

# A NEW AGE OF ANIMAL LAW

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*The field of “animal law”—legal advocacy to improve the world for animals—is growing in the United States. To those unfamiliar with animal law, this growth may appear to result from a unified movement and, more fundamentally, to reflect a unified mindset that all developments in the field amount to progress for animals. For lawyers in the field, however, there is a very real and surprisingly sharp divide between animal welfare proponents, on the one hand, and animal rights proponents, on the other—a divide that influences legal strategy. This Article proposes that, with the rise of plant- and cell-based alternatives for animal products, the rights-welfare divide in animal law will start to collapse, and lawyering will play an even more central role in protecting animals. We do not, like “New Welfarists,” accept that advancements in animal welfare inevitably advance rights for animals. Rather, we believe that lawyers can, based on recent developments in the marketplace, advance animal rights through a careful selection of both abolition- and welfare-focused legal advocacy. This Article explores a combination of legal theory, economic theory, and doctrinal analysis to propose how lawyers can make the biggest difference for animals during this new age of animal law.*

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## INTRODUCTION

Every year, billions of animals suffer and are killed because of deeply ingrained agricultural practices.<sup>1</sup> These same practices wreak havoc on the environment and human workers, and simultaneously prop up a food system that is detrimental to our health and well-being.<sup>2</sup> As lawyers become increasingly aware of this exploitation, the field of “animal law”—legal advocacy to improve the world for animals—is growing in the United States.<sup>3</sup> Top law schools are implementing comprehensive animal law programs and clinics.<sup>4</sup> Nonprofit organizations are expanding and litigating

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<sup>1</sup> Karol Orzechowski, *Global Animal Slaughter Statistics & Charts: 2022 Update*, FAUNALYTICS (July 13, 2022), <https://faunalytics.org/global-animal-slaughter-statistics-charts-2022-update> [https://perma.cc/LS4Z-6PKR] (finding that in 2020, the total number of cows, chicken, and sheep slaughtered was more than seventy-three billion).

<sup>2</sup> See James Cameron & Suzy Amis Cameron, *Animal Agriculture Is Choking the Earth and Making Us Sick. We Must Act Now*, THE GUARDIAN (Dec. 4, 2017), <https://www.theguardian.com/commentisfree/2017/dec/04/animal-agriculture-choking-earth-making-sick-climate-food-environmental-impact-james-cameron-suzy-amis-cameron> [https://perma.cc/ZM6H-5H8B] (highlighting the negative effects of eating meat and dairy on the environment and on human health); Vivian Sandler, *The Environmental Cost of Animal Agriculture*, IAPWA (Aug. 5, 2022), <https://iapwa.org/the-environmental-cost-of-animal-agriculture> [https://perma.cc/TX4C-JVBY] (discussing the secondary negative effects of animal agriculture on the environment including greenhouse gas emissions, deforestation, as well as straining and polluting global freshwater supply); Noa Dalzell, *Dangerous Working Conditions on Factory Farms*, FACTORY FARMING AWARENESS COAL. (Feb. 10, 2021), <https://ffacoalition.org/articles/dangerous-conditions-factory-farms> [https://perma.cc/SWD6-A9SX] (describing the high risk of injury and illness for workers on factory farms despite their low salaries); WORLD ANIMAL PROT., *GLOBAL PUBLIC HEALTH COST OF ANTIMICROBIAL RESISTANCE RELATED TO ANTIBIOTIC USE ON FACTORY FARMS 9* (2023), [https://www.worldanimalprotection.us/sites/default/files/media/global-public-health-technical-report\\_0.pdf](https://www.worldanimalprotection.us/sites/default/files/media/global-public-health-technical-report_0.pdf) [https://perma.cc/QQ4H-C5G8] (reporting on the overuse of antibiotics on factory farms, which contributes to the spread of antimicrobial resistance among animal and human populations); ANN LINDER, VALERIE WILSON MCCARTHY, CHRIS GREEN, BONNIE NADZAM, DALE JAMIESON & KRISTEN STILT, *ANIMAL MARKETS AND ZOO NOTIC DISEASE IN THE UNITED STATES 7* (2023), <https://animal.law.harvard.edu/wp-content/uploads/Animal-Markets-and-Zoonotic-Disease-in-the-United-States.pdf> [https://perma.cc/G5J5-5JHX] (concluding that the many opportunities for zoonotic spillover (meaning the spread of pathogens from animals to humans) within animal commerce in the United States are not being addressed by a comprehensive mitigation strategy).

<sup>3</sup> See Rachana Rathi, *Animal Rights Advocacy Is a Growing Field*, L.A. TIMES (Feb. 25, 2005), <https://www.latimes.com/archives/la-xpm-2005-feb-25-me-onthelaw25-story.html> [https://perma.cc/7LJE-F8JU] (discussing the various animal rights programs emerging in law schools across the country).

