

# INTRODUCTION

## ANIMAL LAW IN ACTION: THE LAW, PUBLIC PERCEPTION, AND THE LIMITS OF ANIMAL RIGHTS THEORY AS A BASIS FOR LEGAL REFORM

By  
Jonathan R. Lovvorn\*

In 1893, a lawyer with a major case pending before the United States Supreme Court was grappling with his doubts. He started to feel so strongly that an appearance before the high court presented grave risks to his client's long-term interests that he typed out a letter laying out his concerns:

I have been having some very serious thoughts in regard to [the] Case of late, as my preparation for the hearing has extended.

Shall we press for an early hearing or leave it to come up in its turn or even encourage delay?

I know you will be surprised to hear this from me, and I will explain the reason of it. When we started the fight there was a fair show of favor with the Justices of the Supreme Court. . . . Of the whole number of Justices there is now but one who is known to favor the view we must stand upon.

The court has always been the foe of liberty until forced to move on by public opinion. It moved on up [in other cases] because the general senti-

---

\* © Jonathan R. Lovvorn 2006. Mr. Lovvorn is the Vice President of Animal Protection Litigation for The Humane Society of the United States, a Professorial Lecturer in Law at George Washington University School of Law, and a Visiting Professor of animal law at Lewis & Clark Law School during the Summer session. He also serves as the Co-Director of the Animal Law Litigation Project—a joint animal law clinic administered by the George Washington University School of Law and the Humane Society of the United States. Mr. Lovvorn earned his L.L.M. in Environmental Law in 2001 from Lewis & Clark Law School, and his J.D. in 1995 from the University of California, Hastings College of the Law. This essay is an adaptation of remarks presented on October 15, 2005, in Otter Rock, Oregon, during the Keynote Address of the Thirteenth Annual National Animal Law Conference. The conference was from October 14–16, 2005, and included events at Lewis & Clark Law School in Portland, Oregon, and in Otter Rock, Oregon.

ment of the country was so unmistakably expressed as to have an *enlightening* effect.

It is of the utmost consequence that we should not have a decision *against* us as it is a matter of boast with the court that it has never *reversed itself* on a *constitutional question*.

My advice is

1—To leave the case to come up when it will and not attempt to advance it.

2—To bend every possible energy to secure the discussion of the principle in such a way as to reach and awaken public sentiment.

Of course, we have nothing to hope for in any change that may be made in the court; but if we can get the ear of the Country, and argue the matter fully *before the people first*, we may incline the wavering to fall on our side when the matter comes up.

. . . [At] any rate it could do no harm in comparison with an adverse decision.<sup>1</sup>

The lawyer was Albion Tourgee, and the case he was preparing to argue was *Plessy v. Ferguson*.<sup>2</sup> The Supreme Court went on in *Plessy* to deny basic civil rights to millions of American citizens and to elevate Jim Crow into the supreme law of the land, where it remained for some sixty years until *Brown v. Board of Education* was decided.<sup>3</sup> More than a hundred years later, Tourgee's letter speaks to us as lawyers and conveys an important message about our overriding duty to our clients and ourselves to put things into perspective and to think long and hard about the consequences of our actions.

Indeed, I fear that far too many of us working to protect animals have lost all perspective about the nature of the society in which we live and the degree to which it is ready to embrace our cause. Like Tourgee, we must stop and remind ourselves, and our clients, of the true nature of the battle we are in and soberly assess our tactics for victory.

For example, not so very long ago, our society visited upon humans many of the same atrocities we rail against today on behalf of nonhuman animals, including medical experimentation, inhumane captivity, and forced performances for public amusement.<sup>4</sup> Thus, in 1906, crowds thronged the monkey house exhibit at the Bronx Zoo to view our "evolutionary ancestors"—monkeys, chimpanzees, an orangutan, and an African pygmy tribesman named Ota Benga.<sup>5</sup> Standing

<sup>1</sup> Jack Greenberg, *Judicial Process and Social Change: Constitutional Litigation* 602-03 (West 1977) (emphasis in original) (reprinting letter from Albion W. Tourgee to Louis A. Martinet).

<sup>2</sup> 163 U.S. 537 (1896).

<sup>3</sup> Greenberg, *supra* n. 1, at 586; *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

<sup>4</sup> See generally Phillips Verner Bradford & Harvey Blume, *Ota: The Pygmy in the Zoo* (St. Martin's Press 1992) (captivity and performance); James H. Jones, *Bad Blood: The Tuskegee Syphilis Experiment* (The Free Press 1993) (experiments).

<sup>5</sup> Bradford & Blume, *supra* n. 4, at 179-90.

one inch shy of five feet tall and weighing 103 pounds,<sup>6</sup> Mr. Benga was sold into slavery in the Belgian Congo just after the turn of the century.<sup>7</sup> He was coerced to “visit” the United States in 1904 by his purchaser, African explorer Samuel Verner.<sup>8</sup> Mr. Benga, along with other pygmies, was displayed at the 1904 World’s Fair in Saint Louis before he was delivered to the Bronx Zoo.<sup>9</sup> Dr. William T. Hornaday, then director of the Zoo, decided to “display” him.<sup>10</sup> Mr. Benga was locked in the monkey house with other primates for most of the day and, occasionally, let out under the supervision of a keeper.<sup>11</sup>

The exhibit was immensely popular, with some forty thousand visitors on its second Sunday.<sup>12</sup> “They chased him about the grounds all day, howling, jeering and yelling. Some of them poked him in the ribs, others tripped him up, all laughed at him.”<sup>13</sup> Finally, after responding to his keepers’ use of force by brandishing a knife, he had to leave the park for good.<sup>14</sup> Later, he attended the Lynchburg Seminary in Virginia, and eventually settled in Lynchburg, working odd jobs at the Seminary and a tobacco factory.<sup>15</sup> In 1916, homesick and despondent, Ota Benga stole a revolver and shot himself in the heart.<sup>16</sup>

I was surprised to learn that Ota Benga’s story is not unique. Indeed, the captive exhibit of human beings was a feature of our society, right into the early part of the twentieth century.<sup>17</sup> Along with Ota Benga, the 1904 World’s Fair in Saint Louis presented an entire “ethnological zoo” for the amusement of fairgoers, with displays of Native Americans, Pacific Islanders, Africans, and other people—most of whom were coerced into coming to the United States to serve as zoo exhibits.<sup>18</sup>

This is not the only familiar outrage visited upon humans. Up to and through the mid-1970s, federal and state governments conducted medical experiments on unwitting prisoners, indigents, and the mentally ill.<sup>19</sup> Most infamous of these cases is the Tuskegee Syphilis Experiment.<sup>20</sup> Over decades, a group of African-American men in Alabama suffering from syphilis were told they were receiving medical

<sup>6</sup> *Id.* at 181.

<sup>7</sup> *Id.* at 106.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.* at 115–23, 168, 177–90.

<sup>10</sup> *Id.* at 177–78.

<sup>11</sup> Bradford & Blume, *supra* n. 4, at 180.

<sup>12</sup> *Id.* at 185.

<sup>13</sup> *Id.* (quoting N.Y. Times).

<sup>14</sup> *Id.* at 187–90.

<sup>15</sup> *Id.* at 204–09.

