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Exploring Animal Rights as an Imperative for Human Welfare

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I. INTRODUCTION

Animal rights advocates make two powerful arguments, among others, in support of their quest to secure more legal protection for animals. The first is that animals, as conscious, feeling, living beings, cannot legitimately be classified as property under the law. The human view that our lives are more precious than those of non-human animals is species-centric and misplaced; therefore, more legal protection against human abuse is appropriate.[1] The second argument is that there is a link between animal cruelty and interpersonal human violence, and therefore it is in society's interest to identify and punish those who treat animals cruelly.[2]

To illustrate the oppressive realities of being classified as property, black slavery is used to depict the cruelties to which animals are subjected. It is argued that only institutionalized slavery truly can compare to the abuses animals often experience at the hands of humans.[3] With slavery as an authenticat-

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1 *See* GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW (1995); TOM REGAN, THE CASE FOR ANIMAL RIGHTS (2d. ed. 2004); STEVEN M. WISE, RATTLING THE CAGE (2000).

2 *See infra* notes 106–109 and accompanying text.

3 *See* REGAN, *supra* note 1, at 348 (noting that the law's treatment of farm animals as property needs to be challenged and that, "[t]hose humans who were slaves were not recognized as legal persons in pre-Civil War America"); PETER SINGER, IN DEFENSE OF ANIMALS 193 (1985) (human domination and enslavement of animals is akin to human imperialism) [hereinafter DEFENSE OF

ing parallel, some animal rights advocates insist that, for the most part animals and humans possess the same moral right to exist.[4]

It is contended, for example, that the criterion for legal protection should be a living entity's ability to suffer, as non-human animals certainly can and do.[5] It is further contended that non-human animals, like humans, are "subjects of a life" with beliefs, desires, emotions, identity, and other attributes of personhood that support the recognition of rights, and in that sense are equal.[6] Another perspective explains that animal rights theory is grounded in principles of "justice," which reject the use of animals as property.[7] That is to say animals have equal inherent value as humans and therefore are entitled to the same considerations as humans when decisions that affect their interests are being made.[8]

The second critical argument in support of more legal protection for animals posits that protecting animals from cruelty is also a way of protecting humans from interpersonal violence. Having concluded that people who abuse animals eventually become cruel to humans, it is argued that early identification and punishment of animal abusers also promote human interests.[9] This argument is compelling, yet controversial.

ANIMALS]; PETER SINGER, PRACTICAL ETHICS 78–80 (2d ed. 1983) [hereinafter PRACTICAL ETHICS] (criticizing the self-interest model of ethics used to justify animal exploitation and noting that "white slave traders who transported African slaves to America had no self-interested reason for treating Africans any better than they did"); MARJORIE SPIEGEL, THE DREADED COMPARISON: HUMAN AND ANIMAL SLAVERY (3d ed. 1996) (generally documenting the similarities in motivations and rationalizations for subjecting blacks and animals to cruel treatment); Gary L. Francione, *Animal Rights and Animal Welfare,* 48 RUTGERS L. REV. 397, 442–43 (1996) (only slavery can be compared to animal exploitation which refuses to recognize even basic animal rights); Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF. L. REV. 765, 832–33 (1995) (arguing for personhood status for animals in view of the law's past "accommodation" of blacks, corporations, trusts, etc.); Debra Squires-Lee, Note, *In Defense Of Floyd: Appropriately Valuing Companion Animals In Tort*, 70 N.Y.U. L. Rev. 1059, 1060 (1995) (for valuation purposes animals are treated like slaves, i.e., non sentient property).

4 *See* PETER SINGER, ANIMAL LIBERATION 1–23 (2d ed. 1990).

5 *Id.*

6 *See* REGAN, *supra* note 1, at 243–48. *See also* ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 55 (Cass R. Sustein & Martha C. Nussbaum eds., 2004) (discussing the role of consciousness in determining whether to grant basic legal rights); WISE, *supra* note 1, at 263.

7 *See* Francione, *supra* note 3, at 398–99. Professor Francione explains the various models of equality that theorists have constructed. For example, Peter Singer's models require that animal interests be given "equal consideration" because the difference in species does not make animals inferior. *Id.* at 411–13. However, Singer's approach accommodates exploitation if circumstances justify it. *Id.* Tom Regan, on the other hand, views animals as having "equal inherent value" from which the respect principle and the right not to be harmed flows. *Id.* at 417. Animal rights theory is molded around the "equal inherent value" belief and grounded in principles of justice. *Id.* at 442–47. Rights theory requires that animals be treated with respect, and exploitation violates both principles of justice and the respect command. *Id.*

8 *See* Francione, *supra* note 3, at 417.

9 *See* Randall Lockwood, *Animal Cruelty and Violence Against Humans: Making the Connection*, 5 ANIMAL L. 81 (1999); Joseph G. Sauder, *Enacting And Enforcing Felony Animal Cruelty Laws to Prevent Violence Against Humans*, 6 ANIMAL L. 1 (2000); Suzanne E. Tallichet & Chris-

Those who disagree with these claims have contested their theoretical foundations and accept the permissibility of animal exploitation.[10] The claim that consciousness should be the baseline for legal rights has been challenged,[11] and it has been argued that animals do not have comparable capacities of personhood to humans.[12] These claims have produced harsh accusations from both sides. The willingness of humans to exploit animals for their benefit has been labeled homocentric, narcissistic, and parasitic,[13] while animal advocates' preoccupation with animal rights has been called fanatical and misanthropic.[14]

But even the most casual contact with some animals can reveal that they are feeling, conscious beings with a sense of self and are capable of suffering.[15] In fact, it is suspected that in some matters animals may even be more perceptive than humans.[16] Why, then, do humans continue to treat animals cruelly?

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topher Hensley, *Exploring the Link Between Recurrent Acts of Childhood and Adolescent Animal Cruelty and Subsequent Violent Crime*, Vol. 29, No. 2, CRIM. JUST. REV. 304 (2004).

10 *See, e.g.*, MICHAEL ALLEN FOX, THE CASE FOR ANIMAL EXPERIMENTATION (1986); Paul Austin, *Can't Believe That Animals Have 'Rights'*, NAT'L L.J., Vol. 12, No. 38, May 28, 1990; David R. Schmahmann & Lori J. Polacheck, *The Case Against Rights for Animals*, 22 B.C. ENVTL. AFF. L. REV. 747 (1995) (noting, among other things, that our moral and legal system could not handle a grant of rights to beings we know so little about; that our legal system is grounded in the recognition and balancing of competing interests and animals cannot participate in these processes; that society must accept some harm to animals in the interest of food, clothing, science, education, etc.). For a discussion of the legal implications of granting animals standing to enforce their legal rights, *see* Cass R. Sunstein, *Standing for Animals*, 47 UCLA L. REV. 1333 (2000).

11 *See* Richard A. Posner, *Animal Rights,* 110 YALE L. J. 527, 532 (2000) (discussing the dilemma of using consciousness or cognitive capacity as the touchstone for legal rights); Sunstein, *supra* note 10, at 1362 (noting that cognitive capacity is not a prerequisite for legal rights); 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, 2 (2001) (rejecting the contention that our society only reserves rights for humans).

12 *See* ERNEST PARTRIDGE, ON THE RIGHTS OF ANIMALS AND OF REASONS (1998) (noting that animals' capacity for self consciousness, time perception, rationality, volition, and language are not remotely comparable to that of humans); Taimie Bryant, *Similarity or Difference as a Basis for Justice: Must Animals be Like Humans to be Legally Protected From Humans?*, 70 LAW & CONTEMP. PROBS. 207, 211 (2007) (even if we agree about which capacities are relevant for comparison, we still cannot say animals and humans are sufficiently alike and, therefore, should be treated the same).

13 *See* Steven J. Bartlett, *Roots of Human Resistance to Animal Rights: Psychological and Conceptual Blocks*, 8 ANIMAL L. 143, 158–69 (2002).

14 *See* Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 25 GA. L. REV. 923, 940–41 (1991).

15 *See* STANLEY COREN, HOW DOGS THINK 294–97 (2004) (giving example of his dog displaying conscious reasoning and logic by actively participating in a game with humans).

16 *See* Don Oldenburg, *Animals Seem to Sense Trouble*, THE MIAMI HERALD, Jan. 13, 2005, at 25A (noting that the sensory capacity of animals allowed them to detect the recent Asian Tsunami well before its arrival); Sandra Blakeslee, *Minds of Their Own: Birds Gain Respect*, THE N.Y. TIMES, Feb. 1, 2005, at F1 (reporting that scientists have discovered that "[t]he avian brain is as complex, flexible and inventive as any mammal brain").

This Article explores why these two seemingly persuasive arguments in support of animal rights have not produced dramatic changes in the legal rules regarding exploitation of animals as a source of food, clothing, research, entertainment, and income, among other things. It shows that these claims reflect a highbrow approach that is detached from the realities of societal ordering, and cultural reality in the United States and around the world.

In Part II of this Article, I describe the historical and continuing subjugation of animals by humans and the evolution of legal protection to curb or end such abuse. This Part notes that animal rights activists vary both in philosophy and strategy, and describes the theories and practices intended to effect legal change.

Part III looks at the abolition of black slavery as a legal anchor for animal rights. Specifically, it explores the claim that the assignment of property status to animals is the ultimate barrier to proper treatment and an end to human exploitation. This Part notes the strong similarities between black slavery and ongoing animal exploitation and the many similarities between animal-rights and civil-rights activism. This Part also shows that despite the strong similarities, consensus to change the property classification does not seem imminent. It concludes by suggesting that the emphasis on the property label is misplaced. And using the evolution of the law of employment discrimination as an example, it shows that animal exploitation will likely continue even with the elimination of the property label.

Part IV evaluates the claim that animal abuse and human abuse are linked. This Part looks at the sources of this claim and their many limitations and contradictions. Specifically, the predictive value of studies and anecdotal evidence linking animal cruelty to interpersonal violence is considered. Further, it considers the indictment that animal rights advocates are themselves cruel because of their indifference to human suffering, demonstrated for example, by their support for abortion rights. It also looks at other examples of insensitivity to human suffering by individuals who exhibit strong affection for animals and shows the obstacle this presents for animal activism.

