

# REMARKS

## ANIMAL RIGHTS: FROM WHY TO HOW

*On January 9, 2016, the Association of American Law Schools hosted a panel by the Section on Animal Law in New York City. The panel featured legal professionals, scholars, and experts from various disciplines who discussed strategies for securing legal rights for animals. The panel explored what the animal rights movement can learn from other social movements, which legal approaches are available to animal advocates, and the need for non-legal strategies to change cultural attitudes. This panel moves beyond the discussion of whether animals have rights, and addresses the important questions and potential strategies for improving the lives of non-human animals.\**

### MODERATOR:

Joan Schaffner

*Associate Professor of Law*

*George Washington University School of Law*

### SPEAKERS:

Sherry F. Colb

*Professor of Law*

*Charles Evans Hughes Scholar*

*Cornell Law School*

Michael C. Dorf

*Robert S. Stevens Professor of Law*

*Cornell Law School*

David Favre

*Professor of Law*

*Nancy Heathcote Professor of Property and Animal Law*

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\* Animal Law Review would like to thank Professor Joan Schaffner for her assistance in the moderating and publication of this panel. We also would like to thank all of the panel participants for their contributions to this engaging discussion. We are honored to have the opportunity to publish these remarks.

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*Wesleyan University*

Angela P. Harris  
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PROF. JOAN SCHAFFNER<sup>1</sup>: The goal of this round table is to bring together experts from different disciplines to discuss a vital and often overlooked aspect of animal rights—namely, how best to effectuate improvement for the lives of nonhuman animals.<sup>2</sup> ‘Animal rights’ is frequently examined in terms of why nonhuman animals should enjoy greater protections and freedoms. We seek to move beyond that threshold issue—which in fact was the subject of our first section’s program in 2008—to integrate, from philosophical, sociological, and legal perspectives, strategies to bring about positive change for nonhuman animals.

This round table comes at an exciting time for nonhuman animals, as social change is reflecting human and nonhuman shared vulnerability to harm; industry is beginning to reflect greater consumer demand for more humane foods and other products; and three legal cases are pending on behalf of chimpanzees in New York’s highest court on a writ of habeas corpus.<sup>3</sup> While scholars and activists differ, often passionately, about their approaches to realizing improvements for animals, they all agree on the goal of improving nonhuman animal lives. Cutting across different strategic approaches are a number of issues, including whether incremental or radical strategies are optimal; whether legal change should drive social change, or vice versa; whether changing the legal status of animals will avoid issues of hierarchy; whether change should be local or more global; and whether individuals in the animal movement should follow the strategies of, and form allies with, leaders of other social movements.

These and other issues will be addressed under the following overarching questions:

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<sup>1</sup> Professor Ani Satz was to moderate this panel but was unable to attend; however, she prepared the opening remarks.

<sup>2</sup> Electronic Audio File: Animal Rights: From Why to How, held by the Association of American Law Schools (Jan. 9, 2016) (on file with Animal Law Review).

<sup>3</sup> *In re Nonhuman Rights Project, Inc. ex rel. Hercules & Leo v. Stanley*, 49 Misc. 3d 746, 748 (N.Y. Sup. Ct. 2015); *In re Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, 124 A.D.3d 148, 149 (N.Y. App. Div. 2015); *In re Nonhuman Rights Project, Inc. ex rel. Kiko v. Presti*, 124 A.D.3d 1334 (N.Y. App. Div. 2015).

First, “How does the animal rights movement differ from other social movements?” Second, “What can the animal rights movement learn from the similarities and differences of other social movements seeking racial equality, rights for women, LGBT individuals, indigenous peoples, and individuals with disabilities?” Third, “Are legal approaches that argue within the property paradigm, or that focus on individual animal communities as gateway groups effective in achieving rights for all animals?” And finally, “Given the current state of the law, are non-legal strategies needed to change cultural attitudes first?”

#### PANEL DISCUSSION 1

*This Panel Discussion features Professors Colb, Favre, and Gruen.*

PROF. JOAN SCHAFFNER: Without further ado, let’s begin with our first question to which David, Sherry and Lori will respond: How does the animal rights movement differ from other social movements?

PROF. DAVID FAVRE: Okay, I am going to take the sort of lawyer perspective here and talk about what is different in the legal tools available to our movement and the other ones that are represented here. First of all, at the international level there is no treaty on animal rights or declaration of animal rights, or a statement of the possible contents of animal rights. There is not even a treaty on animal welfare that is agreed to on an international basis. We don’t have that intellectual construct to help build the law. At the national level, of course, animals are not people and therefore have no status under the U.S. Constitution,<sup>4</sup> and the U.S. Constitution and U.S. Supreme Court have been absolutely critical to the advancement of other groups and their rights, so that path is not really available to us. Under the Animal Welfare Act,<sup>5</sup> the only major national law on the topic, there is no citizen suit leverage or a provision for the collection of attorney fees, which has been absolutely critical to advancement in the environmental area of law. Having those tools to push the agencies are critical to making the agencies do what the law tells them they ought to do.<sup>6</sup> At the state level, animals are, of course, property, and we have fifty states, and we have all kinds of political things going on in the various state legislatures. Thus, it is really hard to get a whole lot of forward movement. I would say the animal cruelty laws have done fairly well in the last twenty years, but beyond that, in trying to get really new visions for animal welfare at the state level, I just haven’t seen it happening. So that is a quick summary of the little problems we have to overcome.

PROF. SHERRY COLB: I would put the differences between the animal rights movement and other social justice movements into three

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<sup>4</sup> Christine M. Korsgaard, *Personhood, Animals, and the Law*, 12 THINK 25, 26 (2013).

<sup>5</sup> Animal Welfare Act, 7 U.S.C. §§ 2131–2159 (2013).

<sup>6</sup> See, e.g., OHIO ENVTL. COUNCIL, A CITIZEN’S GUIDE TO CLEAN WATER ACT ENFORCEMENT 2 (2012) (describing the Clean Water Act’s citizen suit provision).

categories that all begin with *i*. The first *i* is isolation. Animals are not part of, for the most part, advocating for their own rights the way other interest groups who have been able—the civil rights movement, the women’s rights movement—to participate in their own liberation. As a result, that opens up the possibility of people claiming that, “Oh, you are just anthropomorphizing when you say that animals want this or want that.” My view on that is that it’s preposterous if you believe in the theory of evolution to claim that animals wouldn’t want to be free of torture, slaughter, and enslavement, and that is really the very simple, basic rights that we argue they are entitled to. Part of that isolation, though, can be breached if we visit animal sanctuaries, and I think that so many of us have had the experience of going to an animal sanctuary and seeing that these animals have changed so much from when they were on a farm, a working farm, and they were headed for slaughter. They become calm and they become trusting of humans and they show great empathy. A friend of mine brought her husband to an animal sanctuary, and he had just suffered a terrible loss. His son had passed away. And as he stood near the cows, one cow just came over to him and put her nose on him. It was like she understood that there was grief. Both of them had grief that they shared. So that is the first—isolation. Now it is not entirely distinct from humans, because there are human rights movements, for example, for the profoundly mentally disabled and for young children, where those people cannot advocate for themselves. So I think that the difference there is partial but not complete.

The next *i* is investment. People are extremely invested in believing that animals are here for our use, and that they are not entitled to the right to be free of that—to the right to be free of having their skins and their flesh and their bodily secretions used by humans on a daily basis. That, if you think in contrast about, say, the pro-choice movement or the anti-abortion movement, unless somebody is an abortion provider or is somebody who advocates on a daily basis for the right to or against abortion, if they change their mind about the issue, it will not change all that much in their lives. If they can change their mind on this issue, and it is a big change, but their lives will still pretty much look like they looked before. Whereas, when it comes to animal use, it is three times a day or more that people are consuming their flesh, or their secretions, and that makes it very difficult for people to hear what the animal rights movement has to teach. Now, there was a time . . . when people who owned human slaves would have been just as invested in believing the lies that were told about the people that they enslaved. So, the animal rights movement . . . is at an earlier stage of progress than these other movements—but I think we can take heart in the fact that other movements went forward as well, and so will the animal rights movement.