<sup>16</sup> *Id.* at 215–18.

<sup>17</sup> Bradford & Blume, *supra* n. 4, at 1–16, 160–61; see also Erik Larson, *The Devil in the White City* 207 (Vintage Books 2003) (noting the arrival of human cargo for display at the 1893 World’s Fair in Chicago).

<sup>18</sup> Bradford & Blume, *supra* n. 4, at 1–16.

<sup>19</sup> Jones, *supra* n. 4; Howard Markel, *The Ghost of Medical Atrocities: What’s Next, After the Unveiling?* N.Y. Times F6 (Dec. 23, 2003).

<sup>20</sup> Jones, *supra* n. 4.

treatment, when, in fact, the doctors only observed what happened as their diseases progressed over time.<sup>21</sup> Even after it was known that penicillin could cure syphilis, they were denied treatment.<sup>22</sup> The experiment continued into the 1970s, and only in the late 1990s did President Clinton formally apologize for the government's unconscionable behavior.<sup>23</sup>

The Tuskegee experiment was by no means the only such atrocity. During the Cold War, unsuspecting patients were secretly injected with radioactive elements to see how radiation would travel through the body.<sup>24</sup> And, believe it or not, similar practices continue today elsewhere in the world, at times under the direction of U.S. corporations and even academic institutions. For example, in 2001, the pharmaceutical corporation Pfizer was accused of testing meningitis drugs on African children without consent,<sup>25</sup> while the Harvard School of Public Health has admitted it conducted genetic experiments on residents of China without their consent in the late 1990s.<sup>26</sup>

Not surprisingly then—in the face of such gross and ongoing violations of human rights—this society's support for granting nonhuman animals meaningful rights is exceedingly low. And it is likely to remain so for a good long time. Indeed, according to a 2000 Zogby poll, about two and one-half percent of the U.S. population is vegetarian.<sup>27</sup> That is roughly five million Americans.<sup>28</sup> About one-third of these people (nine tenths of a percent of the U.S. population) are thought to be vegan.<sup>29</sup> By contrast, a full six percent of the population believes that the moon landing never happened—that it was staged.<sup>30</sup>

A 2003 Gallup poll painted an even bleaker picture of the prospects for this society embracing legal rights for animals. Nearly two-thirds of Americans oppose banning all medical research on laboratory

<sup>21</sup> *Id.* at 1–9.

<sup>22</sup> *Id.* at 7–8.

<sup>23</sup> Markel, *supra* n. 19, at F6.

<sup>24</sup> *Heinrich ex rel. Heinrich v. Sweet*, 62 F. Supp. 2d 282, 290 (D. Mass. 1999) (action for damages arising out of the federal government's radiation experiments on terminally ill patients without their consent); *see also In re Cincinnati Radiation Litig.*, 874 F. Supp. 796, 802 (S.D. Ohio 1995) (where “[plaintiffs] allege[d] they were exposed to doses of radiation at levels to be expected on a nuclear battlefield” in an experiment funded by the Department of Defense).

<sup>25</sup> Finnuala Kelleher, Student Author, *The Pharmaceutical Industry's Responsibility for Protecting Human Subjects of Clinical Trials in Developing Nations*, 38 Colum. J.L. & Soc. Probs. 67, 67–68 (2004).

<sup>26</sup> Vera Hassner Sharav, *Harvard President Laments China Study\_Globe*, <http://www.ahrp.org/infomail/0502/15.php> (May 15, 2002) (quoting *The Boston Globe*).

<sup>27</sup> Vegetarian Resource Group, *How Many Vegetarians Are There? A 2000 National Zogby Poll Sponsored by the Vegetarian Resource Group (VRG)*, <http://www.vrg.org/nutshell/poll2000.htm> (last updated Aug. 30, 2000).

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> Gallup Org., *Did Man Really Land on the Moon?* <http://poll.gallup.com/content/default.aspx?ci=1993&pg=1> (Feb. 15, 2001).

animals.<sup>31</sup> Sixty-one percent oppose banning all product testing on laboratory animals.<sup>32</sup> And a whopping seventy-six percent oppose banning all hunting.<sup>33</sup> A 2004 Gallup Poll found that sixty-three percent of Americans feel that buying and wearing clothes made of animal fur is acceptable.<sup>34</sup>

Even accounting for the possibility of error and bias in such polls, these numbers are not very comforting for those of us working to better this society's treatment of animals, but they do give us a good idea of how few Americans might support legal rights for animals, otherwise known as "animal rights," as a legal reform. However, the good news is that public support for a more limited agenda—one short of legal personhood for animals—is overwhelming. More than two-thirds of Americans find it unacceptable that there are no federal laws that protect the welfare of animals on the farm.<sup>35</sup> More than four-fifths believe there should be effective laws that protect farm animals against cruelty.<sup>36</sup> And nearly three-quarters of Americans believe there ought to be federal inspections of farms to ensure humane treatment.<sup>37</sup> A significant seventy-five percent of Americans oppose the use of leghold traps.<sup>38</sup> Sixty percent of Americans object to capturing wild dolphins and whales for display in zoos and aquariums.<sup>39</sup> Sixty percent also oppose cloning of animals.<sup>40</sup> A poll of New Jersey residents found that more than four out of five surveyed consider two-foot-wide crates for pigs and calves and forced molting through starvation of egg-laying hens to be cruel.<sup>41</sup> And, most recently, a national poll found that the vast majority of Americans favor humane slaughter methods for chickens, turkeys, and ducks who are raised for food,<sup>42</sup> as opposed to cur-

<sup>31</sup> David W. Moore, *Public Lukewarm on Animal Rights*, Gallup Poll Tues. Briefing 35, 35 (May 21, 2003).

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> Heather Mason, *Americans Unruffled by Animal Testing*, Gallup Poll Tues. Briefing 119, 120 (May 25, 2004).

<sup>35</sup> Poll Rpt. from John Zogby, Pres., Zogby Intl., to Brad Goldberg, Pres., Animal Welfare Trust, *Nationwide Views on the Treatment of Farm Animals* 5 (Oct. 22, 2003) (available at <http://www.animalwelfareadvocacy.org/externals/AWT%20final%20%20poll%20report%2010-22.pdf>).

<sup>36</sup> *Id.* at 6.

<sup>37</sup> *Id.*

<sup>38</sup> Poll Rpt. from Op. Research Corp. to Animal Welfare Inst., *Wildlife Traps* 9 (Nov. 21, 1996) (copy on file with *Animal L.*).

<sup>39</sup> Stephen R. Kellert, *American Perceptions of Marine Mammals and Their Management* 18 (Humane Socy. U.S. 1999) (copy on file with *Animal L.*).

<sup>40</sup> Linda Lyons, *Americans Register Strong Feelings on Cloning Issue*, Gallup Poll Tues. Briefing 97, 98 (July 6, 2004).

<sup>41</sup> NJFarms.org, "*Humane*" Farming Issue Heats Up in New Jersey: Poll Finds Widespread Opposition to Practices Labeled "Humane" by New Jersey Agriculture Department, [http://www.njfarms.org/pr\\_poll.htm](http://www.njfarms.org/pr_poll.htm) (accessed Mar. 10, 2006).

