

INTRODUCTION

LAW AND PUBLIC POLICY: FUTURE DIRECTIONS FOR THE ANIMAL PROTECTION MOVEMENT

By
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The institutional beginning of the humane movement in the United States dates back to the formation of the American Society for the Prevention of Cruelty to Animals (ASPCA), founded by Henry Bergh in 1866.¹ Taking stock of the movement today, we see thousands of organizations at work to protect animals—from local humane societies and wildlife rehabilitation centers to national organizations that focus on all types of animal exploitation. To an extent beyond what Bergh himself could have imagined, the idea of protecting animals has found a place in our lives and in our laws.

We are now at a new and strange juncture in human experience. Never has there been such massive exploitation of animals—from the puppy mills to the canned hunting ranches to the laboratories to the billions of animals raised on factory farms. At the same time, never have there been so many people determined to stop this exploitation. One force or the other has to prevail, and it is the goal of the animal protection movement to see the forces of kindness and mercy triumph

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¹ Dr. Bernard Oreste Unti, *The Quality of Mercy: Organized Animal Protection in the United States 1866–1930* 145 (unpublished dissertation, Am. U. 2002); Pune Dracker, *ASPCA History: “Regarding Henry,”* <http://www.aspca.org/site/PageServer?pagename=bergh> (accessed Mar. 28, 2005).

over custom, complaisance, and selfishness, and to usher in a new era of respect and concern for animals.

The means of effecting these sweeping changes take many forms. There is enlightenment and education, and the personal transformation that occurs when people of conscience become aware of abuse and misconduct. There is direct care and relief, and the humane movement has spent the bulk of its resources during the last century and a half providing shelter, sanctuary, food and water, and other animal care services to creatures in need.

In a market-oriented economy—in which many animals are treated only as commodities—the humane movement must influence corporate practices and policies. We vote for or against animal cruelty with our dollars in the marketplace, and our ability to spur corporate policy changes has enormous implications for animals. When major corporations halted animal testing, or when fast food giants stipulated that producers had to observe basic welfare standards, these decisions affected the lives of millions of creatures.

And then there is the matter of the law. When it comes to animals, the law must speak, and set a standard in society for personal, corporate, and government conduct. Matters dealing with the treatment of animals cannot be left entirely to personal choice or conscience, since many people would knowingly flout society's voluntary proscriptions. As elsewhere in the law, people must be held to clear standards of conduct, and those standards must be enforceable.

The Humane Society of the United States (The HSUS), which now has nearly nine million members, works in all of the above-mentioned arenas, but none is more important than our work to build a body of law to protect animals, and then seeing that these laws are enforced.² All social movements must confront the prospect of long-lasting political change, as their ideas mature and as society comes to accept their basic tenets. Our movement provides no exception to this rule.

At some level, the idea that it is wrong for people to inflict needless harm upon animals is now codified in every state. All fifty states have adopted anti-cruelty statutes, and aggravated animal abuse rises to a felony level offense in forty-one states and the District of Columbia.³ It is a felony to stage dogfighting spectacles in forty-eight states, and cockfighting is a felony in thirty-one states.⁴ In this sense, opposi-

² See Humane Socy. of the U.S., *Legislation and Laws*, http://www.hsus.org/legislation_laws (accessed Mar. 28, 2005) (providing information about HSUS lobbying and law enforcement work, as well as links to information about current bills around the country).

³ Humane Socy. of the U.S., *Animal Cruelty Laws: Where Does Your State Stand?* http://www.hsus.org/legislation_laws/citizen_lobbyist_center/animal_cruelty_laws_where_does_your_state_stand.html (accessed Mar. 30, 2005).

⁴ Humane Socy. of the U.S., *Fact Sheet: Support S. 382/H.R. 817 - The Animal Fighting Prohibition Enforcement Act* (Mar. 2005) (available at http://www.hsus.org/web-files/PDF/109_AF_032005.pdf).

tion to animal cruelty has emerged as something of a universal value in our culture.

