]ompassionate action" and the "category making and unmaking" at stake in claiming dogs as "companions," see Donna J.

- Haraway, *When Species Meet* (Minneapolis: University of Minnesota Press, 2008).
66. *Corso v. Crawford Dog and Cat Hospital*, 97 Misc. 2d 530, 531 (1979).
67. In 2005, Denver reinstated its pit bull ban. See "Denver's pit bull ban roils owners," *The Christian Science Monitor*, July 17, 2005. See also *Colorado Dog Fanciers, Inc. v. City and County of Denver*, 820 P.2d 644 (1991). In "The New Breed of Municipal Dog Control Laws: Are They Constitutional?" *University of Cincinnati Law Review* 53, no. 4 (1984): 1067–82, Lynn Marmer discusses the unconstitutionally vague pit bull ordinances and questions whether the passage of canine control laws is "a constitutionally legitimate exercise of a city's police power to protect the public's safety and welfare" (1067). Numerous pit bull owners tried to save their dogs from breed bans, and Vicki Hearne's experience following her rescue of Bandit is just one example of how the police and legislative ordinances single out not only the dogs but their owners as well—usually suspect because of race, ethnicity, or poverty—for vilification and harassment. In 1989, the U.S. District Court for the Southern District of Ohio in *Vanater v. Village of South Point*, 717 F. Supp. 1236, referred to *Sentell* and reaffirmed its discrimination based on the language of scientific racism: "The Court finds that the Ordinance is a reasonable response to the special threat presented by the Pit Bull dog breed based upon their phenotypical characteristics and the traits which have been bred into the breed by their owners" (1243). The ban against pit bulls and all manner of dogs randomly included in this designation continues. In January 2008, Responsible Owners of Arkansas Dogs (ROADS) filed a constitutional challenge in federal court against ordinances that regulate pit bulls, in this case in four Arkansas cities, described in a chilling website: DogsBite.org: Some Dogs Don't Let Go, at <http://www.dogsbite.org/blog/2008/01/arkansas-group-appeals-to-federal-court.html>.
68. There are some legal exceptions to dog bites and the death penalty. In *Phillips v. San Luis Obispo County Department of Animal Regulation*, 183 Cal. App. 3d 372 (1986), a court of appeal of California reversed the lower court and ruled that Missy—a black Labrador who had bitten at least three children—should not be destroyed, since owners had not been given notice and a hearing. The court declared that Missy "shall live and 'go out in the midday sun'" (374). For a sampling of Internet coverage of "Zero Tolerance: Dog Bites," see <http://www.dogbitelaw.com/PAGES/danger.htm> and <http://www.dogbitelaw.com/PAGES/crim.html>.
69. W.E.B. DuBois, "The Black Code of Georgia," an exhibition at the Exposition Universelle, Paris, April 15–November 12, 1900; George P. Rawick, ed., "Elisha Doc Garey, Ex-Slave in Georgia, Age 76," in *The American Slave: A Composite Autobiography*, vol. 12 (1941; repr., Westport, CT: Greenwood, 1972). See also William Goodell, *The American Slave Code in Theory and Practice* (New York: American and Foreign Anti-Slavery Society, 1853), 237.

BIBLIOGRAPHY

CASES

- Atkins v. Virginia*, 536 U.S. 304 (2002)
- Avery v. Everett*, 110 N.Y. 317 (1888)
- Bailey v. Poindexter's Executor*, 55 Va. 132 (1858)
- Banks v. Beard*, 399 F.3d 134 (2005)
- Baze v. Rees*, 553 U.S. 35 (2008)
- Beard v. Banks*, 548 U.S. 521 (2006)
- Bell v. Wolfish*, 441 U.S. 520 (1979)
- Boyce v. Anderson*, 27 U.S. 150 (1829)
- Bradford v. McKibben*, 67 Ky. 545 (1868)
- Brill v. Flagler*, 23 Wend. 354 (1840)
- Brown v. Carpenter*, 26 Vt. 638 (1854)
- Bryan v. Walton*, 14 Ga. 185 (1853)
- Burchill v. Hermesmeyer*, 212 Tex. Civ. A. S.W. 767 (1919)
- Carnahan v. Hamilton*, 265 Ill. 508 (1914)
- Carter v. Dow*, 16 Wisc. 298 (1862)
- Citizens' Rapid Transit Co. v. Dew*, 100 Tenn. 317 (1898)
- Civil Rights Cases*, 109 U.S. 3 (1883)
- Colorado Dog Fanciers, Inc. v. City and County of Denver*, 820 P.2d 644 (1991)
- Commonwealth v. Alger*, 61 Mass. 53 (1851)
- Commonwealth v. Hazelwood*, 84 Ky. 681; 2 S.W. 489 (1887)
- Commonwealth v. Markham*, 70 Ky. 486 (1870)
- Corso v. Crawford Dog and Cat Hospital*, 97 Misc. 2d 530, 415 N.Y.S.2d 182 (1979)
- Creswell's Executor v. Walker*, 37 Ala. 233 (1861)
- Dred Scott v. Sandford*, 60 U.S. 393 (1857)
- Duckworth v. Franzen*, 780 F.2d 645 (7th Cir. 1985)
- Elder v. Elder*, 31 Va. 252 (1833)
- Estelle v. Gamble*, 429 U.S. 97 (1976)
- Ex parte Cooper*, 3 Tex. App. 489 (1878)
- Farmer v. Brennan*, 511 U.S. 825 (1994)
- Findlay v. Bear*, 8 Serg. & Rawle 571 (1822)
- Fleeming v. Orr*, 2 Macq. H.L. Sc. 14 (1855)