<sup>42</sup> Poll Rpt. from Penn, Schoen & Berland Assocs., Inc. to Humane Socy. U.S., *Humane Society of the United States: Humane Slaughter Agenda* 1 (Apr. 11, 2005) (copy on file with *Animal L.*).

rent U.S. Department of Agriculture policy allowing these animals to be slaughtered without first rendering them insensible to pain.<sup>43</sup>

So there is undoubtedly a gap, and quite a large one, between the current cruelties visited upon animals and where society is ready to go in terms of reform. And standing in this gap are millions upon millions of animals whom society is ready to help<sup>44</sup>—we just need to give people a good push. But, why the disconnect between these high poll numbers and the relatively low level of receptiveness of legislators and courts to humane reforms?

I believe there are lots of reasons, including institutional gridlock, economic factors, and, perhaps a deep-seated fear of animal rights. This fear of animal rights—and of animal rights activists—is undoubtedly fueled, at least in part, by the violent extremists of the movement and the spectre of direct action, which is also sometimes called animal “terrorism.”<sup>45</sup> When I looked at the rhetoric of direct action, I was shocked to discover that the so-called animal terrorists are our fault—i.e., the fault of animal lawyers. Thus, the people who step outside the law allegedly in the name of “animal rights” almost invariably justify their extreme actions based on our failures—failures to pass better laws and the failure to succeed in the courts.

For example, in *Thinking Pluralistically: A Case for Direct Action*, Steve Best tells us:

In terms of conditions for entering a conflict, direct action groups like the ALF and SHAC have strong reasons for resorting to illegal actions, sabotage, and intimidation tactics . . . . Where laws protecting animals exist at all, they are weak, poorly enforced, and constantly revised and watered-down. *In cases where the legal system fails the animals, . . . activists have no choice but to circumvent it and apply direct pressure on exploiters.*<sup>46</sup>

Likewise, Adam Nicolson recently appeared to defend animal rights activists’ indefensible decision to exhume and steal the remains of the grandmother of a guinea pig farmer in the United Kingdom by noting:

We all hate terrorists, but as a side-light on this nasty and bitter corner of modern life, it is interesting to read what Nelson Mandela, at his trial for violence and sabotage in October 1963, had to say about those crimes. This was the trial at which he was convicted and sent to Robben Island for life. He admitted quite freely that he was guilty of what he was accused of. “I do not deny that I planned sabotage,” he told the court. “I did not plan it in a spirit of recklessness, nor because I have any love of violence. I planned it

<sup>43</sup> 70 Fed. Reg. 56624, 56624–25 (Sept. 28, 2005).

<sup>44</sup> See e.g. Natl. Agric. Statistics Serv., *Poultry Slaughter: 2004 Annual Summary 2* (U.S. Dept. Agric. Feb. 2005) (8.89 billion chickens slaughtered in 2004) (available at <http://usda.mannlib.cornell.edu/reports/nassr/poultry/ppy-bban/pslaan05.pdf>).

<sup>45</sup> Paul Elias, *Animal Rights Extremism FBI's Top Domestic Terrorism Priority*, Associated Press (June 21, 2005) (available in WL 6/21/05 APDATASTREAM 04:05:15).

<sup>46</sup> Steve Best, *Thinking Pluralistically: A Case for Direct Action*, [http://www.animalliberationfront.com/Philosophy/A\\_Case\\_for\\_Direct\\_Action.htm](http://www.animalliberationfront.com/Philosophy/A_Case_for_Direct_Action.htm) (accessed Mar. 10, 2006) (emphasis added).

as a result of a calm and sober assessment of the political situation. Without violence there would be no way open to the African people to succeed in their struggle."<sup>47</sup>

As animal lawyers we bear the burden of proving this thesis wrong. The same way that those who eventually freed South Africa proved wrong Mandela's early views on the role that violence would play in ending that struggle, we must prove to would-be direct action advocates that things can change for animals through peaceful and lawful means. How do we accomplish this?

We can make a good start by jettisoning our own revolutionary rhetoric—such as granting animals “personhood” or otherwise eliminating the property status of animals. It is an intellectual indulgence and a vice for animal lawyers to concern ourselves with the advancement of such impractical theories while billions of animal languish in unimaginable suffering that we have the power to change.<sup>48</sup> Moreover, these revolutionary legal theories sound disturbingly similar to, and provide academic fuel for, the rhetoric of some direct action proponents—i.e., that animals can never receive protection without radically revising the U.S. legal system.<sup>49</sup>

Even among those in our own ranks who look to the courts, rather than the streets, to help animals, far too many of us have fallen under the intoxicating thrall of the fantasy of creating something like *Brown v. Board of Education*<sup>50</sup> for animals. The root of this theory is that if we simply find the right legal and scientific arguments, with the right animals, on the right day, with the right judge, we will have an epic courtroom struggle in which the inalienable legal rights of animals will be declared once and for all. But as we daydream about a heroic legal victory for animals that will most likely not occur in our lifetime, millions and millions of animals are suffering in conditions that we have the power, and the societal support, to change today.

And while it is certainly far too easy to attack the legal campaigns of the Civil Rights golden age of the 1950s and 1960s as outdated and bygone models for effectuating social change through the courts,<sup>51</sup> the

<sup>47</sup> Adam Nicolson, *Animal Rights and Wrongs*, <http://www.guardian.co.uk/animalrights/story/0,11917,1555032,00.html> (Aug. 24, 2005).

<sup>48</sup> A quick search of Westlaw (searching for “property status of animals” or “legal personhood for animals” in the Journals & Law Reviews database) reveals that more than a dozen articles have been published between 1996 and 2005 exploring how to change the property status of animals, how to grant certain animals personhood, and other means of reordering the legal system.

<sup>49</sup> See e.g. Gary L. Francione, *Animal Rights and Animal Welfare*, 48 Rutgers L. Rev. 397, 400, 468 (1996) (arguing that the “eradication of the *property* status of animals” is the only method to achieve meaningful protection for animals, and that this “property status of animals . . . ensures that welfarist reforms will generally only facilitate the efficient exploitation of animal property” (emphasis in original)).

<sup>50</sup> 347 U.S. 483.

<sup>51</sup> E.g. Richard A. Posner, *Animal Rights*, 110 Yale L.J. 527, 539 (2000) (Posner reviews the book *Rattling the Cage: Toward Legal Rights for Animals* and claims, “There is a sad poverty of imagination in an approach to animal protection that can think of it

fact remains that many of us are still captivated by the glory of the Civil Rights movement and look to it as a model for how the courts could confer legal rights upon animals in this country in the foreseeable future.<sup>52</sup>

However, according to Jack Greenberg, former head of the Legal Defense Fund, the lawyers that made *Brown* a reality could not have achieved what they did in a society that was not ready for it.<sup>53</sup> Although it is unclear how many Americans supported public school integration at the time of *Brown*,<sup>54</sup> it certainly was several orders of magnitude above the small percentage of Americans who might now support personhood for animals.<sup>55</sup> Indeed, at the time *Brown* was decided, several states had already banned racial segregation in public schools.<sup>56</sup> By contrast, I am not aware of any state, county, or city in America that has ever even recognized that animals have legal rights.