And finally, the third *i* is irrationality. We hear people make arguments in the context of animal rights that are complete nonsense, viewed as such, when it comes to any other rights movement. People

will say, for example, “Well, on Christmas it’s traditional for us to eat ham, and on Thanksgiving it’s a cultural tradition to eat turkey.” And, of course, using that argument, you wouldn’t say it’s a cultural tradition for some groups, here in America, to have incest with their children. We wouldn’t say that, because that would be preposterous. So we understand that values trump culture, except when it comes to animals. And people also ask questions—I wrote this book, *Mind if I Order the Cheeseburger*<sup>7</sup>—and people will ask questions about, “What is wrong with dairy?”, “What is wrong with eggs?”, and they are great questions, and I love answering the questions, except often the same people come back a few weeks later and they are eating the same thing for lunch, and they say, “Well there is nothing wrong with dairy and eggs, right? No one has to die.” I have to break the bad news to them repeatedly, like sort of a weird lunch version of *Groundhog Day*.<sup>8</sup> I would say those are the three areas of difference: isolation, investment, and irrationality.

PROF. LORI GRUEN: I would like to add another *i* . . . instrumentalization. I think many people, even those who are actively trying to protect animals, wittingly or unwittingly maintain a commitment to instrumentalization, the idea that animals can be used in various ways. We see this vividly right now with a proposed plan by the Yerkes National Primate Research Center to send a group of eight chimpanzees to an unaccredited zoo in the UK instead of being allowed to be sent to sanctuary.<sup>9</sup> The goal is clearly that they think chimpanzees should be used, if not in research, then at least as entertainment. They are committed to the continued instrumentalization of animals. Retirement to Chimp Haven, the national sanctuary, would be a statement that the chimpanzees deserve respect and care, to be left alone, but that challenges the commitment to instrumentalization. The chimpanzees are not going to be used in laboratories any longer, but they still need to be used in other ways. And so I think that is another *i* we need to add to the list.

PROF. SHERRY COLB: I agree.

## PANEL DISCUSSION 2

*This Panel Discussion features Professors Dorf, Gruen, Harris, and Jamieson.*

PROF. JOAN SCHAFFNER: Thank you. Let’s turn to our second question, “What can the animal rights movement learn from the similarities and differences of other social movements seeking racial equality,

<sup>7</sup> SHERRY F. COLB, *MIND IF I ORDER THE CHEESEBURGER? AND OTHER QUESTIONS PEOPLE ASK VEGANS* (2013).

<sup>8</sup> *GROUNDHOG DAY* (Columbia Pictures 1993).

<sup>9</sup> Wayne Pacelle, *Yerkes Shouldn’t Offload Chimps to Unaccredited Zoo*, *The Humane Soc’y*, <http://blog.humanesociety.org/wayne/2015/10/yerkes-shouldnt-offload-chimps-to-unaccredited-zoo.html> [https://perma.cc/6XYJ-9JYK] (Oct. 29, 2015) (accessed Mar. 1, 2016).

rights for women, LGBT individuals, indigenous peoples, and individuals with disabilities?” Lori, Mike, Dale, and Angela all will at least start off, and then if anyone wants to add anything else, of course we can do that, but let’s start with Lori.

PROF. LORI GRUEN: Thanks. So one of the things that I think is extraordinarily useful to learn from these other social movements is the value of difference. One of the things that we learn from the feminist movement, for example, is that in the early days the category of ‘woman’ was thought to be a sort of identifying category, but very quickly we learned that the category needed to be carefully modified based on other axes of difference such as race, sexuality, sexual and gender expression, class, ethnicity, ability, etc. So, people could no longer meaningfully say something like, “I am a woman” and have that identity evoke any sort of specific meaningful interests. So one of the important things we learned about how to understand what it meant to be working for say, women’s rights, when women were so vastly different, was how to develop ways of respecting difference. So, that, I think, is one of the key issues that we can learn from—not just the feminist movement—but from other movements for social justice.

When we think about the category ‘animals’ we are talking about a vast category. It is difficult to imagine why all of these distinctive creatures, ants, aardvarks, cheetahs, chinchillas, chimpanzees, and all, are under the same category: animal, a category that also includes human animals. And so there is something both vague and bloated about the category ‘animal.’ That the category is so heterogeneous, it is especially important to recognize the specific differences and particularly the different interest, needs, and concerns that specific animals might have. These differences are important for thinking about policy, which tends to lump everyone together. So, one of the things that we can put our minds to is this idea that there can be a variety of differences within a particular category. Think of disability’—there is not *a* disability. People are disabled in very different ways and their needs and interests are going to be different as a result. We are now understanding in a deeper and more meaningful way the kinds of differences that disability activists are organizing around and for. Looking to the unity in diversity we see in other social movements can help us to understand the needs and the interests of the very diverse group of individuals that fall under broad category of ‘animal’ and move us toward discussions that can meaningfully change the conditions for particular animals and groups of animals.

I spend a lot of time with dogs, as I hope many of you have. I also have spent a lot of time with chimpanzees, which I suspect many of you haven’t. And learning what the individual species’ needs might be takes a certain amount of careful observation, a certain amount of research, and a certain amount of attentiveness, that can help us understand how, for example, dogs experience the world. Dogs are not the same as chimpanzees, and individual dogs and individual chimpanzees differ. But in spending time with both dogs and chimpanzees, I have

developed a set of skills that help me perceive their differences better. The understanding is never complete, but it can certainly get better.

Quite unexpectedly, I ended up with some rescue rats. I had no clue whatsoever what to do with, or how to think about, rescued rats. But given my background in feminism, given my background in queer studies, given my work with dogs, and given my work with chimps, I felt like I had a certain set of skills, not a complete set of skills, but a certain set of skills for trying to attend to these vastly different others. I think if we look to various human social movements, those same dynamics are going on within those movements. . . . For forty years in the women's movement . . . straight women, cisgendered women, white women, all have had to address various concerns about differences between women and have become stronger as a result, and I think one of the things that the animal movement can learn from these other movements is the ways in which differences matter. We can then hone our skills to become attentive to these differences so that we can advocate specifically for the interests and needs of particular others.

PROF. MICHAEL DORF: I would like to begin by thanking Joan and Ani, who unfortunately could not be here today, for organizing this panel. I also would like to thank the AALS for holding this year's meeting in New York City, which is a vegan utopia. I don't teach or practice animal law, but I do live with three dogs, and I know a bit about the relation between law and social movements because of my scholarship and teaching in constitutional law as well as my work as a pro bono attorney over the years with various movement activists. I am going to focus a little bit on the LGBTQ rights movement because the analogy between that movement and the animal rights movement can be useful for a number of reasons.

For many years the friends and colleagues that I worked with, mostly at Lambda Legal and the ACLU, lived in fear—'terror' might be a better word—that somebody outside of the movement would bring a lawsuit too soon. In the period between 1986 and 2003, the worry was that someone would bring a case seeking the overturning of *Bowers v. Hardwick*,<sup>10</sup> which eventually was overturned.<sup>11</sup> While *Hardwick* remained good law, LGBTQ movement lawyers worried that someone would bring a case too soon. Losing such case would be not simply 'not winning,' but would set the movement back. This fear struck me as well-grounded at the time. After all, the law is path-dependent in general, especially those aspects of the law that develop in a common-law fashion, as American constitutional law does. Adverse precedents can become ensconced in the law. It is harder to persuade a court to overturn a precedent than it is to persuade a court to decide your case for you as a matter of first impression. It is even harder to persuade a

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<sup>10</sup> *Bowers v. Hardwick*, 478 U.S. 186 (1986) (holding that a Georgia statute criminalizing sodomy was constitutional).