Yet the body of law that now exists is porous and weak in confronting major institutional forms of animal exploitation. There are no categories of animal research that are forbidden,⁵ and there are but a handful of laws that exist to protect animals reared for food production.⁶

While the industries using animals have amassed formidable power, their long-term dominance is not assured. Building a mass movement of reform can invert the existing political order. But there is no inevitability to this idea. It will occur only when a sufficient number of people of conscience stand together and demand change.

We have seen some meaningful political reforms adopted already, particularly in Europe. In recent years, the European Union, now encompassing twenty-five nations, has decided to phase out veal crates, gestation crates, and battery cages.⁷ The United Kingdom earlier this year did what was politically unthinkable a quarter century ago: it outlawed hunting with hounds.⁸

Here in the United States, we have recently seen the first laws passed to protect animals reared for food—in Florida to ban gestation crates,⁹ and in California to ban the production and sale of foie gras.¹⁰ Congress has passed more than fifteen laws to protect animals in the last decade, and there are now hundreds of bills introduced every year in the States to halt certain forms of animal abuse—from ending greyhound racing to halting bear hunting to mandating that students have the opportunity to refuse to dissect animals in the classroom.¹¹ Since 1990, animal advocates have prevailed in more than a dozen statewide

⁵ Animal Welfare Act, 7 U.S.C.A. § 2131 et. seq. (West 1999 & Supp. 2004).

⁶ David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 *Animal L.* 123, 123 (1996).

⁷ Clare Druce & Philip Lymbery, *Farm Animal Welfare: Three Decades of Progress in Europe, A Report for Animal Rights International*, "Executive Summary" (Sept. 2001) (available at <http://www.ari-online.org/pages/europe1.html>).

⁸ BBC News, *Ban on Hunting Comes into Force* (Feb. 18, 2005) (available at http://news.bbc.co.uk/2/hi/uk_news/politics/4275753.stm).

⁹ Jerry W. Jackson, *Pig Amendment Puts Pressure on Farmers – In other States; Stalls Scarcely are Used Here, But the Ban Builds National Momentum*, Orlando Sentinel Tribune C1 (Nov. 9, 2002); Joe Vansickle, *Florida Outlaws Gestation Stalls*, http://nationalhogfarmer.com/news/farming_florida_outlaws_gestation (Nov. 7, 2002).

¹⁰ U.S. Newswire, *Schwarzenegger Terminates Foie Gras in California; HSUS Urges Consumers Nationwide to Reject the Inhumane 'Delicacy'*, <http://releases.usnewswire.com/GetRelease.asp?id=37181> (Sept. 30, 2004).

¹¹ See e.g. Humane Socy. of the U.S., *Dissection Laws*, http://www.hsus.org/animals_in_research/animals_in_education/dissection_laws.html (accessed Mar. 30, 2005) (listing a number of state bills to allow students to refuse to dissect animals in the classroom); Laurie Fulkerson, *2001 Legislative Review*, 8 *Animal L.* 259, 271 (2002) (discussing Alabama's ban on black bear hunting); Joan Eidinger, *Nowhere to Run: Dog Racing's Next Showdown*, <http://www.animalsagenda.org/articleDetail.asp?menu=News&NewsID=612> (Sept. 6, 2002) (discussing attempts in Arizona to ban greyhound racing).

ballot initiative campaigns—halting cockfighting, hound hunting and baiting, and the use of steel-jawed leghold traps.¹²

As the 109th Congress begins its work, legislation has been introduced to upgrade penalties for animal fighting,¹³ to halt the slaughter of horses for human consumption,¹⁴ to end the pet trade involving primates,¹⁵ and to ban canned hunts.¹⁶ Legislation is expected to be introduced soon to include poultry under the provisions of the Humane Methods of Slaughter Act.¹⁷ All of these reforms should command our attention, and each one can be advanced through the participation of animal advocates throughout the country.

Animal advocates have in recent years become more involved in electioneering. Humane USA, a political action committee formed in 1999, has worked to help elect humane-minded candidates to office and to defeat candidates hostile to our core beliefs.¹⁸ In 2004, Humane USA worked very hard to stymie the plans of former U.S. Representative Chris John (D-LA) to occupy the open U.S. Senate seat for Louisiana. During his decade in the House, John had not only been a leader in the Congressional Sportsmen's Caucus, but he had also been the Congress's leading defender of cockfighting. Humane USA mounted a major independent expenditure campaign, and John suffered a resounding defeat, in which the cockfighting issue played no small role. If we are to succeed politically, our movement needs to demonstrate political strength and elect our favored candidates and oust those hostile to us.