Second, even to talk about replicating the civil rights legal campaign for animals is a bit of a misconception. The legal campaign culminating in *Brown* was a strategy to enforce legal rights granted one hundred years earlier.<sup>57</sup> *Brown* did not recognize African Americans as legal persons, the Thirteenth Amendment did.<sup>58</sup> So what some animal lawyers are actually talking about is trying to recreate *Dred Scott*—which was an action asking the courts to expand the class of “citizens” under the Constitution to include African Americans, much the same way some animal lawyers talk about expanding the term “person” to include non-human animals.<sup>59</sup> But for some reason, they

---

only on the model of the civil rights movement. It is a poverty that reflects . . . the extent to which liberal lawyers remain in thrall to the constitutional jurisprudence of the Warren Court.”); Mark Tushnet, *Some Legacies of Brown v. Board of Education*, 90 Va. L. Rev. 1693, 1696 (2004) (observing that “by the end of the twentieth century most of the planned litigation campaigns had petered out” in the face of “an increasingly conservative judicial climate”).

<sup>52</sup> E.g. Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals* 260–61 (Perseus Books 2000) (offering civil rights cases as models for recognizing the rights of chimpanzees and bonobos).

<sup>53</sup> See Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* 152–211 (BasicBooks 1994) (detailing the process of bringing *Brown v. Board of Education* to the Supreme Court and noting support from social scientists and others).

<sup>54</sup> Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* 310 (Oxford U. Press 2004) (noting that “[s]lightly more than half of the nation supported *Brown* from the day it was decided”).

<sup>55</sup> See Moore, *supra* n. 31, at 35–36 (explaining how the poll result suggesting that twenty-five percent of Americans feel animals should have the same rights as people is likely an overstatement, and inconsistent with the responses to other polling questions showing widespread opposition to banning all medical research, etc.).

<sup>56</sup> Davison M. Douglas, *The Limits of Law in Accomplishing Racial Change: School Segregation in the Pre-Brown North*, 44 UCLA L. Rev. 677, 680 (1997).

<sup>57</sup> 347 U.S. at 488.

<sup>58</sup> U.S. Const. amend. XIII, § 1.

<sup>59</sup> Compare *Dred Scott v. Sandford*, 60 U.S. 393 (1856) with 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 (2001) (discussing the theory of including



think this time around we are going to win. Even if you somehow managed to win the animal *Dred Scott*, or found some other way to slip animals into the personhood club, that would not end animal suffering and exploitation in America, just as the Thirteenth Amendment's grant of personhood did not end systematic oppression of African Americans.<sup>60</sup>

Granting animals personhood does not fix everything, or really anything. What about the one-hundred-year journey after personhood is declared? Recall that after a brief flirtation during post-Civil War Reconstruction, in which freed slaves enjoyed something approaching a full set of civil rights, the country turned around and plunged into the depths of Jim Crow,<sup>61</sup> as legally codified in *Plessy*,<sup>62</sup> and as predicted by *Plessy's* horrified and insightful counsel in the days before *Plessy* was argued.<sup>63</sup>

Thus, I fear that some of us have a fundamental misunderstanding of our position in the history of the struggle for animal rights *vis-à-vis* other movements for legal personhood. And those that look to the struggle for civil rights as an analogy for gaining legal personhood for animals must live with the reality of their own analogy: that such a victory is decades and perhaps even a century or more away.

Organized opposition to slavery in the United States began around 1800.<sup>64</sup> *Dred Scott* was decided in 1856.<sup>65</sup> The Civil War and Thirteenth Amendment were in the 1860s.<sup>66</sup> *Brown* was decided a hundred years later in 1954.<sup>67</sup> The Civil Rights Act was enacted in 1964.<sup>68</sup> The total evolution was at least one hundred fifty years. How much time has lapsed between the emergence of the organized animal rights movement—as opposed to the humane movement—and now? Thirty years? Forty years? Even starting with a date of 1970, it appears we are still at least twenty years away from the animal *Dred Scott*. And we should get to legal personhood on paper for animals in the 2030s. Jim Crow follows shortly after that. And then we finally get to the animal *Brown v. Board of Education* sometime in the middle of the twenty-second century. And yes, all this assumes animal personhood progresses at the same rate as the movement for African American freedom did. Theoretically it could be quicker, but it could be much, much slower too. And in this time how many hundreds of bil-

---

animals within the term "person"); Gary L. Francione, *Animal Rights Theory and Utilitarianism: Relative Normative Guidance*, 3 *Animal L.* 75, 83–87 (1997) (advocating including animals within the term "person").

<sup>60</sup> See Klarman, *supra* n. 54, at 71–76 (discussing laws passed to perpetuate de facto slavery after enactment of the Thirteenth Amendment).

<sup>61</sup> *Id.* at 10–23.

<sup>62</sup> 163 U.S. 537.

<sup>63</sup> Greenberg, *supra* n. 1, at 602–03.

<sup>64</sup> Stanley Harrold, *American Abolitionists* 21 (Longman 2001).

<sup>65</sup> 60 U.S. 393.

<sup>66</sup> Harrold, *supra* n. 64, at 89–94.

<sup>67</sup> 347 U.S. 483.

<sup>68</sup> *Civil Rights Act of 1964*, 42 U.S.C. §§ 2000 to 2000h-6 (2000).

lions of animals will have endured unspeakable suffering and torment that could have been ameliorated?<sup>69</sup>

The bottom line is that, given the current state of our society and the cruelties we still inflict on human persons, animal personhood is for all intents and purposes an impractical and unattainable goal. And, each and every one of us is most likely going to depart this Earth living in a country that does not recognize the legal personhood of animals. Now this is a hard truth, and I suspect that more than a few people will utterly reject that conclusion. But as lawyers, we have a heightened responsibility to tell our clients the hard truths.<sup>70</sup> And the sooner we face and accept this hard truth, at least for the time being, the better off the animals will be.

So, where does that leave us? Pack up and go home? Hardly. It leaves us with a lot of really hard, miserable, and backbreaking work. There are huge opportunities staring us in the face if only we were not too busy daydreaming about constitutional rights for animals. Recall the sweet spot of public policy towards animals—the space in between current practices and where current polling data tells us society is ready to go in terms of reform? The billions of animals trapped in this gap need our help now, not one hundred years from now. This is where the real battle lines for animal protection are drawn—between the forces of animal exploitation seeking to hold this ground that public opinion has already forsaken, and animal advocates fighting to sweep aside the last remnants of opposition to reform.

Nowhere is this gap larger, or more heavily populated, than with regard to farm animals—the numbers are simply staggering. For example, sixty to seventy percent of the six million hogs kept for breeding in the U.S. spend a majority of their lives confined in gestation crates.<sup>71</sup> If you eliminate just this one practice, you are reducing the

---

<sup>69</sup> Rather than turning to the civil rights movement as a fitting strategic model, we and our non-human clients might be better served by looking to the environmental movement and its legal gains over the last thirty years. Indeed, there are important lessons to be learned from their legal successes, and, perhaps more importantly, their diligence and a roll-up-your-sleeves work ethic that lawyers in the animal movement would do well to emulate. The significant legal protections now afforded to our natural environment were not won by lawyers advancing radical theories about the “rights” of trees, rivers, and oceans. *But see* Christopher Stone, *Should Trees Have Standing?—Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450, 456 (1972) (arguing for giving legal rights “to the natural environment as a whole”). Rather, they were won by an organized army of environmental lawyers carrying out professional, systematic campaigns in the courts and legislatures of America. *See* Michael E. Kraft, *U.S. Environmental Policy and Politics: From the 1960s to the 1990s*, in *Environmental Politics and Policy, 1960s–1990s*, 17, 21–33 (Otis L. Graham Jr., ed., Pa. St. U. Press 2000) (reviewing effects of legislative and executive action on environmental policy along with the use of the courts to promote environmental protection).

