

ARTICLES

SPEAKING FOR THE MODERN PROMETHEUS: THE SIGNIFICANCE OF ANIMAL SUFFERING TO THE ABOLITION MOVEMENT

*Listen to my tale; when you have heard that,
abandon or commiserate me as you shall judge
that I deserve. But hear me.*

—Mary Wollstonecraft Shelley,
*Frankenstein: Or the Modern
Prometheus*¹

By
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There is a great divide in animal advocacy between Abolition and Welfare. Abolitionists seek to end the property status of animals. Welfarists, while acquiescing in the categorization of animals as property, seek to improve the conditions in which those animals live and die. Abolitionists have worked

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¹ Mary Wollstonecraft Shelley, *Frankenstein: Or the Modern Prometheus* 124 (Oxford U. Press 2008). The reference in the Article's title to "The Modern Prometheus" alludes not only to the tormented figure from Greek mythology, but more specifically to the character in Shelley's book *Frankenstein: Or the Modern Prometheus*. The subtitle is typically omitted from modern printings. The quotation below the title of this Article is from the 2008 edition by Oxford University Press, which does include the subtitle.

toward their goal for decades, and Welfarists toward theirs for centuries, but animals continue to suffer and die in ever-increasing numbers.

This Article reviews the theories and methods of Abolitionists and Welfarists and suggests one reason that they have failed to relieve animal suffering and death: Welfarists use the right tool in the service of the wrong goal; Abolitionists work toward the right goal but expressly decline to use the right tool. Specifically, Welfarists accurately portray the appalling conditions in which animals live and die, but they inaccurately claim that welfare measures can remedy those appalling conditions without any challenge to the property status of animals. Abolitionists correctly assert that the exploitation of animals must end, and they depict the astonishing rate at which animals are killed and eaten, but they typically spare their audience the unpleasant subject of animal suffering. The thesis of this Article is that the tide of animal suffering and death will turn only when Abolitionists employ the tool used to achieve social change throughout the history of the United States: accurately depicting the suffering of the oppressed, in image and narrative.

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I. INTRODUCTION: THE TORTURED PRISONER AND THE THIRSTY COW

Activists seeking to abolish the property status of animals disagree among themselves on this point: whether they should support welfare measures that would improve the treatment of animals but not end their exploitation. In one of the better-known explorations of this issue, Professor Gary L. Francione argues against incremental measures to improve the treatment of animals, and Ingrid Newkirk, Executive Director of People for the Ethical Treatment of Animals (PETA), argues in favor of such measures. Newkirk claims that there is no valid reason for Abolitionists to withhold support for measures that would relieve animal suffering, such as a statute requiring that cows in transport be given water at certain time intervals.² She equates refusal to support such a statute with the act of an individual who could easily have given water to a thirsty cow being transported to the slaughterhouse but declined to do so.³ Newkirk also argues that a law requiring water for cows can serve as a stepping stone leading to the ultimate goal of abolishing the exploitation of animals.⁴

According to Francione, however, the appropriate metaphor is not the individual encountering the thirsty cow, but a prison guard giving some measure of comfort and kindness to innocent prisoners being tortured in the prison where he works. For example, he provides them with water.⁵ Eventually, the guard quits his job at the prison and works with a human rights organization in order to oppose the institutions that cause innocent people to be imprisoned and tortured for dis-

² Gary L. Francione, *Animal Rights and Animal Welfare*, 48 Rutgers L. Rev. 397, 422–23 (1996).

³ *Id.* See also Steven M. Wise, *Animal Welfare, Animal Right, or Something Else? Thunder Without Rain: A Review/Commentary of Gary L. Francione’s Rain Without Thunder: The Ideology of the Animal Rights Movement*, 3 Animal L. 45, 54–55 (1997) (discussing the thirsty-cow debate).

⁴ Francione, *Animal Rights and Animal Welfare*, *supra* n. 2, at 463.

⁵ *Id.* at 423–24.

agreeing with the government.⁶ In his new position, he faces choices. He may decide to work “within the system,” making compromises in order to obtain a flimsy pretense of legislative protections for prisoners.⁷ Or, instead, he may educate his friends, neighbors, and others about human rights, bringing about change in public opinion so that prisons such as the one where he worked will eventually close.⁸

Just as Newkirk uses her thirsty cow metaphor to argue that the adoption of welfare measures will eventually lead society toward Abolition,⁹ Francione argues that the adoption of welfare measures will hinder progress toward Abolition.¹⁰ This hindrance will occur because, *inter alia*, people who erroneously believe that the law requires the humane treatment of animals will find comfort in that belief as they continue to exploit animals.¹¹ Francione does not assert that all animal exploitation will end overnight; rather, he sets forth criteria to be used in identifying interim measures that can be stepping stones to Abolition.¹² One such measure is education that promotes veganism.

No metaphor can encompass all aspects of this problem. The following retelling of Newkirk’s thirsty-cow story, however, more completely reflects the experience of animal advocates who support welfare measures. Imagine that when the kind passerby is about to give water to the cow, the truck driver arrives and asks what she is doing. She states her intent to give water to the cow. The truck driver says he must obtain permission from his employer, the slaughterhouse that is the cow’s destination. The truck driver contacts the slaughterhouse owner, who worries that the passerby’s work could be seen as an indication that his slaughterhouse does not properly care for animals on their way to slaughter. The owner of the slaughterhouse suggests that the truck driver accept the bucket of water from the passerby, put it in the cab of his truck, and give it to any cow who, in the driver’s judgment, appears to need water during the trip. The truck driver takes the bucket from the passerby. Curious about what will happen, the passerby follows the truck on its way to the slaughterhouse. The

⁶ *But see* Wise, *Animal Rights and Animal Welfare*, *supra* n. 3, at 55–56 (suggesting that if Francione’s prison guard resigns and openly works for human rights, he may well find himself back at the prison as a prisoner instead of a guard).

⁷ Francione, *Animal Rights and Animal Welfare*, *supra* n. 2, at 424.

⁸ *Id.* at 425. The former prison guard cannot perform both functions. Taking such an approach, as People for the Ethical Treatment of Animals [hereinafter PETA] purports to do, involves risks, including the risk that the former guard’s organization would suffer some loss of credibility as a result of taking one position in education efforts and a different position with the legislature.

⁹ *Id.* at 463.

¹⁰ *Id.* at 426.

¹¹ *Id.* See George Messenger, “Handle with Care” Is No Simple Task, *Concord Monitor* 13 (Apr. 19, 2009) (available at <http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20090419/LIVING03/904190339> (Apr. 19, 2009) (last accessed Nov. 21, 2009)) (explaining that the columnist’s daughter, who was previously vegan, resumed the consumption of meat, eggs, and dairy while visiting a less-developed nation where, she believed, animals were treated humanely).

¹² Francione, *Animal Rights and Animal Welfare*, *supra* n. 2, at 463.

truck driver never gives any water to any cow, even though many of them are so thirsty their tongues are swollen and black.

When the passerby and the truck arrive at the slaughterhouse, the passerby finds several news reporters there. She talks with one of them and learns that the owner of the slaughterhouse is about to hold a press conference. Within a few minutes, the owner of the slaughterhouse appears in front of the building and announces a new animal-welfare program. The central feature of this new program, he says, is the provision of water to cows who are in transit whenever the driver determines it is necessary in order to relieve thirst. Footage of the slaughterhouse owner announcing the new welfare initiative is featured on the local evening news. At their annual banquet later that year, an animal protection organization gives its Humane Citizen of the Year Award to the slaughterhouse owner for his animal welfare program benefitting thirsty cows.

A few months later, a motorist passes a truck bearing the name and telephone number of the same slaughterhouse. He sees a cow who appears to be terribly thirsty. He contacts the slaughterhouse and is reassured that the cow was not actually suffering because the slaughterhouse has adopted a thorough animal-welfare program for thirsty cows, which has been approved by a leading humane association.

Today's animal activist (whether individual or organization) deciding whether to support welfare laws is not in the position of the passerby at the beginning of this story, weighing whether to give water to the cow. Today's activist is instead represented by the passerby when the story has ended, as she is considering whether to continue her efforts to improve the treatment of the cows on the truck that stops in her town. For example, she has noticed that flies plague the cows, and she wants to meet the truck the next day and use a fan to blow away these flies. She is not certain her good deeds will have their intended effect, and she is aware that the result of her efforts may be another press conference with the slaughterhouse owner proudly announcing his latest animal-welfare program.¹³

Part II of this Article examines the reasons animals continue to suffer and die in staggering magnitudes in spite of the efforts of two prominent animal advocacy movements: Welfarism and Abolitionism. Part III addresses whether the "animal-rights movement" exists, and if so, whether that movement can succeed where Abolition and Welfare have not. Part IV argues that animal suffering and death of animals will be relieved by changes in the law only when the Abolitionist message, in addition to emphasizing the wrongfulness of exploiting animals, gives due emphasis to the wrongfulness of causing animals to suffer. Part V reviews some of the circumstances in which animals live

¹³ Although this passerby never became an "insider," her efforts were still co-opted by the slaughterhouse. Francione has described, in his prison-guard metaphor, some of these same ills that result from Welfare efforts. *Id.* at 426.

and die along with a recommendation that progress in animal advocacy depends on using the right tool for the right task.

II. ANIMAL SUFFERING AND EXPLOITATION PERSIST IN SPITE OF ABOLITIONISM AND WELFARISM

It was dark when I awoke . . . I was a poor, helpless, miserable wretch. I knew and could distinguish nothing; but feeling pain invade me on all sides, I sat down and wept.

—Mary Wollstonecraft Shelley,
*Frankenstein: Or the Modern Prometheus*¹⁴

Abolitionists have worked for a few decades, and Welfarists for much longer, seeking to benefit animals. Yet the suffering and exploitation of animals continue unabated, as demonstrated by the following examples. These examples are recent; likely to be repeated; and condoned, formally or informally, by a group or organization.

ELECTRIC-SHOCK EXPERIMENT: In 2006, eight male beagles, each one-year of age, arrived at a research laboratory operated by a large pharmaceutical company in central Indiana.¹⁵ After the beagles had been acclimated for several days, researchers shaved each dog's scalp, applied conducting gel, and placed metal electrodes on their shaved scalps.¹⁶ To prevent the dogs' movements from causing injury, the researchers then suspended each dog in a sling so its legs were off the ground.¹⁷ Then, using a generator made especially for this experiment, researchers repeatedly administered electric shock to the eight unanesthetized dogs, increasing the current with each repetition until the shock was so strong that the dogs had convulsions.¹⁸

TOXICITY: In 2002, several beagles were delivered to a research laboratory in Menlo Park, California. The oldest dogs were seventeen months of age, and the youngest were seven months. Some of them had been raised from birth by a multinational business that breeds animals specifically for research laboratories.¹⁹ According to that business' advertising materials, all of its beagles had been socialized at the breeding facility so that researchers would find them to be "active and happy within the cage," to "come willingly to the front when approached," and to be "calm and pleasant when handled."²⁰

¹⁴ Shelley, *supra* n. 1, at 128.

¹⁵ Paul R. Territo et al., *Development and Validation of the Maximal Electro-shock Seizure Model in Dogs*, 30 *J. Veterinary Pharmacology & Therapeutics* 508, 509 (2007).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ Marshall Farms Group, *About Marshall Farms*, <http://www.marshallfarms.com> (last accessed Nov. 21, 2009).

²⁰ Marshall BioResources, *Marshall Beagles*, <http://www.marshallbio.com/main.php?id=25> (last accessed Nov. 21, 2009).

After the dogs had been at the laboratory for two weeks, researchers administered a cancer drug to them intravenously.²¹ The amount of the drug and the duration of the dosing varied among the dogs, the longest period of study being about six weeks.²²

With variations depending on the size of the dose each dog received, the beagles vomited, drooled, had diarrhea, experienced anemia,²³ went into shock, experienced extensive damage to the lining of the gastrointestinal tract, hemorrhaged, and suffered necrosis (death) of bone marrow.²⁴ Some lay prostrate on the floor, unable to rise.²⁵ Some were short of breath.²⁶ The beagles given the largest dosage died within twenty-four hours after the drug was administered.²⁷ Others died later in the study or, found dying, were killed.²⁸ Still others lived for the six-week duration of the study. Some beagles lost as much as one-quarter of their body weight during the experiment.²⁹

The scientists who conducted this experiment stated that they did so at the request of the National Cancer Institute “because of a lack of effective agents for the treatment of human melanoma and because its toxicologic profile might be different than that of [another drug then being studied].”³⁰ Scientists knew, before they began this experiment, that the drug had already been studied in humans,³¹ that the drug was shown, in that study, to have no effect on cancer in any of the participants, and that the study demonstrated that the drug could not be tolerated by humans. Specifically, a clinical trial of the same drug in humans (who were not melanoma patients) approximately two years before the beagle experiment had demonstrated that “*none of the 33 [human] patients . . . had any response to treatment.*”³² The drug was so toxic to humans that the study was aborted. Researchers in the human study stated that “given the poor tolerability, the inability to achieve drug levels necessary to inhibit . . . tumor growth, and *the lack of any responses in our study,*” the next phase of study in humans was

²¹ Jon C. Mirsalis et al., *Toxicity of a Quinocarmycin Analog, DX-52-1, in Rats and Dogs in Relation to Clinical Outcome*, 51 *Cancer Chemotherapy & Pharmacology* 193 (2003).

²² *Id.* at 197. The six-week period included testing over fifteen days and approximately four weeks of “recovery” afterward. *Id.*

²³ *Id.* at 197–98.

²⁴ *Id.* at 198.

²⁵ *Id.* at 197.

²⁶ Mirsalis et al., *supra* n. 21, at 197.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 194.

³¹ Craig A. Bunnell et al., *Phase 1 Clinical Trial of 7-Cyanoquinocarcinol (DX-52-1) in Adult Patients with Refractory Solid Malignancies*, 48 *Cancer Chemotherapy & Pharmacology* 347 (2001).

³² *Id.* (emphasis added). Abolitionism’s goal is to abolish the exploitation of animals; therefore, any alleged purpose or efficacy of an experiment is irrelevant because animals are simply not our testers, not ours to experiment on, regardless of whether the experiment might benefit animals or humans or both.

not warranted.³³ In spite of this information, scientists tested this same drug's toxicity on beagles, as described above.

CAUSING STRESS TO NEWBORN RATS: To study neonatal stress, scientists subjected newborn rats³⁴ to an odd array of stressors unlikely to be replicated in newborn humans or in any species at any age. They separated newborn rats from their mothers for at least eight hours each day, exposed them to inadequate oxygen for eight minutes and then excessive oxygen for four minutes, injected them with morphine each day, and exposed them to 39.2°F (4°C) for twenty minutes each day.³⁵

COWS SPAYED WITHOUT ANESTHESIA: Heifers in beef herds are routinely spayed without anesthesia. The reason for conducting the surgery at all is that unaltered heifers can cause discord in the close confines of the feedlot. The most frequently used method of spaying heifers is vaginal spaying, which is done without anesthesia.³⁶ The procedure usually begins with a hydraulic "squeeze" chute used to keep the cow from moving. A metal instrument roughly one foot long is inserted into the cow's vagina. The instrument is used to punch a hole in the vaginal wall; the instrument is then pushed through the puncture wound and used to cut away the ovaries.³⁷ Some cows keep their backs arched and their tails lifted for several hours after the spaying procedure.³⁸

Animal advocates are likely to be distressed by these four examples. The desire not to read about these experiments and procedures may be strong for some, just as the desire to look away from images of animal suffering may be great. There is reason to believe that repeated exposure to such descriptions and photographs can be detrimental to the well-being of activists. Professor Taimie L. Bryant has examined the danger faced by animal activists of developing a type of post-traumatic stress disorder.³⁹ Yet activists who are concerned enough to monitor the suffering and death of animals will continue to experience such disturbing images and stories. Incidents like these continue because no animal-advocacy movement has been able to prevent them. In

³³ *Id.* (emphasis added).

³⁴ The Animal Welfare Act does not apply to rats, birds, or mice who are bred for research. 7 U.S.C. § 2132 (2006).

³⁵ Ronald J. McPherson et al., *A New Model of Neonatal Stress Which Produces Lasting Neurobehavioral Effect in Adult Rats*, 92 *Neonatology*, 33, 33–41 (2007). Thirty-nine degrees Fahrenheit (4°C) is within the typical range of temperatures for a household refrigerator.

³⁶ Peter J. Chenoweth & Michael W. Sanderson, *Beef Practice: Cow-Calf Production Medicine* 255, 262 (Blackwell Publ. 2005).

³⁷ *Id.*

³⁸ M.J. Garber et al., *Efficacy of Vaginal Spaying and Anabolic Implants on Growth and Carcass Characteristics in Beef Heifers*, 68 *J. Animal Sci.* 1469, 1470 (1990) (available at <http://jas.fass.org/cgi/reprint/68/5/1469.pdf> (last accessed Nov. 21, 2009)).

³⁹ Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 *J. Animal L. & Ethics* 63 (2006) (discussing the potential for post-traumatic stress disorder in animal activists repeatedly exposed to violence against animals).

fact, no animal-advocacy movement currently holds any substantial promise for dogs, rats, cows, or any other exploited animals. This lack of promise is best understood in the context of a dichotomy mentioned in the introduction, which serves as one model of animal advocacy: Welfarism⁴⁰ and Abolitionism.⁴¹

Welfarism does not challenge the property status of animals nor does it oppose the legal regime under which animals are subjected to experimentation and other forms of exploitation, so long as the animals are treated humanely.⁴² It was largely through the work of Welfarists, for example, that the Animal Welfare Act (AWA)⁴³ was adopted. The AWA, and the regulations promulgated pursuant to it, require that decisions be made about such matters as pain, anesthesia, analgesia, and whether it is scientifically necessary to use an animal for more than one major procedure.⁴⁴ So, the AWA, which does not prohibit any of the experiments described above, can fairly be viewed as one of Welfarism's most far-reaching achievements. The AWA is one example of many welfare measures that appear to be victories for animals, but in fact are not, because they do not improve the lot of those animals. If there is any marginal gain for animals as a result of the statute, that gain typically is more than offset by the AWA's tendency to give the public the false sense that animals in research laboratories are treated well.

⁴⁰ See e.g. Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 Va. J. Soc. Policy & L. 587, 593–95 (2002) (detailing the animal Welfare movement and its effect on judicial action); Joseph Lubinski, *The Cow Says Moo, the Duck Says Quack, and the Dog Says Vote! The Use of the Initiative to Promote Animal Protection*, 74 U. Colo. L. Rev. 1109, 1117–21 (2003) (proposing the use of voter initiative and referendum to improve animal welfare); Robert R.M. Verchick, *A New Species of Rights*, 89 Cal. L. Rev. 207, 209–13 (2001) (discussing the utilitarian view of animal Welfarists); Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 Animal L. 133 (2006) (arguing animal welfare is a more accepted notion than animal rights and thus is a more effective way to relieve animal suffering).

