

# INTRODUCTION

## CONFRONTING BARRIERS TO THE COURTROOM FOR ANIMAL ADVOCATES

By  
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## I. A BRIEF HISTORY OF ANIMAL LAW: MAINSTREAMING A NOVEL FIELD OF LAW

Animal law has received much press recently, garnering accolades as a novel and cutting edge field. But the fact of the matter is that animal law is not entirely new. Pioneering animal law practitioners have been trailblazing for decades, and are only now beginning to gain recognition for their efforts. As Joyce Tischler, co-founder of the Animal Legal Defense Fund (ALDF) and animal law practitioner for over a quarter of a century, noted in her opening remarks, in the early days, animal law practitioners were isolated and frequently mocked.<sup>1</sup> But in time, these advocates sought each other out and started to build intellectual communities; they began dialoguing, exchanging ideas, building organizations, formulating plans, and making things happen. As Tischler explained, "In the process of bringing all these lawsuits, something funny happened on the way. An area of the law formed while we weren't looking."<sup>2</sup>

Little by little, animal law began to establish itself within more mainstream legal discourses. This introduction was slow, Tischler observed, "because our legal system abhors change."<sup>3</sup> But the determined, committed, and passionate early advocates refused to let resistance deter them, and their perseverance has paid off. Animal law courses are now taught at law schools across the nation,<sup>4</sup> and student and professional organizations abound,<sup>5</sup> including a national Animal Law Committee within the Tort Trial and Insurance Practice Section of the American Bar Association.<sup>6</sup> Animal law scholarship also flourishes, with four journals dedicated exclusively to animal law and animal law articles increasingly published in generalist journals.<sup>7</sup>

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<sup>1</sup> Joyce Tischler, Symposium, *Confronting Barriers to the Court Room for Animal Advocates* 2-9 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*) [hereinafter *Confronting Barriers*].

<sup>2</sup> *Id.* at 5.

<sup>3</sup> *Id.* at 4.

<sup>4</sup> ALDF, *Programs: Animal Law Courses*, <http://www.aldf.org/content/index.php?pid=83> (accessed Nov. 30, 2006) (list of law schools offering animal law courses).

<sup>5</sup> ALDF, *Programs: SALDF Chapters*, <http://www.aldf.org/content/index.php?pid=51> (accessed Nov. 30, 2006) (list of animal law student groups); ALDF, *Resources: Bar Association Animal Law Sections and Committees*, <http://www.aldf.org/resources/details.php?id=101>

(Jan. 1, 2006) (list of national, state, and regional bar association animal law committees and sections).

<sup>6</sup> ABA, *Animal Law Committee*, <http://www.abanet.org/tips/animal/home.html> (last modified Oct. 30, 2006).

<sup>7</sup> See *Animal L.*; *J. Animal L.*; *J. Animal L. & Ethics*; *J. Intl. Wildlife L. & Policy* (journals dedicated exclusively to animal law). See e.g. Cass R. Sunstein, *Centennial Tribute Essay: The Rights of Animals*, 70 U. Chi. L. Rev. 387 (2003); Donna Mo, Student Author, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. Rev. 1313 (2005); Student Author, *Challenging Concentration of Control in the American Meat Industry*, 117 Harv. L. Rev. 2643 (2004) (examples of recently published animal-related articles in generalist law reviews).

All of these developments have occurred in an incredibly short period of time. As New York University's (NYU) Vice Dean, Clayton Gillette, noted in introducing the symposium, "This dramatic increase in a brand new field [is] something that doesn't happen very frequently . . . . The fact that there is a new field that has arisen is . . . a remarkable event . . . ."<sup>8</sup> The field of animal law has begun to crystallize and garner mainstream acceptance, as evidenced by the developments detailed above and by the multitude of conferences occurring at law schools across the country, including this well-attended symposium at NYU.<sup>9</sup> It is in this sense that animal law is a new field.