<sup>70</sup> *See* Model R. Prof. Conduct 2.1 (ABA 2004) (lawyers have a duty to render “candid” advice not only about the law, but also about “economic, social, and political factors that may be relevant to the client’s situation”).

<sup>71</sup> Natl. Agric. Statistics Serv., *Quarterly Hogs and Pigs* 1 (U.S. Dept. Agric. Dec. 2005) (available at <http://usda.mannlib.cornell.edu/reports/nassr/livestock/php-bb/2005/>)

unimaginable suffering of nearly four million animals, every day, every year. Likewise, eighty-five percent of the one million veal calves raised each year live in crates.<sup>72</sup> Banning such crates would significantly reduce the suffering of another eight hundred fifty thousand animals.

Ninety-eight percent of the more than three hundred million hens in the U.S. are confined in battery cages so small the birds cannot even walk or spread their wings—that is 294 million birds, more than one animal for each and every man, woman, and child in America.<sup>73</sup> All 8.89 billion chickens killed each year in the U.S.<sup>74</sup> are not covered under U.S. Department of Agriculture's interpretation of the Humane Methods of Slaughter Act (HMSA),<sup>75</sup> which means they can be cut, shackled, and hoisted without first being rendered insensitive to pain. If you change this, you provide meaningful relief for more animals than the total number of people on the planet.<sup>76</sup>

And these are not just theoretical numbers, or ideas for discussion. They are real, attainable goals according to published data. To attain these reforms would relieve more animal suffering than all of the efforts of the animal rights movement combined to date. But, what about those that say that the existing legal system has not yielded results and therefore will never come to the aid of these animals?

The available evidence suggests otherwise. The record from the last decade of hard work in the trenches trying to push courts and legislatures to close the gap between public opinion and public policy shows that change within the legal framework is a viable strategy,

---

hgpg1205.pdf); E. A. Pajor, *Group Housing of Sows in Small Pens: Advantages, Disadvantages and Recent Research*, in Coop. St. Research, Educ., & Extension Serv., *Proceedings: Symposium on Swine Housing and Well-being* 37, 37 (Richard Reynnells ed., U.S. Dept. Agric. 2003) (available at [http://www.ces.purdue.edu/pork/sowhousing/swine\\_02.pdf](http://www.ces.purdue.edu/pork/sowhousing/swine_02.pdf)).

<sup>72</sup> Elizabeth Weise, *Illegal Hormones Found in Veal Calves*, [http://usatoday.com/news/health/2004-03-28-veal-usat\\_x.htm](http://usatoday.com/news/health/2004-03-28-veal-usat_x.htm) (Mar. 28, 2004) ("About 1 million veal calves are slaughtered in the USA each year."); U.S. Dept. Agric. Food Safety & Inspection Serv., *Safety of Veal. . . from Farm to Table*, [http://www.fsis.usda.gov/Fact\\_Sheets/Veal\\_from\\_Farm\\_to\\_Table/index.asp](http://www.fsis.usda.gov/Fact_Sheets/Veal_from_Farm_to_Table/index.asp) (May 2005) (leaving eighty-five percent of veal calves as living in "stalls" as opposed to being slaughtered within three weeks of birth).

<sup>73</sup> Humane Socy. U.S., *The Hen Factory Farm*, [http://www.hsus.org/farm\\_animals/factory\\_farms/the\\_hen\\_factory\\_farm/](http://www.hsus.org/farm_animals/factory_farms/the_hen_factory_farm/) (accessed Mar. 11, 2006) (reporting conditions at commercial egg farms); Natl. Agric. Statistics Serv., *Chickens and Eggs* 1 (U.S. Dept. Agric. Jan. 2005) (average of 345 million layers) (available at <http://usda.mannlib.cornell.edu/reports/nassr/poultry/pec-bb/2005/ckeg0105.pdf>); United Egg Producers, *United Egg Producers Animal Husbandry Guidelines for U.S. Egg Laying Flocks* 1 (2d ed., United Egg Producers 2005) (ninety-eight percent of layers are caged) (available at [http://www.uepcertified.com/docs/2005\\_UEPanimal\\_welfare\\_guidelines.pdf](http://www.uepcertified.com/docs/2005_UEPanimal_welfare_guidelines.pdf)); U.S. Census Bureau, *Your Gateway to Census 2000*, <http://www.census.gov/main/www/cen2000.html> (Apr. 1, 2000) (U.S. population of 281,421,906).

<sup>74</sup> Natl. Agric. Statistics Serv., *supra* n. 44, at 2.

<sup>75</sup> 7 U.S.C. §§ 1901–1906; 70 Fed. Reg. at 56624–25.

<sup>76</sup> U.S. Census Bureau, *Total Midyear Population for the World: 1950-2050*, <http://www.census.gov/ipc/www/worldpop.html> (last updated Apr. 26, 2005) (reporting a figure of 6,525,486,603 people in 2006).

even if it is a long, slow, and difficult one. In the last decade, those who have chosen to apply themselves—rather than bemoan the failings of the legal system—have made concrete gains in the courts and in the legislatures. “Animal reform,” as opposed to “animal rights,” is now a commonplace and accepted legislative topic throughout the country, with a dozen new federal animal protection laws in the last decade.<sup>77</sup> Most recently, both houses of the U.S. Congress, in response to humane concerns, voted overwhelmingly to ban the slaughter of horses for food—the first-ever federal ban on slaughtering an animal for commercial consumption.<sup>78</sup>

At the state level, we have seen more than thirty new animal protection laws in just the past four years<sup>79</sup> on topics ranging from a phase-out of foie gras production and sale<sup>80</sup> to bans on various unethical hunting practices.<sup>81</sup> And since 1990 animal advocates have passed

---

<sup>77</sup> 7 U.S.C. § 2156(a) (Supp. 2002) (criminalizing the interstate transport of birds for cockfighting); 10 U.S.C. § 2582 (2000) (providing for adoption, rather than destruction, of military dogs retired from military service); 16 U.S.C. § 1385 (Supp. 1997) (prohibiting driftnet and purse seine net harvesting of tuna labeled “dolphin safe”); 16 U.S.C. § 1857(1)(P) (2000) (prohibiting the practice of “shark finning”—the capture and removal of shark fins and tails and then discarding the wounded animal at sea); 16 U.S.C.A. § 3371–3372 (West Supp. 2005) (prohibiting the interstate transport of lions, tigers, cheetahs, jaguars, and cougars except by federally licensed exhibitors); 16 U.S.C. § 6304 (2000) (establishing a fund for great ape conservation); 18 U.S.C. § 48 (Supp. 1999) (making it a crime to create, sell, or possess depictions of animal cruelty); 18 U.S.C. § 1368 (2000) (making it a federal crime to harm a federal law enforcement dog or horse); 19 U.S.C. § 1308 (2000) (making it a crime to import or export dog and cat fur products); 42 U.S.C. § 287a-3a (2000) (establishing a federal sanctuary system for chimps retired from animal research); 42 U.S.C. § 2851-3 (2000) (establishing an Interagency Coordinating Committee on the Validation of Alternative Methods to develop alternatives to animal testing); 49 U.S.C. § 41721 (2000) (requiring airlines to submit monthly reports to the Secretary of Transportation on the death or injury of animals transported by plane).