⁴¹ See e.g. Gary L. Francione, *Animals as Persons: Essays on the Abolition of Animal Exploitation* (Columbia U. Press 2008); Gary L. Francione, *Introduction to Animal Rights: Your Child or Your Dog?* (Temple U. Press 2000); Gary L. Francione, *Rain Without Thunder: The Ideology of the Animal Rights Movement* (Temple U. Press 1996). Professor Francione has produced a substantial body of scholarship analyzing Welfarism and Abolitionism that is significant to this article.

⁴² Nicole Fox, *The Inadequate Protection of Animals Against Cruel Animal Husbandry Practices Under United States Law*, 17 Whittier L. Rev. 145, 181–83 (1995) (proposing more effective measures to ease factory-farm animals' suffering); Jacqueline Tresl, *The Broken Window: Laying Down the Law for Animals*, 26 S. Ill. U. L.J. 277, 278–81 (2002) (arguing a litigator for animals is more effective advocating for animal welfare than animal rights); Cass R. Sunstein, *The Rights of Animals*, 70 U. Chi. L. Rev. 387 (2003) (advocating for focusing on animal welfare and well-being and rejecting animal-rights claims); Robert Garner, *Political Ideology and the Legal Status of Animals*, 8 Animal L. 77 (2002) (rejecting the more radical claims by animal-rights advocates in favor of focusing on animal welfare).

⁴³ 7 U.S.C. §§ 2131–2159 (2006) (enacted 1966).

⁴⁴ *Id.* at § 2143 (2006).

Abolitionists, unlike Welfarists, seek to end the property status that allows the exploitation of animals. Abolitionist strategy does not include efforts to bring about changes in current statutory or common law for the purpose of improving the treatment of animals. Instead, Abolitionists identify the promotion of veganism as the one essential tool for bringing an end to the exploitation of animals.⁴⁵ Instead of pursuing legislation or litigation intended to reduce the suffering of animals, Abolitionists educate people about veganism in order to make veganism more prevalent and thereby eventually eliminate the exploitation of animals. They present information about the deaths of animals in a compelling, memorable manner. For example, one Abolitionist website features a “ticker” that vividly portrays the astounding number of animals killed to be food since the visitor entered the website.⁴⁶

Abolitionists believe, based on anecdotal evidence, that their efforts to promote veganism are succeeding.⁴⁷ There is no empirical data, however, to support a claim that the vegan percentage of the population is increasing. The empirical data available⁴⁸ suggests that the vegan percentage of the population may instead be decreasing. Promoting veganism is the Abolitionists’ essential tool for achieving their goals; however, this tool does not appear to be working. Abolitionists, consequently, have no more hope to offer to exploited animals than Welfarists do.

Animals have fallen into the gaps between these two movements: Welfarism, which leaves exploitation intact even when it succeeds, and Abolitionism, which works toward a goal that will end animal exploitation but does not appear to be progressing toward that goal. Exploited animals awaiting relief from Welfare or Abolition can be seen as “[w]andering between two worlds, one dead, the other powerless to be born.”⁴⁹

⁴⁵ Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 L. & Contemp. Probs. 9, 42 (2007) (describing the shift to veganism as the most important change to be made on individual and social levels); Gary L. Francione, *Taking Sentience Seriously*, 1 J. Animal L. & Ethics 1, 18 (“The efforts of animal advocates ought to be directed at promoting veganism and the incremental eradication of the property status of nonhumans.”).

⁴⁶ Gary L. Francione, *Animal Rights: The Abolitionist Approach . . . and Abolition Means Veganism!*, <http://www.abolitionistapproach.com> (last accessed Nov. 21, 2009).

⁴⁷ “I wish I had a nickel for every email I have gotten over the years, or every letter that I got before we started with email, where people say ‘I’ve read your stuff, I really never thought about it that way before, it’s absolutely clear that veganism really is the only solution.’” Interview by Bob Torres & Jenna Torres with Gary L. Francione, Distinguished Prof. of Law and Nicholas deB. Katzenbach Scholar of Law & Phil., Rutgers U. School of Law–Newark (June 20, 2008) (transcript available at http://www.abolitionistapproach.com/media/pdf/vegan-freaks-june-2008_p1.pdf (last accessed Nov. 21, 2009)).

⁴⁸ See *infra* Section II(B).

⁴⁹ Matthew Arnold, *Stanzas from the Grande Chartreuse*, in *The Poems of Matthew Arnold 1849–1864*, 260 (Henry Frowde ed., Oxford U. Press 1906).

A. Animal Exploitation Thrives in Spite of Welfare.

The inadequacy of welfare measures was demonstrated in a West Virginia cruelty case. The case arose when workers in a West Virginia poultry slaughterhouse were filmed stomping live chickens, kicking them, and slamming them into walls.⁵⁰ The state attorney, Ginny Conley, initially decided not to prosecute the workers.⁵¹ Why would the prosecutor decline to proceed when the crime was on videotape? In the prosecutor's words, with which other prosecutors in the state agreed, "[T]hese were chickens in a slaughterhouse."⁵² The slaughterhouse workers were not required to abide by the weak law. These were chickens in a slaughterhouse where it was the business of these workers to kill them so they could be processed and delivered to the nation's fast food restaurants and grocery stores.⁵³ These chickens were scheduled to be killed and eaten, and thus no justification was needed for their torture. For these reasons, and as further detailed in the rest of this Section, the history of the animal Welfare movement is not a history of success.⁵⁴

The efforts of Welfarists, however well-intentioned, accomplish little if anything that advances the movement's goal, i.e., to relieve the suffering of animals. In fact, even when Welfarists achieve their goals, animals do not benefit, because animal welfare statutes tend to be underinclusive, weak, vague, sometimes illusory, and rarely enforced. The existence of the Humane Methods of Livestock Slaughter Act (HMLSA),⁵⁵ for example, creates the erroneous impression that there is such a thing as humane slaughter and that the law requires that slaughter must be carried out in a humane manner.

To understand the significance of this statute's failure, it is necessary to understand its origins, especially the public outrage resulting from revelations that animals were abused in slaughterhouses. In

⁵⁰ *Poultry Processor Fires Workers for Abuse*, 153 N.Y. Times C7 (July 22, 2004) (available at <http://www.nytimes.com/2004/07/22/business/poultry-processor-fires-workers-for-abuse.html> (July 22, 2004) (last accessed Nov. 21, 2009)).

⁵¹ Steve Barnes, *National Briefing, West Virginia: Chickens Sentenced; Kickers Not*, 154 N.Y. Times A18 (Jan. 12, 2005) (available at <http://www.nytimes.com/2005/01/12/national/12brfs.html> (Jan. 12, 2005) (last accessed Nov. 21, 2009)) (describing the prosecutor's later unsuccessful presentation to a grand jury, under pressure from PETA).

⁵² Associated Press, *Decision Not to Pursue Chicken Charges Ruffles Feathers*, Charleston Daily Mail 9A (Jan. 12, 2005) (available at 2005 WLNR 508431 (last accessed Nov. 21, 2009)).

⁵³ See generally Pilgrim's Pride, *About Us: From Humble Beginnings to Industry Leader*, <http://www.pilgrimspride.com/aboutus> (last accessed Nov. 21, 2009) (describing the company's customers).

⁵⁴ There have been successful prosecutions of abusers of food animals, but this prosecutor's words embody one key obstacle to such prosecutions.

⁵⁵ 7 U.S.C. §§ 1901–1907 (2006) (enacted 1958). This Act is sometimes referred to as the Humane Methods Slaughter Act or the Humane Slaughter Act. Analyses of the Act can be found in Jeff Welty, *Humane Slaughter Laws*, 70 L. & Contemp. Probs. 175 (Winter 2007); Constantinos Hotis, *The Anthropological Machine at the Abattoir: The Humane Methods of Slaughter Act*, 2006 U. Chi. Leg. Forum 503 (2006).

1958, animal-welfare advocates pressed Congress to adopt legislation requiring that slaughter be humane. The evidence before the legislators included statements from a former meat inspector describing the cows in a slaughterhouse, hanging upside down, shackled to a conveyer line, some with a hip dislocated or a leg broken by the weight of their own bodies, their “agonized screams smothered as they dropped mercilessly, still conscious into a vat of scalding water.”⁵⁶

Another witness told legislators of cows on the conveyer line struggling so violently that they would tear off a foot or break their pelvis or a leg.⁵⁷ The groundswell of anger about these revelations can be gauged by the volume of correspondence addressed to Senators and Congressional Representatives about abuses in slaughterhouses: more letters than Congress received about any other matter then under consideration.⁵⁸

The public’s rage, however, was easily quenched when Congress passed the HMLSA.⁵⁹ Although it placated the public, the HMLSA did little if anything to help animals in slaughterhouses. It applies to only a small percentage of slaughtered animals. Specifically, because of the limitations set by its own terms, it governs less than 2% of the land animals slaughtered for food in the United States each year.⁶⁰ The total number of land animals slaughtered in the U.S. for food annually is an astounding 9 billion.⁶¹ Of those, only about 154 million⁶² are covered by the HMLSA. Almost all of the disparity is attributable to the fact that chickens and other fowl do not come within the purview of the HMLSA.⁶³ The ritual slaughter of animals is also exempt.⁶⁴

As to the minuscule percentage of animals that remain, the HMLSA purports to protect them from such acts as being skinned,

⁵⁶ William M. Blair, *Humane Appeals Swamp Congress: Senate Hearing on Live-stock Slaughter Bill Stirs Wide Interest and Mail Deluge*, N.Y. Times 84 (May 4, 1958); see also Sen. Comm. on Agric. & Forestry, S. 1213, S. 1497, and H.R. 8308, *Proposals Relating to Human Methods of Slaughter of Livestock*, 85th Cong., 2d Sess. 77–87 (Apr. 28–May 1, 1958) (testimony of Christine Stevens, President, Animal Welfare Institute).

⁵⁷ Sen. Comm. on Agric. & Forestry, *supra* n. 56, at 77–87.

⁵⁸ *Id.*

⁵⁹ 7 U.S.C. §§ 1901–1907.

⁶⁰ U.S. Dept. of Agric. Natl. Agric. Statistics Serv., *USDA Poultry Slaughter 2008 Annual Summary*, <http://usda.mannlib.cornell.edu/usda/current/LiveSlauSu/LiveSlauSu-03-06-2009.pdf> (Feb. 2009) (last accessed Nov. 21, 2009); U.S. Dept. of Agric. Natl. Agric. Statistics Serv., *USDA Livestock Slaughter 2008 Summary*, <http://usda.mannlib.cornell.edu/usda/current/PoulSlauSu/PoulSlauSu-02-25-2009.pdf> (Mar. 2009) (last accessed Nov. 21, 2009). The total of all categories of land animals slaughtered in the United States in 2008 was 9,525,371,500. Of those, 9,370,655,000 were chickens and other birds not subject to the Act. Therefore, only 1.6% of the total were subject to the Act.

⁶¹ *Id.*

⁶² *Id.*

⁶³ 7 U.S.C. § 1902(a) (2006); *Levine v. Conner*, 540 F. Supp. 2d 1113 (N.D. Cal 2008) (holding that the HMLSA’s use of the word “livestock” does not include poultry).

⁶⁴ 7 U.S.C. § 1902.

boiled, and eviscerated while still alive and conscious.⁶⁵ In reality, the HMLSA does not provide such protections. To the contrary, many cows, pigs, and other animals suffer the same fate that so angered the citizenry in 1958: They are still alive, awake, and able to sense pain when they are skinned, eviscerated, and, in the case of pigs, dropped into scalding water.⁶⁶ In 2001, slaughter was again in the news, with slaughterhouse employees reporting that they saw “thousands and thousands”⁶⁷ of cows go through the slaughter process alive, being skinned and dismembered while still conscious.⁶⁸ United States Department of Agriculture (USDA) inspectors, who are responsible for enforcing the HMLSA, reported that lax enforcement allows meat producers to violate the Act “with virtual impunity.”⁶⁹

The HMLSA fails animals in another respect: even its routinely ignored protections apply only once an animal has reached the killing floor. It does nothing for animals abused on the way to the slaughter line, such as the animals at Westland/Hallmark Meat Company in Chino, California. In an effort to force sick and injured animals to walk to the slaughter line—so they could be a source of revenue—employees at Westland/Hallmark shocked cows on the eyeballs with cattle prods, shoved them with forklifts, and blasted high-pressure water hoses into their mouths and nostrils.⁷⁰ Changes in the law to keep such downed animals out of the human food supply do not save these animals from other uses. Nor does the HMLSA protect beef cows from being spayed without anesthetic.⁷¹

The failed HMLSA is the welfare statute at least nominally governing the slaughter of a vast number of animals. The next welfare law, in terms of the number of animals affected, is the part of the AWA related to research laboratories.⁷² These sections purport to regulate the use of some animals in research; they require that standards be

⁶⁵ Cf. Joby Warrick, “*They Die Piece by Piece*”: In *Overtaxed Plants, Humane Treatment of Cattle is Often a Battle Lost*, Wash. Post A1 (Apr. 10, 2001) (detailing repeated HMLSA violations at slaughterhouses).

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Philip Brasher, *Veterinarians Will Supervise Humane Slaughter of Livestock*, Orlando Sentinel A21 (Nov. 4, 2001) (available at 2001 WLNR 10862603 (last accessed Nov. 21, 2009)).

⁷⁰ Will Bigham, *Inland Valley Daily Bulletin*, *Westland/Hallmark Slaughterhouse Worker Sentenced to 270 Days in Jail for Cow Abuse*, http://www2.dailybulletin.com/ci_10550911 (Sept. 25, 2008) (last accessed Nov. 21, 2009). An employee who was convicted of cruelty for these actions was allowed to serve his sentence through home detention during weekends. He reported that the methods he used with the downed animals were routine and that he would have been fired if he had failed to use them. *Id.* Although the Food Safety and Inspection Service has barred downed cattle from the human food supply, those downed animals can still be used for other purposes, such as animal food. 9 C.F.R. § 309 (2009).

⁷¹ See generally *supra* nn. 36–38 and accompanying text.

⁷² 7 U.S.C. §§ 2131–2159.

adopted relating to such matters as pain, anesthesia, and analgesia.⁷³ As was the case with the HMLSA, the AWA was enacted because of public outrage.⁷⁴ It is illusory, however; it gives the appearance of regulating research laboratories when in fact it allows them to regulate themselves. A review of the AWA demonstrates that there is actually nothing to enforce except requirements of committee meetings,⁷⁵ paperwork,⁷⁶ and an annual inspection.⁷⁷ Examination beyond the surface reveals that, in spite of its title, the statute does not prohibit experiments such as the one described earlier in this Article in which researchers suspended dogs from the ceiling in slings and shocked them until they had convulsions.

Further evidence of the AWA's failure is that there has been no assertion by any Institutional Animal Care and Use Committee or USDA official that the writhe test, for example, violates the AWA.⁷⁸ The writhe test involves injecting acid into the body cavity of an animal such as a dog and counting the number of times the dog writhes in pain.⁷⁹ These and other experiments on animals are allowed because the AWA does not protect animals in the sense the public believed it did when Congress enacted it. Instead, it is sleight-of-hand. The AWA does not require that animals be treated humanely or that they be given an anesthetic when used in painful experiments. In fact, the AWA does not require research facilities to take any measures to ensure the welfare of animals. Instead, it requires action on the part of the Secretary of Agriculture.⁸⁰ Specifically, the Act requires the Secretary to promulgate regulations, including regulations "to ensure that animal pain and distress are minimized."⁸¹ Instead of fulfilling the responsibility delegated to it by Congress, the Secretary simply re-delegated that responsibility to the institution supposedly being regulated⁸²: the research laboratories whose cruelty and disregard for animal suffering first caused the public outrage that prompted Congress to enact the AWA.

The AWA has actually benefitted only the human animals who conduct research on nonhuman animals. The Foundation for Biomedical Research (FBR), a public-relations organization for the medical re-

⁷³ 7 U.S.C. § 2143(a)(3)(A).

⁷⁴ Blair, *supra* n. 56; *see also* Sen. Comm. on Agric. & Forestry, *supra* n. 56, at 77–87.

⁷⁵ 7 U.S.C. § 2143(b).

⁷⁶ 7 U.S.C. § 2140 (2006).

⁷⁷ 7 U.S.C. § 2143(a)(7)(A).

⁷⁸ T.J. Ness, *Models of Visceral Nociception*, 40 ILAR J. 119 (1999) (available at http://dels.nas.edu/ilar_n/ilarjournal/40_3/40_3Models.shtml (last accessed Nov. 21, 2009)).

⁷⁹ *Id.*

⁸⁰ 7 U.S.C. § 2143.

⁸¹ *Id.*

⁸² In its relationship with research facilities, the USDA seems to go beyond the status of a captive agency and becomes a captive agency suffering from Stockholm Syndrome.

search industry,⁸³ finds the illusory statute useful in its attempts to quiet public concerns about animals used in research. Citing the statute, which does not prevent the writhe test or the electric-shock experiments, the FBR offers this reassurance to anyone who might be disturbed by those or other experiments: “The use of animals in research and testing is strictly controlled, particularly regarding potential pain.”⁸⁴ The effort to protect animals in laboratories has failed, the force of the public’s anger has been wasted, and the only remnant is a pseudo-statute that the biomedical-research industry uses to give false comfort to those who are concerned about animal suffering.

Another reason animal-welfare laws fail is that they are vague—likely a result of the lobbying and negotiations that typically occur during the legislative process. In 2008, California voters approved a ballot initiative that, if it goes into effect in 2015,⁸⁵ will provide that in most circumstances farmers cannot confine veal calves, laying hens, and pregnant sows in a way that prevents them from lying down, standing up, fully extending their limbs, and turning around freely.⁸⁶ That law, however, is virtually unenforceable because it is nearly impossible to prove that it has been violated. The law does not absolutely prohibit those confinements. Instead, it provides only that an animal cannot be confined in such a way for “all of or the majority of any day.”⁸⁷ “Day” is undefined, but if it is taken to mean a twenty-four-hour time period, then the animal supposedly could be confined in the impermissible ways for no longer than twelve hours.

The suffering caused by confinement for twelve hours is not the only negative consequence of this provision. Imagine that in 2015 a California law enforcement officer visits a farm to make sure that the calves are being protected as required by the law. Suppose a calf is confined in one of the impermissible ways. If the law enforcement officer inquires about the confinement, he may be told that the calf had been free from this confinement until the moment before the officer arrived. To prove a violation the officer would have to stay and watch the calf for just over twelve hours to determine whether the confinement persists beyond the twelve-hour limit. If the officer leaves at any point during the twelve hours, he may be faced upon his return with a claim that the calf was freed from the prohibited confinement immediately after the officer’s departure and was free until immediately

⁸³ Foundation for Biomedical Research, *About FBR*, <http://www.fbresearch.org/AboutFBR/tabid/423/Default.aspx> (last accessed Nov. 21, 2009) (“FBR works to inform the news media, teachers, students and parents, pet owners and other groups about the essential need for lab animals in medical and scientific research and discovery.”).

⁸⁴ Foundation for Biomedical Research, *Backgrounder, Animal Research 2*, <http://www.fbresearch.org/Media/MediaRoom/Backgrounder/tabid/601/Default.aspx>; select About Animal Research (last accessed Nov. 21, 2009).