Despite these apparent successes, the fact remains that most animals today are no better off than they were ten years ago; the lives of many have actually deteriorated with the escalation of practices that place profits above all else, particularly the intensive confinement of animals raised for food.<sup>10</sup> David Wolfson, who has managed to balance a fulltime career as a partner at a major law firm with regular animal law teaching, writing, lecturing, and practice,<sup>11</sup> aptly captured and personalized this dynamic when he explained, "[S]ometimes I . . . feel

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<sup>8</sup> Clayton Gillette, Symposium, *Confronting Barriers* 1 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*).

<sup>9</sup> See e.g. Student Animal Legal Defense Fund, *Annual Animal Law Conference*, <http://www.lclark.edu/org/saldf/conference.html> (accessed Nov. 12, 2006) (longest running national animal law conference, which will host its fifteenth annual event in 2007); Duke L., *Duke Law Events*, <http://www.law.duke.edu/webcast/index.html>; select Duke University Animal Law Conference (part 1), (part 2), (part 3), or (part 4) (accessed Nov. 12, 2006) (webcast of animal law symposium held by Duke Law School's *Law & Contemporary Problems*); Yale Bull. & Calendar, *'Future of Animal Law' to Be Explored*, <http://www.yale.edu/opa/v33.n10/story2.html> (Nov. 5, 2004) (described by Yale Law School Dean Harold Koh as an "opportunity to discuss cutting-edge legal issues with the foremost experts in the this field"); ALDF, *Animal Law Events: The Future of Animal Law*, <http://www.aldf.org/events/details.php?id=20> (accessed Dec. 1, 2006) (publicizing "The Future of Animal Law" conference scheduled for Mar. 30–Apr. 1, 2007 at Harvard Law School).

<sup>10</sup> See Student Author, *supra* n. 7, at 2646–52 (discussing confinement conditions of farmed animals, vertical and horizontal integration of the meat processing industry, and the relationship between the two); Mo, *supra* n. 7, at 1319–20 nn. 39–41 (describing confinement conditions experienced by the vast majority of farmed animals in the United States); Warren A. Braunig, Student Author, *Reflexive Law Solutions for Factory Farm Pollution*, 80 N.Y.U. L. Rev. 1505, 1508 n. 14 (2005) (detailing a significant increase over the last thirty years in the number of animals farmed in the United States, and a contemporaneous dramatic decline in the total number of livestock and poultry facilities).

<sup>11</sup> Milbank, Tweed, Hadley & McCloy LLP, *Attorneys: David J. Wolfson*, [http://www.milbank.com/en/Attorneys/v-z/Wolfson\\_David.htm](http://www.milbank.com/en/Attorneys/v-z/Wolfson_David.htm) (accessed Nov. 12, 2006); David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness and the Law: A Modern American Fable*, in *Animal Rights: Current Debates and New Directions* 205–33 (Cass R. Sunstein & Martha C. Nussbaum eds., Oxford U. Press 2004); David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 *Animal L.* 123 (1996). Wolfson teaches animal law seminars at the Benjamin N. Cardozo School of Law, Columbia University Law School, and New York University School of Law. He has previously taught at Harvard Law School and led an animal law study group at Yale Law School.

like I'm running after a train that I know I have to catch. I know that I'm running quicker than I used to. The problem seems to be that the train is also going a little faster than it used to be too."<sup>12</sup>

## II. TRANSCENDING BARRIERS: BUILDING A BRIDGE TO THE FUTURE OF ANIMAL ADVOCACY

What do these dubious successes mean for the animal advocacy movement? How do advocates reconcile the tremendous advances the movement has made in terms of mobilization with the tremendous amount of work that still needs doing? How can the movement put this critical mass and growing mainstream awareness to optimum use? Answering these questions necessitates grappling with the recurring obstacles that those seeking to litigate on behalf of nonhuman animals have faced. The goal of this symposium was to bring leading scholars and practitioners in the field of animal law together to exchange ideas about the barriers animal advocates face and, most importantly, to strategize about overcoming them. The symposium was accordingly organized around some of the major barriers that have interposed themselves between animal advocates and their goals: deeply entrenched cultural myths that hinder legal developments, standing doctrine that delays and sometimes entirely thwarts consideration of the merits in cases concerning nonhuman animals, and the paucity of causes of action that easily lend themselves to animal protection litigation.