<sup>78</sup> See Pub. L. No. 109-97, § 794, 119 Stat. 2120, 2164 (2005) (de-funding U.S. Department of Agriculture inspections of horses, effectively banning their slaughter). Recognizing the significance of this new law as a precedent for animal reform, the U.S. Department of Agriculture, at the urging of the livestock industry, quickly issued an administrative rule to try to nullify Congress’ decision. See *Ante-Mortem Inspection of Horses*, 71 Fed. Reg. 6337, 6341 (Feb. 8, 2006) (to be codified at 9 C.F.R. § 352.19) (interim final rule establishing a voluntary fee-for-service program in which official establishments that slaughter horses can apply and pay for ante-mortem inspection). That decision has been challenged in the U.S. District Court for the District of Columbia. Compl. at 2, *Humane Socy. U.S. v. Johanns*, No. 1:06CV00265 (D.D.C. filed Feb. 14, 2006) (copy on file with *Animal L.*); *Humane Socy. U.S., HSUS and Others Seek Injunction to Halt USDA in Its Attempt to Buck Congress on Horse Slaughter*, [http://www.hsus.org/pets/pets\\_related\\_news\\_and\\_events/usda\\_threatens\\_horse\\_slaughter.html](http://www.hsus.org/pets/pets_related_news_and_events/usda_threatens_horse_slaughter.html) (Feb. 22, 2006).

<sup>79</sup> See *Humane Socy. U.S., Enacted and Vetoed State Legislation*, [http://www.hsus.org/legislation\\_laws/citizen\\_lobbyist\\_center/enacted\\_and\\_vetoed\\_state\\_legislation.html](http://www.hsus.org/legislation_laws/citizen_lobbyist_center/enacted_and_vetoed_state_legislation.html) (accessed Mar. 12, 2006) (linking to annual reports on state legislation).

<sup>80</sup> Cal. Health & Safety Code Ann. § 25980–25982 (West Supp. 2004).

<sup>81</sup> See Cal. Fish & Game Code Ann. § 3003 (West Supp. 2005) (outlawing shooting or killing birds or mammals via the Internet); 7 Me. Rev. Stat. Ann. § 1344(1-A), 1347 (Supp. 2005) (outlawing remote-control hunting); Mich. Comp. Laws § 750.236a (LEXIS

twenty-four ballot initiatives,<sup>82</sup> including measures to outlaw cock-fighting in Arizona,<sup>83</sup> Missouri,<sup>84</sup> and Oklahoma;<sup>85</sup> to stop hound-hunting and baiting of bears in Colorado,<sup>86</sup> Massachusetts,<sup>87</sup> Oregon,<sup>88</sup> and Washington;<sup>89</sup> to halt mountain lion hunting in California;<sup>90</sup> to restrict the use of steel-jawed leghold traps and other body-gripping traps in Arizona,<sup>91</sup> California,<sup>92</sup> Colorado,<sup>93</sup> Massachusetts,<sup>94</sup> and Washington;<sup>95</sup> and to halt the use of gestation crates in Florida.<sup>96</sup>

We have also seen some notable successes in the courts. The Hegins pigeon shoot—which some have used as the poster-child of a cruel practice that could not be stopped within the existing legal framework<sup>97</sup>—was stopped by a litigation campaign to enforce existing law.<sup>98</sup> The Makah whale hunt was twice derailed by a federal court of appeals in Seattle.<sup>99</sup> A federal court in Washington, D.C. put a halt to the indiscriminate killing of more than seven hundred species of mi-

---

current through Feb. 2006) (outlawing computer-assisted hunting); Minn. Stat. § 97B.115 (Supp. 2006) (outlawing computer-assisted remote hunting); N.Y. Env'tl. Conservation Law § 11-1906 (LEXIS current through 2005 Reg. Sess.) (outlawing the business of on-line shooting); N.C. Gen. Stat. § 113-291.1A (2005) (outlawing computer-assisted remote hunting of animals located in North Carolina); 18 Pa. Consol. Stat. § 7641 (Supp. 2006) (outlawing computer-assisted remote hunting); Tenn. Code Ann. § 70-4-502 to 70-4-504 (Supp. 2005) (outlawing computer-assisted remote hunting); Tex. Parks & Wildlife Code § 62.002 (Supp. 2005) (outlawing computer-assisted remote hunting); Vt. Stat. Ann. tit. 10, § 4715 (Supp. 2005) (outlawing hunting by remote-controlled devices); Va. Code Ann. § 29.1-530.3 (Supp. 2005) (outlawing computer-assisted remote hunting); W. Va. Code § 20-2-5(29) (Supp. 2005) (outlawing hunting for a fee if the hunter not at same location as animal); Wis. Stat. § 95.55(5)(b)(1) (LEXIS current through Aug. 2005) (outlawing shooting of farm-raised deer if not physically possessing the weapon).

<sup>82</sup> Humane Socy. U.S., *Past Ballot Initiatives*, [http://www.hsus.org/legislation\\_laws/ballot\\_initiatives/past\\_ballot\\_initiatives/](http://www.hsus.org/legislation_laws/ballot_initiatives/past_ballot_initiatives/) (accessed Mar. 12, 2006).

<sup>83</sup> Ariz. Rev. Stat. § 13-2910.03 (2001) (passed 1998).

<sup>84</sup> Mo. Rev. Stat. § 578.173 (2003) (passed 1998).

<sup>85</sup> Okla. Stat. tit. 21, § 1692.2 (2006) (passed 2002).

<sup>86</sup> Colo. Rev. Stat. § 33-4-101.3 (2005) (passed 1992).

<sup>87</sup> Mass. Gen. Laws ch. 131, § 21A (2002) (passed 1996).

<sup>88</sup> Or. Rev. Stat. Ann. § 498.164 (2003) (passed 1994).

<sup>89</sup> Wash. Rev. Code § 77.15.245 (2001) (passed 1996).

<sup>90</sup> Cal. Fish & Game Code Ann. § 3950.1(a) (West 1998) (passed 1990).

<sup>91</sup> Ariz. Rev. Stat. § 17-301(D) (1996) (passed 1994).

<sup>92</sup> Cal. Fish & Game Code Ann. § 3003.1(a) (West 1998 & Supp. 2006) (passed 1998).

<sup>93</sup> Colo. Const. art. XVIII, § 12b(1) (passed 1996).

<sup>94</sup> Mass. Gen. Laws ch. 131, § 80A (2002) (passed 1996).

<sup>95</sup> Wash. Rev. Code § 77.15.194 (2001) (passed 2000).

<sup>96</sup> Fla. Const. art. X, § 21 (passed 2002).