<sup>11</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overturning the *Bowers v. Hardwick* ruling and finding that the criminalization of same-sex sodomy was unconstitutional).

court to overturn a precedent that has been recently reaffirmed. That was the risk that the LGBTQ rights movement faced in the 1986-2003 period: that an unsuccessful effort to overturn *Hardwick* would make it even harder to persuade the Supreme Court to overturn *Hardwick* at a later date.

How did the movement-lawyers respond to that risk? They kept feelers out in the legal community throughout the country to try to discourage what they regarded as premature lawsuits. However, this tactic was only partly successful, because we have a system of decentralized adjudication and an adversary system in which people seek representation, and they understandably want to win rights for themselves now. They don't care so much about what is good for the movement overall and in the long run.

We can draw some lessons from the LGBTQ rights experience. The first lesson is that the LGBTQ rights lawyers were worried about a real problem that confronts all social justice movements that seek change through the law. You have got to be careful about timing if you are in a position of leadership in a movement. You don't want to seek legal change too soon because it could end up backfiring. That's lesson one.

Lesson two is that there is not much you can do about the timing problem, because there will be people who disagree with you about goals and tactics for achieving those goals, and so whatever you think is the ideal strategy in some sense, it doesn't really matter. We could agree or disagree about what strategies ought to be pursued. The truth is that given our large, decentralized, client-focused adversary system, every strategy will be pursued by somebody. You might think that if you were the czar of the movement you would focus the movement's energy on strategies X, Y, and Z, not alpha, beta, and gamma, at least not yet. But movements don't have czars. Other people in the movement will disagree with your judgment, and so you have to accept that alpha, beta, and gamma are going to happen anyway.

The third lesson I would draw is how incredibly unpredictable these matters are. Think about successful movements for social justice through a combination of litigation and legislation, lobbying, education, and so forth, over the last three quarters of a century. The standard narrative of this period looks at the civil rights movement, the women's rights movement, and the LGBTQ movement, and sees the same happy pattern: each movement initially faced obstacles, but then triumphed. But that story is a vast over-simplification. Just consider the civil rights movement. We are still debating whether *Brown v. Board of Education*<sup>12</sup> was a victory—as most people think, and as we teach in constitutional law. By contrast, Gerald Rosenberg has argued that *Brown* provided a hollow hope and that, in fact, if you look at all

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<sup>12</sup> *Brown v. Board of Education*, 347 U.S. 483 (1954) (holding segregation of public schools to be a violation of the Fourteenth Amendment).



sorts of other measures, we haven't made all that much progress on racial justice.<sup>13</sup>

If we can't even be certain whether civil rights litigation was effective more than six decades after the fact, you can see that these sorts of judgments will be very challenging prospectively. Thus, it turns out that my friends and I who were worried about getting to the courts too soon on LGBTQ issues may have been worried too much. Just over a decade ago, Michael Klarman, who is an extremely good scholar, was fretting over the backlash against what looked like the premature overruling of *Hardwick* and judicial recognition of a right to same-sex marriage in Massachusetts.<sup>14</sup> But it turns out the backlash sparked its own counter-backlash or perhaps 'front-lash,' and so, progress was made incredibly rapidly. I remember being at a conference in 2008, right after Proposition 8 had passed in California.<sup>15</sup> A group of somewhat dejected people considered the question, "In what year will there be same-sex marriage in a majority of the states?" I think the mean answer was 2050. That turned out to have been wildly pessimistic. So yes, let's be cautious, but we also can be hopeful that things can change incredibly rapidly when you reach a turning point.

PROF. JOAN SCHAFFNER: Thank you. It is interesting that you reference California and Prop 8 because Prop 2<sup>16</sup>—which in essence proposed the eradication of veal crates, battery cages, and sow gestation crates—also was before California voters in that same year and passed. Many people joked about the results stating that "Californians like animals more than they like gays!"

PROF. DALE JAMIESON: Yes. So, some of what I say I think will chime with what you have already heard. But, what I want to do first really is to identify two lessons from several centuries of struggles for moral progress, and then try to identify what are the upshots of these. The first lesson is that invisibility is the great enemy of moral progress. So the first thing that has to happen with any social movement is that it and the issues have to become visible, and there are of course many examples of that. There is the invisibility of women's work. Children somehow magically got raised and houses got cleaned, and it was only when these things become visible that the women's movement really becomes possible in a certain way. LGBT people moved from the margins to becoming sons and daughters and brothers and in some cases even husbands and wives of heterosexual people. In 1791, when

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<sup>13</sup> Wayne D. Moore, *The Hollow Hope: Can Courts Bring About Social Change?*, 18 L. & POL. BOOK REV., no. 11, 1045, 1045–46 (2008) (reviewing GERALD ROSENBERG, *THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE?* (2d. ed. 2008)).

<sup>14</sup> Michael J. Klarman, *Brown and Lawrence (and Goodridge)*, 104 MICH. L. REV. 431, 459–73 (2005).

<sup>15</sup> California Marriage Protection Act, CAL. CONST. art. I, § 7.5 (*invalidated by Perry v. Schwarzenegger*, 704 F.Supp.2d 921 (E.D.Cal. 2010)).

<sup>16</sup> CAL. HEALTH & SAFETY CODE §§ 25990–25994 (West 2015).

the British Parliament failed to pass the Abolition Act,<sup>17</sup> which was finally brought before it, the abolitionists started the ‘blood sugar campaign,’ which was a very successful attempt to associate the consumption of sugar with the pain of slave labor.<sup>18</sup> One of the great challenges for the anti-fossil fuel movement<sup>19</sup> is to try to draw connections between the damages of climate change that will be felt in the future—that are already being felt in relatively remote parts of the world<sup>20</sup>—with the emission of tasteless, odorless, colorless gases that occur from what most of us think of as innocent activities. And of course in the case of animals, the issue is to associate a high class, respectable lunch date with the animal suffering that typically entails. So, the first moral is the importance of visibility and of campaigning for the visibility of the issue.

The second moral—and this will really chime, I think, with a lot of what Mike was saying—is to recognize the contingent, piecemeal, surprising, and in some cases, paradoxical, nature of moral progress. History has no direction. It can lurch into reverse as quickly as it can seem to be moving into the future. Allies and opponents can be surprising. People who you think are your friends about some issues can turn out to be your opponents on others, and vice versa. These grand narratives about moral progress are really the stuff of futuristic manifestos and funeral orations, and finally, if we are lucky, textbooks. And I think what follows from this is that we know something about how to make moral progress, but less than we think. There are no permanent victories, but the good news is, there are no permanent defeats. And so the takeaway for me, from this, is to approach these struggles with a sense of humility and dogged determination.

PROF. ANGELA HARRIS: All right, thank you. So my comments are probably going to overlap with a lot of what’s already been said. But in terms of what the animal rights movement can learn from other social movements, one of the places I come to this work is from critical race feminism. And there, one of the key concepts is intersectionality, meaning the idea that forms of domination are all intertwined with

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<sup>17</sup> *The 1807 Act and Its Effects*, ABOLITION PROJECT, [http://abolition.e2bn.org/slavery\\_113.html](http://abolition.e2bn.org/slavery_113.html) [<https://perma.cc/6V62-R38E>] (accessed Feb. 23, 2016).