## III. TAKING STOCK: A CLOSER LOOK AT THE BARRIERS

### A. *Cultural Barriers: Myths, Transparency, and Transformation*

The first panel, "Linking Cultural & Legal Transitions," explored the cultural myths that enable humans to distance ourselves from the routine, institutionalized violence inherent in contemporary human uses of other animals. The panelists, Una Chaudhuri, a Professor of English and Drama at NYU working in the field of Critical Animal Studies;<sup>13</sup> Taimie Bryant, Professor of Law at the University of California, Los Angeles (UCLA), whose novel work on animal issues integrates law and social science;<sup>14</sup> and Dale Jamieson, Professor of

<sup>12</sup> David J. Wolfson, Symposium, *Confronting Barriers* 75 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*).

<sup>13</sup> See *Animality and Performance*, TDR: The Journal of Performance Studies \_\_\_\_ (Una Chaudhuri, guest ed.) (forthcoming 2007); Una Chaudhuri, *(De)Facing the Animals: Zooësis and Performance*, TDR: The Journal of Performance Studies \_\_\_\_ (forthcoming 2007); Una Chaudhuri, *Zoo Stories: "Boundary-Work" in Theatre History*, in *Redefining Theatre History* (W.B. Worthen & Peter Holland eds., Palgrave MacMillan 2003); Una Chaudhuri, *Animal Geographies: Zooësis and the Space of Modern Drama*, 46 *Modern Drama* 646, 646–62 (Winter 2003).

<sup>14</sup> Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 *J. Animal L. & Ethics* 63 (2006); Taimie L. Bryant, *Similarity or Difference As a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?* 70 *L. & Contemp. Probs.* \_\_\_\_ (forthcoming 2006) (draft available at <http://www.law.ucla.edu/docs/>

Environmental Studies and Philosophy and affiliated Professor of Law at NYU, who has studied cultural transformations in the way humans relate to other animals and the environment,<sup>15</sup> brought a wealth of expertise and experience to the table. The panel also addressed the related importance of increasing transparency—of rendering visible practices that are currently hidden from view—and the moral transformation that ensues.<sup>16</sup> As Bryant incisively observed, “With transparency comes transformation and accountability.”<sup>17</sup> Indeed, this transformation is presently occurring on an international scale.<sup>18</sup> Jamieson remarked:

[I]n the broadest sense we’ve won the arguments . . . [T]hat more than anything is why we’re all here and why this conference is introduced by the dean of a law school . . . [T]he transformation of what animal rights meant before these arguments were on the table and what it means now is almost unfathomable.<sup>19</sup>

The panel itself represented a cultural transition in progress. We are in an era of heated and deeply polarized discussions about the appropriate treatment of nonhuman animals. We live, in Jamieson’s words, “in a time in which our moral relationships with animals are

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bryant\_-\_similarity—july\_14.pdf); Taimie L. Bryant, *Mythic Non-Violence*, 2 J. Animal L. 1 (2006) (available at [http://www.animallaw.info/journals/jo\\_pdf/Journal%20of%20Animal%20Law%20Vol%202.pdf](http://www.animallaw.info/journals/jo_pdf/Journal%20of%20Animal%20Law%20Vol%202.pdf)).

<sup>15</sup> See e.g. Dale Jamieson, *Morality’s Progress: Essays on Humans, Other Animals, and the Rest of Nature* (Clarendon Press 2002) (compiling some of Jamieson’s work on these topics); *Readings in Animal Cognition* (Marc Bekoff & Dale Jamieson eds., MIT Press 1996).

<sup>16</sup> Taimie Bryant, Dale Jamieson & Una Chaudhuri, Symposium, *Confronting Barriers* 23–25 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*).

<sup>17</sup> *Id.* at 25.