<sup>97</sup> See Gary L. Francione, *Animals, Property, and the Law* xiii–xv (Temple U. Press 1995) (describing the Hegins pigeon shoot); Gary L. Francione, *Animals, Property and Legal Welfareism: "Unnecessary" Suffering and the "Humane" Treatment of Animals*, 46 Rutgers L. Rev. 721, 723 (1994) (noting continued pigeon shoots as an example of how the property status of animals perpetuates animal cruelty).

<sup>98</sup> *Hulsizer v. Labor Day Comm., Inc.*, 734 A.2d 848 (Pa. 1999).

<sup>99</sup> *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000); *Anderson v. Evans*, 371 F.3d 475, 501–03 (9th Cir. 2004).

gratory birds by federal agencies.<sup>100</sup> A judge in Massachusetts ordered a halt to the stocking and sport shooting of captive-reared pheasants on Cape Cod.<sup>101</sup> And a judge in Washington D.C. has had an order in place for more than seven years blocking sport hunting of bison on the National Elk Refuge in Jackson Hole, Wyoming.<sup>102</sup>

A North Carolina court allowed animal advocates to seize hundreds of abused dogs under that state's private attorney general law.<sup>103</sup> A court in Washington D.C. halted a U.S. Department of Agriculture plan to slaughter white-tailed deer in Iowa.<sup>104</sup> The rescue of the Suarez polar bears from a cruel traveling circus was precipitated by a combined state and federal court litigation campaign, acting in concert with a legislative, media, and regulatory pressure strategy.<sup>105</sup> And just a few months ago the legal campaign to end the use of the misleading "Animal Care Certified" logo on eggs forced the United Egg Producers to remove this logo from its products.<sup>106</sup>

These fights were not won by offering radical, legal-system-changing theories. They were won by hard-working, creative lawyers who squeezed the legal system for every last drop of available protection for their nonhuman clients. Animal-using industries bitterly opposed these judicial and legislative reforms because they know that such reforms not only help animals directly, but also raise public awareness of conditions industry desperately wishes to keep hidden,<sup>107</sup> and set important precedents for additional reforms down the road. For example, after animal advocates succeeded in enacting a state constitutional amendment in Florida to ban cruel confinement of pigs in gestation crates, Neil Dierks, then CEO of the National Pork Producers Council, candidly said, "[i]t was my biggest disappointment in my tenure . . .

---

<sup>100</sup> See *Humane Socy. U.S. v. Glickman*, 217 F.3d 882, 888 (D.C. Cir. 2000) (holding that federal agencies are required to follow the Migratory Bird Treaty Act); 50 C.F.R. § 10.13 (2005) (listing bird species protected by the Migratory Bird Treaty Act).

<sup>101</sup> Memo. & Or. at 2, *Fund for Animals v. Mainella*, No. 02-11855-PBS (D. Mass. Sept. 26, 2003) (copy on file with *Animal L.*).

<sup>102</sup> *Fund for Animals v. Clark*, 27 F. Supp. 2d 8, 15 (D.D.C. 1998).

<sup>103</sup> Perm. Inj. 8, *Animal Legal Defense Fund v. Woodley*, No. 04 CVD 1248 (N.C. Gen. Ct. Just., Dist. Ct. Div., Lee County N.C. Apr. 12, 2005) (copy on file with *Animal L.*).

<sup>104</sup> T.R.O. Hrg. Transcr. 55-66, *Fund for Animals v. Glickman*, No. CA 99-245 (D.D.C. recorded Feb. 12, 1999) (copy on file with *Animal L.*).

<sup>105</sup> Docket Rpt., *People for the Ethical Treatment of Animals v. Department of the Interior*, Civ. No. 01-2299 at 7 (Notice of Dismissal without Prejudice June 18, 2003) (copy on file with *Animal L.*) (entered after defendants seized and relocated the polar bears); Humane Socy. U.S., *Remaining Polar Bears Seized from Suarez Circus*, [http://www.hsus.org/marine\\_mammals/marine\\_mammals\\_news/remaining\\_polar\\_bears\\_seized\\_from\\_suarez\\_circus.html](http://www.hsus.org/marine_mammals/marine_mammals_news/remaining_polar_bears_seized_from_suarez_circus.html) (Nov. 22, 2002).

<sup>106</sup> Pl.'s Compl., *Compassion Over Killing, Inc. v. Giant of Md., L.L.C.*, No. 05-0001077 (D.C. Super. 2005) (copy on file with *Animal L.*); Alexei Barrionuevo, *Egg Producers Relent on Industry Seal*, N.Y. Times C18 (Oct. 4, 2005).

<sup>107</sup> See e.g. Ethan Carson Eddy, *Privatizing the Patriot Act: The Criminalization of Environmental and Animal Protection Terrorists*, 22 Pace Env'tl. L. Rev. 261 (2005) (discussing industry efforts to enact new state laws to limit access to, and even photography of, animal facilities).

[By failing to stop the measure] we've given the opposition a tremendous amount of oxygen."<sup>108</sup>

Indeed, the industries that routinely abuse animals in our society seem quite content to engage animal advocates in a debate framed around animal rights, and more than a little reluctant to face well-organized and calculated reform campaigns. For example, in a recent article entitled *Training for Animal Rights Litigators*, George Watts of the National Turkey Federation explained:

So far, animal rights law programs have focused on existing statutes on animal cruelty and animal welfare. . . . Some of the courses [now] focus not on the law itself but on "lawyering"—the skills needed to be an effective advocate.

I doubt that our country is interested in declaring chickens and other food animals to be persons with rights who are in need of "justice," but *the use of "existing law in creative and novel ways" is well within the grasp of litigators and energetic law students and could cause all sorts of problems for industry.*<sup>109</sup>

As advocates, we owe our clients the good sense to take heed of our opponents' tactical preferences for a debate over animal rights, rather than animal reform. In the words of Sun Tzu, "the clever combatant imposes his will on the enemy, but does not allow the enemy's will to be imposed on him."<sup>110</sup> The billions of animals now suffering in conditions that most Americans overwhelmingly oppose deserve "clever combatants" doing something constructive about this problem, rather than just repeating it over and over again in articles and books, or fighting this battle on the enemy's preferred terms.

I do not doubt that it is far easier to spend one's time theorizing about a society without animal exploitation—or commiserating about the abhorrent state of the nation's animal laws—than doing the hard, un-glamorous work of protecting animals. But as we pine away for a court-imposed silver-bullet for animals, or a paradigm shift in a legal system that has classified animals as property for centuries, billions of animals are enduring suffering that we have the power, and the societal support, to prevent today.

As mentioned previously, each hour of each day, 365 days a year, one million chickens are slaughtered in this country without any legal

---

<sup>108</sup> Brian Carnell, *NPPC Says It Needs More Funds to Fight Activists*, <http://www.animalrights.net/archives/year/2003/000090.html> (Apr. 8, 2003).

<sup>109</sup> George Watts, *Training for Animal Rights Litigators*, *Poultry USA* 10, 10–11 (Sept. 2005) (emphasis added); see also Barbara Duckworth, *New Poultry Standards Fail to Pacify Activists*, *The Western Producer* 34 (Mar. 9, 2006) (United Egg Producers' vice-president stating "that livestock groups in the United States are facing many lawsuits from animal welfare groups," that "[i]t is going to be a problem because they are going to keep challenging," and that "[t]he major challenges are coming from the Humane Society of the United States").