<sup>4</sup> See, e.g., *Matthew Liebman Named New Justice for Animals Chair*, UNIV. S.F. SCH. OF L. (May 8, 2020), <https://www.usfca.edu/news/matthew-liebman-named-new-justice-animals-chair> [https://perma.cc/N5RX-8KR3]; *Center for Animal Law Studies*, LEWIS & CLARK L. SCH., [https://law.lclark.edu/centers/animal\\_law\\_studies](https://law.lclark.edu/centers/animal_law_studies) [https://perma.cc/ZAC8-8X75]; *Animal Law & Policy Program*, HARVARD L. SCH., <https://animal.law.harvard.edu> [https://perma.cc/R7H3-CRRV]; *Law, Ethics & Animals Program*, YALE L. SCH., <https://law.yale.edu/animals> [https://perma.cc/38L4-DGHY]; *Animal Law and Advocacy*, BERKELEY SCH. OF LAW, <https://www.law.berkeley.edu/experiential/pro-bono-program/slps/current-slps-projects/animal->

more successful cases.<sup>5</sup> Resources like the Michigan State Animal Legal and Historic Center,<sup>6</sup> Brooks Animal Law Digest,<sup>7</sup> Animal Law Review,<sup>8</sup> and Animal Law Podcast,<sup>9</sup> which educate lawyers and the public about developments in animal legislation and litigation, are spreading in reach and popularity.

To those unfamiliar with animal law, these developments may appear to result from a unified movement and, more fundamentally, to reflect a unified mindset that all developments amount to progress for animals. But for lawyers who work to advance the law for animals every day, there is a very real and surprisingly sharp divide between animal welfare, on the one hand, and animal rights, on the other.<sup>10</sup> We refer to proponents of animal welfare as “Welfarists” and proponents of animal rights as “Abolitionists.”

As discussed *infra* Part I, Welfarists do not call for the end of all

law-and-advocacy [<https://perma.cc/26V9-24SE>]; *Program on Sustainability and Food and Animal Law*, NW. PRITZKER SCH. OF L., <https://www.law.northwestern.edu/research-faculty/events/sustainability-food-animal> [<https://perma.cc/E2GH-YRDE>].

<sup>5</sup> See, e.g., *Legal Advocacy*, ANIMAL OUTLOOK, <https://animaloutlook.org/legal-advocacy> [<https://perma.cc/6S57-4QQA>] (highlighting the growth of Animal Outlook’s Legal Advocacy Program which was founded in 2004, as well as listing past and ongoing litigation); *Litigation – List of Cases*, ANIMAL LEGAL DEF. FUND, [https://aldf.org/project/litigation-list-of-cases/?tx\\_case\\_status=victory](https://aldf.org/project/litigation-list-of-cases/?tx_case_status=victory) [<https://perma.cc/BGB2-R5AJ>] (outlining all the lawsuits filed in federal and state court by the Animal Legal Defense Fund (“ALDF”) which seek to expand animals’ legal protections); *Past Cases*, ANIMAL WELFARE INST., <https://awionline.org/category/cases/past-cases> [<https://perma.cc/Y8RH-QDW9>] (listing numerous suits brought by the Animal Welfare Institute on behalf of farmed and wild animals); Smith v. Vachris: *The Costco Lawsuit*, LEGAL IMPACT FOR CHICKENS, <https://www.legalimpactforchickens.org/costco-lawsuit> [<https://perma.cc/R4JW-WG3A>] (describing the suit filed by the organization Legal Impact for Chickens against Costco executives for the neglect and abandonment of chickens); *News*, ANIMAL PARTISAN, <https://www.animalpartisan.org/news> [<https://perma.cc/R8V2-QHVD>] (reporting updates on current animal conditions and lawsuits relating to them); *Legal Advocacy*, ANIMAL EQUAL., <https://animalequality.org/legal-advocacy> [<https://perma.cc/4Y2U-YF6U>] (describing Animal Equality’s mission and initiatives to advance animal protections through policy advocacy and litigation).

<sup>6</sup> *Animal Legal and Historical Center Website*, MICH. STATE UNIV. COLL. OF L., <https://www.animallaw.info> [<https://perma.cc/PT8U-VMQG>].

<sup>7</sup> *Brooks Animal Law Digest*, BROOKS INST., <https://thebrooksinstitute.org/brooks-animal-law-digest> [<https://perma.cc/QX88-C5KK>].

<sup>8</sup> *Animal Law Review*, LEWIS & CLARK L. SCH., [https://law.lclark.edu/law\\_reviews/animal\\_law\\_review](https://law.lclark.edu/law_reviews/animal_law_review) [<https://perma.cc/UM9T-YYR9>].

<sup>9</sup> Animal Law Podcast, OUR HEN HOUSE, <https://www.ourhenhouse.org/animallaw> [<https://perma.cc/8Q9S-2Z4N>].

<sup>10</sup> See *Welfare vs. Rights*, ANIMAL WELFARE COUNCIL, [https://www.animalwelfarecouncil.org/?page\\_id=16](https://www.animalwelfarecouncil.org/?page_id=16) [<https://perma.cc/YY4L-9SH5>] [hereinafter *Welfare vs. Rights*, ANIMAL WELFARE COUNCIL] (describing the “paramount” importance of “distinguishing between animal rights and animal welfare” and discussing the difference in the philosophies and goals of welfare-based and rights-based organizations); Erik Marcus, *Animal Rights & Animal Welfare—an Introduction*, VEGAN.COM, <https://vegan.com/info/animal-rights-and-animal-welfare> [<https://perma.cc/CVX2-R4GF>] (“A significant number of animal [rights] advocates today vehemently object to anything that smacks of welfarism, believing that this rhetoric legitimizes using animals in indefensible ways.”).