<sup>18</sup> Discourses about human-animal interactions are by no means limited to the United States; indeed, many other countries appear to be much further along in terms of material improvements in the lives of nonhuman animals. Wolfson & Sullivan, *supra* n. 11, at 221–24 (comparing recent animal protection advances in the European Union with the relative lack thereof in the United States); Christina G. Skibinsky, *Changes in Store for the Livestock Industry? Canada’s Recurring Proposed Animal Cruelty Amendments*, 68 Sask. L. Rev. 173 (2005) (analyzing increasing attention to animal welfare issues in Canada, general public support for updated animal cruelty legislation, and industry backlash); Jessica Braunschweig-Norris, Student Author, *The U.S. Egg Industry - Not All It’s Cracked up to Be for the Welfare of the Laying Hen: A Comparative Look at United States and European Union Welfare Laws*, 10 Drake J. Agric. L. 511 (2005) (describing the disparity between welfare regulation of the egg industry in the European Union and the United States); Kate M. Natrass, “. . . Und Die Tiere”: *Constitutional Protection for Germany’s Animals*, 10 Animal L. 283 (2004) (tracing the legal and social developments leading to Germany’s constitutional amendment providing protection to animals); Delcianna J. Winders, Student Author, *Combining False Advertising and Reflexive Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. Rev. 454, 455 (2006) (comparing the European Union’s ban of testing cosmetics on animals and of marketing products so tested with the United States’ failure to even ensure the veracity of “cruelty-free” claims).

<sup>19</sup> Dale Jamieson, Symposium, *Confronting Barriers* 23 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*).

being radically transformed.”<sup>20</sup> The only uncertainty now is precisely what shape this transformation will take.

*B. Standing As a Barrier: Injuries-in-Fact and Normativeness*

The second panel, “Legal Standing for Animals & Advocates,” analyzed standing jurisprudence, one of many sites of the current cultural transformation. Standing is fundamentally important to litigators of any stripe, because it is an element of the very justiciability of an issue. Katherine Meyer, who has argued some of the most important animal standing cases to date,<sup>21</sup> aptly described the importance of standing, explaining that a lack of standing is “a complete barrier to the courtroom. If you don’t have standing, you don’t get through the door. You may have a cause of action, there may be a door there, but if you don’t [have] standing, you can’t get through it.”<sup>22</sup>

While advocates for humans often take standing for granted, standing has posed a frequent and formidable obstacle for animal advocates. Meyer, who has litigated animal protection cases for nearly fifteen years, commented that standing challenges have been “inevitably the first round of the litigation in all of these cases.”<sup>23</sup> Veteran animal advocate Tischler echoed this experience, reflecting, “We didn’t set out to make standing law. We didn’t want to become standing experts. Dealing with the issue of standing . . . has been a practical necessity, because we are challenged in every case we file.”<sup>24</sup>

These standing challenges can be defeated, as exemplified by Meyer’s victory in *Ringling Bros.*, in which the court held that a former elephant handler had standing to challenge the abusive treatment of the elephants with whom he had worked.<sup>25</sup> Nevertheless, these challenges remain an impediment to litigating the merits of an animal advocacy claim because of the incredible amount of time they take to resolve. For example, Meyer points out that in *Ringling Bros.*, three years of attention to the merits were lost to litigating standing, while the elephants remained in the conditions challenged as abusive.<sup>26</sup>

<sup>20</sup> *Id.* at 14.

<sup>21</sup> *Am. Socy. Prevention Cruelty Animals v. Ringling Bros. & Barnum & Bailey*, 317 F.3d 334, 338 (D.C. Cir. 2003) (holding that a former elephant handler had standing to challenge the treatment of elephants with whom he had worked); *ALDF v. Glickman*, 154 F.3d 426, 445 (D.C. Cir. 1998) (en banc) (holding that a regular visitor to animal exhibitions had standing to challenge the treatment of primates that he had visited).

<sup>22</sup> Katherine Meyer, Symposium, *Confronting Barriers* 34 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*).

<sup>23</sup> *Id.*

<sup>24</sup> Tischler, *supra* n. 1, at 7.

<sup>25</sup> 317 F.3d at 434. The American Society for the Prevention of Cruelty to Animals, other animal welfare groups, and a former elephant handler sued Ringling Bros. under the Endangered Species Act (Endangered Species Act of 1973, 16 U.S.C. § 1540(g) (2002)). The district court dismissed the complaint for lack of standing, but the D.C. Circuit reversed, holding that the former handler had demonstrated a present or imminent injury and established redressability. *Ringling Bros.*, 317 F.3d at 434.

<sup>26</sup> Meyer, *supra* n. 22, at 40.