<sup>18</sup> Jodie Dunville, *Blood Sugar*, ROMANTIC POL., <http://web.utk.edu/~gerard/romanticpolitics/bloodsugar.html> [<https://perma.cc/3Y78-DLV5>] (accessed Feb. 23, 2016).

<sup>19</sup> See Interview by Allen White with Naomi Klein, journalist and author (Dec. 2014), <http://www.greattransition.org/publication/climate-the-crisis-and-the-movement> (accessed Feb. 19, 2016) (discussing how the world needs to reduce the use of fossil fuels in order to stop the overproduction of carbon, which is contributing to climate change); Nick Hopwood & Jordan Cohen, *Greenhouse Gases and Society*, PRATCLIF.COM, <http://pratclif.com/climatechange/Greenhouse%20Gases.htm> (accessed Feb. 23, 2016) (describing the physical properties of greenhouse gasses).

<sup>20</sup> See generally Harriet Alexander, *Global Warming: Ten Most Affected Areas*, THE TELEGRAPH, <http://www.telegraph.co.uk/news/earth/environment/globalwarming/6486612/Global-warming-ten-most-affected-areas.html> [<https://perma.cc/J6PS-6R8X>] (Nov. 3, 2009) (accessed Feb. 19, 2016) (reviewing the regions of the world that already show signs of negative effects resulting from climate change).

one another, and I think that is very clear in the animal rights movement and its relationship with other social movements. So if we think of the intertwining in terms of substance—the line between the human and the animal—we are talking about what a strange line that is; the line itself is a social construct that emerges historically along with the sciences of man, which in turn were entangled with the modern projects of explaining the subordination of women, non-westerners, and people of color through the appeal to an idea of a nature that was beyond politics.<sup>21</sup>

So the philosophical, historical roots of these forms of subordination—at least in the way in which we talk about them in the modern day—are very much all intertwined. We also know from a lot of animal rights scholarship that the ways in which we talk about our use of animals regularly call upon other rhetorics of subordination. For example, Carol Adams and others write about the way in which the politics of eating meat is intertwined with the politics of masculinity and heterosexuality, as well as being entwined with, as we have talked about, the politics of racial, religious, cultural, and ethnic identity.<sup>22</sup> And we constantly use nonhuman animals as a mirror for thinking and talking about humans. So, consider the stakes of seeing chimpanzees versus bonobos as our closest species-relatives in the ape family.<sup>23</sup>

There is also an intertwining, I think, in terms of process, which gets to the ‘how’ question. Critical race feminists have spent decades creating a literature on the difficult work of coalition building; understanding that forms of domination are intertwined requires anti-subordination movements to be conscious of one another at a minimum,<sup>24</sup> and at best, to support one another. The animal rights movement has not always done that well in this regard. Organizations like PETA, for example, have seemingly gone out of their way to push racism and sexism buttons in their effort to promote animal rights.<sup>25</sup> And, more generally, because the animal rights movement tends to be understood as

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<sup>21</sup> See Maneesha Deckha, *Intersectionality and Posthumanist Views of Equality*, 23 WIS. J. L. GENDER & SOC’Y 249 (2008); Maneesha Deckha, *Toward a Postcolonial, Posthumanist Feminist Theory: Centralizing Race and Culture in Feminist Work on Nonhuman Animals*, 27 HYPATIA 527 (2012); Raymond Corbey, *THE METAPHYSICS OF APES: NEGOTIATING THE ANIMAL-HUMAN BOUNDARY* 33-34 (2005).

<sup>22</sup> See Carol J. Adams, *The Sexual Politics of Meat: Barbecues*, CAROLJADAMS.COM, <http://caroljadams.com/carol-adams-blog/the-sexual-politics-of-meat-barbecues> [https://perma.cc/2XEA-9XRM] (accessed Feb. 19, 2016) (discussing how commercial images of meat emphasize sexuality and gender roles); Am. Mktg. Ass’n, *Goat Meat Consumption on the Rise as Immigrants Keep Ties to Home Culture*, EUREKA ALERT, [http://www.eurekaalert.org/pub\\_releases/2015-07/ama-gmc070715.php](http://www.eurekaalert.org/pub_releases/2015-07/ama-gmc070715.php) [https://perma.cc/N3QT-H8MM] (July 7, 2015) (accessed Feb. 19, 2016) (discussing how certain ethnicities consider consuming meat as an expression of their identity).

<sup>23</sup> Kay Prüfer et al., *The Bonobo Genome Compared with the Chimpanzee and Human Genomes*, NATURE, June 28, 2012, at 527.

<sup>24</sup> Hope Lewis, *Feminist Human Rights and Inter/National Black*, 50 ME. L.J. 309, 312 (1998).

<sup>25</sup> See generally Ben Norton, *There’s a Reason No One Likes PETA—It Has Horrible Sexist, Racist Politics*, <http://bennorton.com/peta-has-horrible-sexist-racist-politics/>

white, it's vulnerable to some of the flaws of white privilege. So, one of the lessons, then, to be learned has to do with the process of how we support each other and recognize the intertwining of these different forms of domination. And I think another lesson that the animal rights movement, along with all other social movements, has to constantly learn, at least in this country, is how to think structurally. Social movements in the U.S. all face a similar barrier to structural change and structural analysis. Social movements on behalf of humans usually look first to public law and equality norms, generally found in anti-discrimination law or human rights law, in order to promote themselves. These norms tend to be shaped by a pre-doctrinal commitment to a psychological mindset that stops us from thinking about institutions and structures. Critical race theorists have talked about the way in which anti-discrimination law, for example, focuses on intentional discrimination or intentional prejudice as the fulcrum, thereby ignoring or neglecting issues of structural bias. And when social movements attempt to accomplish structural change outside this frame, as animal rights advocates have tried to do with the common law,<sup>26</sup> they tend to be hampered by the absence of legal and philosophical hooks for doing so. And here I think an interesting lesson might be learned from the environmental justice movement—and that is the need to think about issues of equity.

Back to the alliteration, I've got three *e*'s here: equity, economics, and environment are the three *e*'s of the environmental justice movement. And one of the hallmarks of the movement has been requiring us to think about all of those simultaneously. I think that is useful for the animal rights movement as well. In order to move forward and to think structurally, we need to be able to think about equity, but also about the economics of animal consumption, animal exploitation and abuse, and the environmental concerns as well.

We mentioned the Anthropocene, and this is a key moment for thinking about how we might re-frame ourselves as humans on this planet in relation to other animals and other nonhuman processes. Indeed, rather than 'Anthropocene,' we might want to use another word. Some folks have suggested 'Plantationocene' as a synonym, recognizing that the practices of human slavery and mono-cropping, which came together during the colonial period, laid the ideological and economic foundation for industrial capitalism, which in turn has produced this crisis that we are calling the Anthropocene.<sup>27</sup> So, that is another way in which I think we can build on, or learn from, other social movements as we move the animal rights movement forward.

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[<https://perma.cc/65FZ-MMWZ>] (accessed Feb. 20, 2016) (providing examples of sexist and racist political images PETA has used to further its message).

<sup>26</sup> *Why We Work Through the Common Law*, NONHUMAN RIGHTS PROJECT, <http://www.nonhumanrightsproject.org/why-we-work-through-the-common-law/> [<https://perma.cc/FL2A-72YB>] (accessed Feb. 23, 2016).

<sup>27</sup> See Donna Haraway, *Anthropocene, Capitalocene, Plantationocene, Cthulucene: Making Kin*, 6 ENV. HUM. 159, 159 (2015).