⁸⁵ Cal. Voter Info. Guide, *Text of Proposed Laws*, http://lalaw.lib.ca.us/pdfs/PROP_1108_2.pdf (last accessed Nov. 21, 2009).

⁸⁶ *Id.*

⁸⁷ *Id.*

before the officer's return, making it almost impossible for the officer to prove his case. Furthermore, it is unlikely that a California law enforcement officer will spend twelve hours at a farm watching a calf, so violations may be almost impossible to prove. Even if law enforcement developed a case by actually spending twelve hours and one minute at such a facility, it is still unlikely that prosecution could succeed. Without bringing the crate and the calf to court, it may be difficult to prove that the animal could not turn around.

Since the law is not set forth in terms of feet or inches, a particular stall or crate cannot readily be found to violate the law. If law-enforcement officers visit a farm and see an empty veal crate that seems too small, they may be told that only very small calves—the youngest—are kept in that crate. There are additional problems with these provisions. Imagine that a law-enforcement officer arrives at a veal farm at 6:00 p.m. and sees a calf confined in a prohibited way. The officer stays with the calf from 6:00 p.m. until just after 6:00 a.m., and thus believes he can prove that the veal farm violated the law. The chief executive officer of the farm, however, explains that the farm measures a day as running from midnight to midnight. So, although the calf was confined for more than twelve hours, those twelve hours were not all in one day, so there has been no violation. These failings, combined with the fact that farmers are unlikely to report their own violations, create circumstances in which the statute probably means very little to farm animals in California.

As long as animals are kept as property for the purpose of being exploited, efforts to protect them as they are exploited will accomplish little. A statement by the prosecutor in the case of the chickens who were stomped on, kicked, and slammed into the wall serves to illustrate this point. In initially declining to prosecute, the state attorney offered an explanation she apparently saw as all-encompassing: "These were chickens in a slaughterhouse."⁸⁸ Similarly, a state attorney refusing to prosecute a violation of California's statute might say: "These were veal calves on a factory farm." The violation of welfare laws seems to require no further justification than the fact that the victims are animals who are alive exclusively to fulfill the purposes, tastes, desires, and whims of humans. Welfarists believe, contrary to decades of experience, that animals who are fated for slaughter or experimentation can have relatively pleasant lives and painless deaths. The writhe test, the poisoning of dogs, the skinning alive, the cattle prods on the eyeballs, the high pressure water hose into the nostrils, and the drowning in scalding water prove otherwise. None of these abuses, no matter how many times they are reported, seem capable of demonstrating conclusively to Welfarists that welfare laws cannot protect animals who are property.

⁸⁸ Barnes, *supra*, n. 51.

B. Animal Exploitation Thrives in Spite of Abolitionism

Abolitionists have identified the most important method they employ to end the exploitation of animals: providing education about veganism to make veganism more prevalent, which will ultimately lead to the end of animal exploitation.⁸⁹ Abolitionists believe, based on anecdotal evidence, that their efforts are increasing the ranks of vegans.⁹⁰ There is no empirical data, however, establishing that the vegan percentage of the U.S. population is increasing. In fact, the empirical data suggests that the vegan percentage of the population is trending downward.

The number of vegans in the United States is quite small, never polling above 1.8% of the population. A review of polls suggests a downward trend in that small segment of the population. A 1997 poll conducted by Roper for the Vegetarian Resource Group indicated the vegan percentage of the U.S. population was 1%.⁹¹ The next poll, conducted in 2000 by Zogby, again for the Vegetarian Resource Group, put the figure at 0.9%.⁹² A 2002 poll published in *Time* magazine—the only poll not commissioned by a vegetarian organization or publication—reported the vegan percentage of the population at 0.2%,⁹³ markedly lower than any of the other polls. Subsequent polls reported the vegan percentage of the population at 1.8% in 2003,⁹⁴ 1.4% in 2006,⁹⁵ 0.5% in 2008,⁹⁶ and 0.8% in 2009.⁹⁷

All of these figures together reflect an overall downward trend. The highest figure, 1.8%, was reported in 2003. In neither of the two most recent polls, 2008 and 2009, did the vegan segment of the population reach even the 1% mark. The vegan percentage reflected in each of the two most recent polls (0.5% in 2008 and 0.8% in 2009) is less than

⁸⁹ Interview by Torres & Torres with Francione, *supra* n. 47.

⁹⁰ *Id.*

⁹¹ Vegetarian Resource Group, *How Many Vegetarians Are There? Asks the Vegetarian Resource Group in a 1997 Roper Poll*, 16 *Vegetarian J.* 21 (Sept./Oct. 1997) (The Vegetarian Resource Group speculated about the number of vegetarians in the population based on a 1994 poll but did not identify a figure as the vegan percentage of the population.). See Charles Stahler, *How Many Vegetarians Are There?*, <http://www.vrg.org/nutshell/poll.htm> (last updated Aug. 30, 2000) (last accessed Nov. 21, 2009).

⁹² Vegetarian Resource Group, *How Many Vegetarians Are There?*, 19 *Vegetarian J.* 36 (May/June 2000).

⁹³ *Time* magazine, *Do You Consider Yourself a Vegetarian?* <http://www.time.com/time/covers/1101020715/poll> (last accessed Nov. 21, 2009).

⁹⁴ Vegetarian Resource Group, *How Many Vegetarians Are There?*, 22 *Vegetarian J.* 8 (Issue 3 2003) (citing a 2003 Harris Interactive Survey).

⁹⁵ Charles Stahler, *How Many Adults Are Vegetarian?*, 25 *Vegetarian J.* 14, 15 (Issue 4 2006) (citing a 2006 Harris Interactive survey).

⁹⁶ *Vegetarian Times*, *Vegetarianism in America*, http://www.vegetariantimes.com/features/archive_of_editorial/667 (last accessed Nov. 21, 2009) (citing a 2008 Harris Interactive survey).

⁹⁷ Vegetarian Resource Group, *How Many Vegetarians Are There?*, <http://www.vrg.org/press/2009poll.htm> (last accessed Nov. 21, 2009) (citing a 2009 Harris Interactive survey).

half the high point of 1.8% reflected in the 2003 poll. Even given the increase from 2008 to 2009, the information as a whole indicates that the vegan segment of the population may be shrinking.

Small percentages, such as the figures in these polls, warrant caution, and this is particularly true where, as here, the questions in the various polls are not identical. The need for caution is apparent in the context of a polling concept: margin of error. Not all of these polls state a margin of error, but for those that do state a margin of error, the vegan percentage of the population is smaller than the margin of error. Harris Interactive, which conducted most of these polls, has adopted a policy of not reporting a margin of error for any of its polls because the pollsters have concluded that the public misunderstands the concept, erroneously believing that a margin of error encompasses all possible errors when in fact it accounts only for sampling error—the sample's failure to represent the population as a whole.⁹⁸ Harris, however, did not conduct all the polls, and The Vegetarian Resource Group reported that the Zogby poll conducted in 2000 had a margin of error of plus- or minus- 3%.⁹⁹ The highest figure in any of the polls puts the vegan percentage of the population at 1.8.

While small percentages warrant caution, they can provide useful information, even when the figure reported is within the margin of error. For example, a poll with a margin of error of plus or minus four percentage points reflected that less than 2% of the U.S. population are Holocaust deniers.¹⁰⁰ The University of Chicago professor who analyzed the data reported, "Committed or consistent deniers of the Holocaust make up only a small segment of the population, about 2 percent or less."¹⁰¹ Another illustration of a polling number useful in spite of its small size appears in the *Springfield Massachusetts Republican*. As was the case with the Holocaust-denier survey, this new article relied on a 2% figure. That newspaper reported in 2004 that presidential candidate Ralph Nader could cut into the lead held by Democratic candidate John Kerry. The report was based on polls showing Nader with 2% of the vote, including a Florida poll with a margin of error of 4%.¹⁰² Even if the figures could not be relied on as evidence of a shrinking vegan population, they would, given the most optimistic analysis, demonstrate a vegan segment of the population which is stagnant, moving up and down within a narrow band smaller than the margin of error.

⁹⁸ *Id.*

⁹⁹ Vegetarian Resource Group, *How Many Vegetarians Are There?* (May/June 2000), *supra* n. 92.

¹⁰⁰ Michael R. Kagay, *Poll on Doubt of Holocaust Is Corrected*, 143 N.Y. Times A10 (July 8, 1994) (available at <http://www.nytimes.com/1994/07/08/us/poll-on-doubt-of-holocaust-is-corrected.html> (July 8, 1994) (last accessed Dec. 22, 2009)).

¹⁰¹ *Id.*

¹⁰² Dan Ring, *Nader Candidacy May Affect Election*, *Springfield Mass. Republican* A1 (Oct. 24, 2004).

Also discouraging is the fact that the lowest figure appears in the poll that is probably the most accurate: the 2002 survey by Harris Interactive, reported in *Time* magazine. The most notable differences between the 2002 *Time* magazine poll and all the other polls are sample size and methodology. The sample size for the 2003 *Time* survey was 10,007.¹⁰³ The largest sample size among the other surveys was the Vegetarian Times survey in 2008, with a sample size of 5,050.¹⁰⁴

The other aspect in which the *Time* magazine survey differs from the other surveys is its methodology: The survey identified those in the sample group who did not eat meat and then conducted a poll-within-a-poll, posing further questions only to those identified as “vegetarian.”¹⁰⁵ While some of the other surveys report how vegetarians answered certain questions, only the *Time* poll provides figures from a separate survey administered only to respondents identified as “vegetarian.”

This decrease (or, at the most optimistic, the stagnation) in the vegan percentage of the population may be influenced by any number of factors. It is certainly possible that one factor is a problem discussed by Francione: Some vegans become former vegans when they incorrectly and irrelevantly conclude that the treatment of food animals has become more humane. Another factor discussed by Francione that may contribute to the decrease is that Abolitionists do not have the financial resources of the large animal-protection organizations. Still another possible contributing factor is the tendency of some individuals who may actually be vegans to identify themselves as vegetarians based on concern that their failure to make adequate inquiries at a restaurant may have resulted in consumption of a food containing egg or dairy.¹⁰⁶ Whatever the cause, there is no reason to conclude that the vegan segment of the population is increasing, and there is reason to believe it is decreasing. This information raises important questions about the effectiveness of the methods currently used by Abolitionists to promote veganism.

III. DOES THE ANIMAL-RIGHTS MOVEMENT CURRENTLY EXIST, AND CAN IT ADDRESS THE PROBLEMS ABOLITION AND WELFARE HAVE NOT SOLVED?

Their pronunciation was quick; and, the words they uttered not having any apparent connection with visible objects, I was unable to dis-

¹⁰³ *Time* magazine, *Do You Consider Yourself A Vegetarian?*, *supra* n. 93 (The survey questions are about what foods a person eats, and vegans are included in the broader group labeled “vegetarian.”).

¹⁰⁴ *Vegetarian Times*, *supra* n. 96.

¹⁰⁵ *Time* magazine, *supra* n. 93 (The survey questions are about what foods a person eats, and vegans are included in the broader group labeled “vegetarian.”).

¹⁰⁶ I thank Professor Taimie L. Bryant for this observation.

cover any clue by which I could unra[v]el the mystery of their reference.

—Mary Wollstonecraft Shelley,
*Frankenstein: Or the Modern
Prometheus*¹⁰⁷

Given that Welfarists and Abolitionists have had little success, the potential of the “Animal Rights” movement may warrant consideration: If the “Animal Rights” movement exists and is distinct from Welfarism and Abolitionism, then can Animal Rights succeed where Welfarism and Abolitionism have failed? The first step in addressing that question is defining the Animal Rights movement and its goals—but those concepts seem to become less clear each time the term is used.

A. *The Popularity of the Term “Animal Rights” Has Increased Exponentially in Recent Decades*

Fifty years ago, the term “animal rights” was virtually unknown. In the last three decades of the twentieth century, the term began to appear in court decisions and news stories. The increasing frequency with which it was used, however, did not correlate with any increase in the clarity of its meaning. Analyzing the phrase as it appears in law and the culture at large raises more questions than it answers, leaving doubt as to whether the term has any value as a tool for communicating meaning.

1. *Courts Are Using the Term More Frequently*

Courts in the United States began using the term “animal rights” in the late nineteenth century. One of the earliest U.S. court decisions addressing the rights of animals was a relatively strong vindication of those rights. A man convicted of animal cruelty appealed his conviction, claiming that the statute prohibiting cruelty to animals interfered with his property rights in the animals.¹⁰⁸ The court rejected the argument, recognizing a sound basis for the statute: “the theory, unknown to the common law, that animals have rights which, like those of human beings, are to be protected.”¹⁰⁹ The court not only upheld the statute based on the rights of the abused animal, but went on to use the parent/child relationship as the appropriate model for the relationship between a horse and his owner.¹¹⁰

Twenty years would pass before a court would again consider the question of animal rights. When it did consider the question, emerging technology trumped any consideration of the rights of animals. The production-line automobile industry was still in its infancy when the

¹⁰⁷ Shelley, *supra* n. 1, at 137–38 (emphasis in original).

¹⁰⁸ *State v. Karstendiek*, 22 So. 845, 846 (La. 1897).

¹⁰⁹ *Id.* at 847.

¹¹⁰ *Id.* at 846–47.

case arose, and a New York judge had to resolve a dispute in which the defendant, driving one of the new machines, had struck and killed a turkey belonging to the plaintiff.¹¹¹ The court raised—and seemed to treat as a serious inquiry—the question of whether animals have rights, or at least rights on the highway.¹¹² Ultimately, the court left the question of the existence of animal rights undecided, resolving the dispute between the turkey owner and the motorist by ruling that the rights of the turkey, if any such rights existed, were outweighed by the rights of humans: “the lives of fowls or animals are ordinarily not particularly valuable, and their rights in the highway, if they have any, must, it seems to me, give way to the superior right of the traveling public to pass with reasonable freedom and rational speed along the highway.”¹¹³

After the case involving the turkey’s death, courts were virtually silent on the issue of animal rights for more than fifty years, until 1973.¹¹⁴ Even then, courts did not enumerate any animal’s rights. Instead, courts initially used the phrase “animal rights” only when referring to an organization whose name included the words “animal rights.” Thus, the increasing use of the term in the 1970s reflected not judicial consideration of animal rights, but the increasing number of animal-rights organizations seeking to benefit animals through litigation. This nominative use typically occurred in one of three situations: when the words “animal rights” appeared in the name of a party to the case,¹¹⁵ the name of an *amicus curiae*,¹¹⁶ or the name of a party to a case cited as precedent.¹¹⁷

By 1990, courts were beginning to use the phrase descriptively rather than exclusively in referring to the name of an organization.¹¹⁸ A common example of a descriptive use includes employing the phrase as an adjective modifying either persons¹¹⁹ or organizations.¹²⁰ While this qualitative shift from nominative use to descriptive use was occurring, a quantitative change also came about. By 2004, the number of

¹¹¹ *Park v. Farnsworth*, 164 N.Y.S. 735 (N.Y. Co. Ct. 1917).

¹¹² *Id.* at 736.

¹¹³ *Id.*

¹¹⁴ See *Soc’y. for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915 (D.C. Cir. 1975).

¹¹⁵ See e.g. *Zartman v. Pa. Animal Rights Coalition*, 28 Pa. D. and C.3d 737 (Pa. Comm. Pl. 1983).

¹¹⁶ See e.g. *MOL, Inc. v. Peoples Republic of Bangladesh*, 736 F.2d 1326 (9th Cir. 1984) (amicus brief from Lauri Nicholson & Laurens H. Silver for Animal Rights); *Taub v. State*, 463 A.2d 819 (Md. 1983) (amicus brief from Animal Rights-Boston, Inc.).

¹¹⁷ See e.g. *Township of Springfield v. Lewis*, 702 F.2d 426, 439 (3d Cir. 1983) (citing *Soc’y. for Animal Rights, Inc. v. Schlesinger*, 512 F.2d 915 (D.C. Cir. 1975)).

¹¹⁸ See *Immuno AG v. Moor-Jankowski*, 549 N.E.2d 129, 134 (N.Y. 1989) (referring to a person as “a known animal rights activist”).

¹¹⁹ *Id.*

¹²⁰ See *Intl. Primate Protec. League v. Administrs. of Tulane Educ. Fund*, 895 F.2d 1056, 1059 (5th Cir. 1990) (referring to an organization as an “animal rights” organization).

reported court decisions including the term “animal rights” in any context exceeded thirty.¹²¹

2. *Use of the Phrase “Animal Rights” in Popular Culture Has Grown Exponentially*

Although the frequency with which courts use the phrase “animal rights” has increased moderately over the decades, the cultural use of the phrase has grown explosively. The change began quietly enough, with news of a corporate resolution promoting animal welfare. A 1978 *Wall Street Journal* story described a shareholder resolution that prohibited Exxon from contributing to charities that test on animals¹²² unless the charity maintained a veterinarian on site at all times to “supervise all experiments and to look after the animals’ well-being.”¹²³ In the years since, the number of news reports regarding animal rights has increased. Beginning in 1990 and continuing each year, the number of U.S. news stories using the phrase “animal rights” exceeded 5,000.¹²⁴

B. *The Phrase “Animal Rights” Actually Hinders Communication*

Actual uses of the phrase “animal rights” demonstrate that the words currently have little capacity to communicate, making the concept of an “animal-rights movement” amorphous and elusive. The idea has been tugged at and contorted to cover so many different concepts that it remains stretched and misshapen. Since speakers and writers have attached the label to such a large assortment of incongruous and conflicting organizations, ideas, and acts, the words are actually an impediment to communication and potentially a tool for obfuscation. The best evidence of the phrase’s vagueness is a review of its use, espe-

¹²¹ See e.g. *Ridley v. Mass. Bay Transp. Auth.*, 390 F.3d 65 (1st Cir. 2004); *Gross v. BBC*, 386 F.3d 224 (2d Cir. 2004); *Lynch v. Leis*, 382 F.3d 642 (6th Cir. 2004); *Parks v. Finan*, 385 F.3d 694 (6th Cir. 2004); *Cetacean Community v. Bush*, 386 F.3d 1169 (9th Cir. 2004); *Kuba v. 1-A Agric. Assn.*, 387 F.3d 850 (9th Cir. 2004); *Tandy v. City of Wichita*, 380 F.3d 1277 (10th Cir. 2004); *Utah Animal Rights Coalition v. Salt Lake City Corp.*, 371 F.3d 1248 (10th Cir. 2004); *Burk v. Augusta-Richmond Co.*, 365 F.3d 1247 (11th Cir. 2004); *Pharm. Care Mgt. Assn. v. Me. Atty. Gen.*, 332 F. Supp. 2d 258 (D. Me. 2004); *Mayflower Transit v. Prince*, 314 F. Supp. 2d 362 (D.N.J. 2004); *Phys. Comm. for Responsible Med. v. Leavitt*, 331 F. Supp. 2d 204 (S.D.N.Y. 2004); *Woodyer v. U.S.*, 334 F. Supp. 2d 1263 (W.D. Wash. 2004); *Boranian v. Clark*, 20 Cal. Rptr. 3d 405 (Cal. App. 2d Dist. 2004); *Featherson v. Farwell*, 20 Cal. Rptr. 3d 412 (Cal. App. 2d Dist. 2004); *Comm. to Save Guilford Shoreline, Inc. v. Guilford Plan. & Zoning*, 853 A.2d 654 (Conn. Super. 2004); *Singer v. Township of Princeton*, 860 A.2d 475 (N.J. Super. App. Div. 2004); *United for Peace & Just. v. Bloomberg*, 783 N.Y.S.2d 255 (N.Y. Sup. 2004); *Long v. Noah’s Lost Ark, Inc.*, 814 N.E.2d 555 (Ohio App. 7th Dist. 2004); *State v. Couch*, 103 P.3d 671 (Or. App. 2004) (all using the phrase “animal rights”).