industries that use animals as resources for humans, but instead advocate for measures to improve animals' quality of life. Abolitionists, by contrast, believe that using and killing animals for human gain is inherently wrong and should be abolished because sentient<sup>11</sup> beings have innate rights including a right to continued life.<sup>12</sup> To Welfarists, Abolitionists may seem extreme, unreasonable, and/or overly idealistic, and Welfarists think that incremental reforms are the only pragmatic way to improve conditions for animals.<sup>13</sup> To Abolitionists, Welfarists do not take a strong enough stance against animal exploitation and, more importantly, undermine efforts to improve the status of animals by accepting their exploitation.<sup>14</sup> Whether an organization adheres primarily to a rights-based or a welfare-based philosophy informs how it approaches both advocacy and litigation.<sup>15</sup>

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<sup>11</sup> Sentience is the capacity to feel pleasure or pain and suffering. See GARY L. FRANCIONE, *Taking Sentience Seriously*, in ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION 129–30 (2008) (arguing that we should afford animals more legal protection since they have cognitive characteristics, like emotions, similar to humans); see also JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 311 n.1 (Oxford at the Clarendon Press, 2nd ed. 1823) (1789) (“[T]he question is not, Can they *reason*? [N]or, Can they *talk*? [B]ut, Can they *suffer*?”). Most farm animals—e.g., chickens, cows, pigs, and turkeys—are inarguably sentient. See e.g., Bernard Rollin, *Raising Consciousness About Chicken Consciousness*, ANIMAL SENTIENCE, Oct. 12, 2017, at 1, 3 (describing how chickens are sentient but are often overlooked in part because of their commodification). Jonathan Balcombe demonstrates that fish are sentient as well. See generally JONATHAN BALCOMBE, WHAT A FISH KNOWS: THE INNER LIVES OF OUR UNDERWATER COUSINS (2016)

<sup>12</sup> See Alan Watson, *Foreword* to GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?, at xi (reprt. ed. 2007) (“The problem, according to Francione, is . . . the status of animals as the *property* of humans.”).

<sup>13</sup> See, e.g., *Welfare vs. Rights*, ANIMAL WELFARE COUNCIL, *supra* note 10 (arguing that animal rights groups are extremist, unreasonable, and willing to engage in criminal activities, while welfare groups promote reasonable measures). We note that the Animal Welfare Council conflates differences in *tactics* with differences in *philosophies* when accusing animal rights groups of engaging in criminal activities and terrorism—while it is true that some use tactics, such as vandalism and violence, many others do not, and an adherence to a rights-based philosophy does not require such tactics.

<sup>14</sup> See *What is the Difference Between “Animal Rights” and “Animal Welfare”?*, PETA, <https://www.peta.org/about-peta/faq/what-is-the-difference-between-animal-rights-and-animal-welfare> [<https://perma.cc/E5C4-M7M2>] (criticizing animal welfare advocates for permitting the interests of animals “to be traded away as long as there are some human benefits that are thought to justify that sacrifice”); GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?, at xxv (reprt. ed. 2007) (“If we want to take animal interests seriously and give content to our professed rejection of the infliction of unnecessary suffering on animals, we can do so in only one way: by applying the *principle of equal consideration*, or the rule that we must treat likes alike, to animals.”).

<sup>15</sup> Compare *Welfare vs. Rights*, ANIMAL WELFARE COUNCIL, *supra* note 10 (describing how the Animal Welfare Council is a welfare group promoting moderate measures rather than a more extreme animal rights group while critiquing animal-rights advocacy) and *Who We Are*, ANIMAL WELFARE INST., <https://awionline.org/content/who-we-are> [<https://perma.cc/JS2N-Q2L2>] (describing a welfare-based organizational philosophy embracing actions like “supporting high-welfare family farms, and eliminating inhumane methods used to slaughter animals raised for

Therefore, as explained in Part II, the Abolitionist versus Welfarist debate is more than just theoretical—it has very practical implications for the evolution of animal law and the lives of animals.

At least it did. This Article proposes that over the past five or so years, the practical implications for animal lawyers of the rights-welfare divide have started to dissipate—and we expect this trend to continue. We do not, like “New Welfarists,”<sup>16</sup> accept that advancements in animal welfare inevitably advance the Abolitionist agenda. Instead, we believe that a growing marketplace for vegan products will—arguably for the first time—enable Abolitionist lawyers to implement welfare strategies to their benefit. Why? The introduction of plant-based substitutes for animal products has started to make the market for animal products more elastic, and the introduction of fermentation-derived and cell-based substitutes has the potential to accelerate this change in elasticity.<sup>17</sup> We propose that in an increasingly elastic market, welfare-based litigation that drives up the price of animal products has increasing potential to impact consumer decision-making. In addition, we propose that plant-based, fermentation-derived, and

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food”) with *Frequently Asked Questions*, NONHUMAN RTS. PROJECT, <https://www.nonhumanrights.org/frequently-asked-questions> [<https://perma.cc/UG34-WVM4>] (discussing the differences between a rights and welfare-based approach and explaining why the Nonhuman Rights Project takes the former) and ANIMAL OUTLOOK, <https://animaloutlook.org/about> [<https://perma.cc/W8ZS-X4W5>] (describing the rights-based mission of Animal Outlook, formerly known as Compassion Over Killing, to promote veganism).