One further thing, which pertains to lessons from indigenous peoples. I don't want to be presumptuous and try to speak for native peoples, but one of the values of working in coalition as I have urged that we do, is the opportunity to be exposed to, and learn from, different philosophies of existence. Without endorsing the sentimental view that all indigenous peoples live in harmony with nature, it is nevertheless true that many indigenous peoples have a very different understanding of humans and their place among other animals than the contemporary Western understanding. And if we are going to survive the Anthropocene, it might be useful to investigate those understandings and maybe learn from them as well. Thanks.

### PANEL DISCUSSION 3

*This Panel Discussion features Professors Colb, Favre, Gruen, and Jamieson.*

PROF. JOAN SCHAFFNER: Thank you. Our third question is, "Are legal approaches that argue within the property paradigm, or that focus on individual animal communities as gateway groups, effective in achieving rights for all animals?" Sherry, Dale, David and Lori will address this question. Sherry, why don't we start with you?

PROF. SHERRY COLB: I don't have alliteration for this one, but I am a big fan of gateway communities of animals. I think many of us who have had relationships with a particular kind of animal—dogs, we have three dogs—have found that they have really opened our eyes to a lot of things and . . . long before we knew anything about the animal rights movement, we came to see that these are actual individuals with preferences and personalities that are very distinct from one another. I think sometimes we lose sight of the gateway part though. We sometimes focus on particular species and then get caught up in that particular species. For example, when Michael Vick and his behavior with the dogs and fighting dogs came out,<sup>28</sup> there was a lot of emphasis among animal protection groups on, "Oh, he should be punished, this is terrible," while other animals who are just like dogs are being abused every day by the very people who are condemning Michael Vick. And there was this opportunity to refer back to intersectionality, as Angela mentioned, there is a real racism about selecting Michael Vick as the place, the vehicle for speaking about dog abuse and not looking at what other animals are experiencing at the same time at the hands of people of all races.

A similar situation prevailed for Marius, the giraffe in the Copenhagen Zoo, who was shot to death and then dissected for children to

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<sup>28</sup> Samantha Drake, *Animal Rights Activists Go Their Separate Ways on Michael Vick*, <http://www.pet360.com/dog/lifestyle/animal-rights-activists-go-their-separate-ways-on-michael-vick/AkDD7DQdgUOW8iCJZgkflg> [https://perma.cc/RV9Q-U4QJ] (accessed Feb. 23, 2016).

watch, and this was very upsetting.<sup>29</sup> And of course, Michael Vick's story was upsetting to me as well. But, here again was another opportunity to talk about animals as individuals and to talk about how, just like the dogs, and just like the giraffes, and just like Cecil, the lion,<sup>30</sup> there are all of these animals who are suffering tremendous pain on farms, and whom we are eating, literally. We could have used these occasions to say that we need to stop doing that if we are to have a sort of non-hypocritical stance that we can take towards these various animals. Melanie Joy wrote a book called, *Why We Love Dogs, Eat Pigs, and Wear Cows*,<sup>31</sup> and I think there she is doing exactly what we need to be doing, which is to talk about the gateway community at the same time as we challenge people to think about all of the other animals who are suffering, because otherwise if we end up focusing on just, "I am a cat person" or, "I am a dog person", and "Isn't this killing of a lion or a giraffe outrageous," and we don't go anywhere from there, then, really, we end up with a gated community instead of a gateway community.

PROF. DALE JAMIESON: Yeah, well, so I've got some pretty good *g* terms?

PROF. SHERRY COLB: All right, I'll take it.

PROF. DALE JAMIESON: So, when it comes to these questions about gateway communities, sort of incremental change, or attempts at more general change, I always think of this story that is attributed to Zhou Enlai.<sup>32</sup> It turns out that this is actually based on a mistranslation,<sup>33</sup> but don't tell anyone, because the story is just so good—plus it conforms with all of our stereotypes, another thing we all pretend to like about these things. But, the story is that Zhou Enlai was asked once what he thought about the French Revolution, and his answer was,

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<sup>29</sup> *Danish Zoo That Killed Marius the Giraffe Puts down Four Lions*, THE GUARDIAN, <http://www.theguardian.com/world/2014/mar/25/danish-copenhagen-zoo-kills-four-lions-marius-giraffe> [https://perma.cc/R24P-GSLB] (Mar. 25, 2014) (accessed Feb. 23, 2016).

<sup>30</sup> See, e.g., Editorial, *Cecil: RIP*, 30 EARTH ISLAND J. 5 (2015) (describing the events surrounding the death of Cecil, a 13-year-old lion that lived in Zimbabwe's Hwange National Park).

<sup>31</sup> See MELANIE JOY, *WHY WE LOVE DOGS, EAT PIGS, AND WEAR COWS: AN INTRODUCTION TO CARNISM* 131–34 (Conari Press ed., 2010) (discussing the carnistic schema that depends on a system of deception and consists of some species of animals being edible, while others are not, and discussing how to escape it).

<sup>32</sup> See, e.g., *The Revolution's Indispensable Man*, CNN, <http://www.cnn.com/SPECIALS/1999/china.50/inside.china/profiles/chou.enlai/> [https://perma.cc/ADM3-MBW3] (accessed Feb. 22, 2016) (chronicling the biography of Zhou Enlai, premier of the People's Republic of China from 1949 until his death in 1976, including his welcoming Nixon to China in February 1972 after years of American hostility).

<sup>33</sup> See Fiona Macdonald, *The Greatest Mistranslations Ever*, BBC, <http://www.bbc.com/culture/story/20150202-the-greatest-mistranslations-ever> [https://perma.cc/39U3-KCWE] (Feb. 2, 2015) (accessed Feb. 18, 2016) ("[A]ccording to retired U.S. diplomat Charles W Freeman, Jr.—Nixon's interpreter during the historic trip—the misconstrued comment was 'one of those convenient misunderstandings that never gets corrected.'").

“It’s too soon to tell.”<sup>34</sup> And, I think a lot of that is true with these different kinds of approaches that we are talking about to making change. We simply don’t know from the perspective of history what is likely to be the most successful in the long run. And I think it is important at this point to be throwing mud in all kinds of directions, and trying to see what sticks, what is actually going to gain traction, and what is actually going to make a difference in the world.

Now, the problem we run into is a kind of resource allocation problem. Should we be doing more of this thing and less of that thing, how can we try to figure out where the expectations are better for success or less good for success? And, we need to do some of that, and we will do some of that, but there is another issue in the background. Since I am big on quoting apocryphal statements, I think it was Donald Rumsfeld who once said in response to a question about why the war in Iraq was going so badly, and he said, “Well, you fight with the army you’ve got, not the one you wish you had.”<sup>35</sup> And there is certain wisdom in that; we have a kind of social movement that’s in practice and in play. And it’s composed of people like us with particular psychologies, particular temperaments, and particular ways of taking the world. Some of these people are cat people, some of them are dog people, some of them, you know, are concerned about food issues, right? There are all kinds of different tendencies and dispositions people have, and to some extent the work that they do—we do—is going to express these psychological predilections. And I think the way to think about this is that we are conducting a natural experiment in real time about what strategies and what approaches will be effective. We will only know how it turns out when people write the textbooks, and in some ways I think, yes, there is an issue about resource allocation and about what some of us think we should be doing rather than other things. But the bigger issue is to stay out of each other’s way.

PROF. DAVID FAVRE: Well, this is a topic on which I have been thinking for several decades, and I want to distinguish between ‘change of social attitudes’ versus ‘change in the law itself.’ ‘Social attitude’ is beyond me at this point. Changing the law though, I think I have given considerable thought. I am a property professor. I have been teaching property for thirty-seven years, and it seems pretty clear to me, we are not going to change property law anytime soon as it relates to animals, i.e. to transform their legal status and say that they

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<sup>34</sup> See *id.* (noting that when Zhou Enlai said, “It was too early to tell,” he was actually referring to the May 1968 events in France, thereby bolstering the stereotype that Chinese politicians are wise by thinking of future consequences more so than Western politicians).