¹²² Wall St. J. Abstracts, 1978 WLNR 15306 (Mar. 30, 1978) (last accessed Nov. 21, 2009).

¹²³ *Id.*

¹²⁴ These figures were obtained by searching the U.S. news reports Westlaw database (“USNEWS”) using the terms “animal rights” and da(1990) and then the search “animal rights” and da(1991) and so forth.

cially the lack of clarity as to whether the animal-rights movement is an Abolitionist movement, a Welfare movement, or some other type of movement

1. *Is Peter Singer an Advocate for Animal Rights?*

One measure of the confusion caused by use of the phrase “animal rights” is the inability of scholars to determine whether Peter Singer, one of the most prominent figures in animal advocacy, supports animal rights. The following references reflect disparate views on what should be a simple question of fact: whether Singer is an animal-rights advocate. Professor Laurence Tribe refers to Singer as “the best known of the philosophers of animal rights.”¹²⁵ Other scholars join Tribe in identifying Singer with animal rights, using such phrases as these: “[a]nimal rights advocates such as Peter Singer,”¹²⁶ “strong advocates of animal rights, such as Peter Singer,”¹²⁷ and “the seminal animal rights figure, Peter Singer.”¹²⁸ Other scholars, however, place Singer outside the animal rights camp, describing him instead as a “leader supporting the cause of animal welfare,”¹²⁹ or as a “welfare advocate,”¹³⁰ or referring to animal-rights theorists who stand “in contrast to utilitarians such as Peter Singer.”¹³¹ This lack of consensus as to whether Singer advocates animal rights does not result from confusion about his views; his views are well documented.¹³² The lack of consensus points instead to the fact that there is no shared understanding of the basic meaning of “animal rights.”

2. *Are PETA, HSUS, and Farm Sanctuary Animal-Rights Organizations?*

All U.S. animal advocacy organizations, including the most prominent, function in a world made less navigable by the confusion surrounding the term “animal rights.” Three of the largest such organizations in the U.S. are People for the Ethical Treatment of Ani-

¹²⁵ Laurence H. Tribe, *Ten Lessons Our Constitutional Experience Can Teach Us about the Puzzle of Animal Rights: The Work of Steven M. Wise*, 7 *Animal L.* 1, 7 (2001).

¹²⁶ Geordie Duckler, *Two Major Flaws of the Animal Rights Movement*, 14 *Animal L.* 179, 185 (2008).

¹²⁷ Jessica Berg, *Of Elephants and Embryos: A Proposed Framework for Legal Personhood*, 59 *Hastings L.J.* 369, 404 n. 132 (2007).

¹²⁸ Gerald L. Eichinger, *Veterinary Medicine: External Pressures on an Insular Profession and How Those Pressures Threaten to Change Current Malpractice Jurisprudence*, 67 *Mont. L. Rev.* 231, 267 (2006).

¹²⁹ Pablo Lerner & Alfredo Mordechai Rabello, *The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities*, 22 *J.L. & Religion* 1, 22–23 (2006).

¹³⁰ Matthew Armstrong, *Cetacean Community v. Bush: The False Hope of Animal Rights Lingers On*, 12 *Hastings W-N.W. J. Envtl. L. & Policy*, 185, 203 (2006).

¹³¹ Wendy E. Parmet, *Liberalism, Communitarianism, and Public Health: Comments on Lawrence O. Gostin's Lecture*, 55 *Fla. L. Rev.* 1221, 1228 (2003).

¹³² See generally Peter Singer, *Animal Liberation* (2d ed., N.Y. Rev. of Bks. 1990).

mals (PETA),¹³³ the Humane Society of the United States (HSUS),¹³⁴ and Farm Sanctuary.¹³⁵

PETA¹³⁶ refers to itself not only as an animal-rights organization, but as the largest such organization in the world.¹³⁷ The disconnect between PETA's motto and its campaigns exemplifies the confusion regarding the term "animal rights." PETA's motto is decidedly Abolitionist: "[A]nimals are not ours to eat, wear, experiment on, or use in entertainment."¹³⁸ Yet much of PETA's work is Welfarist, seeking improved conditions for exploited animals rather than an end to their exploitation.

One example of the disparity between PETA's motto and its work can be found in a particular aspect of its campaign against the fast-food business KFC Canada. After encouraging its members to put pressure on KFC Canada to improve its treatment of animals, PETA worked to reach an agreement with the corporation. One provision among several in that agreement requires KFC Canada to "[u]rge Canadian KFC's chicken suppliers to adopt better practices, including improved lighting, more space for birds, [and] lower ammonia levels."¹³⁹ This provision does not exhibit Abolitionist principles. PETA's message has two inherent flaws. First, the changes are not quantified. The requirement is for "lower stocking density," rather than a specified amount of space for each bird, and for "[lower] ammonia levels," rather than elimination of ammonia or even reduction to a specified level. Second, KFC Canada is not asked to agree to require its suppliers to adopt such changes. It agrees to "urge" its suppliers to make the changes. More important than the agreement's weakness is its incongruity with PETA's claim to be not merely an animal-rights organization, but one founded on principles including the position that animals are not ours to eat. Eating chickens, of course, is exactly what most

¹³³ PETA, *PETA's Mission Statement*, <http://www.peta.org/about/index.asp> (last accessed Nov. 21, 2009) (claiming 2 million members).

¹³⁴ HSUS, *About Us*, http://www.hsus.org/about_us/ (last accessed Nov. 21, 2009).

¹³⁵ Farm Sanctuary, *About Us*, <http://farmsanctuary.org/about/> (last accessed Nov. 21, 2009).

¹³⁶ Professor Gary L. Francione has thoroughly documented PETA's focus on welfare measures, referring to the organization as "New Welfarist," i.e., as stating support for abolishing the exploitation of animals while asserting that the only work that can be done presently involves welfare measures. See e.g. Gary L. Francione, *Reflections on Animals, Property and the Law and Rain without Thunder*, *supra* n. 45; Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 *Animal L.* 75, 76 (1997); Gary L. Francione, *Animal Rights and Animal Welfare*, *supra* n. 2. Professor Francione describes HSUS, Peter Singer, and others as "New Welfarists."

¹³⁷ PETA, *PETA's Mission Statement*, *supra* n. 133.

¹³⁸ PETA, *PETA's History: Compassion in Action*, <http://www.peta.org/factsheet/files/FactsheetDisplay.asp?ID=107> (last accessed Nov. 21, 2009).

¹³⁹ PETA, *PETA Wins Five-Year Kentucky Fried Cruelty Campaign in Canada*, <http://www.peta.org/MC/NewsItem.asp?id=11484> (June 2, 2008) (last accessed Nov. 21, 2009).

customers of KFC Canada continue to do, both before and after the agreement was entered into, PETA's motto notwithstanding.

PETA's battle against another fast-food giant further highlights the discrepancy between PETA's Abolitionist motto and its Welfarist campaigns. PETA attempted to persuade McDonald's to adopt a method of slaughtering chickens that PETA claims is less cruel than McDonald's current method.¹⁴⁰ Despite its motto, PETA does not condemn McDonald's for selling the flesh of chickens; instead, PETA spars with McDonald's as to which method of slaughter is less cruel.

In contrast to PETA, HSUS does not claim to be an animal-rights organization. Instead, HSUS identifies itself as "the nation's largest and most effective animal protection organization."¹⁴¹ The president and CEO of this animal-protection organization, however, has made it clear that he intends HSUS to be not just an animal-rights organization, but "the NRA of the animal rights movement,"¹⁴² an apparent reference to the fundraising and lobbying prowess of the National Rifle Association.¹⁴³ Not only does the president and CEO intend for it to be an animal-rights organization, HSUS also lauds laws that establish animal rights. In its newsletter, HSUS praises a New Jersey statute that HSUS describes as creating "rights for animals."¹⁴⁴ The newsletter story, in contrast to the headline, does not announce any rights for animals.¹⁴⁵ Instead, the story describes New Jersey's dissection opt-out statute, pursuant to which a student who objects to dissecting animals is not required to do so.¹⁴⁶ The right, if there is a right, belongs to the student; the animal whom an objecting student would otherwise have dissected may benefit, but only because of the student's choice. Of course, the animal saved by one student's choice may be dissected by another student, although the net number of animals dissected will ultimately be reduced by the number of students who opt out of dissection.

This information, taken together, demonstrates the difficulty of determining HSUS's position on animal rights. HSUS is an animal-protection organization; its president and CEO wants it to be a formidable animal-rights organization. In the meantime, HSUS praises a

¹⁴⁰ PETA, *McCruelty: I'm Hatin' It*, <http://getactive.peta.org/campaign/mccruelty> (last accessed Nov. 21, 2009).

¹⁴¹ HSUS, *About Us*, http://www.hsus.org/about_us/index.html (last accessed Nov. 21, 2009).

¹⁴² Animal People, *Editorial: For Leadership, Look in the Mirror*, <http://www.animalpeoplenews.org/92/1/editorial2.html> (last accessed Nov. 21, 2009).

¹⁴³ Julie Bosman, *NRA Plans Anti-Obama Ads*, 157 N.Y. Times A14 (July 2, 2008); David Nakamura & Nikita Stewart, *Gun Law Push Puts D.C. Vote Bill on Indefinite Hold*, Wash. Post B1, B015 (Mar. 5, 2009).

¹⁴⁴ Stephanie Edwards, *New Jersey Dissection Law Protects Student—and Animal—Rights*, http://www.hsus.org/animals_in_research/animals_in_research_news/dissection_choice_new_jersey.html (Feb. 1, 2006) (last accessed Nov. 21, 2009).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

statute as creating rights for animals, even though the statute, if it creates rights at all, creates them for students.

Another prominent animal advocacy organization, Farm Sanctuary, not only describes itself as a farm-animal-rights organization but lists among its accomplishments that it was the first “animal rights proponent” invited to speak publicly about animal rights at a United States Department of Agriculture (USDA) event.¹⁴⁷ That distinction means that Farm Sanctuary personnel were guests of the government regulators who oversee the killing of billions of animals each year in slaughterhouses.¹⁴⁸

Farm Sanctuary’s presentations to the USDA were not the organization’s only connection to that agency. Farm Sanctuary has praised USDA’s decision to keep downed cattle (animals too hurt or sick to walk to the slaughter line, who are often abused in an effort to make them walk) out of the human food supply.¹⁴⁹ The ban applies only to cattle, and it does nothing to keep other downed animals out of the animal food supply or from being otherwise used.¹⁵⁰ Farm Sanctuary’s praise of the USDA demonstrates that labeling a group as an animal-rights organization reveals little about its views. Regardless, the *New York Times* followed Farm Sanctuary’s lead, describing Farm Sanctuary as an animal rights organization.¹⁵¹ Specifically, when Farm Sanctuary worked to pass a ballot initiative requiring better conditions for livestock (rather than elimination of the exploitation of animals as food), the *New York Times* referred to the organization as “the biggest farm-animal-rights group in the United States.”¹⁵²

Other aspects of Farm Sanctuary’s work generate confusion as to what the organization means when it refers to itself as an animal-rights organization. These conflicting initiatives have included an educational effort to promote veganism¹⁵³ and a decision to join Peter Singer and animal advocacy groups in signing a letter complimenting the meat-selling grocery chain Whole Foods on its “Farm Animal Com-

¹⁴⁷ Farm Sanctuary, *Farm Sanctuary President Speaks at USDA Symposium in Washington, D.C.*, http://farmsanctuary.org/mediacenter/2004/pr_usdasymposium_04.html (Sept. 20, 2004) (last accessed Nov. 21, 2009).

¹⁴⁸ U.S. Dept. of Agric. Natl. Agric. Statistics Serv., *USDA Poultry Slaughter 2008 Annual Summary*, *supra* n. 60.

¹⁴⁹ Farm Sanctuary, FARM SANCTUARY THANKS PRESIDENT OBAMA AND AG SECRETARY VILSACK FOR BANNING NON-AMBULATORY CATTLE FROM THE HUMAN FOOD SUPPLY, http://farmsanctuary.org/mediacenter/2009/pr_downer_loophole_closed.html (Mar. 16, 2009) (last accessed Nov. 21, 2009).

¹⁵⁰ *Id.*

¹⁵¹ Maggie Jones, *The Barnyard Strategist*, 158 N.Y. Times MM47 (New York Edition) (Oct. 26, 2008) (available at <http://www.nytimes.com/2008/10/26/magazine/26/animal-t.html> (Oct. 24, 2008) (last accessed Nov. 21, 2009)).

¹⁵² *Id.*

¹⁵³ Farm Sanctuary, *About Us: Education*, <http://farmsanctuary.org/about/education/> (last accessed Nov. 21, 2009); *see also* Veg For Life: A Farm Sanctuary Campaign, *Welcome to Veg for Life*, <http://www.vegforlife.org/> (last accessed Nov. 21, 2009) (listing recipes, tips, and information about following a vegetarian lifestyle).

passionate Standards.”¹⁵⁴ Following criticism of its decision to be a signatory on the letter, Farm Sanctuary issued a statement that the letter was vague and had been misunderstood by some, and that Farm Sanctuary, although it had signed the letter, viewed the words “humane” and “slaughter” as contradictory.¹⁵⁵

3. *What Do Courts Mean When They Use the Term “Animal Rights”?*

When journalists and animal activists use the term “animal rights” without acknowledging its lack of content, the confusion surrounding the term is exacerbated. The danger is even greater, however, when courts use the term without conveying a significant meaning.

There are three contexts in which courts have typically used the term “animal rights.” First is the nominative use, in which courts necessarily employ the phrase because it appears in the name of a party. Second is the descriptive use, as when courts use the term to characterize a person, organization, or idea, such as an “animal rights organization” or the “animal rights movement.” An example of the second use—the descriptive use—is one court’s reference to the American Society for the Prevention of Cruelty to Animals (ASPCA) as among the “animal rights activists” that had made statements critical of the horse carriage trade.¹⁵⁶ Yet the ASPCA does not identify itself as an animal-rights organization. It views the question of whether to eat animals as a “personal decision,”¹⁵⁷ and it believes research on animals should be done only if no alternatives exist and if the research has significant humanitarian value.¹⁵⁸

The third use, defining what rights, if any, animals have, is also characterized by confusion. Although the U.S. Court of Appeals for the Eleventh Circuit referred to animal rights as an “important public is-

¹⁵⁴ Ltr. from Peter Singer, President, Animal Rights Intl., to John Mackey, CEO, Whole Foods Market, <http://www.abolitionistapproach.com/media/links/p24/supported.pdf> (Jan. 24, 2005) (last accessed Nov. 21, 2009) (listing Farm Sanctuary as one of the undersigned groups expressing appreciation).

¹⁵⁵ Farm Sanctuary, *About Us: Position Statements, “Humane Meat,”* <http://www.farmsanctuary.org/about/position/> (last accessed Nov. 21, 2009) (“The language of the letter was vague and we regret that some have misinterpreted it. Farm Sanctuary has never and will never support so-called ‘humane’ meat. We maintain that the words ‘humane’ and ‘slaughter’ are mutually exclusive.”).

¹⁵⁶ *McGill v. Parker*, 179 A.2d 98, 110 (N.Y.A.D. 1 Dept. 1992) (referencing to statements of ASPCA and others on horse carriage trade, in defamation action, as “highly partisan expressions of opinion by animal rights activists . . .”).

¹⁵⁷ American Socy. for the Prevention of Cruelty to Animals, *Eating Meat*, <http://www.aspc.org/about-us/policy-positions/eating-meat.html> (last accessed Nov. 21, 2009).

¹⁵⁸ American Socy. for the Prevention of Cruelty to Animals, *Research: General Considerations*, <http://www.aspc.org/about-us/policy-positions/research-general-considerations.html> (last accessed Nov. 21, 2009).

sue,”¹⁵⁹ courts have not articulated a coherent body of law regarding the rights of animals. One court, for example, quoted with some level of approval a dissenting report appearing in the legislative history of a federal statute outlawing materials depicting cruelty to animals.¹⁶⁰ That dissenting report states that “on balance, animal rights do not supersede fundamental human rights.”¹⁶¹ Another court, rather than conducting any such balancing of human and animal rights, resolved a claim for injury of animals by unambiguously denying that animals have any rights: “Animals do not have established ‘rights’ under the law. They are considered personal property and do not have the right or capability to commence litigation.”¹⁶² The inconsistency in judicial pronouncements on the rights of animals is exacerbated by the illusory nature of the statutes from which some of those “rights” are said to arise. Congress has enacted statutes, such as the Animal Welfare Act,¹⁶³ that only appear to protect animals and are in fact illusory.¹⁶⁴ Any rights that courts recognize as arising from those statutes are likely to be illusory as well.

One U.S. Court of Appeals has identified multiple rights that, the court opined, are possessed by animals: “Animals have many legal rights, protected under both federal and state laws.”¹⁶⁵ The court identified, as one source of animal rights, the African Elephant Conservation Act,¹⁶⁶ even though that statute provides for the killing of elephants by expressly allowing U.S. citizens to import any “elephant trophies,” they shoot in Africa¹⁶⁷ and by specifying the conditions under which the Secretary of the Interior may suspend the moratorium on importation of ivory into the United States.¹⁶⁸

As another example of a statute conferring rights on animals, the court referred to the provisions of the Horse Protection Act.¹⁶⁹ While the Horse Protection Act does prohibit, *inter alia*, showing a horse that has been “sored” to cause a sought-after, unnatural gait,¹⁷⁰ it does not protect a horse from being exported from the United States by land for

¹⁵⁹ *Chandler v. Ga. Pub. Telecomm. Commn.*, 917 F.2d 486, 489–90 (11th Cir. 1990) (Libertarian candidate’s effort to participate in Presidential debate).

¹⁶⁰ *U.S. v. Stevens*, 533 F.3d 218, 226–27 (3d Cir. 2008), *cert. granted*, 129 S.Ct. 1984 (2009).

¹⁶¹ *Id.* (Court, in striking down statute outlawing possession of video depicting cruelty to animals, quotes dissenting report from legislative history.).

¹⁶² *Snugglers’ Meadow Farms, L.L.C. v. Land O’Lakes, Inc.*, No. 1:04CV785, 2006 WL 346396 (N.D. Ohio Feb. 13, 2006).

¹⁶³ 7 U.S.C. §§ 2131–2156 (2006).

¹⁶⁴ *Supra* Section II(A).