While animal advocates have consistently faced standing challenges and heightened scrutiny, Jonathan Lovvorn, Vice President of Animal Protection Litigation for the Humane Society of the United States, commented that courts will readily assume with little analysis that anyone financially impacted by an action has standing to challenge it.<sup>27</sup> In essence, Professor David Cassuto, who teaches and writes on animal law, observed that standing, particularly the injury-in-fact prong of standing analysis, poses a normative question.<sup>28</sup> Lovvorn elaborated on this notion, asserting that underlying the heightened scrutiny of standing in animal protection cases “is the idea that the courts don’t really think that the injury that we’re talking about is a real injury.”<sup>29</sup>

The task before the animal advocacy movement, then, is to communicate these injuries in a manner comprehensible to a wider audience. This task comprises two elements. First, Lovvorn argued, advocates must learn to present the injuries at issue in terms that are intelligible to those accustomed to conceptualizing injuries as arising from automobile accidents and commercial disputes.<sup>30</sup> Second, he added, advocates must attend to the public perception of these issues, addressing the inevitable, if under-acknowledged, interaction between cultural and legal norms.<sup>31</sup> Both of these tasks require cultural transformation and call for the same transparency discussed by the first panel, as well as mindful attention to the big picture and the relationship between incremental immediate steps and long-term goals.

### C. Causes of Action: Doors into the Courtroom

The third panel, “Animal Advocacy & Causes of Action,” considered existing and potential avenues into the courtroom for animal advocates. Panelists included Carter Dillard,<sup>32</sup> David Favre,<sup>33</sup> Eric

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<sup>27</sup> Jonathan Lovvorn, Symposium, *Confronting Barriers* 41 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*); see e.g. *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 733–34 (D.C. Cir. 2003) (finding standing to be “self-evident” and declining to require that the intervenor provide more than allegations to establish standing where the type of injury alleged was the “threatened loss of tourist dollars” and harm to property).

<sup>28</sup> David Cassuto, Symposium, *Confronting Barriers* 32 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*); see also David Cassuto, *The Law of Words: Standing, Environment, and Other Contested Terms*, 28 Harv. Envtl. L. Rev. 79, 95–100 (2004) (critiquing injury-in-fact jurisprudence as normative and contingent, and arguing that definitions of injury should instead be derived exclusively from statutes).

<sup>29</sup> Lovvorn, *supra* n. 27, at 41.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 46.

<sup>32</sup> Carter Dillard is the Director of Farm Animal Litigation for the Humane Society of the United States. He wrote the seminal work on how animal advocates can use false advertising law. *Infra* n. 39.

<sup>33</sup> David Favre is a professor at Michigan State University College of Law. He teaches animal law and wildlife law and has authored a variety of scholarly articles and books on animal law, including a casebook and a recently published article. David Favre, *Animals: Welfare, Interests, and Rights* (Mich. St. U., Det. College L. 2003);

Glitzenstein,<sup>34</sup> Mariann Sullivan,<sup>35</sup> and Sonia Waisman.<sup>36</sup> The discussion was wide-ranging and tackled a multitude of issues, including claims for recovery beyond “replacement value” when companion animals are intentionally or negligently injured or killed,<sup>37</sup> private enforcement of animal cruelty statutes,<sup>38</sup> claims challenging false representations made by manufacturers about their treatment of ani-

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David S. Favre, *Judicial Recognition of the Interests of Animals—A New Tort*, 2005 Mich. St. L. Rev. 333 [hereinafter *A New Tort*].

<sup>34</sup> Eric Glitzenstein is a founding partner of Meyer Glitzenstein & Crystal. He has litigated a plethora of citizen suit actions and has written on the importance of citizen suit enforcement and judicial oversight to environmental law.

<sup>35</sup> Mariann Sullivan is the Deputy Chief Attorney for the New York State Appellate Division, First Department. She serves on various animal law committees and writes on animal law.

<sup>36</sup> Sonia Waisman teaches animal law at California Western School of Law and co-authored the first animal law casebook. Pamela D. Frasch, Sonia S. Waisman, Bruce A. Wagman & Scott Beckstead, *Animal Law* (1st ed., Carolina Academic Press 2000) (casebook currently in third edition). She has also written on the recovery of noneconomic damages for the wrongful killing or injury of companion animals. *Infra*, n. 37.