<sup>35</sup> See William Kristol, *The Defense Secretary We Have*, WASH. POST, Dec. 15, 2004, at A33, <http://www.washingtonpost.com/wp-dyn/articles/A132-2004Dec14.html> (accessed Feb. 18, 2016) (quoting prior Defense Secretary Donald Rumsfeld’s statement on December 8, 2004, at a town hall meeting with soldiers at Camp Buehring in Kuwait) (“As you know, you go to war with the Army you have. They’re not the Army you might want or wish to have at a later time.”).

are not property. That seems to be the goal of a lot of people in the animal movement. They are just kidding themselves; that is just not going to happen. That is why for over a decade I have been arguing for an intermediate spot, and that is to create a new category of property, living property. With this category we can move the animals over and start creating a new legal regime that is specifically for animals and allow a transformation to a future vision of animal status.

Legal change is going to be incremental, right? How else is it going to be? How else are you going to change the law, except incrementally? We are not going to have a civil war over this; we are not going to adopt a constitutional amendment in my perceivable future that is going to say “animals are persons”. So, it has to be incremental, and I think the best way to give some scholarship focus to the issue is to create this idea of living property.

And I also would like to throw out there that one of the lines I get so tired of hearing is that, “Animals are just like tables under the law.” They are not just like tables! We have got an anti-cruelty law that says they are not like tables. We don’t have anti-table cruelty laws, right? We don’t allow trusts to be created on behalf of tables. Animals are already moving to a different category quietly. And why can’t the movement accept this, and take homage in that, and support this incremental process rather than wanting some unforeseeable, gargantuan change that, all of a sudden, is going to rip through society? Sorry, I feel a little strong about that.

PROF. LORI GRUEN: I just wanted to make a point following up on what everybody has said. One of the things that worries me about the sort of movement to the gateway animal, for example, making chimpanzees persons before the law is the role that persons under the law have played historically. I work in a maximum-security prison. I teach philosophy to men who are incarcerated. And I am reminded on a regular basis that the status of black men as persons was a legal maneuver to hold them criminally liable without granting any positive rights. As Khalil Muhammad<sup>36</sup> and Colin Dayan<sup>37</sup> and others have powerfully argued, black masculinity was criminalized through the legal maneuver of granting them ‘personhood.’ There is always going to be a sort of echo of this historical conceptualization in the work to try to establish that chimpanzees have the legal status of persons. This legal and philosophical category of ‘person’ is deeply fraught with issues. While it is true, perhaps, that we should let a million flowers bloom, there is also a way in which some of the work, when we identify particular animals as deserving special legal status, cannot just harm other animals, which I think many people have been discussing, but can also reinforce

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<sup>36</sup> See KHALIL GIBRAN MUHAMMED, *THE CONDEMNATION OF BLACKNESS* (Harvard Univ. Press 2011).

<sup>37</sup> See COLIN DAYA, *THE LAW IS A WHITE DOG: HOW LEGAL RITUALS MAKE AND UNMAKE PERSONS* (Princeton Univ. Press 2011).



problematic conceptual categories that are currently harming disenfranchised human animals.

#### PANEL DISCUSSION 4

*This panel discussion features Professors Colb, Dorf, Favre, Gruen, Harris, and Jamieson.*

PROF. JOAN SCHAFFNER: We will conclude our panel with this final question, “Given the current state of the law, are non-legal strategies needed to change cultural attitudes first?” All of our panelists will respond to this question. Let’s begin with Angela.

PROF. ANGELA HARRIS: Well, here I guess I’m in the ‘let a thousand flowers bloom’ category . . . I agree with Dale there is no way to predict in some kind of scientific way what the best strategies are going to be and whether culture should come before law. And I think given the history that we do know, the legal changes and the cultural changes are so intertwined that it is hard to say which started what. So, the best thing to do is to try to change on all fronts, both the work of cultural visibility that we’ve talked about—making the abuse and exploitation of animals so visible and so in our face that we are forced to respond because our old denial mechanisms don’t work anymore—and at the same time, doing the legal work, whether it’s in property law, or whether it’s in statutory law, or other forms of law, to move forward the project of figuring animals as beings that have legal rights. And, just in terms of insightful models—which again, this may be one of those things that politically is never going to happen in the United States—but it is interesting that Bolivia and Ecuador have rights of nature now in their constitutions.<sup>38</sup> And, one might say that nature cannot have rights, and have the very similar sorts of arguments that people raise about animals having rights, but nevertheless that law is there, and there is the opportunity of building a new jurisprudence off of it, so that is just an example of the sorts of new legal blooms that can come out of this process. But I think it really has to be legal and cultural at the same time.

PROF. DALE JAMIESON: Sure. Well, what better place than a meeting with a bunch of lawyers to say this. I tend to think of law as being relatively epiphenomenal, i.e., relative to deeper cultural and social changes. So, I think of the role of law as really codifying, encouraging, and helping to stabilize what are essentially underlying changes in values, and I think there are a lot of examples of this from the environ-

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<sup>38</sup> See CONSTITUCIÓN POLÍTICA DEL ESTADO [C.P.E.] [CONSTITUTION] art. 33 (Bol.) (stating that there is a right to a healthy, protected, and balanced environment, and that the exercise of this right is extended to both present and future generations, including to other living things); C.P.E. art. 33 (stating that any person on his own behalf, or on behalf of the collective, can take legal action in defense of environmental rights); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [C.R.] [CONSTITUTION] ch. 7 (Ecuador) (setting out rights of nature in articles 71 through 74). For a discussion of these and other provisions, see Angela P. Harris, *Vulnerability and Power in the Age of the Anthropocene*, 6 WASH. & LEE J. ENERGY CLIMATE & ENV. 98, 153–159 (2014).

mental movements and the civil rights movements. But, let me just give one very homely example which I think illustrates this. It's a contestable example, but of course I'm right in my telling of it! I am old enough to remember when I would sit in a room and have arguments about what way a particular social movement should go, where we would all be smoking cigarettes and all that kind of stuff. There was a particular view about the distribution of rights to indoor air, that . . . underlaid that behavior. And essentially it was that indoor air was a resource that anybody could use to externalize the costs of their smoking. If you didn't like it, then you would just join a different social movement, or leave the room, or whatever the case may be.

Essentially what happened, for reasons that are interesting to speculate about, is that a value change occurred about the distribution of these rights, and we began to see indoor air as something that everyone had a right to its being clean. If you wanted to externalize the cost of your smoking, then you needed to go do it somewhere else and not degrade a right that other people had. When we began to get that change of values, we began to get things like voluntary no-smoking sections in restaurants and on airplanes and so on and so-forth. And when enough of that value change occurred, then courageous legislators stepped forward to make this mandatory.<sup>39</sup> For me, this homely example tends to exemplify what the relationship is between law and underlying value and culture change. It isn't that law is unimportant; once you legislate, you codify value change, you encourage it, and you also help to stabilize it and make it very difficult to reverse.