There has been a noticeable up-tick in interest in the domain of political organizing and recognition of the importance of the law. The proliferation of animal law courses in our nation's law schools has been one of the most encouraging developments in the entire field. Students have shown great interest in taking these courses and many have gone on to make important contributions to this work through law review articles, public debates, and litigation.

With these considerations in mind, The HSUS established an Animal Protection Litigation section on January 1, 2005, with the goal

¹² Wayne Pacelle, *The Animal Protection Movement: A Modern-Day Model Use of the Initiative Process*, in *Initiative Referendum Institute, The Battle over Citizen Lawmaking* 109, 112 (Dane Waters ed., Carolina Academic Press 2002). See also e.g. 21 Okla. Stat. Ann. § 1692.1–1692.9 (West 2002 & Supp. 2005) (banning cockfighting); Or. Rev. Stat. Ann. § 498.164 (West 2003 & Supp. 2004) (banning hound hunting and baiting of black bear and cougar); Cal. Fish & Game Code Ann. § 3003.1 (West Supp. 2005) (banning the use of steel-jawed leghold trap).

¹³ Sen. 382, 109th Cong., 1st Sess. (Feb. 15, 2005); H.R. 817, 109th Cong. 1st Sess. (Feb. 15, 2005).

¹⁴ H.R. 503, 109th Cong., 1st Sess. (Feb. 1, 2005).

¹⁵ H.R. 1329, 109th Cong., 1st Sess. (Mar. 16, 2005).

¹⁶ Sen. 304, 109th Cong., 1st Sess. (Feb. 7, 2005).

¹⁷ *Humane Methods of Livestock Slaughter Act*, 7 U.S.C. §§ 1902–07 (2000 & Supp. 2002).

¹⁸ See Humane USA, *About Us*, <http://www.humaneusa.org> (accessed Mar. 28, 2005) (for more information about Humane USA and its political activity).

of consolidating and managing our program-related litigation and in bringing major cases to advance our goals in the legal domain.¹⁹ The new section—which consists of eight attorneys led by Jonathan Lovvorn—oversees the full docket of state and federal court litigation undertaken by The HSUS, including dozens of active cases to protect whales, dolphins, and other marine mammals; to conserve manatees, wolves, and other endangered and threatened species; to defend migratory birds, and other wild animals subject to sport hunting and trapping; and to improve the treatment of companion animals, farm animals, performing animals, and animals used in research.

The idea of an active litigation department is not a new one. The Animal Legal Defense Fund has long emphasized the importance of a vibrant strategic focus on litigation and the law. The idea even has a strong original precedent in the example of Bergh and the ASPCA. By 1870, the ASPCA's growing burden of legal work led Bergh to hire Elbridge T. Gerry as legal counsel.²⁰ Gerry, a descendant and namesake of the Massachusetts patriot who signed the Declaration of Independence and later served as the fourth vice president, drafted virtually every bill proposed by the ASPCA until Bergh's death in 1888.²¹ Gerry also represented the ASPCA in a number of contentious and precedent-setting court cases, including complex prosecutions, libel lawsuits, testamentary challenges, restraining orders, contempt citations, and writs of habeas corpus.²²

Some of our movement's best gains have occurred in the courts in recent years. In 2004, the courts upheld voter-approved initiatives in Oklahoma to ban cockfighting²³ and in California and Washington to outlaw certain forms of trapping and animal poisons.²⁴ The courts halted bear hunting in New Jersey,²⁵ and put roadblocks in further bison killing in Yellowstone National Park.²⁶ Federal courts also put a stop to an effort to weaken our federal dolphin protection laws²⁷ and

¹⁹ See Humane Socy. of the U.S., *Animals Win Big in the Courts in 2004 as HSUS Launches New Litigation Section*, http://www.hsus.org/about_us/history/animals_win_big_in_the_courts_in_2004.html (accessed Mar. 30, 2005) (discussing the new litigation section as well as successes of the animal protection movement in the courts during the past year).