The last Part of this Article addresses animal exploitation as a universal cultural norm that academic theories are incapable of greatly influencing. Specifically, this Part confronts the reality that throughout the world most people regard animals as an inferior order whose exploitation is necessary to further human health and welfare. This world-view has existed since time immemorial and has been justified by need and religious doctrine, among other things. Animal rights advocates cannot avoid the proven benefits of exploitation such as food supply, medical advances, items of pleasure or comfort, and financial rewards that are culturally acceptable and entrenched. As an immigrant society, America, although progressive, is representative of this world-view. Therefore, educational programs that target cultural misperceptions about the benefits of exploitative acts can help change public attitudes and behavior. It concludes that utopian legal proposals are provocative but detached from the reality that

even humans must submit to exploitation that our system of legal ordering deems justifiable.

II. ANIMAL ABUSE, THE MOVEMENT AND THE LAW

A. A Cross Section of Abuse

Throughout history, animals have faced the unenviable challenge of coexisting with humans. Cruelty is a legacy of the exploitative aspects of this coexistence.[17] In the Middle Ages, animals were tried for crimes, executed, excommunicated, and even burned at the stake.[18] Today, animals are still being used or abused in a wide variety of ways,[19] including being sacrificed in religious ceremonies.[20] However, it is the cruelty that is inflicted when animals are handled for food and scientific research purposes, among other things, that often generates the most widespread public attention and outcry.[21] Despite the activ-

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[17] *See, e.g.*, Jim D. Paola, *Two Charged in Dog's Attack on 'Coon,'* SO. FLA. SUN SENTINEL, Jan. 19, 1995, at 1B. (five men watched and cheered as a pit bull mauled a caged raccoon to death); Rob Parsons, *Convicted Dog Abuser Faces New Charges*, COLUSA COUNTY SUN-HERALD, Oct. 3, 2008 (pit bull owner cropped his dog's ear with scissors but did not use anesthesia or antiseptic, and kept him in a dirty kennel with open wounds infested by flies). In another case, a man was convicted of killing a pelican by feeding it fish laden with firecrackers. *See Bird Abuser to Serve Animals*, THE MIAMI HERALD, July 21, 1995, at B1. Such instances of cruelty pale in comparison to the cruelty inflicted in the pursuit of human desires and interests. Cruelty in the course of animal farming and research, as examples, is much more intense and pervasive. *See Farm Sanctuary Releases Statement Corroborating Abuse Captured by PETA's Undercover Investigation of Iowa Pig Farm*, BUS. WIRE, Sept. 18, 2008; Morgan O'Rourke, *KFC Supplier Investigated for Animal Cruelty*, RISK MANAGEMENT, Vol. 51, Issue 10, Oct. 2004, at 8. It is for this reason that animal rights advocates focus on ending institutionalized exploitation, as opposed to individual incidents of abuse.

[18] *See* TOM REGAN, ALL THAT DWELL THEREIN: ANIMAL RIGHTS AND ENVIRONMENTAL ETHICS 150 (1982). Homosexuals faced the same irrational wrath of humans during the Middle Ages when they were burned at the stake as punishment for their third "offense" of homosexuality. *See* Fernando J. Gutierrez, *Gay and Lesbian: An Ethnic Identity Deserving Equal Protection*, 4 LAW & SEXUALITY 195, 218 (1994).

[19] *See Sex Dungeon Stint Doesn't Faze Labrador*, THE MIAMI HERALD, July 1, 1995, at B1.

[20] The Santeria religion includes animal sacrifice in its rituals. "Sacrifices are performed at birth, marriage, and death rites, for the cure of the sick, for the initiation of new members and priests, and during an annual celebration. Animals sacrificed in Santeria rituals include chickens, pigeons, doves, ducks, guinea pigs, goats, sheep, and turtles. The animals are killed by the cutting of the carotid arteries in the neck. The sacrificed animal is cooked and eaten, except after healing and death rituals." Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993) (holding that religious animal sacrifice is protected by the Free Exercise Clause of the United States Constitution). *See also* Pablo Lerner & Alfredo Rabello, *The Prohibition of Ritual Slaughtering*, 22 J. OF L. & REL. 1 (2007) (discussing the potential use of animal rights as a pretext for discriminating against religious minorities).

[21] The largest animal rights organization, People For The Ethical Treatment Of Animals (PETA), "focuses its attention on the four areas in which the largest numbers of animals suffer the most intensely for the longest periods of time: on factory farms, in laboratories, in the clothing

ism, most of society still accepts the use of animals for food, clothing, research, entertainment, education, and religious purposes.

B. Legal Responses

Legislatures have responded to pressures stemming from growing sympathy and support for animals by passing animal cruelty legislation, which regulates human conduct vis-á-vis animals. Legislation protecting animals from abuse goes as far back as the 1600s. With an original focus on cattle, the Massachusetts Bay Colony, in 1641, included in its "Body of Liberties" a provision prohibiting cruelty to animals.[22] Much later, states enacted laws to protect owners' property interest in their cattle.[23] Almost two hundred years after the Massachusetts Bay Colony initiative, New York enacted an anti-cruelty law which expanded protection beyond the property interests of owners.[24] The New York statute was later revised to further expand protection,[25] and less than a century after the New York initiative all states had legislated on this subject.[26]

Federal legislation relating to how animals may be treated dates back to 1873 with the Twenty-Eight Hour Law,[27] which was repealed and replaced with a 1906 version.[28] This law required more humane treatment of animals in transit by requiring the provision of food, water, and rest.[29] Further, the Humane Slaughter Act,[30] was signed into law in 1960 in order to make the slaughtering process less cruel.[31] In 1966, the Animal Welfare Act[32] was passed. The Act

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trade, and in the entertainment industry." PETA, http://www.peta.org/about/index.asp (last visited Nov. 10, 2009).

22 *See* 43 THE HARVARD CLASSICS: AMERICAN HISTORICAL DOCUMENTS, 1000–1904, at 84 (Charles W. Eliot ed., New York: P.F. Collier & Son 1910) (the Massachusetts Body of Liberties). Liberty 92 provided that: "No man shall exercise any Tyranny or Crueltie towards any bruite Creature, which are usuallie kept for man's use." Liberty 93 also promoted humane treatment of animals in transit by providing: "If any man shall have occasion to leade or drive Cattle from place to place that is far off, so that they be weary, or hungry, or fall sick, or lambe, It shall be lawful to rest or refresh them, for competant time, in any open place that is not Corne, meadow, or inclosed for some peculiar use." *Id.* at 84.

23 *See, e.g.*, 1821 Me. Laws Ch. IV, §7 ("That if any person shall cruelly beat any horse or cattle, and be thereof convicted, before a Justice of the Peace, he shall be punished by fine not less than two dollars nor more than five dollars, or by imprisonment in the common goal for a term not exceeding thirty days, according to the aggravation of the offence.").

24 *See* N.Y. REV. STAT., Part IV, Ch. 1, Tit. 6 §26(2) (1829).

25 *See* N.Y. REV. STAT. Tit. 6, § 26 (1866).

26 *See* EMILY STEWART LEAVITT, ANIMALS AND THEIR LEGAL RIGHTS 13 (1991).

27 *See* Cruelty To Animals in Transit Act, Ch. 252, 17 Stat. 584 (1873).

28 *See* Ch. 3594, 34 Stat. 607 (1906); 49 U.S.C. § 80502 (1994).

29 *See id.*

30 7 U.S.C. §§ 1901–1906 (1994 & Supp. 1999).

31 *See id.*

32 *See* Pub. L. No. 89-544, 80 Stat. 350 (1966); 7 U.S.C. §§ 2131–2159 (1994 & Supp. 1999).

has since been amended several times to regulate the treatment of animals being used for research.[33] Federal laws also protect specific animal groups such as wild horses and eagles.[34]

Because the nineteenth century laws were grounded in respect for property rights, they had a limited effect in protecting domesticated animals and no effect in protecting wild animals.[35] But advocacy for animal rights has intensified, and as a result, current laws prohibiting animal cruelty are much broader than their nineteenth century counterparts.[36] Protection now exists both for domesticated and wild animals, and judicial enforcement has significantly increased. In fact, outside of permitted institutionalized uses or cruelty, the improper treatment of animals can result in severe criminal penalties. Killing a puppy got one Florida man a nine and a half year prison term,[37] while in another dog mistreatment case the judge lamented that a one-year jail sentence was not long enough.[38]

Some of the criminalized conduct does raise eyebrows. For example, animal cruelty charges for killing a rat[39] or allowing one's pet pig to get too fat[40] may seem a novelty, if not bizarre to some. Large rewards in animal cruelty cases highlight the high level of human concern and preoccupation with humane animal treatment and punishing offenders.[41] The penalty for animal cruelty may

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33 For a discussion of the forces and actions that led to the enactment of these statutes, *see generally* LEAVITT, *supra* note 26. And for a general summary treatment of the legal rules governing man's relationship with animals, *see* JORDAN CURNUTT, ANIMALS AND THE LAW (2001).

34 *See, e.g.*, the Wild Free-Roaming Horses and Burros Act, 16 U.S.C. §§ 1331–1340 (1994); Bald Eagle Protection Act, 16 U.S.C. § 668(a)–668(d).

35 *See* Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention,* 87 IOWA L. REV. 1, 26–28 (2001).

36 *See* Sunstein, *supra* note 10, at 1333 (a "pervasive goal" of federal law has been animal protection).

37 *See* Manny Garcia, *Puppy Killer to Serve 9.5 Years in Prison*, THE MIAMI HERALD, Dec. 20, 1995, at 1B.

38 Calling state sentencing guidelines inadequate for limiting him, the judge stated: "I can't think of any worse crime than to take advantage of animals and dogs who can't defend themselves . . . . If it were up to me, I would sentence him to a long prison term." Mike Folks, *Man Gets Jail Time for Animal Cruelty: Judge Criticizes Limit, Says Year Isn't Enough*, SO. FLA. SUN SENTINEL, Jan. 4, 1996, at 3B.

39 In this case, a gardener was charged with animal cruelty for bashing a rat to death with a broom handle wrapped with newspaper. The rat was killed because it was eating his tomato plants. *See Rat-Killing Case May Be Dismissed*, SO. FLA. SUN SENTINEL, Aug. 11, 1994, at 3A.

40 *See* Ray Recchi, *Watching the Law Bark Up the Wrong Tree*, SO. FLA. SUN SENTINEL, Nov. 13, 1994, at 1E.