<sup>37</sup> Because companion animals are legally private property, plaintiffs have historically been able to recover only the “replacement value” of an animal that is killed or injured. See Sonia S. Waisman & Barbara R. Newell, *Recovery of ‘Non-Economic’ Damages for Wrongful Killing or Injury of Companion Animals*, 7 Animal L. 45, 70 (2001) (arguing that damages for noneconomic harms are justified and explaining the Tennessee “T-Bo Act” which allows for recovery of damages for loss of companionship of particular pets) (Tenn. Code Ann. § 44-17-403 (West 2004)); *A New Tort*, *supra* n. 33, at 340–43 (noting “replacement value” as indication of impoverished nature of body of law dealing with protection of animal interests). For additional analyses of the valuation of nonhuman animals, see Geordie Duckler, *The Economic Value of Companion Animals: A Legal and Anthropological Argument for Special Valuation*, 8 Animal L. 199, 203–04 (2002) (arguing that animals have particular values in addition to their property value); Christopher Green, Student Author, *The Future of Veterinary Malpractice Liability in the Care of Companion Animals*, 10 Animal L. 163, 179 (2004) (providing comprehensive factual analysis of valuation of companion animals and its implications for veterinary malpractice liability).

<sup>38</sup> Animal cruelty laws are generally criminal provisions that can only be enforced by a prosecutor who has complete prosecutorial discretion. See Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 Animal L. 243, 244 (2003) (arguing that prosecutorial discretion is the “lynchpin of our legal system,” as “[a] prosecutor’s power to decide whether or not to charge an individual with the commission of a crime is virtually unchecked”). Animal cruelty violations, moreover, appear to be seriously under prosecuted. *Id.* at 245–47. Mechanisms that enable private citizens to bring cruelty claims have garnered increasing attention as a means of ensuring more vigorous enforcement of these laws. *Id.* at 264–66 (proposing a model self-help statute empowering private citizens to enforce cruelty laws). See also William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 Animal L. 39, 41–45 (2005) (drawing on experience of North Carolina civil remedy provision to propose a model anti-cruelty civil remedies statute).



mals,<sup>39</sup> existing and proposed citizen suit provisions,<sup>40</sup> challenges to unlawful or capricious government actions,<sup>41</sup> open government claims to increase transparency and expose practices,<sup>42</sup> and even potential constitutional claims.<sup>43</sup>

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<sup>39</sup> As consumers increasingly integrate animal concerns into their purchasing habits, manufacturers have begun to respond with a plethora of labeling claims about the treatment of animals. See Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 *Animal L.* 25, 26 (2004) (noting the success of “animal advocacy groups . . . in convincing consumers to make ethical choices when buying”). See also Winders, *supra* n. 18, at 458–59 nn. 13–14 (noting that statistics indicate that “cruelty-free” labels affect consumer purchasing habits). Unfortunately, all too often these claims are false or misleading, which is problematic from both an animal protection and a consumers’ rights perspective. See Dillard, *supra* n. 39, at 26 (stating that “[b]ecause consumers will often pay more for humanely produced goods, and because those goods often cost more to produce, there is an incentive to convince buyers at the point of purchase that goods are created under more animal-friendly conditions than they in fact are”). See also Winders, *supra* n. 18, at 459–60 (noting that the lack of a standardized definition of “cruelty-free” means consumers are at risk of being misled or deceived). False advertising law is increasingly used to hold manufacturers accountable for misleading claims about their treatment of animals. See Mariann Sullivan, *To Tell the Truth: The Role of Consumer Protection Litigation in Resolving Disputes between Animal Protection Agencies and Industry*, *Animal L. Comm. Newsltr.* 26–29 (Fall 2005) (detailing recent false advertising activity initiated by animal advocacy movement) (on file with *Animal L.*). See generally Dillard, *supra* n. 39 (detailing the various avenues available for advocates to bring false advertising claims).

<sup>40</sup> See e.g. Student Author, *2002 Legislative Review*, 9 *Animal L.* 331, 345–56 (Emilie Keturakis ed., 2003) (proposing citizen suit as a means of addressing the government’s failure to enforce the Animal Welfare Act (AWA)).