PROF. SHERRY COLB: My view is that I am very ambivalent about the idea of legal change for animals, because I think that with 98% of the population participating in the consumption of them, that there isn't all that much we can do with the law that isn't going to further entrench what's going on. I would give a couple of examples. One sort of celebrated event in animal protection circles was when the Israeli Supreme Court banned foie gras.<sup>40</sup> And, I think that certainly a part of me wants to rejoice because here you have some animals who will at least potentially not be suffering in one way, though they will likely be suffering in a different way because they weren't freed from being killed or being made ill, just from the force-feeding. And then, Justice Strasberg Cohen, who had written the majority opinion for the Israeli Supreme Court, spoke on a panel at Columbia, and for the most part, she was celebrated for this forward-thinking opinion, but her opinion distinguished between basic foods and luxury foods.<sup>41</sup> That was the

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<sup>39</sup> See David B. Ezra, *Sticks and Stones Can Break My Bones, but Tobacco Smoke Can Kill Me: Can We Protect Children from Parents That Smoke?*, 13 ST. LOUIS U. PUB. L. REV. 547, 548, 551 (1994) (discussing how nonsmokers forged the way for the right to avoid breathing environmental tobacco smoke by forming activist groups, pursuing court actions, lobbying legislators, and forcing employers to take action against smokers, leading to much federal, state, and local legislation protecting non-smokers).

<sup>40</sup> HCJ 9232/01 Noach v. The Attorney General 215 IsrLR 215 (2003) (Isr.).

<sup>41</sup> *Id.* at 268.

distinction, because there had to be a distinction, because otherwise, talking about foie gras might be a gateway to talking about all of the other abuses that animals experience when people consume animal foods of any type. So she had to come up with a line, where foie gras fell on one side of the line, and everything else is done routinely to animals and ipso facto legitimate, so she came up with basic foods and luxury foods. And luxury foods is a way of saying that not that many people do it so we can get away with taking it away from them.

But basic foods are something else. Actually Michael (Dorf) here raised his hand during this panel about the foie gras decision and asked why chickens are a basic food, why aren't all of these animals that we don't need to eat from a nutritional standpoint, why aren't they all luxury foods? And her response was, "you are entitled to your lifestyle." And it was such a strange response, a very defensive kind of potentially offensive response, because it implies "I will tolerate you, but do not expect me to join you." She apparently felt like 'you are supposed to be cheering for me because I made a little dent in something,' but the way she made the dent was to draw a line that really doesn't make a lot of sense, and that can then be used later and referred to later, to say, "well, this is a basic food, because lots of people want to continue eating it." The greater a difference the change would make then, the less inclined the Court would be to make that change.

Then there is the Steven Wise litigation<sup>42</sup> . . . I admire the litigation; he is extremely smart, and the thinking and the research that goes into it is really quite impressive. But then I worry there too, because he is selecting the smart animals, the humanoid animals, and the chimpanzees that we can say they are a lot like us. And he says things along the lines of "I am not saying that being really smart like us is a necessary condition, I am just saying it is a sufficient condition."<sup>43</sup> But once we start talking about the intelligence of the animal and the corresponding sort of autonomy they experience, we are saying it—human-like cognition—is a relevant dimension for rights. And we

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<sup>42</sup> See *What Is the Nonhuman Rights Project?*, THE NONHUMAN RIGHTS PROJECT, <http://www.nonhumanrightsproject.org/overview/> [<https://perma.cc/LEY8-A5LU>] (accessed Feb. 23, 2016) (describing the Nonhuman Rights Project, which was founded in 2007 by Steven Wise and aims to gain legal personhood for nonhuman animals through common law litigation, beginning with the more cognitively complex animals including chimpanzees, elephants, dolphins, and whales).

<sup>43</sup> See Charles Siebert, *Should a Chimp Be Able to Sue Its Owner?*, N.Y. TIMES MAG., <http://www.nytimes.com/2014/04/27/magazine/the-rights-of-man-and-beast.html> [<https://perma.cc/2VE5-AB8D>] (Apr. 23, 2014) (accessed Feb. 23, 2016) (quoting Steven Wise's answer to the question of whether he would consider filing a lawsuit on behalf of animals that are arguably less intellectually sophisticated than the animals in the suits he is currently bringing) ("[T]he animals we are currently choosing to represent . . . we've spent years trying to understand what their cognitive capabilities are. But we feel very comfortable in saying that for any nonhuman animal who is autonomous, whatever species they may be, then we will go into court and make the argument that they have a sufficient condition for rights. We've never claimed it's a necessary condition, and as the public debate evolves, people may be making other arguments based on other factors.").

have fought a long time for the proposition that intelligence is not a relevant dimension for rights when it comes to humans.

We used to experiment on those we considered less intelligent humans,<sup>44</sup> and we now understand that it is not a relevant dimension for the right against being tortured, and enslaved, and killed. So there is a line in Steven Wise's submissions where he said, essentially, "Chimpanzees are autonomous and self-determining beings, they are not cabined by instinct like many perhaps in the nonhuman kingdom are"<sup>45</sup>, and so that is where the implicit line comes in, "Don't worry, we are not asking for rights for all the animals, we are just asking for the humanoid." And that distinction is one that I think the animal rights movement tries to explode and to expose as wrong and so, going into court, necessarily has you making arguments that you may really want to reject in your life as an advocate.

And then finally, the laws for animals can be counterproductive. When Proposition 2 was passed, the *New York Times* a few years later had a headline that said something like, "They wish they all could be California hens."<sup>46</sup> And it was a joke and it was really kind of celebrating for people, implying, "Now you can eat eggs from chickens from California, and they will have had the greatest life on earth, and you will be contributing to that great life by eating their eggs." And the fact was that, at that time, the law hadn't even gone into effect. So the Public Relations benefit of these sorts of marginal changes that may or may not be helpful to animals, the PR benefit where people can feel good, where people who might have been headed toward giving up animal food consumption can feel good. "I am getting my food from California," they might think, "and so I know things are good." This is a real downside, I think, of pressing for legal change. And that is why I sort of err on the side of social change first. The law, which is a conservative institution, can then follow.

PROF. LORI GRUEN: I too have mixed views about whether one or the other should be prioritized. I do have to say, following up on what Michael said, when those of us who have been working to end chimpanzee research met over a period of many years, when we thought, "When will it end?" I actually hoped it would happen before I died. And lo and behold it happened, way before—I mean (knocking on wood)—it wasn't meant to be a causal relationship. They are not in a sanctuary,

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<sup>44</sup> David J. Rothman, *Were Tuskegee & Willowbrook 'Studies in Nature'?*, 12 HASTINGS CTR. REP. 5, 5 (1982).

<sup>45</sup> Brandon Keim, *Chimpanzee Rights Get a Day in Court*, WIRED, <http://www.wired.com/2015/05/chimpanzee-rights-get-day-court/> [<https://perma.cc/8Q39-98C8>] (May 27, 2015) (accessed Feb. 23, 2016) (quoting Steven Wise, "Chimps are autonomous and self-determined beings. They are not governed by instinct . . . [t]hey are self-conscious. They have language, they have mathematics, they have material and social culture. They are the kinds of beings who can remember the past and plan for the future.")

<sup>46</sup> Stephanie Strom, *Wishing They All Could Be California Hens*, N.Y. TIMES, <http://www.nytimes.com/2014/03/04/business/theyre-going-to-wish-they-all-could-be-california-hens.html> [<https://perma.cc/QP8G-JXG7>] (Mar. 3, 2015) (accessed Feb. 23, 2016).

but . . . this past year invasive biomedical research on chimpanzees was finished.<sup>47</sup> And that is, I think to a large extent not at all social- or movement-oriented. It is actually primarily economic, to some extent it just has to do with efficiency and inefficiency. And the fact that there is now a series of prohibitions and difficulties in the law and regulatory schemes to make it so that if you were to want to use chimpanzees in research, it is very, very, difficult to do.<sup>48</sup> That is very helpful for the chimpanzees. Getting them to sanctuary is another matter; it is a political issue, as opposed to a legal issue per se.