¹⁶⁵ *Cetacean Community v. Bush*, 386 F.3d at 1175.

¹⁶⁶ 16 U.S.C. §§ 4201–4246 (2006).

¹⁶⁷ *Id.* at § 4222(e) (2006).

¹⁶⁸ *Id.* at § 4222(c).

¹⁶⁹ *Cetacean Community v. Bush*, 386 F.3d at 1175 (citing Horse Protection Act, 15 U.S.C. §§ 1821–1831 [2006]).

¹⁷⁰ 15 U.S.C. § 1824 (2006). See *Derickson v. U.S. Dept. of Agric.*, 546 F.3d 335, 337 n. 1 (6th Cir. 2008) (explaining a “sore” horse).

slaughter.¹⁷¹ The court also identified the Wild Free-Roaming Horses and Burros Act¹⁷² as a source of rights for those animals.¹⁷³ The express purpose of Congress in adopting that statute, however, is an anthropocentric one: to protect these horses and burros because they “are living symbols of the historic and pioneer spirit of the West,”¹⁷⁴ and to “contribute to the diversity of life forms within the Nation and enrich the lives of the American people.”¹⁷⁵

The same court referred to the Animal Welfare Act (AWA)¹⁷⁶ as a source of animal rights.¹⁷⁷ In that statute, Congress requires, *inter alia*, that the USDA promulgate regulations regarding the treatment of animals in research laboratories, a responsibility which the USDA delegates to the research facilities themselves along with broad powers given to the facility to waive and make exceptions to any and all substantive mandates.¹⁷⁸ The most significant difficulty with identifying the AWA as a source of rights is that such an identification raises questions like this one: What class of rights allows a researcher to inject acid into the rights-holder’s abdominal cavity and then count the number of times she writhes?¹⁷⁹ The court’s reference to the AWA as conferring rights on animals also raises this question: If a rights-holder can be subjected to the writhe test¹⁸⁰ and the electric-shock experiment,¹⁸¹ what types of experiments can be conducted on animals who do *not* have rights?¹⁸²

4. *What Do Legal Scholars Mean When They Use the Term “Animal Rights”?*

Not only courts, but also legal scholars have ascribed rights to animals. Professor Cass Sunstein has written that the AWA

creates something like an incipient federal Bill of Rights for animals, providing protection against suffering and abuse, . . . [and t]he upshot is that federal and state law recognize a great deal in the way of rights for animals, not only against torture and abuse, but also against neglect.¹⁸³

¹⁷¹ See 15 U.S.C. § 1824 (failing to prohibit the exportation of slaughter horses from the United States by land).

¹⁷² 16 U.S.C. §§ 1331–1340 (2006); see also Cass R. Sunstein, *A Tribute to Kenneth L. Karst: Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. Rev. 1333, 1333 (2000) (referring to the Animal Welfare Act as “an incipient bill of rights for animals”).

¹⁷³ *Cetacean Community v. Bush*, 386 F.3d at 1175.

¹⁷⁴ 16 U.S.C. § 1331 (2006).

¹⁷⁵ *Id.*

¹⁷⁶ 7 U.S.C. §§ 2131–2156 (2006).

¹⁷⁷ *Cetacean Community v. Bush*, 386 F.3d at 1175.

¹⁷⁸ 7 U.S.C. 2143.

¹⁷⁹ Ness, *supra* n. 78.

¹⁸⁰ *Id.*

¹⁸¹ Territo et al., *supra* n. 15.

¹⁸² *Id.*

¹⁸³ Cass R. Sunstein, *Enforcing Existing Rights*, 8 Animal L. i, ii (2002). Professor Sunstein’s suggestion that the AWA creates an incipient federal bill of rights for animals

Attributing the AWA's failings to inadequate enforcement, Professor Sunstein argues "if the Animal Welfare Act were taken seriously, we could accomplish a great deal to reduce animal suffering."¹⁸⁴

The AWA, even if it were meticulously obeyed and vigorously enforced, would allow researchers to conduct the poisoning study, the writhe test, the neonatal stress study, and the electric shock experiment as described above.¹⁸⁵ The abuse of animals subjected to these and other such tests does not result from any failure to enforce the AWA. Making dogs writhe in pain does not violate the AWA, nor does poisoning dogs and watching them slowly die,¹⁸⁶ or hanging them in slings and shocking them until they have convulsions.¹⁸⁷ Failing to file the required paperwork,¹⁸⁸ the committee minutes,¹⁸⁹ or the inspection reports¹⁹⁰ violates the AWA.

Other scholars would recognize the rights only of certain animals. Professor Steven M. Wise, for example, argues for the recognition of liberty rights for chimpanzees. Liberty rights, as identified by Wise, include at least the right to bodily integrity and the right to bodily liberty.¹⁹¹ He advocates overcoming the obstacles to animal rights one at a time,¹⁹² and he sets forth the idea "practical autonomy,"¹⁹³ a concept pursuant to which the strength of an animal's liberty rights depends on "what mental abilities she has and how certain we are that she has them."¹⁹⁴ Although Professor Elizabeth Anderson has not expressly advocated for the rights of other animals, she favors the right of great apes not to be subject to human predation.¹⁹⁵ Standing in opposition to Wise's theory (as well as Singer's) are the views of Judge Richard Posner, who argues for an approach that he refers to as

seems to indicate that his threshold for such rights is low. Even such a moderate view drew the ire of the veal and milk industries when Sunstein was nominated to lead the Office of Management and Budget's Office of Information and Regulatory Affairs. In response to those industry concerns, Senator Pat Roberts of Kansas extracted a promise from Sunstein that he "does not plan to regulate animal husbandry." Dan Friedman & Carrie Dann, *Animal Rights Views Slow OMB Nominee*, Congress Daily (June 15, 2009).

¹⁸⁴ Sunstein, *Enforcing Existing Rights*, *supra* n. 183, at ii. .

¹⁸⁵ *Supra* Part II.

¹⁸⁶ *Supra* Part II.

¹⁸⁷ *Supra* Part II.

¹⁸⁸ 7 U.S.C. § 2143 (researchers can grant themselves exceptions to the Act and regulations simply by placing an explanation in the research protocol and the report to the animal use committee).

¹⁸⁹ *Id.* (animal-use committee to file reports of inspection twice a year).

¹⁹⁰ *Id.*

¹⁹¹ Steven M. Wise, *The Entitlement of Chimpanzees to the Common Law Writs of Habeas Corpus and De Homine Replegiando*, 37 Golden Gate U. L. Rev. 219, 220 (2007) (describing rights of bodily liberty and bodily integrity).

¹⁹² *Id.*

¹⁹³ See e.g. Steven M. Wise, *Rattling the Cage Defended*, 43 B.C. L. Rev. 623, 655 (2002).

¹⁹⁴ *Id.* at 691.

¹⁹⁵ Cass R. Sunstein & Martha C. Nussbaum, *Animal Rights: Current Debates and New Directions* 295 (Oxford U. Press 2004).

“humancentric” and that leaves the treatment of animals largely to human knowledge about them and human sentiment toward them.¹⁹⁶

Others theorists have argued specifically that the AWA, which requires research facilities to consider such issues as pain, anesthesia, and analgesia, confers rights on animals¹⁹⁷ but only when the violation of those rights causes aesthetic injury to a human.¹⁹⁸ Applying this theory to the shock experiment, discussed *supra* Part II, would result in the conclusion that the dogs in the laboratory had a right not to be shocked. The right is an illusion, however, as these theorists’ further explanation reveals. The animal’s “right” actually belongs to a human.¹⁹⁹ The human has standing to sue for a violation of the AWA if the human is disturbed by seeing the dog shocked to the point of convulsions.²⁰⁰ This idea of a right not to suffer in a way that upsets a human is a quintessentially anthropocentric notion.

5. *What Rights Are Included in the Animal Bill of Rights?*

The confusion as to the meaning of animal rights is also apparent in the *Animal Bill of Rights*,²⁰¹ a document promoted by the Animal Legal Defense Fund. The first right mentioned is the right of animals “to be free from exploitation”²⁰² If that right were recognized, the remainder of the *Animal Bill of Rights* would be unnecessary. Among the other rights enumerated is the right of laboratory animals not to be used in cruel or unnecessary experiments.²⁰³ Animals that have the right to be free from exploitation have, by definition, the right not to be used in *any* experiments, regardless of their necessity or cruelty. Using an animal in an experiment is exploitation, so an animal about to be used in an experiment need only invoke that right to be free from exploitation.

Also enumerated in the *Animal Bill of Rights* is the right of farm animals to an environment that satisfies their basic physical needs.²⁰⁴ If animals have the right to be free from exploitation, this right for farm animals is unnecessary because animals would not be used for food, rendering moot the amount of space allowed for each animal. The same problem would exist in the United States Bill of Rights if the right against self-incrimination²⁰⁵ was followed by the “right not to be subjected to unfair cross-examination when required to testify.” A

¹⁹⁶ *Id.* at 51, 66.

¹⁹⁷ *Developments in the Law—Access to Courts: VI. Aesthetic Injuries, Animal Rights, and Anthropomorphism*, 122 Harv. L. Rev. 1204, 1211–13 (2009).

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 1213.

²⁰¹ Animal Legal Defense Fund, *Animal Bill of Rights*, <http://www.animalbillofrights.com> (last accessed Dec. 14, 2009).

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.*

²⁰⁵ U.S. Const. amend. V.

human possessing the right not to incriminate himself has no need for a right not to be unfairly cross-examined when required to testify, because he cannot be required to testify. Enumerating the weaker right undercuts the stronger right, indicating that the stronger right is not as all-encompassing as it seems. A human Bill of Rights might also provide for the “right to have counsel present to raise objections whenever the witness is required to testify against his will.” In both instances, the strong initial statement of the right is undercut by the subsequent statements of weaker rights. The *Animal Bill of Rights* states an all-encompassing right—the right to not be exploited—and then enumerates additional rights that indicate that the exploitation of animals, with certain conditions, is assumed.

6. *Clarity Is Essential*

In the context of this confusion, few things are what they seem. For example, a law allowing scientists to hang dogs in slings and shock them until they convulse appears in the United States Code under the title “Animal Welfare Act.”²⁰⁶ While no branch of government will intervene to help the convulsing laboratory dog,²⁰⁷ Courts *will* recognize a human’s aesthetic injury caused by *seeing* the dog convulse. Other theorists²⁰⁸ go further and identify the human’s aesthetic interest as creating “rights” purported to belong to animals; if the theory is applied to the electric shock experiments, it would provide not for the alleged right to be free from shock but for the right to be free from shock in the presence of a human who would be upset by the sight. Thus, phrases like “animal rights” and “animal welfare” seem to have entered some linguistic house of mirrors that distorts the words beyond recognition.

Even among those who seek to promote animals as right-holders, the confusion about the nature of those rights is great—and rarely addressed. To say “we favor rights for animals” means very little. One consequence of that lack of content is that a person might support an organization upon learning of its position in favor of “animal rights,” only to ascertain later that the organization meant—and used his money to accomplish—something very different from what the supporter intended. By contrast, there is significant meaning conveyed by the statement, “We favor abolishing the property status of animals to end their exploitation.” There is also meaning, however self-contradictory, in the statement, “we want animals to remain property and to continue being eaten and experimented on, but we want them to live otherwise pleasant lives as they are exploited in those ways.” All persons, organizations, initiatives, laws, and ideas in animal advocacy should be identified using descriptive terms that indicate the advo-

²⁰⁶ 7 U.S.C. § 2143; Territo et al., *supra* n. 15 (noting that the study was “conducted in compliance with . . . the Animal Welfare Act (7 U.S.C. 2131–2159)”).

²⁰⁷ Territo et al., *supra* n. 15.

²⁰⁸ *Aesthetic Injuries, Animal Rights, and Anthropomorphism*, *supra* n. 197.

cates' and organizations' general goals. The phrase "animal rights" has been so distorted that there no longer exists any identifiable "animal rights movement" that might succeed where Welfarism and Abolitionism have not. Right-holding is likely to be a crucial concept for animals, but it is currently without a consistent structure.²⁰⁹

IV. ABOLITIONISTS SHOULD FOLLOW THE LEAD OF OTHER SOCIAL JUSTICE MOVEMENTS BY DEPICTING THE SUFFERING THAT DEFINES THE LIVES OF ANIMALS

Let me see that I excite the sympathy of one creature.

—Mary Wollstonecraft Shelley,
*Frankenstein: Or the Modern Prometheus*²¹⁰

Animal Abolitionists recount the narratives of animal suffering much less frequently and with much less detail than do Welfarists. When Abolitionists do refer to the suffering of animals, they typically do so only in the most general sense, as when they address the inconsistency in the notion of unnecessary suffering,²¹¹ the "moral schizophrenia" of condemning such unnecessary suffering while causing animals pain by activities that are not necessary,²¹² and the failure of the prohibition against causing unnecessary suffering.²¹³ Professor Tom Regan refers to philosophers' views about animals' pain, but does not describe the suffering of animals in any of the settings where it is so specific, detailed, and ubiquitous.²¹⁴ In discussing the Humane Methods of Livestock Slaughter Act (HMLSA), Abolitionists address slaughter generally but tend not to describe the atrocities committed against animals in slaughterhouses.²¹⁵ They argue that welfare measures are likely to result in increased use by placated consumers, therefore increasing suffering,²¹⁶ but the reference to suffering is only a general one. Abolitionist theory includes other broad references to pain: pointing out that the "minimal pain" requirement of the Animal Welfare Act (AWA) is as meaningless as the phrase "unnecessary suf-

²⁰⁹ For various treatments of the distinction between animal rights and animal welfare, see Neil D. Hamilton, *One Bad Day: Thoughts on the Difference Between Animal Rights and Animal Welfare*, 106 Mich. L. Rev. First Impressions 138 (2008); Ruth Payne, *Animal Welfare, Animal Rights, and the Path to Social Reform: One Movement's Struggle for Coherency in the Quest for Change*, 9 Va. J. Soc. Policy & L. 587 (2002).

²¹⁰ Shelley, *supra* n. 1, at 137–38.

²¹¹ Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, *supra* n. 45, at 9–11.

²¹² Gary L. Francione, *The Use of Nonhuman Animals in Biomedical Research: Necessity and Justification*, 35 J.L., Med. & Ethics 241, 242 (2007).

²¹³ Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, *supra* n. 45, at 10.

²¹⁴ Tom Regan, *Defending Animal Rights* 74 (U. Illinois Press 2006).

²¹⁵ *Id.* at 10–11.

²¹⁶ *Id.* at 11.

fering,”²¹⁷ explaining that promoting veganism will reduce suffering by decreasing the demand for animal products,²¹⁸ describing the views of the utilitarian philosopher Jeremy Bentham,²¹⁹ discussing the similar-minds theory,²²⁰ and observing that the animals most regularly exploited by humans have the capacity for pain and suffering.²²¹

Much less frequently, Abolitionists describe the specifics of the lives and deaths of exploited animals.²²² Professor Steven M. Wise, for example, communicates the facts of an animal’s painful life on a factory farm.²²³ Abolitionists also describe with specificity the story of the chimpanzee Jerom, who “languished in the small, windowless, cinder-block cell within the Yerkes Regional Primate Research Center with eight more pain-wracked years to live”²²⁴ Other specific references to pain in Abolitionist writings include descriptions of the mutilation of farm animals without pain relief,²²⁵ the crowding of farm animals into filthy containers for transport,²²⁶ the allotting of small areas to battery hens, and the suffering they experience when packed into cages in a way that crushes them.²²⁷ Abolitionists also refer to the specific way in which geese are abused to produce *pâté de fois gras*, i.e., having “tubes shoved down their throats”²²⁸ to force-feed them.

These specific descriptions of animal suffering do not predominate in Abolitionist arguments, as evidenced by the three Abolitionist tracts that are available today. “The Starting Point”²²⁹ and the “Animal

²¹⁷ *Id.* at 19.

²¹⁸ *Id.* at 43.

²¹⁹ *Id.* at 39.

²²⁰ Francione, *Taking Sentience Seriously*, *supra* n. 45, at 8.

²²¹ Gary L. Francione, *Equal Consideration and the Interest of Nonhuman Animals in Continued Existence: A Response to Professor Sunstein*, 2006 U. Chi. Leg. Forum 231, 234 (2006).

²²² Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 Rutgers L.J. 247, 259 (2008) (relating stories of specific animals who suffer, including longtime primate companions who were separated from each other). Professor Bryant, rather than focusing on the term “Abolition,” makes the case for “sacrificing” our sacrifice of animals.

²²³ Steven M. Wise, *Rattling the Cage Defended*, *supra* n. 193. Professor Wise does not use the word “Abolitionist” in describing himself; his theories do coincide to a certain extent with Abolitionism, but with regard to a narrower range of animals: He argues that chimpanzees and bonobos should be recognized as common-law persons with basic rights to bodily integrity and bodily liberty; he also describes his law practice as focusing on “slave law” because of his view that animals are slaves.

²²⁴ Steven M. Wise, *Dismantling the Barriers to Legal Rights for Nonhuman Animals*, 7 Animal L. 9, 15 (2001).

²²⁵ Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, *supra* n. 45, at 10.

²²⁶ Francione, *The Use of Nonhuman Animals in Biomedical Research*, *supra* n. 212.

²²⁷ Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, *supra* n. 45, at 16.

²²⁸ *Id.* at 27.

²²⁹ The Starting Point. Le Point de Départ., <http://thestartingpointisveganism.blogspot.com/> (May 24, 2008) (last accessed Nov. 21, 2009).

Rights Abolitionist Approach” tract²³⁰ make only oblique, general references to the suffering of animals. The third tract, which powerfully depicts animal suffering, is produced by a regional organization, the Boston Vegan Association.²³¹ The content of these tracts, with the national and international groups making only general references to the suffering of animals, is a significant example of Abolitionists’ tendency to avoid references to the specific ways in which animals suffer.

It is clear that the suffering of animals matters to Abolitionists; the purpose of their work is to benefit animals. It does appear, however, that the suffering of animals does not have a significant role in Abolitionist theory. Not only do Abolitionists de-emphasize the suffering of animals, but some expressly state that the suffering of animals is of little significance to their theories except as proof that animals have an interest in their own continued existence. For example, in rebutting the claim that sentient nonhumans have an interest in how they are treated but no interest in their continued existence, Professors Gary Francione and Anna Charlton assert that “sentience is *only* a means to the end of continued existence.”²³² Francione also states that “all sentient beings share in common an interest in continuing to live—sentience is *merely* a means to the continued existence of organisms that are able to have mental experiences of pleasure and pain.”²³³ The argument is not that the significance of sentience is its tendency to protect the interest in continued existence; the argument is that it is the only significance of sentience. Professor Francione, in a 2009 podcast interview, discussed the weakness of welfare measures.²³⁴ He offered the example of slavery, explaining that while it is better for a slave owner to beat the slaves five times a week rather than ten times a week, the real problem is the institution of slavery, which should be abolished.²³⁵ Rebutting the notion that a reduction in animal suffering makes their exploitation acceptable, he said this about animals: “It doesn’t matter how we’re treating them.”²³⁶

²³⁰ Gary L. Francione & Anna E. Charlton, *Animal Rights: The Abolitionist Approach*, http://www.abolitionistapproach.com/media/pdf/ARAA_Pamphlet.pdf (last accessed Sept. 11, 2009).