41 Money poured in so quickly in a dog killing case that the reward was capped at fifteen thousand dollars. *See* Gary Stein, *Animal Crimes Rate Higher in Sympathy*, SO. FLA. SUN SENTINEL, April 26, 1996, at 1B. In another case, sixty-five hundred dollars was offered for information leading to the arrest and conviction of the person who skinned a live dog. *See Reward Posted in Skinned-Dog Case*, THE MIAMI HERALD, Feb. 24, 1995, at 5B.

also in some instances exceed that for cruelty to another human.[42] In one case more money was donated to find a dog killer than to find the killer of two young blacks.[43]

This emphasis on the interests of animals can create the impression that animals are valued too highly by the law. For example, a judge observed that death row inmates did not get the quality of attention and help a dog received after the dog was determined to be a nuisance and sentenced to death.[44] These cases reinforce the perception that humans are hardening toward each other while developing more empathy for animals.

C. *The Call for More Protection*

Despite the legal accomplishments of animal rights advocates, the call for more protection continues.[45] Reported cases of abuse and prosecution sustain public concern about animal cruelty, and institutional practices regarded as cruel keep the movement animated. In order to elevate protection beyond the borders of human interests, it is argued that animals are not property. At one extreme, animals are regarded as having the same inherent value as humans and, therefore, entitled to the same considerations that humans get when decisions are being made about them.[46] It is argued that animals have equal inherent value, thus making their exploitation violative of the principles of justice[47] and the violators speciesists.[48] However, most animal rights advocates accept human

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[42] *See* Ann Landers, *To Combat Violence*, SO. FLA. SUN SENTINEL, Sept. 14, 1995, at 2E. In this case, a man was charged with battery for beating and choking his girlfriend and animal cruelty for strangling her pet rabbit. For the battery, he faced a penalty of up to one year in jail and a $1,000 fine. The animal cruelty charge carried a maximum of one-year jail time and a fine of $20,000. In Oklahoma, one individual faced a five-year prison term and a five thousand dollar fine for kicking a cat, while another faced only a seventy-day jail term for beating his girlfriend. *See Law Favors Pets Over People,* NAT'L L.J., Jan. 9, 1995, at A10.

[43] While fifteen thousand dollars was being offered for a dog killer, only eleven thousand dollars was offered to capture the person who committed a double homicide. *See Reward Set in Murders*, SO. FLA. SUN SENTINEL, Apr. 19, 1996, at 3B.

[44] Alexander Stille, *Animal Advocacy*, THE NAT'L L.J., Vol. 12, No. 32, Apr. 16, 1990, at 1. In another instance, one writer expressed alarm in an editorial because a teenager who killed three young men while drag-racing got a four-year sentence, while a puppy killer got nine and a half years. *See* Editorial, *Values 101*, THE MIAMI HERALD, Dec. 21, 1995, at 34A.

[45] *See* Livingston, *supra* note 35, at 30 (current laws do not provide enough protection or the appropriate penalties for animal abuse).

[46] *See* REGAN, *supra* note 1, at 330–31, 353, 362–63.

[47] S*ee* Francione, *supra* note 3, at 398–99.

[48] Humans who devalue non-human animals and discriminate against them solely because of the difference in species are regarded as speciesists. *See* ANTHONY WESTON, TOWARD BETTER PROBLEMS 72 (1992) ("More precisely, speciesism is the supposition that we can draw an ethical distinction between all the members of one species and all the members of all other species on account of the difference in species itself. According to the speciesist, it is *because we are human* that we are entitled to ethical consideration; because other animals are not human, they are not so entitled.").

domination and exploitation but call for more humane treatment and an end to unnecessary suffering.[49]

Although animal rights advocates vary in both their philosophical beliefs and methodologies, they collectively have improved the standing of animals[50] and have gained the attention of lawmakers.[51] However, there is still a general sense that far too much abuse continues and this fuels passionate, continuing advocacy.[52]

In order to protect animals from cruelty, practices have ranged from peaceful protests[53] to criminal conduct.[54] As part of the struggle, strategies used

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[49] *See* Francione, *supra* note 3, at 397 (noting that "animal welfare" theorists accept the use of animals as a means to human ends as long as it is done humanely and without unnecessary suffering).

[50] *See* DEFENSE OF ANIMALS, *supra* note 3, at 197–200 (noting that "civil rights" tactics were used successfully against a museum and a major corporation that were using animals for experiments); *see also* Neil D. Hamilton, *Feeding Our Future: Six Philosophical Issues Shaping Agricultural Law*, 72 NEB. L. REV. 210, 248 (1993) (noting that the animal rights movement will force farmers to establish "codes for humane production," and that the increasing popularity of vegetarianism is partly attributable to the animal rights movement).

[51] John Muggeridge, *Red in Tooth and Claw*, THE HUM. LIFE REV., Vol. 21, No. 1, at 63, 64 (1995) (noting that animal rights activism has become mainstream social protest capable of securing legislative changes). *See also* Lydia Martin, *Animal Rights the X Cause*, THE MIAMI HERALD, May 2, 1995, at E1 (noting that animal rights is a "major focus" among young Americans); Alexander Stille, *supra* note 44, at p.1, col. 1 (noting that animal rights is a growing practice area, is taught in law schools and has a Political Action Committee).

[52] Kniaz, *supra* note 3, at 784–96 (addressing deficiencies in federal laws and their enforcement). *See also* LAWRENCE FINSEN & SUSAN FINSEN, THE ANIMAL RIGHTS MOVEMENT IN AMERICA: FROM COMPASSION TO RESPECT 21–22 (1994) (commenting on the reasons for the emergence of animal rights advocacy in the 1980s, the authors conclude that

> surely prominent among them is simply the relevation of the facts of animal suffering on such a massive scale. That such suffering is endorsed as normal practice by a variety of industries and institutions is also a significant factor, leading to the necessity of a more powerful critique than the traditional categories of compassion and cruelty could supply.

Id.).

[53] *See* Kniaz, *supra* note 3, at 772 (identifying the strategies used by various animal advocacy groups). One group focuses on education and lobbying for protective legislation while another emphasizes lawsuits, political protest, economic campaigns, civil disobedience, boycotts, picketing, and demonstrations. *Id.*

[54] *See id.* at 776–77. ("The AFL and other animal liberation groups engage in *direct action*, i.e., clandestine, illegal activity to protect animals and further the liberators agenda for change . . . . Liberation actions have ranged from vandalism, to release of animals, to a lone murder attempt." (footnote omitted)). *See also* Denise R. Case, *The USA Patriot Act: Adding Bite to the Fight Against Animal Rights Terrorism?* 34 RUTGERS L.J. 187 (2002) (noting some of the criminal activities of animal rights advocates and the ineffectiveness of existing laws to combat such behavior); Wesley J. Smith, *Terrorists, Too*, NAT'L REV., Oct. 2, 2002, *available at* http://www.nationalreview.com/comment/comment-smith100202.asp.; Terry Friedman, *FBI, ATF Address Domestic Terrorism,* CNN, May 29, 2005, http://www.cnn.com/2005/US/05/19/domestic.terrorism/index.html (violent animal rights extremists and eco-terrorists

during the Civil Rights Movement have been employed, including publicity campaigns.[55] Raising public consciousness and sensitivity in addition to reforming the law has allowed the movement to grow in size and strength, even though theories and strategies differ.[56] Incrementally, the rights and protections that animal supporters seek are being realized.[57]

III. ANALOGIZING ANIMAL ABUSE TO SLAVERY

Animal rights advocates who reject the classification of animals as property use slavery to depict the institutionalized exploitation to which animals are subjected.[58] It is argued that "no other situation, other than slavery, is comparable with respect to the baseline protection afforded to animals."[59] The property status of animals is regarded as the foundation for their exploitation. This parallels the status of black Americans before emancipation whose property status served as the key barrier to greater legal protection. It is argued that as long as animals are regarded as chattel, there will be no recognition of their basic rights and they can be subjected to abuse in the interest of the most trivial human pursuits.[60] It is further contended that the dominating and enslaving of animals is akin to the human imperialism of two hundred years ago which justified the refusal to recognize the equality and interests of other races.[61] Animal liberators view themselves as an underground railroad pursuing animal freedom in much the same way this system operated to free black slaves. Animal liberators also see similarities between the legal techniques used to prosecute them and those used to retain blacks in bondage.[62]

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now pose one of the most serious terrorism threats to the nation, top federal law enforcement officials say).

55 *See* DEFENSE OF ANIMALS, *supra* note 3, at 197; *see also* Henry Mark Holzer, *Pro Bono Lawyers are Sought for Animal Rights,* Vol. 14, No. 35, NAT'L L.J., May 4, 1992, at 15 (commenting that the animal rights movement of the 1970s came out of the human rights movement of the 1950s and 1960s, thereby making the lessons of the prior movement applicable).

56 *See* Kathryn Alfisi, *Animal Law*, WASH. LAW. 23 (March 2008) (noting some of the divergent approaches to securing animal rights as this practice area grows in popularity).

57 *See id.*

58 *See supra* note 1 and accompanying text. This reliance on slavery has caused two commentators who reject the idea of granting rights to animals to note: "It is standard, indeed almost mandatory, preface [for] writings by animal rights activists to allude to the ridicule with which the ideas of early abolitionists and suffragettes were received." Schmahmann & Polacheck, *supra* note 10, at 779–80. *See also* SPIEGEL, *supra* note 3, at 15–44 (arguments such as animals have poor intellectual skills and inability to reason, love, or feel pain had their genesis in animal oppression and were later advanced against blacks to justify the cruelties of slavery).

59 *See* Francione, *supra* note 3, at 442–43.

60 *Id.* at 436–46.

61 *See* DEFENSE OF ANIMALS, *supra* note 3, at 193, 208–11.

62 Kniaz, *supra* note 3, at 773, 822, 830.

In effect, the property status previously assigned to blacks and currently assigned to animals is regarded as the enduring obstacle to recognition of basic rights for animals.[63] Until basic rights are recognized, the interests of animals will always be trampled by even the most trivial human pursuits.[64] Animal rights advocates also emphasize that many of the same arguments made against animal rights were made against blacks to legitimize their property status.[65] Once the precept of black inferiority was accepted, it legitimized hunting, packing, transporting, torturing and otherwise cruelly treating blacks as we now treat animals. Property status also undergirds and reinforces beliefs that living creatures do not have the capacity to love or suffer.[66]

The comparison of animals to slaves is powerful because, like animals today, blacks were hunted in their homelands, chained, tightly packed in the most horrendous quarters, and shipped off to a lifetime of misery, if they survived the journey.[67] Family units were torn apart, and this destruction was justified by doubting black emotional content and ability to suffer or because of in-

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63 *See* Francione, *supra* note 3, at 445–46.