²⁰ Unti, *supra* n. 1, at 145.

²¹ *Id.*

²² *Id.*

²³ *Edmondson v. Pearce*, 91 P.3d 605 (Okla. 2004).

²⁴ *Citizens for Responsible Wildlife Mgt. v. State*, 103 P.3d 203 (Wash. App. Div. 2 2004); *Natl. Audubon Socy. v. Schwarzenegger*, No. 98-4610 (N.D. Cal. Oct. 15, 2004).

²⁵ *U.S. Sportsmen's Alliance Found. v. New Jersey Dept. of Env'tl. Protection*, 867 A.2d 1147 (N.J. 2005).

²⁶ *The Fund for Animals v. Norton*, 326 F. Supp. 2d 124 (D.D.C. 2004).

²⁷ *Earth Island Inst. v. Evans*, 2004 WL 1774221 (N.D. Cal. Aug. 9, 2004). See also U.S. Newswire, *Federal Court Strikes Down Bush Administration's Effort to Weaken Dolphin Protection*, <http://releases.usnewswire.com/GetRelease.asp?id=34524> (Aug. 10, 2004).

ruled that the Makah Indians in Washington State could not kill gray whales at this time.²⁸

Our court docket at The HSUS now consists of 30 cases – everything from protecting the federal law against animal fighting to challenging the use of elephants in the circus. We are also partnering with some of the nation’s leading law firms to provide pro bono assistance and working with law schools and their students interested in animal law. Already this year, The HSUS has won cases on gray wolf²⁹ and Florida panther protection,³⁰ and initiated new actions to protect harbor seals in California,³¹ to gain access to federal records on pain and distress in animal research,³² and to defend a local parish’s ordinance prohibiting cockfighting.³³

While the challenges we face are formidable, it is clear to me that the winds are changing and they are at our back. I believe during this decade we will see rapid change in the corporate sector, in the courts, and in state legislatures. The idea that animals matter and that the law should shield them from abuse and exploitation is too obvious for good people to deny. Their day must come, and it is our duty to hasten the day when the law will provide meaningful protections for the least among us.

²⁸ *Anderson v. Evans*, 350 F.3d 815 (9th Cir. 2003), amended and superseded on denial of rehearing, 371 F.3d 475 (9th Cir. 2004).

²⁹ Press Release, Humane Socy. of the U.S., *Wildlife Protection and Conservation Groups Celebrate A Resounding Legal Victory for Wolves Across the United States* (Feb. 1, 2005) (available at http://www.hsus.org/press_and_publications/press_releases/wildlife_protection_and_conservation_groups_celebrate_a_resounding_judicial_victory_for_wolves_across_the_united_states.html).

³⁰ Press Release, Humane Socy. of the U.S., *Victory for National Parks and the Florida Panther* (Feb. 23, 2005) (available at http://www.hsus.org/press_and_publications/press_releases/victory_for_national_parks_and_the_florida_panther.html).

³¹ Press Release, Humane Socy. of the U.S., *The HSUS Seeks Temporary Restraining Order to Protect San Diego Seals* (Mar. 25, 2005) (available at http://www.hsus.org/press_and_publications/press_releases/the_hsus_seeks_temporary_restraining_order_to_protect_san_diego_seals.html).

³² Press Release, Humane Socy. of the U.S., *The Humane Society of the United States Files Suit Challenging USDA’s Refusal to Disclose Information on Animal Research* (Jan 27, 2005) (available at http://www.hsus.org/press_and_publications/press_releases/the_humane_society_of_the_united_states_files_suit_challenging_usdas_refusal_to_disclose_information_on_research_animals.html).

³³ Press Release, Humane Socy. of the U.S., *Nation’s Largest Animal Protection Group Asks Louisiana Supreme Court to Uphold Local Cockfighting Ban* (Mar. 28, 2005) (available at http://www.hsus.org/press_and_publications/press_releases/nations_largest_animal_protection_group_asks_louisiana_supreme_court_to_uphold_local_cockfighting_ban.html).