²³¹ The Boston Vegan Assn., *Welcome to the Boston Vegan Association!*, <http://www.bostonvegan.org> (last accessed Dec. 14, 2009).

²³² Gary L. Francione & Anna E. Charlton, *Animal Advocacy in the 21st Century: The Abolition of the Property Status of Nonhumans*, in Taimie Bryant, Rebecca Huss & David Cassuto, *Animal Law and the Courts: A Reader* 20 (Thompson/West 2008) (emphasis added) (rebutting Welfarist argument that animals have an interest in avoiding suffering, but no interest in continuing to live).

²³³ Gary L. Francione, *Animal Rights: The Abolitionist Approach . . . and Abolition Means Veganism!*, *FAQs, Question 11*, <http://www.abolitionistapproach.com/faqs/> (last accessed Nov. 21, 2009) (emphasis added).

²³⁴ Interview by Elizabeth Collins with Gary L. Francione, Distinguished Prof. of Law and Nicholas deB. Katzenbach Scholar of Law & Phil., Rutgers U. School of Law-Newark (March 30, 2009) (podcast available at <http://www.abolitionistapproach.com/audio/> (last accessed Sept. 30, 2009)).

²³⁵ *Id.*

²³⁶ *Id.*

Reducing the suffering of exploited animals does not justify their exploitation, but animal suffering does matter. It matters to the animal, and it matters to those who have empathy for her. Most importantly, it matters to those who would end the exploitation of animals because the suffering of exploited animals is one compelling argument for ending that exploitation. If animals did not suffer at all, exploiting them would still be wrong. The suffering that inevitably arises from exploitation is powerful evidence that the exploitation must end.

Welfarists use the proper tools—narratives and images of animal suffering—but they are satisfied to classify animals as property. Abolitionists work toward the valid outcome, but they decline to use the most powerful tool available. Abolitionists have the opportunity to break through this impasse by demonstrating to the public not only that animals are exploited but also that they suffer. Professor Francione has described some of the reasons he believes Abolitionists should be hesitant to describe animal suffering. Specifically, he has questioned the validity of what he refers to as “blood and guts’ advocacy.”²³⁷ He uses that label for “gory materials [such as] videos of slaughterhouses or other brutal situations,”²³⁸ but it is not yet clear which depictions of animal suffering, other than slaughterhouse videos, fall within the category “blood and guts advocacy.” Among the questions that arise in this regard are whether his comments are directed only to slaughterhouse videos or also to still photographs, written descriptions, and places other than the slaughterhouse. As to those materials he would include in the category “blood and guts,” Francione questions the usefulness of such materials in animal advocacy. While he doubts that there is a single right or wrong answer on the issue, Francione offers several arguments in opposition to employing depictions of animal suffering as a tool for ending the oppression of animals.²³⁹

First, he suggests that some people will simply refuse to look at such materials and will walk away from a table or lecture where they are presented, depriving the advocate of the opportunity to educate those individuals.²⁴⁰ One concern with this line of argument is that Francione does not refer to evidence supporting this assertion that a certain percentage of people walk away from depictions of animal suffering. Without such evidence, it is impossible to make a valid judgment about whether depictions of animal suffering will drive people away. Moreover, even if evidence established that people walk away

²³⁷ Gary L. Francione, *A Comment on “Blood and Guts” Advocacy*, <http://www.abolitionistapproach.com/a-comment-on-blood-and-guts-advocacy> (July 29, 2009) (last accessed Nov. 21, 2009). Professor Francione’s objection to “blood and guts” advocacy does not encompass all slaughterhouse videos, however, because his website features graphic video from a cattle slaughterhouse. *Video*, <http://www.abolitionistapproach.com/video> (Apr. 7, 2006) (last accessed Nov. 21, 2009).

²³⁸ *Id.*

²³⁹ *Id.*

²⁴⁰ *Id.*

from such depictions, the argument would still fail to account for a different opportunity the advocate may lose. If the advocate avoids the accurate narratives and images of animal suffering in an effort to spare his audience, he loses the opportunity to educate the audience about animal suffering—and he loses that opportunity even as to that percentage of his audience (which no empirical evidence has established to be less than 100%) that would have stayed. In addition, the history of social justice movements demonstrates the importance of accurate portrayals of the suffering of the oppressed.²⁴¹

Clarification is also necessary as to any degree of inconsistency between this first argument, that these materials are so disturbing as to drive away some members of the intended audience, and the second argument: that “we are a society that has become numb to terrible violence [and] we should not overestimate the impact of videos and materials that we think are shocking.”²⁴² If our society is numb to violence (and Francione offers no evidence that it is), then people will not walk away from these depictions. Conversely, if the images are so disturbing as to drive some people away, then not everyone is numb to them. Moreover, it is possible that every audience member would stay for the presentation and that every audience member would be troubled by the depictions of animal cruelty. There is no evidence to the contrary because there is no evidence on this point at all.

Francione’s most fundamental reason for opposing depictions of animal suffering is found in the final objections he raises. These core objections grow out of a presupposition for which support is not offered in the comments on “blood and guts advocacy”: that accurate portrayals of animal suffering cause the viewer or reader to embrace Welfareism and reject Abolitionism. Specifically, Francione makes these assertions: “[G]ory materials almost always tend to make the viewer focus on the treatment [of animals] and not on their use.”²⁴³ “[S]how someone something that portrays terrible treatment and the almost automatic reaction is that treatment should be improved, and not that the use should be stopped altogether.”²⁴⁴

These assertions are not followed by reference to any evidence that the “almost automatic reaction” to animal suffering is support for Welfare. To whatever extent (if any) depictions of animal suffering do evoke support for Welfare rather than Abolition, the reason is not some mysterious, inherent alchemy by which the information invariably produces that reaction. Instead, any support for Welfare in such a circumstance results from a simple fact, which Francione acknowledges:²⁴⁵ Those who are told about animal suffering are not informed of the opportunity to support Abolition. They are not even told that

²⁴¹ See *infra* Sections IV(B)–(F).

²⁴² Francione, *A Comment on “Blood and Guts” Advocacy*, *supra* n. 237.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ *Id.*

Abolitionism exists. They are told only about Welfarism. As Professor Francione writes:

[Welfarists] will show the horrors of a chicken slaughter facility to get support for gassing the chickens; they will show a conventional battery cage operation to get support for cage-free eggs. The message is *clear and explicit*: let us show you how horrible it is, but, with your support, we can eliminate the “worst abuses” and make it better.²⁴⁶

When Welfarists depict the suffering of animals and plead for their audience to support Welfarist measures, it is no surprise if some in the audience do exactly as they are asked. Nor is it surprising if those who see depictions of suffering fail to pursue Abolitionism, since these presentations, as described by Francione, do not mention Abolitionism.

Francione also argues that Abolitionists must avoid the portrayal of animal suffering because the explicit message linked with depictions of animal suffering is a Welfarist message.²⁴⁷ The *reason*, however, that the explicit Welfarist message is linked with depictions of animal suffering is that only Welfarists depict animal suffering. If Abolitionists linked their message—including the inefficacy of Welfare—with depictions of animal suffering, then the Abolitionist message would be “clear and explicit” in those depictions of animal suffering.

This would all be of little consequence if the ranks of Abolitionists were swelling, but they are not. Veganism, validly identified by Francione as the “moral baseline”²⁴⁸ of the Abolitionist movement, appears to be on the decline, and certainly shows no signs of growing.²⁴⁹ History holds the promise that veganism will become prevalent when Abolitionists take up the mantle of their historical forebears in social justice efforts and tell the whole story of animals’ lives and deaths.

Francione is also correct, of course, that if animals did not suffer, it would still be wrong to use them. The history of animal exploitation—and especially the inefficacy of the Welfare movement—establish, however, that flesh-and-blood humans living in the real world do not and will not face the dilemma whether to exploit animals who are property but do not suffer. The inability of the Welfare movement to relieve animal suffering demonstrates that as long as animals are property, animals will suffer.

After rejecting depictions of animal suffering as a tool for advocates, Francione describes the argument he uses instead. Ironically, animal suffering is foundational to that argument. Francione writes:

I start almost every presentation that I give on animal ethics with a discussion of our shared acceptance of the moral principle that it is morally wrong to inflict “unnecessary” *suffering* and death on animals . . . and that

²⁴⁶ *Id.* (emphasis added).

²⁴⁷ *Id.*

²⁴⁸ Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, *supra* n. 45, at 41.

²⁴⁹ *Supra*, Section II(B).

any coherent understanding of the concept of necessity must exclude . . . [99.99% of our animal use, which imposes] *suffering* and death . . . for reasons of pleasure, amusement, or convenience.²⁵⁰

The question is unavoidable: What suffering? Is it not Francione's position that the suffering of animals should not be depicted because it will lead inexorably to support for Welfarism?

Francione ends the argument against depictions of animal suffering with these words:

I understand that it is important to educate the public about the realities of contemporary animal exploitation. But it is also important to make clear that even if we got rid of every factory farm and had only the family farms that some welfarists characterize as ideal, or even if every laboratory adhered scrupulously to every law and regulation concerning vivisection, animals would still be . . . made to suffer all sorts of deprivations.²⁵¹

Here, Francione comes full circle and suggests the approach that would pair the valid goal of abolition with the powerful tool of portraying animal suffering. He also calls on Abolitionists to do the hard work of making it clear that when welfare measures succeed, animals continue to suffer.

Only Abolitionism holds any real promise of ending the torment and killing of animals. But Abolitionism is not succeeding. It would be a bitter irony if Abolition ultimately falls short of its goal because its most powerful voices declined to tell its most compelling story.

A. *The Legal Significance of Suffering*

Contrary to the assertion that sentience matters only as a vehicle to continue living is the axiom that suffering matters. It matters in courts of law, and it matters in the court of public opinion, which so often has a role in shaping the law. In fact, the United States legal system reflects a keen awareness of, and concern about, physical and mental pain. This awareness and concern find their earliest, and perhaps their most fundamental, expression in the Eighth Amendment to the United States Constitution, which embodies principles extending at least as far back in history as the Magna Carta.²⁵² The shortest in the Bill of Rights at only sixteen words, the Eighth Amendment pro-

²⁵⁰ Francione, *A Comment on "Blood and Guts" Advocacy*, *supra* n. 237 (emphases added and omitted).

²⁵¹ *Id.*

²⁵² Dawinder S. Sidhu, *On Appeal: Reviewing the Case against the Death Penalty*, 111 W. Va. L. Rev. 453, 458 (2009) (prohibition against cruel and unusual punishment can be traced to English Bill of Rights and Magna Carta); Michael J. O'Conner, *What Would Darwin Say?: The Mis-Evolution of the Eighth Amendment*, 78 Notre Dame L. Rev. 1389, 1391 (2003) (prohibition against cruel and unusual punishment can be traced to the Magna Carta and is identical to language in English Bill of Rights); Sandy Baggett, *In Search of a Right to Die: Preventing Government Infliction of Pain*, 65 Tenn. L. Rev. 245, 281 (1997) (prohibition comes from English Bill of Rights and the ban is based on principles in Magna Carta); Michael Friedman, *Cruel and Unusual Punishment in the Provision of Prison Medical Care: Challenging the Deliberate Indifference Standard*, 45

vides, “Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.”²⁵³ The concept most clearly related to suffering is embodied in the phrase “cruel and unusual punishment,” which has a long history of judicial interpretation demonstrating “evolving standards of decency,”²⁵⁴ and marking the point beyond which the government may not go in punishing a lawbreaker. Courts have not shown an eagerness to find violations of the cruel-and-unusual clause. The United States Supreme Court was sharply divided by the 1958 case of an Army deserter who raised an Eighth Amendment challenge to the statute under which the government punished him by revoking his United States citizenship.²⁵⁵ Referring to a United Nations report indicating that only two of eighty-four member nations had enacted such a punishment, the plurality concluded that expatriation of a deserter constituted cruel and unusual punishment.²⁵⁶ The Court reasoned that “the American concept of man’s dignity does not comport with making even those we would punish completely ‘stateless’-fair game for the despoiler at home and the oppressor abroad, if indeed there is any place which will tolerate them at all.”²⁵⁷

More recently, courts have concluded that officials violate the cruel-and-unusual provision when they handcuff a subdued inmate to a hitching post, in the sun, in an uncomfortable posture, without water or any type of break, subject to the taunting of other inmates, for seven hours;²⁵⁸ or when they injure an inmate by use of a cattle prod, leaving visible damage.²⁵⁹

While Eighth Amendment jurisprudence addresses the suffering of convicted inmates, the law is also concerned with suffering on the other side of the criminal encounter, where the focus is not on the perpetrator of a crime but on the victim. Capital murder statutes, for example, require that the jury consider the existence of the aggravating and mitigating circumstances of the crime.²⁶⁰ The conduct of the defendant in a capital murder case is scrutinized when the sentencing

Vand. L. Rev. 921, 926 (1992) (general principle of prohibition extends as far back as Magna Carta).

²⁵³ U.S. Const. amend. VIII. For an analysis of the “cruel and unusual” clause, see Sarah Reed, *Sentencing and Punishment—Cruel and Unusual Punishment: The United States Supreme Court Upholds California’s Three Strikes Law, Ruling the Law Does Not Violate the Eighth Amendment’s Prohibition on Cruel and Unusual Punishment*, 80 N.D. L. Rev. 497 (2004).

²⁵⁴ *Trop v. Dulles*, 356 U.S. 86, 101 (1958)

²⁵⁵ *Trop v. Dulles*, 356 U.S. 86.

²⁵⁶ *Id.* at 101–02.

²⁵⁷ *Id.*

²⁵⁸ *Hope v. Pelzer*, 536 U.S. 730 (2002) (punishment for alleged disruptive behavior).

²⁵⁹ *Brown v. Hughes*, 894 F.2d 1533 (11th Cir. 1990).

²⁶⁰ See Ala. Code § 13A-5-49 (2005); Fla. Stat. Ann. § 921.141 (2006); Kan. Stat. Ann. § 21-4636 (2007); La. Stat. Ann. C. Cr. P. Art. 905.4 (2008); Miss. Code Ann. § 99-19-101 (2006); N.C. Gen. Stat. Ann. § 15A-2000 (West 2007).

statute includes, as an aggravating factor,²⁶¹ that the murder was especially heinous, atrocious, or cruel. Among the evidence held sufficient to support such a finding are the following: The victim knew of his impending death for at least forty-five minutes, he was afraid and hyperventilating, and his call to his father to say goodbye showed acute awareness of impending death;²⁶² evidence that the defendant, in a single incident, beat and stabbed his victims and set the house on fire while one victim, a child, was still alive.²⁶³ The sentence was also upheld where the defendant, in killing his girlfriend's nineteen-month-old child, brutally kicked or punched the victim, and after incapacitating her, methodically poured hot cooking oil onto various portions of her body, including her genital region.²⁶⁴

The law's dual concerns with the suffering of the convict and the suffering of the victim are so significant that they change the outcome of a case. Our legal system's concern with the suffering of an inmate is so important that we will outlaw a particular punishment, reverse a court's ruling, or overrule a jury finding. Concurrently, our legal system's concern with the suffering of a murder victim is so great that evidence of that suffering is literally a matter of life and death: It can justify execution.

Further, suffering matters not only in criminal law, but also in tort law. The law of tort is concerned not just with the death of victims²⁶⁵ but also with their physical suffering. This concern distinguishes tort law from the Welfarist dichotomy in which suffering matters, but death does not. It also distinguishes tort law from the Abolitionist dichotomy in which death matters per se, but suffering apparently does not.

Some feminist legal theorists have recognized the significance of animal suffering.²⁶⁶ Rather than focusing on rights, Welfare, or Aboli-

²⁶¹ For additional decisions interpreting the heinous, atrocious, and cruel aggravator, see *Wickham v. State*, 998 So. 2d 593 (Fla. 2008); *Davis v. State*, 2 So. 3d 952 (Fla. 2008); *State v. Banks*, 271 S.W.3d 90 (Tenn. 2008); *State v. Vasquez*, 194 P.3d 563 (Kan. 2008); *Commonwealth v. Powell*, 956 A.2d 406 (Pa. 2008); *State v. Murrell*, 665 S.E.2d 61 (N.C. 2008); *Chamberlin v. State*, 989 So. 2d 320 (Miss. 2008).

²⁶² *Hudson v. State*, 992 So. 2d 96 (Fla. 2008).

²⁶³ *O'Kelley v. State*, 670 S.E.2d 388, 496 (Ga. 2008) (relying on both physical and psychological torment).

²⁶⁴ *People v. Whisenhunt*, 186 P.3d 496 (Cal. 2008); *Walker v. State*, 957 S.2d 560 (Fla. 2007) (victim endured emotional terror and torture for several hours before death); *Powell*, 956 A.2d 406.

²⁶⁵ See generally Suzanne M. Scheller, *Arbitrating Wrongful Death Claims for Nursing Home Patients: What Is Wrong with This Picture and How to Make It "More" Right*, 113 Penn. St. L. Rev 527 (2008) (discussing the action for wrongful death).

²⁶⁶ *Attention to Suffering: Sympathy as a Basis for Ethical Treatment of Animals*, in *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals* 147-70 (Josephine Donovan & Carol J. Adams eds., Continuum Publ. Co. 1996); *Caring About Animals: A Feminist Exploration*, in *Beyond Animal Rights: A Feminist Caring Ethic for the Treatment of Animals* 170-96 (Josephine Donovan & Carol J. Adams eds., Continuum Publ. Co. 1996).

tion, they promote an ethic of care.²⁶⁷ One of the complexities of this theory is the question of how it applies to some of the worst human conduct, such as whether and how an ethic of care would be enforced against scientists conducting the electric-shock experiment or workers shocking downed cows with cattle prods.

Not only does our legal system take note of suffering, but there is also significant evidence from history that revealing the suffering of the oppressed is an effective tool in bringing about social change.

B. Narrative and Image Empower the Nineteenth Century Movement to Abolish Slavery in the United States.

Suffering matters not only in existing law but as a reason for changing an unjust law. The events leading to the Emancipation Proclamation and the Thirteenth Amendment demonstrate the importance of telling the stories of the oppressed. The effort to abolish human slavery in the United States in the nineteenth century used narrative and image to great effect. Those who spoke and wrote of the suffering of slaves brought that suffering to the attention of the populace. In addition, there are vivid examples of the effect that image and narrative had on those who possessed the power to end slavery, most notably Abraham Lincoln.

1. Nineteenth Century Abolitionists Depict the Suffering of Slaves.

In the United States during the nineteenth century, opposition to slavery became a prominent topic both in private conversations and public dialogue. Those opposed to slavery were known as “Abolitionists.”²⁶⁸ These Abolitionists, black and white, men and women, publicized the evils of slavery by describing, with clarity and detail, the suffering that slaves experienced as a consequence of their status as property.²⁶⁹ Tracts and pamphlets explaining their plight were essential to the work of Abolitionists. One such pamphlet gave a detailed account of the experience of Sojourner Truth.²⁷⁰ Born into slavery under the name Isabella, she was ultimately emancipated, after which she became an Abolitionist and Suffragist.²⁷¹ The biographical tract

²⁶⁷ *Id.* (both sources).