64 *Id.* at 436. Activities such as carriage rides, rodeos, and zoos fall in this category. *Id. See also* Julie Chao, *Animal Parks Use Gory Spectacle to Draw Crowds*, THE MIAMI HERALD, Feb. 25, 2005, at 22A (noting the huge demand in China for animal parks where visitors pay to watch tigers chase down and tear apart chickens and other animals).

65 For example, one such argument was that Blacks were intellectually inferior and better off subjugated. *See* SPIEGEL, *supra* note 3, at 24–25, 67–71.

66 *See* SPIEGEL, *supra* note 3, at 45–50.

67 *See* DANIEL P. MANNIX & MALCOLM COWLEY, BLACK CARGOES: A HISTORY OF THE ATLANTIC SLAVE TRADE 1518–1865 105–06. Although the mortality rate was higher when slave ships were overloaded, "tight packing" was the preferred method for slave traders. *See id.* The typical space allowed per slave was "every man . . . six feet long by sixteen inches wide (and usually about two feet, seven inches high); every woman, a space five feet, ten inches long by sixteen inches wide . . . ; every boy, five feet by fourteen inches; every girl, four feet, six inches by twelve inches." *Id.* at 107. Notwithstanding such limited space allocation, captains routinely added more slaves to already cramped quarters. For example, one captain squeezed 609 blacks into quarters allocated for 454. *Id.* The mortality rate for slaves was therefore inevitably high. One estimate places the loss during transport at 12.5% with a total loss of 50% from the time of capture to settlement in North America or the West Indies. *Id.* at 123. The longer the voyage, the greater the number of deaths. *Id.* at 112. Death was not only the product of cramped filthy environments but also the result of murder. In "emergency situations" such as illnesses or supply shortages, blacks were poisoned or jettisoned *en masse*. *Id.* 125–26. Blacks who were traumatized and had gone mad were "simply clubbed on the head and thrown overboard." *Id.* at 117. And in one litigated case, the jury determined that jettisoning blacks was proper and no different from tossing horses overboard. *Id.* at 126.

Descriptions of the manner in which cattle were and continue to be transported reminds us of the horrendous conditions under which black slaves were packed like books and transported from their homelands. One writer notes "Between Indianola, Texas, and New Orleans, Louisiana, cattle were carried on steamers, under deck in a crowded condition, with poor ventilation — four and five days sometimes longer — without food or water. In one instance reported, of 150 cattle shipped, 40 died on the short voyage." *See* LEAVITT, *supra* note 26, at 29.

difference to obvious emotional bonds.[68] During and after slavery, brutal punishment was arbitrarily inflicted on blacks with little regard for their ability to suffer or feel pain.[69] This abuse was facilitated and protected by state laws that denied blacks legal persona and responded to assaults by strangers only as threats to private property.[70]

Many of the justifications offered for black slavery also continue to promote animal abuse. For example, cruelty against blacks was also reconciled on religious grounds[71] as is animal exploitation.[72] However, biblical teaching

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[68] The indifference to the emotional bonds of black families or the attitude that blacks could not bond emotionally was routinely demonstrated in the buying and selling practices of early American society. Advertisements routinely reflected this insensitivity. For example, one advertisement in a New Orleans newspaper provided: "Negroes for sale — a Negro woman, 24 years of age, and her two children, one eight and the other three years old. Said Negroes will be sold separately or together, as desired. The woman is a good seamstress. She will be sold low for cash, or exchange for groceries. For terms apply to Matthew Bliss and Company, 1 Front Levee." A. LEON HIGGINBOTHAM, JR., IN THE MATTER OF COLOR: RACE AND THE LEGAL PROCESS — THE COLONIAL PERIOD 12 (1978) (footnote omitted). Reservations about the emotional capacity of blacks plagued even the most sophisticated citizens of the slavery era. Thomas Jefferson, commenting on this subject, wrote that "love seems with them to be more an eager desire than a tender delicate mixture of sentiment and sensation. Their griefs are transient." A. LEON HIGGINBOTHAM, JR., SHADES OF FREEDOM 33 (1996) [hereinafter SHADES OF FREEDOM].

[69] *See* Judith K. Schafer, *"Details are of a Most Revolting Character" Cruelty to Slaves as Seen in Appeals to the Supreme Court of Louisiana*, 68 CHI.-KENT L. REV. 1283 (1993) (slaves faced unprovoked senseless violence from all sectors of society and state codes exempted many abusive acts from the definition of cruelty). *Id.* at 1284–87.

[70] *See* Omar Swartz, *Codifying the Law of Slavery in North Carolina: Positive Law and the Slave Persona*, 29 THURGOOD MARSHALL L. REV. 285 (2004) (noting that laws criminalizing assaults and killings of blacks were not enforced by courts except to the extent of protecting the owner's property interest).

[71] *See* STEPHEN R. HAYNES, NOAH'S CURSE: THE BIBLICAL JUSTIFICATION OF AMERICAN SLAVERY (2002). *See also* William M. Wiecek, *The Origins of the Law of Slavery in British North America*, 17 CARDOZO L. REV. 1711, 1726–27 (1996) (the bible provided mixed messages about race but its weight of authority rested with the proposition that there is no basis for racial enslavement).

[72] *See Genesis* 1:26–28.

> And God said, Let us make man in our image, after our likeness; and let them have dominion over the fish of the sea, and over the fowl of air, and over the cattle, and over all the earth, and over every creeping thing that creepeth upon the earth . . . . So God created man in his own image . . . .
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> And God blessed them, and God said unto them, be fruitful, and multiply, and replenish the earth, and subdue it; and have dominion over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth.

See also St. Augustine, *Summa Theologica*, Question 64 (God created animals for man's use). *But see* MATTHEW SCULLY, DOMINION 11–17 (noting that religious doctrine and religious-minded people have also advocated against cruelty to animals); Statement Of The Right Reverend Monsignor LeRoy E. McWilliams, President of The National Catholic Society For Animal Welfare, 87th Cong. 2d Sess. at 63–65 (Sept. 28 & 29, 1962) (reporting to Congress that many "Popes,

and support for man's dominion over animals has been harshly criticized. One animal rights theorist noted:

> Here is the myth to make human beings feel their supremacy and their power. Man alone is made in the image of God. Man alone is given dominion over all the animals and told to subdue the earth. . . . The influence of Judeo-Christian insistence on the God-like nature of human beings is nowhere more apparent than in the standard Western doctrine of the sanctity of human life: a doctrine that puts the life of the most hopelessly and irreparably brain damaged human being — of the kind whose level of awareness is not underestimated by the term "human vegetable" — above the life of a chimpanzee.[73]

Additionally, the benefits derived from subjugation helped to perpetuate slavery[74] and helps to justify some forms of animal exploitation.[75] Humans rely heavily on animals as a source of food and for scientific experiments, and this is not likely to change in the foreseeable future. The formal ideology and institutional practice of slavery continued for hundreds of years even though opponents to the institution offered compelling reasons for its abolition.[76] Similarly,

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cardinals and princes of the church [ ] continually point out that we must care for animals and spare them unnecessary suffering." *Id.* at 63).

[73] *See* SINGER, *supra* note 3, at 2–8.

[74] In commenting on how individual states facilitated economic development through legalizing the institution of slavery, one writer notes:

> Profitability was the sole determinant in the decision whether or not to enslave black Africans.
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> . . . .
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> [I]t is indisputable that blacks were not imported in large numbers until the development of the rice economy. Whether mistaken or not, the colonists believed that slaves were a better investment than other forms of unwaged labor. Purportedly, blacks survived better than whites or Indians in the torrid, mosquito-infested swamps where South Carolina's basic crop, rice was cultivated.

See HIGGINBOTHAM, JR., *supra* note 68, at 164. By contrast, "[d]omestic slavery never assumed the economic importance in Massachusetts that it had in the more southern colonies." *Id.* at 98. Nonetheless, "[m]erchants from Massachusetts, the most vigorous slave traders in the New World, made enormous profit from the slave trade." *Id. See also* James Lindgren, *Measuring the Value of Slaves and Free Persons in Ancient Law*, 71 CHI.- KENT L. REV. 149, 214 (1995) (noting that slavery is usually grounded in economics).

[75] See Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N. Y. U. ENVTL. L. J. 531, 532 (1998) ("The law of property acts as a justification for practices that are, insofar as the law is concerned, just economically efficient uses of resources.").

[76] SHADES OF FREEDOM, *supra* note 68, at 53–54. German Mennonites and Quakers were the first to renounce slavery as immoral. Others opposed it on the grounds that it violated natural, human, and civil rights. *See id.* Still others opposed slavery out of self-interest. *Id.* at 55. And many treated the black subjects of their advocacy with contempt. *See id.* at 58–59.

animal exploitation continues despite persuasive arguments that they deserve better treatment. And like abolitionists of slavery times, some animal supporters are willing to violate property laws to liberate exploited animals.

Viewing blacks as different and inferior rationalized subordination.[77] Like black slavery, the assignment of property status to animals serves human interests that are furthered by exploitation, and this makes it difficult to get a legislative or judicial response that categorically rejects the property classification.[78] Gaining consensus that many animals have the core attributes of personhood has proved evasive.[79] And even if it could be proved that some animals have essentially the same capacities as humans, it does not mean that humans will not subordinate their interests. Animal rights advocates must contend with the reality that humans cling to hierarchical structures that benefit them even if this means being cruel to animals,[80] or to other humans.[81]

But even on the property classification issue some progress has been made. There have been gradual shifts in the way the law classifies some animals. City ordinances have been passed to remove the designation of humans as owners of pets.[82] By designating owners as guardians, the status of animals is

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[77] Even at the turn of the twentieth century, basic reference materials such as the Encyclopedia Britannica taught that blacks were not fully human. *See* Roy L. Brooks, *Race as an Underinclusive and Overinclusive Concept*, 1 AFR.-AM. L. & POL'Y REP. 9, 18 (1994).

[78] *See, e.g.*, Michael P. Mills, *Slave Law in Mississippi*: *From 1817–1881: Constitutions, Codes and Cases,* 71 MISS. L.J. 153, 167 (2001) (noting that Mississippi law prohibited cruel treatment of slaves yet permitted owners wide discretion to be cruel to perfect their authority and domination in order to perpetuate slavery).