<sup>16</sup> Gary L. Francione, *A Short Essay on the Meaning of “New Welfarism”*, ANIMAL RIGHTS: THE ABOLITIONIST APPROACH (June 4, 2018), <https://www.abolitionistapproach.com/a-short-essay-on-the-meaning-of-new-welfarism> [<https://perma.cc/8H7D-88S4>] (identifying groups that “decided to promote the same old donation-generating welfarist campaigns and single-issue campaigns but claimed that they were doing so as a means to the end of achieving ‘animal rights’” as “new welfarists”).

<sup>17</sup> “Plant-based” refers to products such as oat milk, soy milk, Just Egg, Miyoko’s cheese, Impossible Burgers, Tofurky Roasts, and Beyond Sausages, which replicate the texture and taste of animal products using protein from plants, such as peas. “Cell-based” refers to actual animal tissue that is grown in a laboratory rather than processed from a slaughtered animal. “Fermentation-derived” refers to products comprised of proteins, enzymes, flavor molecules, vitamins, pigments, and fats produced by microorganisms, as well as products comprised of these microorganisms themselves. Each type of alternative product has unique hurdles and advantages. Plant-based products are ethical and sustainable to produce and have already reached the market, offering an immediate alternative to animal products and short-term returns for investors. Cell-based products most directly replicate animal products, but their production raises ethical concerns such as the use of fetal bovine serum, and at present, they are further from price parity. Fermentation-derived products may offer a more ethical solution than cell-based products, but they are also in earlier stages of development. According to the Good Food Institute, “[i]ncreasingly, we may start to think of plant-based, fermentation-derived, and cultivated products as an intersecting venn diagram rather than as three distinct categories.” *Where Does Fermentation Fit in the Alternative Protein Landscape?*, GOOD FOOD INST., <https://gfi.org/fermentation> [<https://perma.cc/AC6H-9C57>]. These intricacies are beyond the scope of this Article, so we refer to plant-based, fermentation-derived, and cell-based products collectively as “Alternatives” throughout.

cell-based products (collectively “Alternatives”) open new avenues for Abolitionist litigation, for which welfare cases—if strategically selected—can set favorable precedent. For both of these reasons, the introduction of Alternatives is making animal law increasingly important to the animal-rights movement.

This Article has four parts. Part I undergoes a comparative analysis of welfarism and abolitionism, pointing to the key distinctions between these ideologies. We review not just the respective philosophies of animal rights and animal welfare activists, which have been the subject of much academic discourse,<sup>18</sup> but also how their approaches play out in the legal field. In Part II, we turn our attention to the rapidly growing market for Alternatives. Applying basic principles of economics, we argue in Part III that as plant-based foods become increasingly competitive in the marketplace and fermentation-derived and cell-based products reach supermarket shelves, Abolitionists—with whom the authors align—can find increasing utility in welfare efforts; specifically, (at least some) welfare measures will drive up prices of animal products and steer consumers towards newly available substitutes. In Part IV, we argue that Abolitionist lawyers are a key piece of this puzzle because they must prove to consumers that Alternatives are, and must be viewed as, true market substitutes for animal products. For the reasons explained in Parts III and IV, we conclude that legal advocacy on behalf of animals will have a growing role to play in the movement and an exponentially greater impact than ever before. In Part V, we caution Abolitionists to remain circumspect when employing Welfarist strategies, and we propose three criteria that Abolitionists should use to evaluate these strategies before employing them.

## I

### THE TRADITIONAL DIVIDE BETWEEN ANIMAL RIGHTS AND WELFARISM

Animal welfarism is the more commonly accepted approach to animal protection among the general public; most people like the idea of treating animals well, while fewer have reached the point of believing that animals should have inalienable rights.<sup>19</sup> Like Abolitionists, Welfarists generally

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<sup>18</sup> See generally GARY L. FRANCIONE & ROBERT GARNER, *THE ANIMAL RIGHTS DEBATE: ABOLITION OR REGULATION?* (2010) (offering competing arguments for the Abolitionist and Welfarist approaches to animal protection).

<sup>19</sup> See Douglas McPherson, *Animal Rights or Welfare - The Big Difference*, HUFFINGTON POST (May 9, 2015), [https://www.huffingtonpost.co.uk/douglas-mcpherson/animal-rights-or-animal-welfare\\_b\\_6822860.html](https://www.huffingtonpost.co.uk/douglas-mcpherson/animal-rights-or-animal-welfare_b_6822860.html) [<https://perma.cc/5YU2-NXWD>] (“[N]early everyone believes in animal welfare . . .”). While fewer people are Abolitionists, it is harder to pinpoint the size of this demographic. On one hand, most people’s behavior does not align with an animal-rights philosophy. See *id.* (“[P]erhaps only the 2% of the population that identifies itself as vegetarian or

believe that animals are sentient and have an interest in avoiding suffering, yet they do not think animals have a right to life or a right to not be property.<sup>20</sup> According to a Welfarist approach, then, we can slaughter and eat animals, as long as we treat them well during their lifetimes and kill them in a way that minimizes pain and suffering. Some Welfarists go as far as to sanction and even promote companies that use animals for human gain, as long as they do so in a “humane” manner.<sup>21</sup>

The big question, then, is what does “humane” mean to Welfarists? In the realm of animal agriculture, welfare advocates fight against particularly cruel practices like tail-docking,<sup>22</sup> debeaking,<sup>23</sup> declawing<sup>24</sup> and ventilation

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vegan share [the] view of animal rights.”). On the other hand, surveys have found that “[a]lmost a third of Americans, 32%, believe animals should be given the same rights as people,” even if their behavior does not reflect this view. Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP (May 18, 2015), <https://news.gallup.com/poll/183275/say-animals-rights-people.aspx> [<https://perma.cc/S2C5-6CRE>].