²⁶⁸ See generally Amy Reynolds, *Through the Eyes of the Abolitionists: Free Association and Anti-Slavery Expression*, 11 *Comm. L. & Policy* 449 (2006) (discussing the work of nineteenth-century Abolitionists).

²⁶⁹ For an analysis of the U.S. government’s early efforts to silence nineteenth-century Abolitionists, see Katherine Hessler, *Early Efforts to Suppress Protest: Unwanted Abolitionist Speech*, 7 *B.U. Pub. Int. L.J.* 185, 191 (1998) (describing the speech of nineteenth-century Abolitionists and analyzing the absence of societal support that such speech has in common with the speech of advocates for the environment, animal rights, and gay/lesbian/bisexual rights).

²⁷⁰ Olive Gilbert, *Narrative of Sojourner Truth, A Northern Slave, Emancipated from Bodily Servitude by the State of New York, in 1828; with a portrait* (Boston 1850).

²⁷¹ *Id.* at 13, 116–21.

describes Isabella's suffering, including one beating in particular, at the hands of her brutal master:

[S]he found her master with a bundle of rods, prepared in the embers, and bound together with cords. When he had tied her hands together before her, he gave her the most cruel whipping she was ever tortured with. He whipped her till the flesh was deeply lacerated, and the blood streamed from her wounds²⁷²

Fredrick Douglass, like Sojourner Truth a freed slave, gave an address in Ireland in which he exposed certain specifics about the day-to-day lives of slaves. When he offered his audience narratives of the experience of slaves, Douglass was arguing not for reform but for abolition:

If more than seven slaves are found together in any road, without a white person—twenty lashes a piece. For visiting a plantation without a written pass—ten lashes. For letting loose a boat from where it is made fast—thirty nine lashes; and for the second offence, shall have his ear cut off. For having an article for sale without a ticket from his master—ten lashes. For being on horseback without the written permission of his master—twenty five lashes I saw one poor woman who had her ear nailed to a post, for attempting to run away, but the agony she endured was so great, that she tore away, and left her ear behind.²⁷³

In an autobiographical tract, Douglass wrote of seeing his own master tie a young, lame woman at breakfast, whip her until she bled, leave her tied, return at dinner, and whip her again, “cutting her in the places already made raw with his cruel lash.”²⁷⁴

While Truth and Douglass offered specific accounts from their personal experiences, the fiery Abolitionist William Lloyd Garrison referred to the suffering of slaves from the perspective of an outsider but nevertheless referenced their experiences. Alluding to the American Revolution with biting irony, Garrison described the founders of the nation going “through their seven years’ struggle, mingling the clanking of fetters, and the crack of the slave whip, and the groans of their imbruted victims with their cries for liberty and their shouts of victory!”²⁷⁵

The ranks of the Abolitionists also included a number of ministers who told the stories of the suffering of slaves. On September 15, 1791, Congregationalist preacher Jonathon Edwards, who would later serve as President of Union College, condemned slavery in a vivid sermon

²⁷² *Id.* at 27.

²⁷³ Frederick Douglass, Address, *I Am Here to Spread Light on American Slavery* (Cork, Ireland Oct. 14, 1845) (available from The Gilder Lehrman Center for the Study of Slavery, Resistance, and Abolition at <http://yale.edu/glc/archive/1014.htm> (last accessed Nov. 21, 2009)).

²⁷⁴ Frederick Douglass, *Narrative of the Life of Frederick Douglass an American Slave*, 85–86 (Benjamin Quarles, Belknap Press 1960).

²⁷⁵ William Lloyd Garrison, Speech, *The War—Its Cause and Cure* (May 3, 1861), in *William Lloyd Garrison and the Fight against Slavery: Selections from The Liberator* 165 (Bedford/St.Martin's 1995).

delivered in New Haven, Connecticut.²⁷⁶ Edwards described the wrongs committed against the slave, including “the lash, the smack of which is all day long in the ears of those who are on the plantation or in the vicinity.”²⁷⁷ Edwards told his congregation that the lash was so skillfully applied that it not only cut the skin but tore “out small portions of the flesh at almost every stroke.”²⁷⁸ Unitarian pastor William Ellery Channing delivered a speech at Lennox, Massachusetts on the ninth anniversary of the abolition of slavery in the British West Indies. He employed a description of the suffering of slaves, not to argue that slavery should be reformed so that slaves would be treated more kindly, but to persuade his audience that an institution that allowed such torture must end. Channing alluded to arguments then being made by proponents of slavery, who claimed that emancipation would cause suffering.²⁷⁹ Contrasting the reality of slavery with those imagined horrors, Channing told his audience:

My friends, your compassion is often called forth by predictions of massacre, of butchered children, of violated women, in case of emancipation. But do not waste your sympathies on possible evils, which wisdom and kindness may avert. Keep some of your tears and tenderness for what exists, for the poor girl whose innocence has no protection; for the wife and mother who may be widowed and made childless before night by a stroke of the auctioneer’s hammer; for the man subjected to the whip of a brutal overseer, and hunted, if he flies, by blood-hounds, and shot down if he outstrips his own pursuers.²⁸⁰

Another pastor issued an indictment against slavery, charging the institution and its proponents with “branding and lacerating the naked bodies of men and women, because their skins are black, leaving them no hope of redress for the most shocking cruelty”²⁸¹

Other speeches and publications described similar tortures, including a girl stripped and beaten until large pieces of flesh had actually been torn out by the whip²⁸² and a master who punished a recaptured runaway slave by tying him to a log and pulling a toenail out with pliers, threatening to pull out two more if the slaves again

²⁷⁶ Jonathan Edwards, Sermon, *The Injustice and Impolicy of the Slave Trade, and of the Slavery of the Africans* (New Haven, Ct., Sept. 15, 1791) (Edwards is not related to the fiery preacher of the same name who delivered the sermon, “Sinners in the Hands of an Angry God.”) (copy of transcript on file with *Animal Law*).

²⁷⁷ *Id.*

²⁷⁸ *Id.*

²⁷⁹ William E. Channing, Unitarian Theologian, Address, *The Anniversary of Emancipation, in the British West Indies* 37 (Lennox, Ma., Aug. 1, 1842) (facsimile of original available at Library of the University of Massachusetts at Amherst (available at <http://www.library.umass.edu/spcoll/digital/antislavery.htm> (last accessed Nov. 21, 2009)).

²⁸⁰ *Id.*

²⁸¹ Heman [sic] Humphrey, D.D., Reverend, Speech, *Our Nation* 20 (Pittsfield, Mass., Jan. 4, 1861).

²⁸² S.W. Streeter, Pastor, *American Slavery, Essentially Sinful: A Sermon*, 9, 10 (Oberlin: J.M. Fitch 1845).

attempted to escape his bondage.²⁸³ Harriet Beecher Stowe's widely-read portrayal of the suffering of slaves, *Uncle Tom's Cabin*,²⁸⁴ sold 10,000 copies during its first week in print.²⁸⁵ By 1861, with the nation on the verge of civil war, the novel was available in sixteen languages and had sold 4.5 million copies.²⁸⁶ When President Abraham Lincoln received Stowe at the White House in 1862, he greeted her as "the little lady who started this great war."²⁸⁷

These Abolitionists did not focus exclusively on the slaves' status as property, as today's animal Abolitionists do. The nineteenth-century pamphlets that included these descriptions of abuse were Abolitionist pamphlets; accordingly, they contained no argument for improvement of the institution of slavery. They did, however, describe the abuse a human can suffer when he is property. They made the argument not in support of the reform of slavery but as a compelling reason for ending slavery.

2. *Abraham Lincoln Sees Slaves and Cannot Forget the Sight.*

Before and during the American Civil War, Abolitionists urged President Lincoln to free all slaves. Lincoln believed that the power to free slaves, if he, as President, possessed it at all,²⁸⁸ was a war power.²⁸⁹ Yet Lincoln recognized the importance of choosing the right moment for such an act. September 16, 1862, the bloodiest single day of battle in American history, culminated in the Union victory at Antietam and gave Lincoln a position of strength from which he could press forward to emancipation.²⁹⁰ Encouraged by that military success, Lincoln moved swiftly. On September 22, 1862—a mere five days after Antietam—Lincoln signed the Preliminary Emancipation Proclamation.²⁹¹ It declared his intent to sign a proclamation on January 1, 1863, that would free all slaves in states or parts of states in rebellion against the United States.²⁹² On New Year's Day 1863, Lincoln signed

²⁸³ Charles Sumner, *The Barbarism of Slavery, 1860*, in *Against Slavery: An Abolitionist Reader* 313, 319 (Mason Lowance ed., Penguin Classics 2000).

²⁸⁴ *Concluding Remarks from Uncle Tom's Cabin*, in *Against Slavery: An Abolitionist Reader*, *supra* n. 283, at 291; *see also* Harriet Beecher Stowe, *Uncle Tom's Cabin* (W.W. Norton & Co. 1993).

²⁸⁵ *Concluding Remarks*, *supra* n. 284, at 292.

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *See* Sanford Levinson, *The David C. Baum Memorial Lecture: Was the Emancipation Proclamation Constitutional? Do We/Should We Care What the Answer Is?*, 2001 U. Ill. L. Rev. 1135, 1139, 1142, 1144 (2001) (discussing the constitutionality of the Emancipation Proclamation).

²⁸⁹ *See* Allen C. Guelzo, *Restoring the Proclamation: Abraham Lincoln, Confiscation, and Emancipation in the Civil War Era*, 50 How. L.J. 397, 397 (Winter 2007) (for an exploration of the War Power, the Proclamation and Lincoln's motives in executing it).

²⁹⁰ David Goldfield et al., *The American Journey: A History of the United States* 430 (Teaching & Learning Classroom ed., brief 4th ed., Pearson Educ., Inc., 2007).

²⁹¹ *Id.* at 431.

²⁹² *Id.*

the Emancipation Proclamation, freeing the slaves in those states and parts of states enumerated in the Proclamation.²⁹³

The Report of a Senate Select Committee on Slavery and the Treatment of Freedmen, however, revealed that the Proclamation was flouted. It showed that even after emancipation, a white person might deal with a former slave in any way he wished; he could “starve him, or he may whip him to death, murder him in cold blood, or burn him alive.”²⁹⁴ Narratives of slaves included a description of the actions of one white man with freed slaves:

Mr. Long would tie them up by the wrist, so high that their toes would just touch the ground, and then with a cow-hide lay the lash upon the naked back, until he was exhausted, when he would sit down and rest. As soon as he had rested sufficiently, he would ply the cow-hide again, thus he would continue until the whole back of the poor victim was lacerated into one uniform coat of blood.²⁹⁵

Because of the limitations of the Emancipation Proclamation, Lincoln wished to have a constitutional amendment adopted and ratified that would end legal slavery in the United States forever. The amendment was introduced, and when it seemed to stall in the House of Representatives, Lincoln personally made certain it was prominently featured at the 1864 Republican National Convention. That exposure led to passage by Congress. Although a Constitutional Amendment does not require the signature of the president, Lincoln, in an act apparently singular among U.S. presidents, signed his name after those of the Speaker of the House and the President of the Senate on the Amendment, dating his signature February 1, 1865.²⁹⁶ The Amendment was ratified by the last necessary state on December 6, 1865, eight months after Lincoln’s assassination.²⁹⁷

The decisions Lincoln made as president were informed by his experiences long before the war. Lincoln’s law partner, William Herndon, wrote in his biography of Lincoln about a riverboat trip Lincoln took to New Orleans as a young man. Herndon described an incident alleged to have occurred at a slave auction during this journey:

In New Orleans, for the first time Lincoln beheld the true horrors of human slavery. He saw “negroes in chains—whipped and scourged.” Against this inhumanity his sense of right and justice rebelled . . . One morning in their rambles over the city the trio passed a slave auction. A . . . mulatto girl was being sold. She underwent a thorough examination at the hands of the bidders; they . . . made her trot up and down the room like a horse. . . The whole thing was so revolting that Lincoln moved away from the

²⁹³ *Id.*

²⁹⁴ Sen. Select Comm. on Slavery and the Treatment of Freedmen 10 (accompanying S. Bill 99) (Feb. 29, 1864) (available at <http://www.archive.org/details/insenateofuniteds00unit> (last accessed Nov. 23, 2009)).

²⁹⁵ Theodore Dwight Weld, *American Slavery as It Is: Testimony of a Thousand Witnesses* 50 (Am. Anti-Slavery Socy. 1839).

²⁹⁶ U.S. Const. amend. XIII.

²⁹⁷ *Id.*

scene . . . Bidding his companions follow him he said, "By God, boys . . . [i]f I ever get a chance to hit that thing [meaning slavery], I'll hit it hard."²⁹⁸

Whether this incident ever occurred is in doubt. John Hanks, who reported the story to Herndon as his own first-person account, apparently had separated from Lincoln and the remainder of the group before the boat arrived in New Orleans;²⁹⁹ therefore, Hanks could not have been present with Lincoln at a slave auction in that city. Hanks, however, was not Herndon's only source regarding Lincoln's experience at the auction in New Orleans. Herndon asserted that Lincoln himself referred to the New Orleans slave auction in conversations with Herndon.³⁰⁰

However dubious the accounts of the New Orleans incident, Lincoln's encounter with slaves during another boat trip is subject to no such dispute. The source is Lincoln himself, in separate letters to his friend, slave-holder Joshua Speed,³⁰¹ and to Joshua's sister, Mary Speed. In 1841, Lincoln and Joshua Speed travelled on a steamboat from Louisville, Kentucky to St. Louis, Missouri.³⁰² That same year, Lincoln wrote to Mary Speed. Recounting the boat trip, Lincoln described twelve slaves who were on board, "chained six and six together."³⁰³ He wrote, "A small iron clevis was around the left wrist of each, and this fastened to the main chain by a shorter one at a convenient distance from the others; so that the negroes were strung together precisely like so many fish upon a trot-line."³⁰⁴ He also described the slaves' pain at being taken from everyone and everything they had loved to live under the rule of a ruthless master.³⁰⁵

In 1855, Lincoln wrote to his friend Joshua Speed. Even after fourteen years, the images of the slaves persisted, and they troubled him. Lincoln began the letter to Joshua Speed with comments on slaves generally: "I hate to see the poor creatures hunted down, and caught, and carried back to their stripes, and unrewarded toils."³⁰⁶ Lincoln then described his specific memories of the slaves with whom Lincoln and Speed had travelled on the steamship:

You may remember, as I well do, that from Louisville to the mouth of the Ohio, there were, on board, ten or a dozen slaves, shackled together with

²⁹⁸ William H. Herndon & Jesse W. Weik, *Herndon's Life of Lincoln* 63–64 (World Publg. Co. 1949) (brackets in original).

²⁹⁹ *Id.* at 64 n. 1.

³⁰⁰ *Id.* at 64.

³⁰¹ *The Essential Lincoln: Speeches and Correspondence* 31 (Orville Vernon Burton ed., Hill & Wang 2009).

³⁰² *Id.* at 32.

³⁰³ *Lincoln on Race and Slavery* 10 (Henry Louis Gates, Jr. ed., Princeton U. Press 2009).

³⁰⁴ *Id.*

³⁰⁵ *Id.*

³⁰⁶ *The Essential Lincoln*, *supra* n. 301, at 32.

irons. That sight was a continual torment to me, and I see something like it³⁰⁷ every time I touch the Ohio, or any other slave border.³⁰⁸

Volumes have been written on the causes of the Civil War and the forces that led to the abolition of slavery.³⁰⁹ Lincoln's ambivalence on slavery is well known. There is no precise formula for determining the extent to which Lincoln's knowledge of the experiences of slaves hastened their emancipation. At least two things are known: (1) Abolitionists, who sought not the reform of slavery but always its end, knew the power of the slaves' own stories of suffering, as evidenced by their use of those stories to promote their cause; and (2) Lincoln, who signed the Emancipation Proclamation and labored for passage of the Thirteenth Amendment, had seen slaves in irons and described that sight, years later, as a "continual torment" to him.³¹⁰ It can be assumed that he was not writing to garner favor, since his correspondent was a slaveholder.

The number of animals who suffer, and the magnitude of their suffering, are both immense. The experiences of those animals have the power to influence the public as well as elected officials. Abolitionists' lack of success in their efforts to promote veganism may well result from their nearly exclusive focus on the property status of animals as the evil that needs to be overcome. Abolitionists' recognition that animal sentience is more than just a means to the end of continued existence may be the key to increasing the ranks of vegans and thereby achieving the abolition of the property status of animals.

C. *Narratives of Violence against Suffragists Change Public Opinion.*

Tennessee ratified the Nineteenth Amendment in 1920, the last state necessary to make women's right to vote a part of the Constitution.³¹¹ That ratification came seventy-two years after women's demand for the vote in the Declaration of Sentiments was signed in

³⁰⁷ See Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. Animal L. & Ethics 63 (2006) (discussing the potential for post-traumatic stress disorder in animal activists repeatedly exposed to violence against animals).

³⁰⁸ *The Essential Lincoln*, *supra* n. 301, at 32.

³⁰⁹ See e.g. Harold Holzer, Edna Greene Medford & Frank J. Williams, *The Emancipation Proclamation: Three Views* (La. St. U. Press 2006); Allen Guelzo, *Lincoln's Emancipation Proclamation* (Simon & Schuster 2004).

³¹⁰ See Allen Guelzo, *Restoring the Proclamation: Abraham Lincoln, Confiscation, and Emancipation in the Civil War Era*, 50 How. L.J. 397 (Winter 2007) (making the case that it was not Lincoln's motive or methods that mattered, but the Emancipation Proclamation itself, with his signature at the bottom); Robert Fabrikant, *The Emancipation Proclamation Unveiled: A Reply to Professor Guelzo*, 50 How. L.J. 417 (Winter 2007) (attributing Lincoln's decision to sign the Proclamation primarily to the need to fill the ranks of the Union Army with escaped slaves living in the North, which could not be done without freeing them); *The Essential Lincoln*, *supra*, n. 301, at 32.

³¹¹ Linda L. Ammons, *What's God Got to Do with It? Church and State Collaboration in the Subordination of Women and Domestic Violence*, 51 Rutgers L. Rev. 1207, 1283 n. 344 (1999).