[79] The "perfectionist theory of justice" advocated by philosophers such as Aristotle and Nietzsche, which may serve as a foundation for slavery by assigning status based on the extent an individual possessed certain virtues, has little if any currency today. *See* REGAN, *supra* note 1, at 234–35 ("Though consensus is a rare thing in the cloakrooms of philosophy, few, if any, philosophers today would defend a perfectionist theory of justice . . . .").

[80] *See* Rebecca Dresser, *Research on Animals: Values, Politics, and Regulatory Reform*, 58 S. CAL. L. REV. 1147, 1177 (1985) (noting that adoption of restrictions on animal research proposed by theorists is improbable given the high value society places on the benefits of animal experimentation).

[81] *See* Derrick Bell, *Racism is Here to Stay: Now What*?, 35 HOW. L.J. 79, 89 (1991) (Bell states that:

> Civil rights advocates and organizations must face the unavoidable truth that this nation's social stability is built on a belief in and a determination to maintain white dominance, that racism is the manifestation of this deeply entrenched determination, and that even a total reform of our economy would not erase and might intensify the need of whites to measure their self worth by maintaining blacks in a subordinate status.

Id.); *see also* Trina Grillo & Stephanie M. Wildman, *Obscuring the Importance of Race: The Implication of Making Comparisons Between Racism and Sexism (or Other-Isms)*, 1991 DUKE L. J. 397, 399 (1991) (white supremacy is "American social reality").

[82] *See* Joseph Giordano, *West Hollywood's 'Owners' Now Pets' Legal 'Guardians,'* L.A. DAILY NEWS, Feb. 23, 2001, at E2; *Dog Days in Berkeley*, THE SAN FRANCISCO CHRONICLE,

improved because it changes the responsibility of humans toward them.[83] Some courts have also rejected the notion that animals are solely property.[84] And in Switzerland, for example, the law has for some time recognized animals as beings, not merely chattel.[85]

Removal of the property label can be a tremendous accomplishment because it changes human perception and responsibility. But the importance of the property label may be overstated. The reality is that there are many legal accomplishments despite the designation of animals as property. Further, greater rights for animals can be gained without the elimination of their property status because human personhood is not a prerequisite for the grant of legal rights.[86] But even more importantly, a change in label will not automatically change human interests that require subordination.

The black post-emancipation experience demonstrates the many obstacles to equal treatment that can persist despite a recognition of legal personhood. Constitutionalizing black personhood and equality in the Thirteenth[87] and Fourteenth Amendments[88] paved the way for a formal recognition of black interests. These laws helped to confirm that blacks possess all of the attributes associated with personhood.[89] But acknowledgement of equal personhood did not produce consensus on how blacks should be treated. Those with power determined whose interests were superior and whose interests could be sacrificed as part of this "equal" coexistence.[90]

Personhood status, with its promise of full and equal participation and full consideration of one's interests, proved to be an illusion. Private individuals, government agencies and the courts accepted, promoted, and protected vari-

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March 2, 2001, at A26; Charlie Brennan, *You Don't Own Me,* THE DALLAS MORNING NEWS, July 13, 2000, at 2A.

83 *See* Giordano, *supra* note 82 (guardian denotes more of a caretaker rather than exploiter status).

84 *See* Corso v. Crawford Dog & Cat Hospital, 415 N.Y.S.2d 182 (N.Y. 1979) (a pet's status is somewhere between property and person); Blaha v. Stuard, 640 N.W.2d 85 (S.D. 2002) (living creatures cannot be products).

85 *See Germany Adds Animal Rights to Constitution*, THE MIAMI HERALD, May 18, 2002, at 16A.

86 *See* Tribe, *supra* note 11, at 2 (our laws recognize rights in inanimate objects such as churches, unions and corporations).

87 U.S. CONST. amend. XIII.

88 U.S. CONST. amend. XIV.

89 *See id.* The Fourteenth Amendment made blacks citizens and granted them equal protection of the laws. *Id.*

90 Southern legislators, for example, enacted laws that subordinated the interests of blacks to those of whites with the express approval of the Supreme Court. *See* Plessy v. Ferguson, 163 U.S. 537 (1896). The Court's restrictive interpretation of the constitutional promise of equality paved the way for very racially oppressive practices that lasted almost a century after emancipation. *See* Hodges v. United States, 203 U.S. 1 (1906) (holding that violence and intimidation of black workers by private individuals are not constitutionally prohibited).

ous degrees of exploitation in a variety of contexts.[91] And many forms of exploitation continue today, despite laws prohibiting them.[92] In reality, therefore, our society permits and sometimes condones exploitation of one group by another.

Our labor and employment laws provide a good example of the limits of legal personhood. Emancipation and constitutionalized equality did not produce equal treatment in the workplace. For many blacks in the South, working conditions remained oppressive and akin to slavery.[93] Personhood status did not guarantee jobs for blacks, or ensure decent working conditions, or even subsistence pay.[94] Instead, cruel practices were developed to secure black labor on terms that approximated slavery.[95] In addition, legal devices were constructed to ensure that this oppressive labor system continue for the benefit of planters and other employers.[96]

Constitutionalized personhood did not eliminate employment discrimination, which plagued blacks nationwide. For a race of people who generally depended on employment for subsistence, this was a cruel reality. And for a long time, patently discriminatory practices were tolerated by all branches of government as an acceptable response to personhood.[97] Employers were there-

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91 *See generally* GUNNAR MYRDAL, AN AMERICAN DILEMMA (1944) (discussing the black experience of discrimination in every aspect of life and noting that the exploitative practices were cultural and institutional both in the South and the North).

92 *See* Ronald Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375 (1995) (noting that Title VII has not been effective at deterring employment discrimination).

93 *See* REPORT OF THE COMM'RS OF THE BUREAU OF REFUGEES, FREEDMEN, & ABANDONED LANDS, H.R. Exec. Doc. 27, 39th Cong. 1st Sess., at 84–85 (1865) (noting that black workers were treated no better than when they were slaves).

94 The Thirteenth and Fourteenth Amendments indirectly conferred personhood status on blacks by abolishing slavery, conferring citizenship, and granting equal protection of the laws. *See* U.S. CONST. amends. XIII–XIV. The implication of human equality was left to state legislators and judges, who were free to say whose interests must be sacrificed in workplace ordering.

95 *See* DOUGLAS A. BLACKMON, SLAVERY BY ANOTHER NAME 27 (2008).

96 For example, vagrancy laws provided a cheap source of black labor and emigrant-agent laws helped to prevent the migration of blacks from the South where labor conditions were oppressive. *See* Davison M. Douglas, *Contract Rights and Civil Rights*, 100 MICH. L. REV. 1541, 1544 (2002).

97 *See* Risa Lauren Goluboff, "*Let Economic Equality Take Care of Itself:" The NAACP, Labor Litigation, and the Making of Civil Rights in the 1940s*, 52 UCLA L. REV. 1393, 1443 (2005) (The Supreme Court had ruled in the Civil Rights cases that the grant of equality provided by the Fourteenth Amendment did not require private employers to give equal consideration to the interests of blacks in the workplace.). In Congress, Democratic and Republican legislators sat on the fence for almost a century and watched as workplace exploitation drove blacks into deep poverty, forcing a civil rights revolution and a statute prohibiting employment discrimination. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701–716, 78 Stat. 241, 253–66 (1964). And from emancipation to the 1960s, most presidents did not make black civil rights an executive priority. *See* GEORGE SINKLER, THE RACIAL ATTITUDES OF AMERICAN PRESIDENTS: FROM ABRAHAM LINCOLN TO THEODORE ROOSEVELT 12–13 (1971).

fore free to refuse to employ blacks for any cruel reason or to employ them in the worst jobs and give them the least pay — and this they did.[98]

Seventy years after emancipation, when it was decided that American workers needed more legal protection from oppressive employment practices, blacks were not included as a protected group. In 1935, Congress passed the National Labor Relations Act,[99] empowering labor unions to protect workers but at the same time permitting unions and employers to subordinate the interests of black workers.[100] A century of constitutionalized personhood had elapsed before it was determined that the cruelty of employment discrimination on the basis of race should be expressly prohibited.[101]

Despite the enactment of legal prescriptions for equal workplace treatment, legal rules and practical considerations still permit some cruel acts of discrimination in the employment context. In the first place, the law excludes some employers from its coverage.[102] Second, not all cruel workplace conduct is prohibited.[103] And third, some prohibited behavior, even if engaged in, may not result in any punishment.[104] In effect, equal consideration of one's interests does not guarantee freedom from exploitation or cruel treatment. As a result, cruelty against blacks and others in the form of employment discrimination persists, sometimes practiced with nooses reminiscent of slavery and the Jim Crow era.[105]

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98 One of the seminal cases discussing cruel employment practices is *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), where blacks were only hired for the least desirable jobs and at the lowest pay. The company also designed a seniority system and transfer structure to lock blacks into those positions.

99 *See* An Act of July 5, 1935, Ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151–169 (1994)).

100 *See generally id.* (While the National Labor Relations Act legitimized the existence and objects of unions, it did not prohibit racial discrimination by employers and unions even though such conduct had driven blacks to the margins of American society.).

101 It was not until 1964 that unions and employers were expressly prohibited from arbitrarily discriminating against blacks. *See* Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. §§ 2000e to 2000h-6 (1988)).

102 For example, employers with fewer than fifteen employees are not covered by Title VII. *See id.* at § 701(b).

103 The hanging of a noose in the workplace was deemed outside the law's prohibitions even though it represents one of the cruelest symbols of black oppression. *See* EEOC v. Foster Wheeler Constructors, Inc., 2002 WL 976618, at *7 (N.D. Ill. March 28, 2002). This case involved two nooses: one hung by a white supervisor outside a work area and the other hung over the doorframe of a construction trailer. *Id.* at *4. The court found that plaintiffs did not prove a racial intent in hanging the nooses. *Id.* at *7.

104 An employer can consider and rely on a person's race in making an adverse employment decision provided that race is not the motivating factor for that decision. *See* Rebecca Hanner White & Linda Hamilton Krieger, *Whose Motive Matters?: Discrimination in Multi-Actor Employment Decision Making*, 61 LA. L. REV. 495, 527–28 (2001).