<sup>41</sup> See Administrative Procedure Act (APA), 5 U.S.C. §§ 702–706 (2000) (providing judicial review of the actions of federal agencies and requiring reviewing courts to “compel agency action unlawfully withheld or unreasonably delayed” and to “hold unlawful and set aside agency action, findings, and conclusions” that are, *inter alia*, arbitrary or capricious). Because the AWA lacks a citizen suit provision, challenges to its enforcement, or lack thereof, must be brought under the APA. See Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2000 & Supps. II 2002, III 2003, IV 2004) (regulating treatment of animals). Analogous state administrative procedure acts similarly provide review of state administrative actions. For a database of state administrative procedure resources, see Fla. St. U. College L., *ABA Administrative Procedure Database: State Resources*, [http://www.law.fsu.edu/library/admin/state\\_resources.html](http://www.law.fsu.edu/library/admin/state_resources.html) (accessed Nov. 12, 2006).

<sup>42</sup> See Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000) (requiring federal agencies to publicly disclose certain documents). FOIA can assist animal advocates by enabling them to access information, such as information about federally regulated animal industries. The Ninth Circuit’s decision in *U.S. v. Catholic Healthcare W.* represents a recent use of FOIA by animal advocates. 445 F.3d 1147, 1156 (9th Cir. 2006) (allowing an action against a researcher for his experimentation on beagles to proceed, where the plaintiffs alleged, based on information obtained through FOIA, that the researcher had fraudulently obtained seven hundred thousand dollars in grant money from the government).

<sup>43</sup> The panelists specifically discussed a remark made by Laurence Tribe about the possibility of interpreting the Thirteenth Amendment to extend protection to nonhuman animals. See 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, 4 (2001) (“[T]he Thirteenth Amendment, which prohibits slavery throughout the United States[,] . . . is not limited to government violations but extends to private conduct as

Despite the expansive list of topics covered and the exploratory nature of the discussion, some overarching and unanimously agreed upon themes emerged. Perhaps most important was a compelling reminder that advocates must not lose sight of the forest for the trees. As moderator Len Egert, one of the founding partners of Egert & Trakinski, an animal law practice based in New York City, thoughtfully urged:

[A]s a movement, as animal advocates[,] we have to constantly be thinking about the types of cases we bring and whether or not we're going to move forward and take a step forward in a direction that we want to go in . . . . [W]e need to think about what our goals are all the time and be very careful that we're not doing more harm than good, because we are really at the beginning stages and we have to make sure we get to the place we want to be.<sup>44</sup>

#### IV. PLANNING AHEAD: DEVELOPING A VISIONARY PRAGMATIC STRATEGY FOR THE FUTURE OF ANIMAL LAW

Egert's call for strategy, visionary pragmatism, and perspective was, in fact, voiced throughout the daylong symposium. In her opening overview of the past, present, and future of animal law, Tischler emphasized, "We are going to have to focus on [the] creation . . . of breakthrough cases."<sup>45</sup> Likewise, Meyer noted the importance of a thoughtful incrementalism undergirded by a long-range vision and plan, explaining, "It's like *Brown vs. Board of Education*.<sup>46</sup> That wasn't the first case they brought. They brought all these other incremental cases leading up to *Brown* . . . to establish that principle."<sup>47</sup> Egert carefully considered a step-by-step strategy, insisting:

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well[, indicating that] . . . our constitutional apparatus and tradition include[s] devices for protecting values even without taking the step of conferring rights on new entities—by identifying certain things that are simply wrong.”

<sup>44</sup> Len Egert, Symposium, *Confronting Barriers* 50 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*).

<sup>45</sup> Tischler, *supra* n. 1, at 7.

<sup>46</sup> 347 U.S. 483, 495 (1954) (holding that “in the field of public education the doctrine of ‘separate but equal’ has no place” and that “such segregation is a denial of the equal protection of the laws”).