<sup>20</sup> See Patti Strand, *What Is Animal Welfare and Why Is it Important? The Difference Between Animal Rights & Animal Welfare*, NAT’L ANIMAL INT. ALL. (June 10, 2014), <http://www.naiaonline.org/articles/article/what-is-animal-welfare-and-why-is-it-important#sthash.fofs7poo.dpbs> [<https://perma.cc/RL9G-K69W>] (discussing the difference between how animal rights and animal welfare proponents consider the legal rights of animals).

<sup>21</sup> See *id.* (supporting efforts of farmers, ranchers, animal scientists, and others to improve animal conditions); see also ANIMAL WELFARE COUNCIL, <https://www.animalwelfarecouncil.org> [<https://perma.cc/Z4J9-6V8N>] (“The Animal Welfare Council members support the use of animals in recreation, entertainment, industry and sports. We are dedicated to advancing the responsible and humane use of animals in these activities.”).

<sup>22</sup> See *Canine Tail Docking FAQ*, AM. VETERINARY MED. ASS’N, <https://www.avma.org/about/canine-tail-docking.aspx/canine-tail-docking-faq> [<https://perma.cc/7SYM-UYTF>] (explaining that tail docking is the painful practice of removing a dog’s tail which can have long-term negative impacts on how a dog processes and perceives pain).

<sup>23</sup> See *Chickens Used for Eggs: Battery Cages Compel Debeaking*, FARM SANCTUARY, <https://www.farmsanctuary.org/chickens> [<https://perma.cc/T4ZT-5BAK>] (scroll down to “Chickens Used for Eggs”; click “Next” to view slide titled “Battery Cages Compel Debeaking”) (explaining that because chickens’ beaks are filled with nerves, the removal of part of their beaks, known as debeaking, can result in severe and chronic pain).

<sup>24</sup> See *The Paw Project Position Statement on Declawing of Cats*, THE PAW PROJECT, <https://pawproject.org/about-declawing/position-statement-on-declawing> [<https://perma.cc/BHD8-6VTR>] (explaining that declawing is the amputation of healthy tissue to permanently remove a cat’s claws which can lead to acute and chronic pain in their paws and even back, as well as chronic stress).

shut down;<sup>25</sup> breeding practices that result in poor animal health;<sup>26</sup> and confinement of animals in small cages or stalls indoors.<sup>27</sup> Welfarists assert that farmers should allow animals to access pasture areas, engage in “natural behaviors such as ranging, foraging, rooting, and grooming,” and form social relationships with one another.<sup>28</sup> They often, much like rights advocates, oppose industrial animal agriculture (better known as “factory farming”) and the production of certain types of meat like veal or foie gras,<sup>29</sup> but unlike rights advocates, they support certain family farms.<sup>30</sup> They propose

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<sup>25</sup> See *Ventilation Shutdown Used to “Depopulate” Farm Animals During Pandemic Causes Severe Suffering*, ANIMAL WELFARE INST. (July 1, 2020), <https://awionline.org/press-releases/ventilation-shutdown-used-depopulate-farm-animals-during-pandemic-causes-severe> [<https://perma.cc/67EF-N7PB>] (stating that ventilation shutdown involves turning off the airflow in a barn and leaving trapped animals to die by heat stroke and suffocation—a process that often takes several hours and “likely results in severe animal suffering”); *Newly Uncovered Footage Reveals Cruel Truth About Ventilation Shutdown*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/newly-uncovered-footage-reveals-cruel-truth-about-ventilation-shutdown> [<https://perma.cc/H9Z4-4V2S>] (providing footage of ventilation shutdown experiments).

<sup>26</sup> See *Cattle*, ANIMAL WELFARE INST., <https://awionline.org/content/cattle> [<https://perma.cc/7J6U-2ZDV>] [hereinafter *Cattle*, ANIMAL WELFARE INST.] (describing how dairy cows are bred “to produce up to 12 times the amount of milk needed to feed her calf” and how “[p]roducing such vast quantities of milk in one lactation cycle is so taxing and stressful that dairy cows are typically kept only for three or four years (or three cycles of pregnancy, birth, and lactation) before they are slaughtered”—whereas “[i]n traditional pastoral conditions, before industrial farming, cows could live up to 25 years”); Hannah Bugga, *NEW VIDEO: These Chickens Are So Calcium Deficient They Lay Eggs Without Shells*, MERCY FOR ANIMALS (Sept. 18, 2020), <https://mercyforanimals.org/blog/new-video-these-chickens-are-so-calcium-deficient> [<https://perma.cc/6RJP-42PN>] (explaining how hens kept in tiny cages called battery cages suffer from restricted movement, open wounds, severe calcium deficiency, and even death).