<sup>110</sup> Sun Tzu, *The Art of War* ch. 6, <http://eawc.evansville.edu/anthology/artwar.htm> (accessed Mar. 12, 2006).

requirement that they be rendered insensible to pain before they are shackled, cut, and bled out.<sup>111</sup> This does not happen solely because animals are property, nor does it require any radical academic theories to remedy this situation. Instead, it requires hard work in the legislative and judicial branches of our federal government, by large numbers of people, to close a simple loophole in existing law.<sup>112</sup> And every single hour we spend theorizing about an epic legal battle that may never be joined, one million more chickens die a horrible death.

In response to such arguments, it may be tempting to say that there is plenty of room for both academic exploration of animal rights and hard work in the trenches. But I submit that, in fact, these impractical revolutionary legal theories are hurting animals every day. They are the opiate of the animal law masses. The bottom line is that we need foot soldiers, not philosophers, and the handful of scholars who are already devoted to exploring what a future world with animal rights might look like are more than sufficient for that particular task. Far too many of the rest of us are trapped in their seductive web of animal rights theory—unable, or perhaps unwilling, to roll up our sleeves and set to work helping animals the hard way.

I often ask myself, if our voiceless clients languishing in battery cages and gestation crates could speak to us, what would they say to us? What would they ask us to spend our time on? If you were in their place, what would you be saying? Would you be screaming at your lawyer to get you out of a gestation crate now? Or urging them to explore theories for radically reordering our legal system?

But things are starting to change from within the movement itself. In the last year, The Humane Society of the United States has hired more than a half-dozen new lawyers to build and litigate cases to help the billions of animals stuck in the gap between humane attitudes and public policy.<sup>113</sup> Organizations like the Animal Legal Defense Fund, Farm Sanctuary, People for the Ethical Treatment of Animals, and the Physician's Committee for Responsible Medicine are also ramping up their legal efforts, and many of these groups are adding

---

<sup>111</sup> Natl. Agric. Statistics Serv., *supra* n. 44, at 2. (averaged from 8.89 billion chickens in 2004, divided by 8,760 hours).

<sup>112</sup> Compare 7 U.S.C. § 1902 (directing that all “cattle, calves, horses, mules, sheep, swine, and other livestock” be “rendered insensible to pain” before being processed for slaughter (emphasis added)) with 70 Fed. Reg. at 56624–25 (informing slaughterhouses and the public that the HMSA does not require “humane methods” for “handling and slaughter of poultry”); see also Pl.’s Compl. 3, *Levine v. Johanns*, No. C 05 4764 (N.D. Cal. filed Nov. 21, 2005) (challenging the exclusion of poultry from the definition of “livestock” because the Webster’s Dictionary in use when Congress enacted the HMSA defined “livestock” as “domestic animals used or raised on a farm,” and because the U.S. Department of Agriculture’s interpretation of the HMSA renders the “and other livestock” language of the HMSA essentially superfluous”) (available at [http://www.hsus.org/web-files/PDF/HMSA\\_complaint.pdf](http://www.hsus.org/web-files/PDF/HMSA_complaint.pdf)).

<sup>113</sup> See Humane Socy. U.S., *Animal Protection Litigation Section*, [http://www.hsus.org/in\\_the\\_courts/](http://www.hsus.org/in_the_courts/) (accessed Mar. 12, 2006) (discussing the Society’s litigation efforts).



lawyers every year.<sup>114</sup> These groups are not doing this because lawyers are fun and exciting people to have around the office, but because they know that the legal system is bearing fruit and they need more and more talented fruit pickers.

In conclusion, let me say that although it may come as a surprise from the foregoing discussion, I am actually trying to deliver the optimistic message that the legal system actually works. It may not work as quickly or effectively as some would like, but legal change rarely comes quickly. It is important to remember that the law does not change society, society changes the law.<sup>115</sup> And no one ever said that social change is an easy job.

I do not pretend to suggest we can use the existing legal framework to end all animal suffering. But I also refuse to accept that our hands are tied until and unless we overhaul the system. I think Robert F. Kennedy found eloquent inspiration from Albert Camus on this issue, albeit in a different context, when he recorded in his personal papers:

We are faced with evil. I feel rather like Augustine did before becoming a Christian when he said, "I tried to find the source of evil and I got nowhere." But it is also true that I and few others know what must be done. . . . Perhaps we cannot prevent this world from being a world in which children are tortured. But we can reduce the number of tortured children. And if you believers don't help us, who else in the world can help us do this?<sup>116</sup>

---

<sup>114</sup> E-mail from Lisa Franzetta, Dir. Commun., Animal Leg. Def. Fund, to Robert A. Dell, Assoc. Ed., *Animal L.* (Mar. 16, 2006, 4:29 p.m. PST) (copy on file with *Animal L.*); e-mail from Jeffrey S. Kerr, Gen. Counsel & Vice Pres. Corp. Affairs, Found. Support Animal Protec., to Jonathon R. Lovvorn, Vice Pres. Animal Protec. Litig., Humane Socy. U.S. (Mar. 16, 2006, 6:58 p.m. EST) (PETA) (copy on file with *Animal L.*); e-mail from Mindy Kursban, Exec. Dir. & Gen. Counsel, Phys. Comm. Responsible Med., to Jonathon R. Lovvorn, Vice Pres. Animal Protec. Litig., Humane Socy. U.S. (Mar. 16, 2006, 8:03 p.m. EST) (copy on file with *Animal L.*); e-mail from Jonathon R. Lovvorn, Vice Pres. Animal Protec. Litig., Humane Socy. U.S., to Robert A. Dell, Assoc. Ed., *Animal L.*, FW: *Litigation at Farm Sanctuary* (Mar. 20, 2006, 5:40 p.m. EST) (copy on file with *Animal L.*). In addition, there are a growing number of private, public interest law firms – including Meyer Glitzenstein & Crystal, Egert & Trakinski, Evans & Page, and many others – that are devoted almost exclusively to bringing practical, strategic lawsuits to protect animals using existing state and federal laws. See Natl. Ctr. Animal L., *Animal Law Career Guide 22–29* (Natl. Ctr. Animal L. 2006) (available at <http://www.lclark.edu/org/nca/objects/AnimalLawCareerGuide.pdf>) (for a comprehensive listing of animal law attorneys); Meyer Glitzenstein & Crystal, *Home*, <http://www.meyerglitz.com/> (accessed Apr. 2, 2006) (for information on a successful Washington, D.C. public interest firm); Satya, *On the Right Side of the Law: The Satya Interview with Amy Trakinski and Len Egert*, <http://www.satyamag.com/apr05/trakinski.html> (accessed Apr. 2, 2006) (for an interview with two successful animal law attorneys).

<sup>115</sup> See *supra* nn. 53–69 and accompanying text (discussing how the enactment of the Thirteenth Amendment was a necessary but not sufficient condition for the legal system's recognition of the rights of African Americans in the United States).

<sup>116</sup> Arthur M. Schlesinger, Jr., *Robert Kennedy and His Times* 619, 988 n. 62 (Houghton Mifflin 1978).