Seneca Falls, New York during the first Women's Rights Convention.³¹²

In that long struggle, it was likely the narratives of violence against Suffragists that eventually turned the tide. In the months and years leading up to the Nineteenth Amendment, approximately 100 Suffragists were arrested and jailed after violence broke out at demonstrations.³¹³ Most of them went on hunger strikes in response to which their jailers force-fed them.³¹⁴ Narratives of the force-feeding enraged the public, and by 1918 President Woodrow Wilson stated his support for women's suffrage.³¹⁵

D. The Photography of Lewis Hine Exposes the Abuse Inherent in Child Labor Practices.

In the early years of the twentieth century, approximately 2 million children aged sixteen and younger worked in the fields, mines, mills, and factories of the United States.³¹⁶ Three-year-old children picked cotton in fields.³¹⁷ Thousands of boys descended into coal mines and, at the end of a long day, returned to the surface with soot-covered faces.³¹⁸ Working for a committee seeking to reform child labor, Lewis Hine toured the country from 1908 to 1912 and photographed the lives of these children.³¹⁹ One of Hines' subjects was a five-year-old boy named Manuel, who awoke at 3:00 a.m. each day to work all day peeling shrimp.³²⁰ Hine also portrayed a four-year-old girl required to pick eight pounds of cotton each day.³²¹

Hines's photographs had a gradual effect as part of a larger effort, rather than as a sudden, dramatic presentation of a single scene. The Fair Labor Standards Act, banning the most abusive practices depicted by Hines, was enacted in 1938, more than twenty-five years after Hine's work depicting child labor had ended.³²²

³¹² Sarah Miller Little, *A Woman of Property: From Being It to Controlling It. A Bicentennial Perspective on Women and Ohio Property Law*, 16 *Hastings Women's L.J.* 177, 184 (2005).

³¹³ Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 *Suffolk U. L. Rev.* 27, 49 (2005).

³¹⁴ *Id.*

³¹⁵ *Id.*

³¹⁶ Russell Freedman, *Kids at Work: Lewis Hine and the Crusade against Child Labor* 1-2 (Houghton Mifflin 1994).

³¹⁷ *Id.* at 2.

³¹⁸ *Id.* at 49.

³¹⁹ *Id.* at 19.

³²⁰ *Id.* at 2.

³²¹ *Id.* at 67.

³²² 29 U.S.C. § 8 (2006); see generally Julie Novkov, *Historicizing the Figure of the Child in Legal Discourse: The Battle over the Regulation of Child Labor*, 44 *Am. J. Leg. Hist.* 369, 372, 377 (Oct. 2000) (discussing child labor reform and the work of Lewis Hine).

E. Images and Narrative from Birmingham Influence Passage of the Civil Rights Act of 1964.

On May 3, 1963, Dr. Martin Luther King, Jr. addressed a crowd of more than 1,000 African-Americans at Birmingham, Alabama's 16th Street Baptist Church.³²³ King galvanized the crowd before they set out into the streets of Birmingham to protest racial segregation. Hundreds of marchers from the church joined another 3,000 already in the streets for a march through a city infamous for its racism.³²⁴ The response from law enforcement was brutal. Police and firefighters turned fire hoses on the demonstrators, knocking some off their feet.³²⁵ The fire hoses used against these marchers were so powerful they could separate bricks from mortar and split the bark from trees, both at a distance of 100 feet.³²⁶ These blasts from powerful water hoses were not the only tool of Birmingham officials that day. On the order of the City's Police Commissioner, Eugene "Bull" Connor, police officers waded into the crowd, swinging billy clubs and setting police dogs on the marchers.³²⁷

The day after the demonstration in Birmingham, the front pages of newspapers across the nation featured not only the story of the protest but also Associated Press photographs. In one, a police officer holds a young black man by his cardigan sweater while a police dog lunges to bite his abdomen.³²⁸ In another photograph, Birmingham firefighters blast demonstrators with fire hoses.³²⁹ President John F. Kennedy saw the picture of the police dog lunging at the young man as well as television news footage of the attack.³³⁰ One White House visitor that day pressed Kennedy about the federal government's response to the violence against the demonstrators. Kennedy said that the photograph of the police dog attack "made [him] sick," but that as president he had no authority to intervene in such state and local matters.³³¹ He added that he planned to send administration officials to Birmingham as mediators.³³²

At a press conference five days after the Birmingham demonstrations, Kennedy announced his intention to bring both sides together in

³²³ Taylor Branch, *Parting the Waters: America in the King Years 1954-63*, 758 (Simon & Schuster 1988).

³²⁴ Foster Hailey, *Dogs and Hoses Repulse Negroes at Birmingham*, 112 N.Y. Times A1 (May 4, 1963). Hundreds of others were trapped inside the church when police sealed its doors. *Id.*

³²⁵ Robert Dallek, *An Unfinished Life: John F. Kennedy 1917-1963*, 594 (Little, Brown & Co. 2003).

³²⁶ Branch, *supra* n. 323, at 759-60.

³²⁷ *Fire Hoses and Police Dogs Quell Birmingham Segregation Protest*, Wash. Post A1 (May 4, 1963).

³²⁸ AP Wirephoto, 112 N.Y. Times A1 (May 4, 1963).

³²⁹ Branch, *supra* n. 323, at 764.

³³⁰ Dallek, *supra* n. 325, at 594.

³³¹ *Id.*

³³² Branch, *supra* n. 323, at 764.

order to settle peacefully the abuses that had been inflicted on the black citizens of Birmingham.³³³ King and other leaders of the civil rights movement criticized Kennedy for his failure to take decisive action.³³⁴ Kennedy continued to argue that considerations of federalism prohibited him from taking any action to interfere in the decisions of state and local governments. Meanwhile, seismic waves from Birmingham had spread across the country, drastically altering public opinion. Prior to the march in Birmingham, 4% of the U.S. population believed that civil rights was the most important issue the nation faced.³³⁵ After the news coverage of fire hoses and police dogs, that figure leapt by a factor of more than a dozen, from 4% to 52%.³³⁶

The images also had their effect on Congress. Five days after the police violence in Birmingham, and the same day as Kennedy's press conference, the Committee on the Judiciary of the House of Representatives conducted a session of its hearings on civil-rights legislation. Committee Chair Emanuel Celler opened the hearings that day with phrases emphasizing the importance of legislative action: "Police clubs and bludgeons, fire hoses and dogs have been used on defenseless school children who were marching and singing hymns."³³⁷

On June 11, 1963, barely a month after the march in Birmingham and the sea change in public opinion that followed its coverage, Kennedy acted. In a television address from the White House that night he said, "Now the time has come for this nation to fulfill its promise. The events in Birmingham and elsewhere have so increased the cries for equality that no city or state or legislative body can prudently choose to ignore them."³³⁸ In that address, Kennedy announced that he would introduce civil-rights legislation and urge Congress to pass it quickly.³³⁹ Although Kennedy was assassinated November 22, 1963, his successor, President Lyndon B. Johnson, signed the Civil Rights Bill of 1964 into law on July 2, 1964.³⁴⁰ Among other provisions, it prohibits discrimination in places of public accommodation and in employment.³⁴¹

During the civil rights era, public opinion polling was available. It provided a more vivid and precise portrayal than had previously been

³³³ *Id.* at 787.

³³⁴ *Id.*

³³⁵ Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 436 (Oxford U. Press 2004).

³³⁶ *Id.*

³³⁷ Robert V. Remini, *The House: The History of the House of Representatives* 397 (Smithsonian Bks. 2006).

³³⁸ Branch, *supra* n. 323, at 824.

³³⁹ *Id.*

³⁴⁰ James N. Giglio, *Kennedy, John Fitzgerald (1917-63)* in *The American Heritage Encyclopedia of American History* 490 (John Mack Faragher ed., Henry Holt & Co. 1998); Robert J. Cottrol, *Civil Rights Act of 1964*, in *Encyclopedia of the American Presidency Vol. 1* (Leonard W. Levy & Louis Fisher eds., Simon & Schuster 1994).

³⁴¹ Pub. L. No. 88-352 § 703, 78 Stat. 241 (1964) (employment discrimination); 42 U.S.C. § 2000(a) (2000) (public accommodation).

available of the role the depiction of suffering played in bringing about social change. The stories and images from Birmingham put the image and narrative of violence against the demonstrators on every newsstand and in the mouths of every television news anchor. Public opinion shifted, elected officials acted, and the law changed. In a pattern repeated throughout U.S. history, depicting the experiences of the oppressed played an important part in ending that oppression.

The focus on these narratives was not limited to news outlets. Law journals also told these true stories. The experiences recounted in civil-rights-era law journal articles include the attack on Sarah Louise McCoy, an African-American woman attending a previously all-white college, who was beaten by fifteen or twenty white adults.³⁴² Another law journal article described an 1873 incident in which whites surrounded a building that had been taken over by blacks, set it on fire, and shot the blacks to death as they escaped the burning building.³⁴³ Other narratives employed in scholarly journals were the bombing of a black lawyer's home, the shooting of three blacks on the eve of the integration of a Birmingham, Alabama high school, and the bombing of the Sixteenth Street Baptist Church in Birmingham, Alabama, in which four black schoolgirls were killed.³⁴⁴ Legal theorists also depicted the death of a thirteen-year-old black boy shot in the back by a policeman and the riots that ensued³⁴⁵ as well as the death of murder of Mack Charles Parker.³⁴⁶

F. Images and Narratives of Bloody Sunday Hasten Passage of the Voting Rights Act of 1965.

The Civil Rights Act of 1964 did not address the devices—including violence, poll taxes, and literacy tests—by which white Southerners kept black citizens from exercising their constitutional right to vote. So, in 1965, civil rights leaders focused their efforts on voting rights. On Sunday, March 7, 1965, approximately 600 marchers set off to cross the Edmund Pettus Bridge, which led to Selma, Alabama.³⁴⁷ About fifty state troopers met them as they crossed the bridge.³⁴⁸ The troopers ordered the marchers to disperse and gave them two minutes to do so.³⁴⁹ The marchers did not disperse. Instead,

³⁴² Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial*, 113 U. Pa. L. Rev. 793, 799 n. 2 (1965).

³⁴³ Laurent B. Brantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 Yale L.J. 1353, 1365 (1964).

³⁴⁴ See e.g. Louis Lusky, *Racial Discrimination and the Federal Law: A Problem in Nullification*, 63 Colum. L. Rev. 1163, 1174–75 n. 49 (1963) (describing these events).

³⁴⁵ *Id.*

³⁴⁶ William W. Van Alstyne, *State Action*, 14 Stan. L. Rev. 3, 15 (1961).

³⁴⁷ Goldfield et al., *supra* n. 290, at 837.

³⁴⁸ United Press Intl., *Alabama State Police Gas, Beat Selma Negro Marchers*, http://100years.upi.com/sta_1965-03-07.html (Mar. 7, 1965) (last accessed Nov. 21, 2009).

³⁴⁹ *Id.*

they prayed, many kneeling on the bridge.³⁵⁰ When two minutes had passed, about half the troopers waded into the crowd, clubbing the praying marchers and shoving them to the ground.³⁵¹ The troopers used their clubs to break the arms and legs of marchers and to fracture the skull of future U.S. Congressman John Lewis.³⁵² After the crowd retreated about 50 yards, the troopers launched round after round of tear gas at them³⁵³ until they ran, choking on the gas, in all directions.³⁵⁴ Mounted police officers then pursued them with bullwhips.³⁵⁵

Eight days later, President Johnson addressed Congress, urging legislators to pass what would become the Voting Rights Act of 1965. Johnson's remarks left no doubt about the significance of Bloody Sunday:

At times history and fate meet at a single time in a single place to shape a turning point in man's unending search for freedom. So it was at Lexington and Concord. So it was a century ago at Appomattox. So it was last week in Selma, Alabama.³⁵⁶

On August 4, 1965, five months after Bloody Sunday, Johnson signed into law the Voting Rights Act of 1965, outlawing poll taxes, literacy tests, violence, and other barriers to African Americans' right to vote.³⁵⁷

V. CONCLUSION

I felt that there was some justice in his argument.

—Mary Wollstonecraft Shelley,
*Frankenstein: Or the Modern
Prometheus*³⁵⁸

The history of advocacy for animal welfare in the United States is long and largely fruitless. In 1866, Aristocrat Henry Bergh founded the American Society for the Prevention of Cruelty to Animals. In the 143 years that have passed, hundreds of organizations representing millions of members have been formed and hundreds of laws enacted, all purporting to protect animals. In spite of this long history of legislation and advocacy, a nineteen-year-old Florida man accused of mutilating a dozen cats was released on bail because he was not viewed as a

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² *Id.*

³⁵³ *Id.*

³⁵⁴ United Press Intl., *Alabama State Police Gas, Beat Selma Negro Marchers*, *supra* n. 348.

³⁵⁵ *Id.*

³⁵⁶ President Lyndon B. Johnson, Speech, Mar. 15, 1965.

³⁵⁷ *Encyclopedia of Race and Racism*, Vol. 3, 205–06 (John Hartwell Moore ed., Macmillan Reference USA 2008).

³⁵⁸ Shelley, *supra* n. 1, at 170.

danger to the community.³⁵⁹ A Pennsylvania man avoided a prison sentence even though he put his own dog in the veterinary hospital for a week by beating the dog with a board that had sharp nails protruding from it.³⁶⁰

After those 143 years of advocacy and legislation purporting to help animals, not only does cruelty to companion animals persist, but acts of cruelty against farm animals are literally standard practice. Pigs and cows feel their tails being cut off with hot pinchers.³⁶¹ Beef cows have the uterus removed without anesthesia.³⁶² Thousands and thousands of animals who are alive and awake feel their skin being wrenched from their bodies in slaughterhouses.³⁶³ Dogs in toxicity tests are poisoned with overdoses of drugs even though toxicity in humans has already been established.³⁶⁴ Other dogs are hung from the laboratory ceiling in slings and shocked until they convulse.³⁶⁵ Researchers apply corrosive substances to the eyes of rabbits to determine what damage will result.³⁶⁶ Newborn chicks, unwanted because they are male, are suffocated in plastic bags.³⁶⁷ Scientists inject acid into a dog's abdomen and count the number of times she writhes.³⁶⁸ Workers shock injured cows with cattle prods on their eyeballs in an effort to force them to walk to the slaughter line in spite of their injuries.³⁶⁹ Commercial and hobby fishers watch as flailing fish suffocate on the decks of their boats. A rat is placed in a container full of water, so deep that he cannot touch bottom, with walls so high and rounded he cannot climb out or even grasp a corner. He frantically paddles and eventually gives up, a procedure that produces depression in the

³⁵⁹ Sarah Larimer, *Teen Accused of Fla. Cat Killings Released on Bail*, <http://abcnews.go.com/US/wireStory?id=7858632> (June 17, 2009) (last accessed Nov. 21, 2009).

³⁶⁰ Daniel Malloy, *Man Who Severely Beat Dog Gets House Arrest*, <http://www.post-gazette.com/pg/09142/971886-53.stm> (May 22, 2009) (last accessed Nov. 21, 2009).

³⁶¹ Am. Vet. Med. Assn., *Background: Welfare Implications of Tail Docking of Dairy Cattle*, http://www.avma.org/reference/backgrounders/tail_docking_cattle_bgnd.asp (Apr. 25, 2006) (last accessed Nov. 21, 2009).

³⁶² Peter J. Chenoweth & Michael W. Sanderson, *Beef Practice Cow-Calf Production Medicine* 255 (Blackwell Publ. 2005).

³⁶³ See Warrick, *supra* n. 65.

³⁶⁴ Mirsalis et al., *supra* n. 21.

³⁶⁵ Territo et al., *supra* n. 15 (explaining the authors' method so that other researchers can use the same method to induce convulsions that resemble grand mal seizures).

³⁶⁶ Helmut Greim & Robert Snyder, *Toxicology and Risk Assessment: A Comprehensive Introduction* 359–60 (Wiley-Interscience 2008) (describing process of testing irritants and corrosives in rabbits' eyes).

³⁶⁷ Bill Williams, *Are You a Meat-Eater? Read This if You Dare*, *Boston Globe* 13 (May 27, 2009).

³⁶⁸ Ness, *supra* n. 78.

³⁶⁹ Bigham, *supra* n. 70.

rat.³⁷⁰ Nine billion animals are killed to be food in the United States each year.³⁷¹

These actions continue, year after year, in spite of all the animal-welfare organizations and all the animal-welfare laws. Welfarists use some of these images and narratives, and sometimes the result is that legislators enact new welfare laws, but little actually changes in the places where animals live and die. This is so because animals remain our property, for our use, our stomachs, and our latest shade of nail polish. As the West Virginia prosecutor phrased it, “These are chickens in a slaughterhouse,”³⁷² one vivid expression of a fundamental human presupposition: A person’s property is his, to do with as he will. As long as animals are our property, to exploit as we see fit, welfare laws are nothing more than a balm for our conscience and a means for denying our complicity in their torture and death.

Welfarists understand the power of these images and narratives, but like Esau selling his birthright for a bowl of pottage,³⁷³ Welfarists trade that power for empty promises and illusory laws. Unlike Welfarists, Abolitionists seek to end the property status of animals. If they succeed, the legal exploitation of animals, and the consequent suffering and death, will end. But Abolitionists are not succeeding. Efforts to abolish some forms of animal exploitation have existed since 1981 at the latest.³⁷⁴ Yet, for those twenty-eight years, Abolition, like Welfare, has made little if any progress. To the contrary, there are indications that the vegan segment of the population may be decreasing—a sign that Abolitionists are not moving towards their goal and may in fact be losing ground.

Among major social-justice movements in the United States, Abolitionism is unique in its reluctance to call attention to the suffering of the oppressed. This reluctance may arise from fear of being confused with Welfarists and the related fear of being sidetracked with exploiters’ proposals to “address” the suffering highlighted by Abolitionists with welfare measures. Abolitionists may also wish to avoid being labeled “sentimental” or “emotional.” In a time when there appear to be fewer vegans with each survey,³⁷⁵ those concerns, even if they were valid, would not justify a failure to raise the alarm about the anguish

³⁷⁰ Vincent Castagné et al., *Rodent Models of Depression: Forced Swim and Tail Suspension Behavioral Despair Tests in Rats and Mice* / *Current Protocols: The Fine Art of Experimentation*, 5.8 *Current Protocols in Pharmacology* (2007); Ernest L. Abel, *Physiological Effects of Alarm Chemosignal Emitted During the Forced Swim Test*, *J. of Chem. Ecology* (Jan. 10, 2005) (forced swim test causes stress, as evidenced by frantic paddling).

³⁷¹ U.S. Dept. of Agric. Natl. Agric. Statistics Serv., *USDA Poultry Slaughter 2008 Annual Summary*, *supra* n. 60; U.S. Dept. of Agric. Natl. Agric. Statistics Serv., *USDA Livestock Slaughter 2008 Summary*, *supra* n. 60.

³⁷² Barnes, *supra* n. 51.

³⁷³ *Genesis* 25:29–34 (King James).

³⁷⁴ Edward Hudson, *Planned Deer Hunt Spurs Volleys of Protest*, 131 *N.Y. Times* B1 (Nov. 10, 1981) (organization formed to abolish sport-hunting).

³⁷⁵ *Supra* Section II(B).

animals are experiencing as a result of their property status. Welfare and Abolition have been losing ground, or standing still, for decades. Billions and billions of animals suffer and die as the solution is debated. Raising the alarm about the pain of animals is essential. Accurate portrayals of suffering have brought about change in other decades, and animals desperately need change.

The ranks of vegans will increase, and thus the abolition of animal exploitation will draw nearer, when Abolitionists use the tools of Welfarists. Individuals and organizations working for abolition gain ground each time their call for abolition of the property status of animals is supported by the stark, spare, unadorned portrayals of animals living and dying to satisfy the tastes, purposes, depravities, and whims of humans.