<sup>47</sup> Meyer, *supra* n. 22, at 45–46; see also Leland B. Ware, *Setting the Stage for Brown: The Development and Implementation of the NAACP's School Desegregation Campaign, 1930-1950*, 52 Mercer L. Rev. 631, 632 (2001) (describing the “long-range, carefully coordinated litigation campaign” preceding the decision in *Brown*); Jack Greenberg, *Crusaders in the Courts: How a Dedicated Band of Lawyers Fought for the Civil Rights Revolution* 152–211 (Basic Bks. 1994) (discussing the evolution of *Brown*). Panelist Lovvorn has suggested elsewhere, however, that animal advocates exercise caution with the *Brown* analogy as “far too many . . . have fallen under the intoxicating thrall of the fantasy of creating something like *Brown v. Board of Education* for animals” when, in fact, there will be no “court-imposed silver-bullet for animals.” Jonathan R. Lovvorn, *Introduction: 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, 139, 147 (2006) (footnote omitted). Even in the civil rights context, *Brown* has proven to be no “silver-bullet,” yet another reason for animal advocates to avoid romanticizing it. See

[I]t's very important to see the big picture and look at what potentially is down the line so that we can do the hard work of figuring out incrementally . . . what cases, what steps are going to lead to that, or lead at least to an ability to make those arguments and really have them heard in court.<sup>48</sup>

Fleshing out such goals, however, can be difficult. As Wolfson reminded animal advocates, “[A]t the end of it we’re just trying to change the world. That’s all we’re trying to do here. We’re just trying to basically change something from top to bottom.”<sup>49</sup> When the transformation called for is so fundamental that it goes to the core of many of our daily consumption practices and implicates the lives of literally billions, it can be frustrating and seemingly impossible to establish a clear vision, let alone develop a strategy to realize that vision.

But a pragmatic visionary strategy is not impossible. For example, Sullivan suggested developing a vision of “where we would . . . like to go in a realistic sense legally in the next 20 or 30 years . . . .”<sup>50</sup> In doing so, there is much to learn from the hard earned experiences of prior social movements that have used the law as a tool for social change. Despite the obvious differences between advocacy on behalf of humans and advocacy on behalf of nonhuman animals, there are also similarities and strategic lessons to be learned if we look and listen.

Animal issues are on the table in a way they have never been before. As Jamieson and Wolfson both emphasized:

[I]n many ways we have already won most of the arguments. The key issues that we argue on behalf of have already been proven. That animal issues [are] a serious ethical concern. That animals are treated in ways that are very hard to justify [and] the majority of times very unnecessary. [T]hat there is a great deal of need for change. And that people should care about those issues.<sup>51</sup>

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Charles J. Ogletree, *With All Deliberate Speed: Reflections on the First Half Century of Brown v. Board of Education* (W.W. Norton & Co. 2004) (analyzing ramifications of *Brown* decision and arguing that its mandate was flawed from the beginning); Derrick Bell, *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (Oxford U. Press 2004) (arguing that *Brown* undermined rather than advanced the education needs of black children). As Lovvorn himself argues, animal advocates can still learn from cultural and legal strategic efforts preceding *Brown*, even while recognizing there will be no “silver-bullet.”

<sup>48</sup> Egert, *supra* n. 44, at 60.

<sup>49</sup> Wolfson, *supra* n. 12, at 76–77; *see also* Lovvorn, *supra* n. 47, at 134 (discussing animal advocates’ “overriding duty to . . . put things into perspective and to think long and hard about the consequences of [their] actions”). A part of this “big picture” view is, of course, combining a sense of realism and pragmatism. *See id.* (urging animal advocates to “soberly assess [their] tactics for victory”).

<sup>50</sup> Mariann Sullivan, Symposium, *Confronting Barriers* 65 (N.Y.C., N.Y., Apr. 14, 2006) (copy of transcript on file with *Animal L.*). *See also* Lovvorn, *supra* n. 47, at 142 (suggesting that animal advocates focus on “the space in between current practices and where current polling data tells us society is ready to go in terms of reform”).

<sup>51</sup> Wolfson, *supra* n. 12, at 75–76 (paraphrasing Jamieson).

Animal advocates have succeeded in creating a mainstream discourse. Transformation is already underway. Now, the question is what role advocates will play in this transformation and what will ultimately result. These decisions are ours to make.