<sup>27</sup> See *How Factory Farming Hurts Animals*, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspc.org/protecting-farm-animals/animals-factory-farms> [<https://perma.cc/Y6L2-ZDJQ>] (click “Expand to read more” after each animal’s introductory paragraph) (describing the various ways confinement is harmful to animals including increased susceptibility to disease, increased risk of injury, inability to express natural behaviors, and sometimes death); *What Are Gestation Crates for Pigs and Why Are They Bad?*, THE HUMANE LEAGUE (Oct. 13, 2022), <https://thehumaneleague.org/article/pig-gestation-crates> [<https://perma.cc/X3EL-F8YZ>] (explaining how extreme confinement weakens bodily systems such as cardiac and immune systems, decreases bone strength, wastes muscle mass, causes injuries and lesions, and leads to chronic psychological stress).

<sup>28</sup> *High Welfare Alternatives*, ANIMAL WELFARE INST., <https://awionline.org/content/high-welfare-alternatives> [<https://perma.cc/JS87-WKVP>].

<sup>29</sup> See *Cattle*, ANIMAL WELFARE INST., *supra* note 26 (“From the perspective of those who consider animal welfare an important consideration when farming, ‘high-welfare’ veal is simply not possible to produce.”); *What You Can Do for Farmed Animals*, ANIMAL WELFARE INST., <https://awionline.org/content/what-you-can-do-farmed-animals> [<https://perma.cc/A2P8-X9Y3>] [hereinafter *What You Can Do for Farmed Animals*, ANIMAL WELFARE INST.] (“The following foods always involve significant animal suffering, and should be avoided: frog legs, foie gras, live sashimi, and shark fin soup.”).

<sup>30</sup> See *On the Farm*, ANIMAL WELFARE INST., <https://awionline.org/content/farm> [<https://perma.cc/HDQ7-2J2L>] (describing how confined animal feeding operations, or factory



slaughterhouse designs that minimize animals' fear and slaughter methods that decrease their chance of experiencing pain before they die.<sup>31</sup> And they advocate for consumers to purchase “free-range,” “pasture-raised,” “humane certified,” “grass-fed,” and/or “cage-free” meat, milk, and dairy.<sup>32</sup>

Welfarists also push for humane standards in animal experimentation,<sup>33</sup> anti-cruelty laws protecting companion animals,<sup>34</sup> and sometimes even boycotts of certain uses of animals. For example, Animal Welfare Institute—a welfare-focused organization that supports humane animal farming—views the captivity of whales and dolphins as unavoidably inhumane.<sup>35</sup> (As discussed *infra* Section II, the authors would follow this argument to its

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farms, “create serious welfare problems for animals,” while praising “higher-welfare farms that allow the animals to exhibit more of their natural behaviors, get exercise, have extended access to the outdoors and fresh air, and be social with each other”).

<sup>31</sup> See Ryan Bell, *Temple Grandin, Killing Them Softly at Slaughterhouses for 30 Years*, NAT'L GEOGRAPHIC (Aug. 19, 2015), <https://www.nationalgeographic.com/culture/article/temple-grandin-killing-them-softly-at-slaughterhouses-for-30-years> [<https://perma.cc/Y6J9-Z4S4>] (describing how welfare-advocate and agriculture professor Temple Grandin designed curved loading chutes to “shield [cows] from viewing what’s ahead, keeping them calm” and the center-track restrainer to keep cows still during stunning, minimizing the possibility of a cow staying conscious for the rest of the slaughter process). Temple Grandin famously draws on her experience with Asperger’s Syndrome and “thinking in pictures” to try to understand the perspective of a cow and figure out how to reduce the fear cows experience. TEMPLE GRANDIN, THINKING IN PICTURES: AND OTHER REPORTS FROM MY LIFE WITH AUTISM 4 (2d ed. 2006) (“I credit my visualization abilities with helping me understand the animals I work with.”). Grandin serves as a good example of how welfarists can markedly differ from rights advocates—while she clearly cares about animals, she works with, not against, the animal agribusiness and has said, “I think we can eat meat ethically . . . but we’ve got to give animals a good life.” Bell, *supra*.

<sup>32</sup> See *What You Can Do for Farmed Animals*, ANIMAL WELFARE INST., *supra* note 29 (“When shopping for meat, dairy, and eggs, look for labels indicating the product is third-party certified for animal welfare.”); *Making Better Food Choices*, ANIMAL WELFARE INST., <https://awionline.org/content/consumers-guide-food-labels-and-animal-welfare> [<https://perma.cc/FV9Q-W2KV>] (describing different labels and categorizing them according to whether they guarantee high animal care standards and whether they are third-party verified).

<sup>33</sup> See *AWI Position Statement*, ANIMAL WELFARE INST., <https://awionline.org/content/awi-policy> [<https://perma.cc/KN6C-FKUZ>] (“Research must not be conducted on animals unless, at minimum . . . the animals are maintained in an optimum, species-appropriate environment; . . . the animals are under the care of professionally trained, compassionate personnel; and . . . the animals’ pain . . . and anxiety are . . . minimized by . . . scientifically sound experimental design and . . . anesthetic . . . or tranquilizing drugs.”).

<sup>34</sup> See *Companion Animals*, ANIMAL LEGAL DEF. FUND, [https://aldf.org/focus\\_area/companion-animals](https://aldf.org/focus_area/companion-animals) [<https://perma.cc/2H92-XXQM>] (explaining that “[t]he Animal Welfare Act is the chief federal law concerning companion animals,” and that states and localities have additional protections).