105 *See* Williams v. New York City Hous. Auth., 154 F. Supp. 2d 820 (S.D.N.Y. 2001). In response to a black employee's claim that his supervisor created a racially hostile workplace by hanging a noose on the supervisor's office wall, the judge noted that "the noose is among the most

IV. LINKING ANIMAL CRUELTY TO INTERPERSONAL VIOLENCE

A. *The Indeterminacy of Studies Showing a Link*

Those arguing for more animal rights have adopted the conclusion reached by some social and behavioral scientists that there is a link between cruelty to animals and interpersonal violence.[106] Social and behavioral scientists looking at this issue have done a number of studies to determine whether such a link exists.[107] By collecting data about violent incarcerated men, individuals prosecuted for intentional cruelty to animals, serial killers, and violent juvenile offenders, among others, it was determined that these individuals abused animals at a much higher rate than their non-violent counterparts.[108] Based on such studies, it is then suggested that animal abuse is part of the developmental history of violent adults, and so, in some sense, animal abuse is a dress rehearsal or training ground for later violence against other humans.[109]

Although advocating a link promotes public awareness and legal intervention, it is not without controversy or limitations.[110] Some studies have

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repugnant of all racist symbols, because it is itself an instrument of violence." *Id.* at 824; *see also* Paul Vitello, *Few Answers About Nooses, but Much Talk of Jim Crow,* N.Y. TIMES, Oct. 21, 2007, at A 31 (discussing a spate of workplace noose incidents in the New York area and the terrorizing effect they have on blacks).

[106] *See* Livingston, *supra* note 35, at 5–6. Journalists have joined in to oversimplify this multifaceted and perplexing problem and to promote public perception of a link. *See* Kathleen Kernicky, *Silent Victims: Animals Can't Tell Us What Hurt Them or How*, SO. FLA. SUN SENTINEL, March 15, 1995, at 1E; *see also* Shirley Ratner, Editorial, *Animal Cruelty Constitutes Criminal Felon Behavior*, SO. FLA. SUN SENTINEL, Aug. 16, 1994, at 10A ("Studies have shown that young people who are cruel and aggressive towards animals are likely to engage in violent behavior against humans.").

[107] *See* Arnold Arluke, Jack Levin, Carter Luke & Frank Ascione, *The Relationship of Animal Abuse to Violence and Other Forms of Antisocial Behavior*, J. OF INTERPERSONAL VIOLENCE, VOL. 14, NO. 9, 963, 963–65 (1999) (describing and commenting on a variety of studies undertaken).

[108] *See id.; see also* Mary Muscari, *Juvenile Animal Abuse: Practice and Policy Implications for PNPs*, J. OF PEDIATRIC HEALTH CARE, Vol. 18, No.1, 15 (2004).

[109] *See* Arluke, et. al., *supra* note 107, at 970 ("There are many thought-provoking and heartfelt newspaper and magazine articles, editorials, essays, speeches, discussions, summit reports and commentaries on the abuse-violence link that emphasize the generality of the graduation hypothesis. . . . [S]ome animal advocates advance the graduation hypothesis as a way to further public concern for animal mistreatment." (citation omitted)); Muscari, *supra* note 108, at 18.

[110] See Alex Duncan & Catherine Miller, *The Impact of an Abusive Family Context on Childhood Animal Cruelty and Adult Violence*, 7 AGGRESSION & VIOLENT BEHAV. 365, 366 (2002).

> The research that suggests a link between childhood animal cruelty and adult violence is limited and inconsistent. There is also much disagreement over the degree of association between cruelty to animals in childhood and violence towards people in adulthood. The use of a single symptom as a predictor for adult behavior, research that is 'soft' and contradictory, and samples of limited generalizability have been arguments made by many in the field discounting the association between childhood animal cruelty and adult violence.

shown no direct link or association,[111] other reasons for adult interpersonal violence have been identified,[112] and social and behavioral scientists also recognize many other contexts in which animal abuse takes place.[113] For example, studies show that childhood animal cruelty is much more prevalent when children live in dysfunctional or abusive homes,[114] have mental health problems, were sexually abused, or were subjected to corporal punishment.[115] Therefore, the fact that some of the children who abuse animals later go on to abuse humans does not establish that one causes the other.

In fact, even studies suggesting a link come with many caveats and limitations. First, studies often rely on data gathered from very discrete individuals who may not be entirely reliable sources. For example, parents are usually the providers of data about their children's animal cruelty practices.[116] Studies rely on the memories and credibility of murderers and other violent offenders who may be incarcerated.[117] As such, little if any of the data provided can be verified. Further, what constitutes cruelty may not be defined in the study, so it

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Id.; *see also* Arluke et. al., *supra* note 107, at 970 ("At least in the general population, the deviance generalization hypothesis seems to be a more accurate characterization of animal abuse than the violence graduation hypothesis.").

111 *See* Catherine Miller, *Childhood Animal Cruelty and Interpersonal Violence*, Vol. 21, No. 5, CLINICAL PSYCHOL. REV., 735, 741 (2001).

112 For example, one study showed that childhood fighting, temper tantrums, school problems, and interpersonal problems were more predictive of adult violence than bedwetting, firesetting, and animal cruelty. *See* Miller, *supra* note 111, at 739–40. Studies have also shown a link between physical abuse of children and adult violence. Duncan & Miller, *supra* note 110, at 376. *See also* Arluke et.al., *supra* note 107, at 964.

> The adult personality disorder most closely related to violent behavior is antisocial personality disorder (APD) and its diagnosis has, as a prerequisite, the presence of conduct disorder (CD) prior to age 15. . . . Although aggressiveness is also listed as a symptom of APD, there is no specific mention of animal abuse. This contrasts with the diagnostic symptoms for CD, which includes cases where a child or adolescent 'has been physically cruel to animals'.[sic] Physical cruelty to animals is one of 15 separate symptoms listed under the CD classification.

Id. (citation omitted). For a variety of perspectives on the cause of interpersonal human violence, *see* IMPULSIVITY: THEORY, ASSESSMENT, & TREATMENT (Christopher D. Webster & Margaret A. Jackson, eds., 1997) (collecting articles explaining violent aggression from the perspectives of biological, chemical, and neurological defects).

113 *See* Duncan & Miller, *supra* note 110, at 368 (an abusive home environment is a contributor to animal abuse).

114 *See id.*

115 *See* FRANK ASCIONE, U.S. DEP'T. OF JUST., JUVENILE JUSTICE BULLETIN, ANIMAL ABUSE AND YOUTH VIOLENCE 7–9 (2001), http://www.ncjrs.gov/pdffiles1/ojjdp/188677.pdf.

116 *See* Miller, *supra* note 111, at 741–42.

117 *Id.* at 742.

cannot be ascertained whether the act involved is generally regarded as cruel.[118] In addition, studies often do not account for the frequency of abuse so an isolated act may not be differentiated from repetitive acts of cruelty.[119] In effect, studies use and rely on limited information from select groups to make generalized conclusions about all people. This use of a single behavior or trait to predict adult behavior can be regarded as both premature and speculative.[120]

At best, what can be said is that many studies have speculated about the nexus between childhood animal cruelty and adult violence. The cause or origin of animal cruelty has not been established in order for one to conclude that it is the precursor to adult violence. What the studies do show is the coexistence of more animal cruelty with certain conditions. For example, in abusive homes, children tend to abuse the family pet more than in family environments free of abuse. This does not explain or prove whether the child is imitating the dysfunction of the home or was already predisposed to abuse. In the end, studies making the link are limited, inconsistent, speculative and contradictory.

B. The Problem of Animal Rights Advocates Who Are Cruel to Humans

The link is further challenged by cases of individuals who are notorious for their interpersonal violence yet seemingly incapable of being cruel to animals. One such standout is Adolf Hitler, who reportedly proclaimed: "I love animals, and especially dogs."[121] Hitler spoke openly about his affection and attachment to his dog, Fox, noting that: "[i]t was crazy how fond I was of the beast."[122] He also regarded his dog and other animals as possessing human qualities or capacities. He spoke of his dog's ability to reflect on the past,[123] and surmised that

> [a]nimals cry aloud when they're hungry, when they're in pain, when they're in love. The language of the birds is certainly more developed than we think. We say that cats are playful creatures. Perhaps they think the same of us. They endure us

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118 *See id.* (noting that a lack of consensus as to what constitutes cruelty has hindered research efforts and cruelty is not defined in most studies).

119 *See* ASCIONE, *supra* note 115, at 5 ("Animal abuse may vary in frequency, severity, and chronicity and range from the developmentally immature teasing of animals (e.g., a toddler pulling a kitten along by the tail) to serious animal torture (e.g., stealing neighborhood pets and setting them on fire). Unfortunately, most assessments of cruelty to animals lack a scaling of these important differences.").

120 *See* Duncan & Miller, *supra* note 110, at 366, 372, 375.

121 ADOLF HITLER, HITLER'S TABLE TALK 1941–1944: HIS PRIVATE CONVERSATIONS 247 (Norman Cameron & R.H. Stevens trans., Enigma Books 2000) (1953).

122 *Id.* at 232.

123 *Id.* at 233.

> as long as they can, and when they've had enough of our childishness, they give us a scratch with their claws![124]

The Nazis also regarded Kosher or fully conscious slaughter as cruel and made it illegal in their animal protection laws.[125] It is believed that the detailed animal protection law promulgated by the Nazis was drafted under Hitler's direct supervision.[126] While they were cruel to Jews and insensitive to Jewish suffering, the Nazis gave great consideration to the interests of animals. The goal of their law was to protect animals from pain and suffering, and it was drafted broadly to include fish and cold-blooded animals.[127] The law protected animals during transport, experiments, and slaughter, with a requirement for anesthesia or stunning before the kill.[128] This preoccupation with helping animals avoid pain did not extend to Jews.

Another homicidal maniac who was devoted to animals is Alexander Pichushkin, who was convicted of forty eight murders but claims to have committed sixty-one.[129] A neighbor recalled finding him speechless with grief because his cat had died.[130] He was also devastated by the death of his dog and this led to depression.[131] Other serial killers were similarly devoted or sensitive to animals.[132]

Other examples of insensitivity to the suffering of humans by individuals who champion protection for animals abound. For many people, the interests of animals take priority over any human concern. Some animal rights activists are regarded as being part of this group and have been labeled as fanatics, criminals, and misanthropes who would casually harm the interests of humans to further the interests of animals.[133] Critics charge that animal rights advocates are misanthropic, as evidenced for example, by their acceptance of abortion.

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124 *Id.* at 165–66.

125 *See* BORIA SAX, ANIMALS IN THE THIRD REICH 69, 147 (2000).

126 *See id.* at 113.

127 *See id.* at 111–12.

128 *Id.* at 110–15.