I am more hopeful about the law doing certain kinds of things, for example, expanding the Animal Welfare Act to cover rats and mice, millions of whom aren't currently considered "animals" under the AWA.<sup>49</sup> These are incredible creatures that don't have any visibility, to go back to this issue of invisibility. And the public is not that interested in mice and rats. Imagine social movements for mice and rats—I am not going to put my hope on the success of those movements given current attitudes. So, in some way I do think that legal and regulatory practices can be put in place that can then help make visible questions that are invisible to the social milieu. I am surprised that I actually would think that legal changes could have the kind of effect on social change, but I think we've seen it happen, and I hope it can continue to happen.

PROF. DAVID FAVRE: I think legal change is episodic. We are at a point now where legal change is difficult because of the stranglehold existing in our political process. When the chair of the Science Committee in the House of Representatives does not believe in global warming,<sup>50</sup> it's hard to see how rational discussions are going to occur in our higher levels of representative government. So I think for the near future it will be a time of social change, and I am already seeing a lot of social change. I think the attitude towards animals, the concern for animals, is growing among wider and wider groups of people. For example, the food movement group—it is not part of the animal movement, but it nevertheless is supportive of better animal welfare.

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<sup>47</sup> Francis S. Collins, *NIH Will No Longer Support Biomedical Research on Chimpanzees*, NAT'L INST. OF HEALTH, <https://www.nih.gov/about-nih/who-we-are/nih-director/statements/nih-will-no-longer-support-biomedical-research-chimpanzees> [https://perma.cc/6NHM-YP22] (Nov. 18, 2015) (accessed Feb. 23, 2016).

<sup>48</sup> Hanna Coate, *Overview of Great Apes Under the Chimpanzee Health Improvement, Maintenance, and Protection Act*, ANIMAL LEGAL & HISTORICAL CTR., <https://www.animallaw.info/article/overview-great-apes-under-chimpanzee-health-improvement-maintenance-and-protection-act> [https://perma.cc/FL7Q-DFRY] (2011) (accessed Feb. 23, 2016).

<sup>49</sup> Animal Welfare Act, 7 U.S.C. § 2132 (2012).

<sup>50</sup> Joby Warrick, *Congressional Skeptic on Global Warming Demands Records from U.S. Climate Scientists*, WASH. POST, <https://www.washingtonpost.com/news/energy-environment/wp/2015/10/23/congressional-skeptic-on-global-warming-demands-records-from-u-s-climate-scientists/> [https://perma.cc/Y9N8-AGY9] (Oct. 23, 2015) (accessed Feb. 23, 2016).

Consider the status of the chimpanzee in research: I also am pretty much shocked about how much change has occurred in the past three years. Having dealt with Congress for decades, I did not have ending chimpanzee research on my agenda. It just wasn't going to happen, and yet it has now happened, not because of the law but from changing attitudes in the world of scientific research. Apparently some people that dealt with chimpanzees cared about them in a moral sense and really did come to a decision that science shouldn't keep doing research with them. In public documents they could not bring themselves to say that the practice is immoral, instead they talk about economics and some of the other things, but I think it's also pretty clear that there has been a shift in the attitude of those that were in research. Now, will this new vision shift down to the rats? Not anytime soon I am afraid.

Another example of social change that I thought was a shocker this year was McDonald's' announcement.<sup>51</sup> Again, I do not think it was (or is) possible to adopt a law that would have told McDonalds they couldn't use caged eggs anymore. Of course it's only for the United States, and it's not a law so they can't change their mind. But, they made a public pronouncement of moving toward not just cage-free eggs, but of free-range eggs. No law in the U.S. says you have to use free-range eggs. It was the power of the public's changing attitudes about animal welfare. McDonald's, I assume, understands the difference between cage-free and free-range. There is a huge difference in the management of chickens if you go that route.

Finally, if I could just hook back to a prior point of discussion when talking about respecting differences in animals and species. I live with chickens, and I live with sheep. And there is a big difference between predator animals, which are dogs and cats, and prey animals like sheep and chickens. And if you really want to have a little bit more robust understanding of the differences of the animals out there and what their needs and interests are, I would suggest you become familiar with the prey animal. So I am hopeful that we can take this pause in our ability to adopt new laws and develop stronger social change so we can solidify into the law some of that change when we get a more responsive political process. Thank you.

PROF. MICHAEL DORF: I'd like to make a number of points. First . . . a number of us have talked about the heterogeneity and the messiness of movements, and I agree with that characterization. It is nonetheless useful to draw a distinction between the movement for improved welfare of animals being used in various ways by humans and the movement for the abolition of the use of animals by humans. Legal changes have been somewhat effective with respect to the first, that is to say, somewhat helpful in improving the conditions of the animals

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<sup>51</sup> FAQs, MCDONALD'S, [http://www.mcdonalds.com/us/en/your\\_questions/our\\_food/do-you-currently-use-cage-free-eggs.html](http://www.mcdonalds.com/us/en/your_questions/our_food/do-you-currently-use-cage-free-eggs.html) [https://perma.cc/QYN3-Z82Y] (2016) (accessed Feb. 23, 2016).

that are being exploited. The question for me, since my view is on the animal rights side, not on the animal welfare side, is, “What is the utility, if any, of legal strategies to get us towards animal rights, that is to say towards abolition of human exploitation of nonhuman animals?”

Next, I would like to challenge a premise of the question we are now addressing, even though I think I suggested the question in the first place. The premise I want to challenge is that legal strategies and social strategies that aim to change hearts and minds occupy separate universes. They do not. My point is not simply that law and society interact. It’s that they are in some sense part of the same life-world. Let me give a couple of examples.

After the Supreme Court decided in 2008 that Americans have a right to be armed with handguns,<sup>52</sup> Reva Siegel wrote a fascinating paper in the *Harvard Law Review*, in which she described the movement for individual rights under the Second Amendment as a social movement through the law.<sup>53</sup> It was a social movement organized around the law, so it is not as though we talked about the relation between people in the streets and people in the courthouse. The idea was that the people in the courthouse were in a sense the people in the streets.<sup>54</sup>

The gun rights case is not a unique example. Michael McCann, who is an excellent sociologist, has written a fair bit about the use of legal strategies, whether they are through the legislature or through litigation as a form of social organizing.<sup>55</sup> I think it is very much an open question—an empirical question, but a very complex empirical question—whether the legal reforms that animal advocates are able to get will move us towards abolition or not; but if they do, courtroom victories will be largely irrelevant. Think about the PETA lawsuit on behalf of Tilikum, the orca,<sup>56</sup> or maybe the Nonhuman Rights Project’s lawsuits on behalf of the chimpanzees.<sup>57</sup> They can win by losing. That is to say, the point of the lawsuit isn’t necessarily to win enforceable rights. It’s impossible to win enforceable rights for some of these cases. Thus, the point is simply to raise consciousness. It’s an open question whether that will work or not for any particular litigation or legislative campaign, but I don’t think it’s right to think of these campaigns as something apart from the social movement. The social movement works through the law as well as through the streets. In that sense I want to push back a little bit, on this idea of law being epiphenomenal.

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<sup>52</sup> *District of Columbia v. Heller*, 554 U.S. 570 (2008).

<sup>53</sup> Reva Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 *HARV. L. REV.* 191, 194 (2008).

<sup>54</sup> *Id.*

<sup>55</sup> Michael McCann & William Haltom, *Ordinary Heroes vs. Failed Lawyers—Public Interest Litigation in Erin Brockovich and Other Contemporary Films*, 33 *L. & Soc. INQUIRY* 1045, 1062–63 (2008).

<sup>56</sup> *Tilikum v. Sea World*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012).

<sup>57</sup> *The Nonhuman Rights Project, Inc. ex rel. Tommy*, 124 A.D.3d at 148.

I think that law is part of the social movements that enable other sorts of changes, including legal changes.