<sup>35</sup> See *Confinement of Marine Life*, ANIMAL WELFARE INST., <https://awionline.org/content/confinement-marine-life> [<https://perma.cc/U3RG-DWGH>] (“Whales and dolphins are complex social animals and are not well suited for a life in captivity.”); *The Case Against Marine Mammals in Captivity*, ANIMAL WELFARE INST., <https://awionline.org/content/case-against-marine-mammals-captivity> [<https://perma.cc/3TB6-RGWL>] (“Marine mammals, but especially the larger, wide-ranging predators such as whales, dolphins, and polar bears, simply do not belong in captivity.”).

logical conclusion: because any form of animal agriculture is impossible to carry out humanely, we believe that Welfarists, like Abolitionists, should live a vegan lifestyle.)

As a practical matter, Welfarists often work with animal industries to help them develop better animal treatment standards.<sup>36</sup> These advocates might create voluntary welfare certification programs, through which animal farms can earn a seal of approval if they meet certain standards.<sup>37</sup> They advance policy efforts encouraging Congress, regulatory bodies, and state legislatures to ensure that animals are treated as well as possible by farms, laboratories, and other industries.<sup>38</sup> And they litigate to defend and enforce welfare measures.

When it comes to litigation, it is more straightforward for lawyers to bring Welfarist than Abolitionist lawsuits. Because animal welfare legislation has been on the books for years,<sup>39</sup> welfare advocates, unlike rights advocates, often have clear law on their side without needing to get too creative. They typically have one of two objectives: (1) enforce existing laws requiring the humane treatment of animals or (2) force the government to regulate animal welfare more stringently and impose new welfare measures. For example, in *American Anti-Vivisection Society v. USDA*, Welfarist-plaintiffs sued the United States Department of Agriculture, arguing that the agency must adopt regulations applying the Animal Welfare Act to birds.<sup>40</sup>

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<sup>36</sup> See, e.g., *History of AWI's Leadership on Establishing and Upholding Farmed Animal Standards*, ANIMAL WELFARE INST., <https://awionline.org/content/history-awis-leadership-establishing-and-upholding-farm-animal-standards> [<https://perma.cc/UHL6-8Z7E>] (outlining the Animal Welfare Institute's prior collaboration with farmers and other stakeholders to develop pig husbandry standards).

<sup>37</sup> See, e.g., *id.* (describing the Animal Welfare Institute's *Animal Welfare Approved* certification program).

<sup>38</sup> See, e.g., *Legislation*, ANIMAL WELFARE INST., <https://awionline.org/content/legislation> [<https://perma.cc/UH8F-9JX5>] (discussing the Animal Welfare Institute's legislative advocacy for stronger animal protections).

<sup>39</sup> See *Nat'l Pork Producers Council v. Ross*, 598 U.S. 356, 365 (2023) ("States (and their predecessors) have long enacted laws aimed at protecting animal welfare," such as a 1641 prohibition on animal cruelty in the Massachusetts Bay Colony.); see also David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1993 DET. COLL. L. REV. 1, 2 (1993) (describing how "[t]he last half of the nineteenth century saw the adoption of anti-cruelty laws which became the solid foundation upon which today's laws still stand"); *Legislative History*, ANIMAL WELFARE INST., <https://awionline.org/content/legislative-history> [<https://perma.cc/FG7G-2C2K>] (describing animal welfare laws advanced by the Animal Welfare Institute since the 1950s, starting with the first federal Humane Methods of Slaughter Act in 1958).

<sup>40</sup> See *Am. Anti-Vivisection Soc'y v. U.S. Dep't of Agric.*, 946 F.3d 615, 617 (D.C. Cir. 2020) (reversing the district court's decision to dismiss by finding that the animal rights groups alleged sufficient facts that the United States Department of Agriculture failed to take action to protect birds, as the statute required); see also Jareb Gleckel & Grace Brososky, *Rock and Hard Place Arguments*, 44 SEATTLE U. L. REV. 655, 694–98 (2021) (discussing the American Anti-Vivisection Society's litigation strategy); Mariann Sullivan, *Animal Law Podcast #8: What's Up with Birds*

The most famous contemporary welfare case is *Nat'l Pork Producers Council v. Ross*, in which the U.S. Supreme Court upheld California's Proposition 12, a ballot initiative that, in relevant part, banned the sale of pork in California from pigs whose mothers were confined in gestation crates.<sup>41</sup>

In general, Welfarist litigation theories are more likely to find receptive judges and juries than rights-based theories because they are “on-the-wall” cases.<sup>42</sup> That is not to say, however, that Welfarists have easy legal battles; law enforcement officers and administrative agencies are often reluctant to enforce anti-cruelty laws to protect non-companion animals like farmed animals, animals in live markets, and especially fish.<sup>43</sup> And it is always challenging to advance the law, such as by litigating for more expansive readings of anti-cruelty laws.<sup>44</sup> Still, many major victories in animal law are Welfarist in nature, and they are increasing in frequency.<sup>45</sup>

In contrast to welfarism, “animal rights,” or abolitionism, refers to the theory that all sentient<sup>46</sup> beings have an inherent right to live their own lives,

*and the Animal Welfare Act? With Bruce Wagman*, OUR HEN HOUSE (Jan. 27, 2016), <https://www.ourhenhouse.org/2016/01/animal-law-podcast-8-whats-up-with-birds-and-the-animal-welfare-act-with-bruce-wagman> [<https://perma.cc/GJ8M-QV7N>] (discussing USDA's refusal to write regulations covering the Animal Welfare Act and the resulting litigation efforts).