129 *See Russia 'Chessboard Killer' Guilty,* BBC NEWS, http://news.bbc.co.uk/2/hi/europe/7059939.stmk , Oct. 24, 2007. *See also* Fred Attewill, *The Animal Lover Who Killed Humans to Let Them Into Another World*, GUARDIAN, Oct. 24, 2007, http://www.guardian.co.uk/world/2007/oct/24/russia.

130 *Id.*

131 *Id.*

132 *See* Arluke et. al., *supra* note 107, at 972.

133 *See* Mensch & Freeman, *supra* note 14, at 940–41 (commenting that one of the negative attributes some animal rights activists share with pro-life advocates is "a singular and selective fanaticism" and that "[t]he combination of fervent concern for the suffering of helpless animals with an apparent indifference to the suffering of, for example, people with serious illnesses who might be helped by animal experimentation, undercuts the moral persuasiveness of their position"); *see also* Schmahmann & Polacheck, *supra* note 10, at 754 (noting that animal rights advo-

Many leading animal rights advocates take a very liberal position on the abortion issue.[134] Their pro-choice sentiments are grounded in reservations about the fetus's status as a person, its ability to suffer or feel pain, and its potential to disempower the woman. For example, a spokesperson for a leading animal rights advocacy group stated that: "a human being has no special rights. A rat is a dog is a boy."[135] This spokesperson noted that: "More animals suffer and die at the hands of humans than do human fetuses (assuming they *can* suffer) and it is, at the very least, open to debate that a healthy adult animal is a more worthy candidate for moral concern."[136] Peter Singer, a leading animal rights advocate wrote: "even an abortion late in pregnancy for the most trivial reasons is hard to condemn unless we also condemn the slaughter of far more developed forms of life for the taste of their flesh."[137]

Further evidence that many who are sensitive to the interests of animals are insensitive to human interests can be found in the public reaction to acts of interpersonal violence versus responses to acts of animal cruelty. In one South Florida case a man was shot and killed for no apparent reason.[138] The case got scant mention in the local papers and no one called or provided any information.[139] Around the same time, a dog was killed and the story was repeatedly carried by all media outlets.[140] There was a similar response when a stray dog was hit by a car and people called to offer support, money, and adoption.[141] One woman at the scene told a reporter she would not have been bothered if the victim were a person.[142] Many other homicide cases fail to trigger public outrage and support similar to that exhibited for animal cruelty. A serial murderer had burned and killed three homeless women in Miami before the public demonstrated any interest in the victims.[143] And while reward funds in animal cruelty cases have been capped because of human generosity, people give very little to such funds in homicide cases.[144]

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cates oppose scientific research using animals even if it holds the cure to AIDS, and one advocate even sees AIDS as good for the decline of human population).

134 *See* Tom Stacy, *Reconciling Reason and Religion: On Dworkin and Religious Freedom*, 63 GEO. WASH. L. REV. 1, 16 n.99 (1994).

135 *See* Muggeridge, *supra* note 51, at 66.

136 *Id.*

137 *See* PRACTICAL ETHICS, *supra* note 3, at 151.

138 *See* STEIN, *supra* note 41, at 1B.

139 *See id.*

140 *Id.*

141 *Id.*

142 *Id.*

143 *See* Frances Robles, *Dog Burning Stirs Anger, Big Reward*, THE MIAMI HERALD, Apr. 24, 1996, at 1B.

144 *See id.*

The unreliability of studies showing a link between animal cruelty and interpersonal violence, coupled with evidence that sensitivity to animal and human interests are not linked, undermine the effectiveness of this argument. Like the attempt to prove animals have human capacities and therefore should not be regarded as property, the link to interpersonal violence comes with many caveats. Defects in these claims promote debate but bring little consensus and few converts. And the animal rights movement needs consensus to effect change in the laws. Instead animal rights activists must spend time refuting allegations that they do not care about people or that they cling to animals because they are unable to develop healthy relationships with people.

For example, in response to the charges on the abortion issue, animal advocates argue that pro-life advocates fetishize the fetus by discussing it independently from the "person" carrying it. The reality is that the mother may suffer if she is not given a right of self-determination and this is a major consideration that anti-abortionists evade.[145] Giving personhood status to fetuses, particularly in the first trimester, is inappropriate because the fetus would not constitute meaningful life given its undeveloped character.[146] Further, animal rights advocates note that, in any event, personhood is determined by culture and for centuries white males arbitrarily determined who or what was a person.[147]

To further respond to the pro-choice indictment, animal rights advocates contend that assigning personhood to a fetus only masks other concerns because of exceptions made for rape victims.[148] "If fetuses are indeed persons, they are hardly less persons if they are conceived as a result of rape. Yet most of the anti-abortion movement is willing to grant an exception in the case of pregnancy due to rape."[149] They also point to additional exceptions made for severely retarded fetuses or those with fatal physical defects.[150]

All of this creates great conflict. It does little to persuade that personhood is a panacea or that kindness to animals promotes kindness to humans. What remains clear, however, is that humans remain cruel to each other and to

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145 *See* CAROL ADAMS, ABORTION RIGHTS AND ANIMAL RIGHTS, BETWEEN THE SPECIES 182–83 (1991).

146 *See id.* at 182.

147 *See id.* at 184–85.

148 *See* WESTON, *supra* note 48, at 51.

149 *See id.*

150 *See id.* at 53.

> Of course, it might be argued that a severely retarded fetus is not in fact a person in a full enough sense to have the rights normally associated with persons. But this is perilous territory for a movement that wants to insist on the personhood even of the conceptus, a microscopic being that cannot hold a candle to any fetus, no matter how 'defective.'

Id. *But see* Tribe, *supra* note 11, at 7 (It is mistaken to tie rights to measurable traits such as self awareness or moral reasoning because one can then say that rights for infants or the retarded are optional.).

animals alike. And interpersonal cruelty persists in many forms, despite a plethora of laws ordaining equality and prescribing penalties for civil and criminal acts of cruelty. It is in this context that demands for increased protection for animals must be explored. After all, the human interest in being free from cruelty endures and must compete for attention with human advocacy for animal protection.

V. CONFRONTING THE CULTURE OF EXPLOITATION

The contention that animals are like people and should have similar protection against cruel treatment as people is part of a narrow academic debate. Most people in the United States and around the world view animal exploitation as necessary and in furtherance of human interests.[151] And for the millions of people who cannot afford to feed themselves, the idea of caring and supporting animals and their legal rights is off the table. To suggest to some people that they cannot hunt or trade in animals because it is cruel will not resonate without meaningful alternatives being offered. The killing of wild and domesticated animals for food is a universal cultural norm.[152] In some cases, animal exploi-

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[151] In addition to being a source of food, animals are also credited with facilitating scientific advances that have benefited mankind and animals alike. *See* 91 Cong. Rec. A813, A814 (1945) (statement of Rep. Woodruff).

> The number of animals used for the benefits of the human race in making possible the recent advances of surgery and medicine is insignificant, indeed infinitesimal compared with the number used for human food and human service; but the benefits to mankind which result from animal experimentation are immeasurable in quantity and very precious in quality. The benefits of the discoveries go on, generation after generation, multiplying as they go.

Id. Doctors also noted that, because animals are also affected by many diseases that plague humans, prevention and treatment methods discovered through animal experimentation are utilized to control diseases afflicting animals. *Id.* And in some cases in which animals were not suitable subjects, doctors have volunteered their bodies as the media for exploitation. *Id.*

[152] This norm is codified in religious texts and practices in the United States and around the world. Starting with broad biblical teaching in Genesis and elsewhere, humans subscribing to the Christian tradition have regarded all animals as theirs to exploit generally. *See* SCULLY, *supra* note 72, at 15–17 (religious doctrine makes humans both stewards and exploiters of animals without specific regulations about unnecessary cruelty to them). The uncertainty of religious texts has permitted various groups to carve out animals for food consumption practices that suit their needs. *See* Benjamin Pi-wei Liu, Comment, *A Prisoner's Right to Religious Diet Beyond the Free Exercise Clause*, 51 UCLA L. Rev. 1151, 1153 n.2 (2004) (observing that Jews and Muslims avoid pork, some Buddhists follow a vegetarian diet while others eat meat, devout Catholics avoid meat on Fridays, Hindus regard the cow as sacred and avoid beef, and Rastafarians follow a vegetarian regimen, all because of interpretative choices they made based on religious texts). *See also* Joel Richard Paul, Cultural Resistance to Global Governance 76, 85 (2000), http://ssrn.com/abstract=272637 or doi:10.2139/ssrn.272637 (Asian culture dating back more than 3000 years regards some animal products as having great medicinal value, while "Norway and Japan view whaling as an essential aspect of their national culture dating back centuries.").

ters may be choosing between hunger and animal suffering.[153] And intellectual arguments are not likely to be persuasive when most people are convinced there are tangible benefits from eating, researching on, and trading in animals.

Animal rights advocates must be sensitive to global human needs, whether real or perceived, in order to persuade others that practices of exploitation should change. The multiplicity of cultures in the United States provides a good example of the challenge ahead. The United States remains a melting pot of immigrants from around the world, evidenced by the approximately thirty-eight million immigrants residing in the country in 2007.[154] Most of these immigrants hail from cultures steeped in the belief that animals exist for man's use.[155] These immigrants, new and old, generally have a perspective that places animals at man's service. Whether because of Christian Doctrine, their socialization, or their need, animals are typically viewed as being of an inferior order and subject to human control. This is reflected in laws and practices which classify non-human animals as part of a lower species. As a result, many humans do not have a sense of revulsion at cruel practices that may even be unnecessary.

The case of a dog killer in an affluent Hong Kong neighborhood is illustrative.[156] Thirty-eight well-bred and groomed dogs belonging primarily to expatriate bankers and lawyers were killed by poisoning along a path historically used by locals for their morning walks.[157] The dog owners and other dog lovers reacted violently to the crimes,[158] while locals saw the poisonings as bringing welcome relief from dog feces which the domestics walking the dogs often did not clean up.[159] And the same cultural divide can be seen in the United States between what animal rights activists view as cruel and what immigrants and others view as culturally acceptable.[160]

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153 *See* S.L. Davis, *What Would the World Be Like Without Animals for Food, Fiber, and Labor? Are We Morally Obligated to do Without Them?*, 87 POULTRY SCIENCE 392, 393 (2008).

154 *See* STEVEN A. CAMAROTA, CENTER FOR IMMIGRATION STUDIES, IMMIGRANTS IN THE UNITED STATES, 2007: A PROFILE OF AMERICA'S FOREIGN-BORN POPULATION 1 (2007), http://www.cis.org/articles/2007/back1007.pdf ("The nation's immigrant population (legal and illegal) reached a record of 37.9 million in 2007.").

155 *See id.* at 12. Hispanics and Asian/Pacific Islanders represent more than three-quarters of the post-2000 immigrants. *Id.* Hispanics are generally affiliated with Christian tradition, which approves animal exploitation. Asian culture values animals not only for food but also for their perceived medicinal value. *See* Paul, *supra* note 152, at 76 (great healing powers are attributed to the body parts of the Asiatic tiger and rhinoceros.).

156 *See* Kate Linebaugh, *On a Hong Kong Trail, A Serial Dog Slayer Terrorizes Pet Owners; Canine Hater Uses Poison Bait, Manages to Dodge Law; Caspar's Last Moments*, THE WALL ST. J., Oct. 26, 2005, at A1.

157 *See id.* Another sixty dogs got very sick from the poisoning. *Id.*

158 *See id.* One dog owner said "there wouldn't be much left to punish," if she and other dog owners got their hands on the killer. *Id.*

159 *See id.* To locals, the dogs are just a dirty nuisance, and police believe that they endorse the killer. *Id.*

160 *See, e.g.*, Ming-Han Liu, Comment, *Reconsidering Animal Rights: Should Selling Live Animals for Food Consumption be Banned*, 6 DICK. J. ENVTL. L. & POL'Y 279, 281–82 (1997)

For most people, eating the meat of animals is a natural right. Saying that there are alternative sources of protein may only make animal advocates seem self-righteous.[161] And legislating morals is a hard-sell because it runs counter to cultural norms and American individualism. In China and other parts of Asia, it is culturally acceptable to eat cats, dogs, monkeys and other animals that some people regard as lovable and intelligent companions.[162] And in some cultures, animal consumption is not merely a dietary choice but is grounded in its perceived medicinal benefits.[163] This traditional way of thinking is difficult to overcome because people believe it benefits them.

Further, a great deal of animal destruction is grounded in the economics of trading in endangered species, deforestation, and other unnecessary acts from which humans benefit.[164] Even in this arena, the tradition of exploitation can overwhelm common sense. Rare and endangered species are continually being destroyed for their pelts, furs, horns, and any other body parts that produce income to the trader and personal gratification to human consumers.[165] These

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(discussing the Chinese tradition of selling and killing live animals for food being practiced in San Francisco, and animal activists' contention that these practices are inhumane).

161 *See* Davis, *supra* note 153, at 392 (arguing that this option is not available to hundreds of millions of poor people around the world).

162 *See A Woman's Fight to Keep Cats off Shenzhen's Plates*, SOUTH CHINA MORNING POST, Aug. 19, 2007, at 6 (news reports indicate thousands of cats are consumed each day in Guangdong province China); *Activists Hound Dog-Eaters*, THE NEW ZEALAND HERALD, Aug. 4, 2007 (Koreans eat about 100,000 tons of dog meat each year); Fuchsia Dunlop, Op-Ed, *It's Too Hot for Dog on the Menu*, THE N.Y. TIMES, Aug. 4, 2008, at A19 (dogs have been on the menu in China for thousands of years); Cho Ji-hyun, *Dog Meat Faces Hygiene Crackdown*, THE KOREA HERALD, Apr. 14, 2008 ("There are about 530 restaurants selling dog meat in Seoul."); Leu Siew Ying, *In Guangdong, You are Worth What You Eat*, SOUTH CHINA MORNING POST, Apr. 29, 2003, at 7 ("The origin of this penchant for devouring the animal kingdom is rooted in the Chinese belief in the curative value of some foods. . . . Monkey and pig brains are believed to nourish the brain and dog meat to keep one warm.").

163 *See* Paul, *supra* note 152, at 76 (some Asians believe that the body parts of tigers and rhinos can cure tuberculosis, rabies, asthma, fever, heart disease, impotence, paralysis and insomnia, among other things); *see also* Siew Ying, *supra* note 162, at 7 ("Chinese medicine practitioners use animals including dogs, monkeys, earthworms, centipedes, tortoises, poisonous snakes, and pangolins in their medications. Even China Wildlife Conservation Association secretary-general Chen Run-sheng will vouch for their curative value.").

164 *See* Duc Hung, *Cry From The Wild*, THE VIETNAM INVESTMENT REV. (April 8, 2002) (poaching has reduced Vietnan's population of wild rhinos to five or six because of high demand for their horns which people believe can treat most diseases, including cancer and AIDS); Chai Mei Ling, *Effect of the Bangkok Bust*, N. STRAITS TIMES (MALAYSIA), Apr. 6, 2008, at 36 (the demand for the fur of Tibetan antelopes, which is woven into shawls desired by Americans, Europeans, and the Japanese, has promoted poaching that reduced the antelope population from 1,000,000 to 50,000); *see* Siew Ying, *supra* note 162, at 7 ("[W]ildlife cuisine has become a trendy and luxurious delicacy.").

165 *See* Paul, *supra* note 152, at 75–76 (despite the fact that some animal species face extinction due to human exploitation, some countries may still regard their tradition of exploitation strong enough to trump international protective norms); *see also* Hung, *supra* note 164 (poachers target

practices are likely to continue as long as the belief systems that support them remain in place.

This world-wide belief that animals must be exploited to advance human health and welfare is embedded in American society. Dramatic changes in the legal system are not likely unless public conviction changes. Arguing that animals are akin to persons will not change public conviction that their exploitation is necessary. More compelling would be an argument that particular forms of cruelty or exploitation serve no human purpose.[166] This has worked in the past and is part of the difficult task ahead for animal rights advocates. As the black experience shows, it is virtually impossible to eliminate unnecessary acts of cruelty even with the passage of laws mandating fair treatment.

The reality is that an emancipation proclamation and constitutionalized equality did not insulate blacks from exploitation and cruel treatment, which in some instances served no acceptable human purpose.[167] And asserting one's legal right to be treated as a person could be sufficient justification for a lynching long after blacks had become persons under the law.[168] On southern farms and plantations, blacks evolved from chattel laborers to persons who were *de facto* slaves.[169] In many cases, these legally free and equal workers were treated as brutally as when the law regarded them as property.[170] For decades after personhood status was granted, the terror of lynching remained a constant threat to the legal grant of equality.[171]

The benefits of personhood were further nullified by acts of exploitation tolerated or sanctioned by the law. Legal personhood did not protect blacks from laws and conduct designed to keep the benefits of personhood and equality out of reach.[172] As a result, cruelty survived alongside legal declarations of personhood. This reality is particularly disenchanting because continuing acts of cruelty serve no legitimate human purpose and, therefore, are unnecessary. The survival of exploitative practices against humans puts the claims of animal rights advocates in perspective.

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endangered animals such as rhinos, tigers, panthers, elephants, monkeys, snakes, lizards, bears, and tortoises because of their medicinal and food value).

166 Legislators have thrown their support behind bills seeking to protect animals, in part because of public outcry that some acts are unnecessarily cruel and further no human purpose. *See* 111th Cong. Rec. 10574, 10574–76 (1965) (statement of Sen. Clark).

167 *See* Taunya Lovell Banks, *Exploring White Resistance to Racial Reconciliation in the United States*, 55 RUTGERS L. REV. 903, 926 (2003) (simply being black could be provocation for random acts of violence).

168 *See* Sherrilyn A. Ifill, *Creating a Truth and Reconciliation Commission for Lynching*, 21 LAW & INEQ. 263, 272–73 (2003).

169 *See id.* at 273.

170 *See* Douglas, *supra* note 96, at 1544.

171 *See* Margaret M. Russell, *Reopening the Emmett Till Case: Lessons and Challenges for Critical Race Practice*, 73 FORDHAM L. REV. 2101, 2110–11 (2005).

172 *See* Maya Grosz, Article, *To Have and to Hold: Property and State Regulation of Sexuality and Marriage*, 24 N.Y.U. REV. L. & SOC. CHANGE 235, 265 (1998).

Regardless of their legal status, animals will continue to depend on humans to protect their interests. Experience teaches that when humans deem it appropriate, they will exploit animals. As the black experience shows, legal personhood is not a panacea for cruel treatment. Linking animal cruelty to interpersonal violence is also not responsive to the conviction that exploitation is necessary. First, the soundness of this argument is in question, and, second, there is no evidence that it is widely accepted. Moreover, the reality is that neither argument is indispensable to the grant of further legal protection. Significant legal change depends on changed convictions. Further, as is the case for societal ordering of humans, no grant of protection will ever be absolute. Animal rights, like civil rights for humans, will be a relative concept that is adjusted to suit our real and perceived needs.

VI. CONCLUSION

In our cruel world, animals are increasingly occupying a preferential place in the sentiments and priorities of humans.[173] Publications of every stripe now routinely document the feelings and aspirations of humans who advocate change in the existing human/animal relationship. This growing attention to animals will likely continue irrespective of whether animals are property or animal abusers graduate to abuse humans.

The goal of eliminating cruelty, regardless of the legal status of the victim, is noble. Ideally, all groups pursuing this goal should work as partners.[174] But humans will not allow the broad interests of animals to be protected to the detriment of real and perceived human welfare. Honest educational programs that target misperceived human needs can help change human culture. Sensitizing humans to unnecessary cruelty will also improve public support for more protection. However, utopian or unreliable theories about the causes and cures for animal exploitation will more likely stir dissenters into action.

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[173] The financial and emotional commitment many individuals make to their animals is amazing. *See* Alfisi, *supra* note 56, at 23 (in her will, Leona Helmsley left twelve million dollars for her dog); Stephanie Garry, *Law Will Let You Take Fido to the Grave*, THE MIAMI HERALD, May 2, 2007, at 5B (Florida legislature passed a law permitting residents to be buried with the ashes of their pets). Besides the basic cost for food, a substantial amount of money is spent on medical care, including psychiatric assistance and plastic surgery. *See* Squires-Lee, *supra* note 3, at 1066–67. There is even politically correct speech when speaking about animals. For example, proper form would dictate that you say "companion" not "pet," "guardian" not "owner," "he" or "she," and not "it," when speaking about animals. *Id.* at 1059 n.2.

[174] *See* Mensch & Freeman, *supra* note 14, at 940. *See also* ADAMS, *supra* note 145, at 186.