<sup>41</sup> Nat'l Pork Producers Council, 598 U.S. at 364.

<sup>42</sup> See Jack M. Balkin, *From Off the Wall to On the Wall: How the Mandate Challenge Went Mainstream*, THE ATLANTIC (June 4, 2012), <https://www.theatlantic.com/national/archive/2012/06/from-off-the-wall-to-on-the-wall-how-the-mandate-challenge-went-mainstream/258040> [<https://perma.cc/UAN7-66NY>] (“Off-the-wall arguments are those most well-trained lawyers think are clearly wrong; on-the-wall arguments, by contrast, are arguments that are at least plausible, and therefore may become law, especially if brought before judges likely to be sympathetic to them.”).

<sup>43</sup> See Cheryl Leahy, *Do Animal Protection Laws Address Widespread Cruelty? Unique Challenges and Potential for Addressing Institutional Abuse to Farmed Animals*, 32 S. CAL. REV. L. & SOC. JUST. 133, 147 (2023) (describing how institutionalized cruelty in animal agriculture is “left largely untouched by the law and its processes and enforcement: it is in fact protected by it”).

<sup>44</sup> See, e.g., *id.* at 189–93 (describing Animal Outlook's efforts to enforce Maine's anti-cruelty laws for fish and the enforcement agency's deference to private industry).

<sup>45</sup> See, e.g., Nat'l Pork Producers Council, 598 U.S. at 364; Matthew Zampa, *How Undercover Investigation of Lamb Slaughterhouse Led to Federal Prosecution*, SENTIENT MEDIA (June 14, 2019), <https://sentientmedia.org/how-undercover-investigation-of-lamb-slaughterhouse-led-to-federal-prosecution> [<https://perma.cc/UZY2-2AGV>] (“In a first for the animal agriculture industry, Superior Farms entered a consent decree with the USDA to reform its killing methods and other inhumane and otherwise misleading practices that Animal Outlook's investigation brought into question.”); Helena Bottemiller, *Landmark Settlement Reached in Westland-Hallmark Meat Case*, FOOD SAFETY NEWS (Nov. 18, 2012), <https://www.foodsafetynews.com/2012/11/landmark-settlement-reached-in-westlandhallmark-meat-case> [<https://perma.cc/6R3V-VGUV>] (“[T]he federal government [entered] a final judgement of \$497 million against [the now-defunct Westland/Hallmark Meat Co.], which used to be one of the biggest suppliers of ground beef to the National School Lunch Program.”).

<sup>46</sup> See *supra* note 11 (defining sentience).

free of human exploitation.<sup>47</sup> Professor Gary Francione, the legal scholar and ethicist who most strongly articulates the Abolitionist approach, lays out the following six principles of abolitionism:

Every sentient being has a right not to be used as property (Principle 1); Abolitionists should never promote welfare reform campaigns or single-issue campaigns (Principle 2); Abolitionists should promote veganism as a moral imperative (Principle 3);<sup>48</sup> Sentience and no other cognitive characteristic is necessary to have the moral right not to be used exclusively as a resource (Principle 4); Abolitionists should reject all forms of discrimination—human and nonhuman (Principle 5); and Abolitionists should reject violence and promote nonviolence (Principle 6).<sup>49</sup>

Accordingly, Abolitionists argue that we should stop farming animals altogether because respecting the rights of animals means not using animals for food. We violate an animal's right not to be property when we treat that animal as a resource, a mere source of milk, eggs, or meat. We violate an animal's right to continued life when we lead that animal to slaughter. We also violate a cow's right to bodily integrity when we forcibly impregnate her annually so that she will produce milk,<sup>50</sup> or a hen's right when we trim her beak, take her eggs, and send her to slaughter after a year of egg production.<sup>51</sup> With this in mind, rights advocates argue that consumers should remove all animal products from their diets—plain and simple.

The animal rights philosophy similarly calls for the abolition of other

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<sup>47</sup> See Watson, *supra* note 12 (“[I]f a human is to be included in the moral community . . . [o]ne person cannot be the resource of another. If we also purport to take animal interests seriously, we cannot continue to consider animals as a resource to which we owe only humane treatment.”).

<sup>48</sup> *Definition of Veganism*, VEGAN SOC'Y, <https://www.vegansociety.com/go-vegan/definition-veganism> [<https://perma.cc/8VVP-6RJB>] (“Veganism is a philosophy and way of living which seeks to exclude . . . all forms of exploitation of, and cruelty to, animals for food, clothing or any other purpose; and by extension, promotes the development and use of animal-free alternatives for the benefit of animals, humans and the environment.”).

<sup>49</sup> Gary L. Francione & Anna Charlton, *The Six Principles of the Abolitionist Approach to Animal Rights*, THE ABOLITIONIST APPROACH, <http://www.abolitionistapproach.com/about/the-six-principles-of-the-abolitionist-approach-to-animal-rights> [<https://perma.cc/XEX9-63WM>]. As discussed below, we abide by all principles except (in part) Principle 2.

<sup>50</sup> See *How to Get a Cow Pregnant*, GROW (Oct. 23, 2008), <https://grow.cals.wisc.edu/deprecated/agriculture/how-to-get-a-cow-pregnant> [<https://perma.cc/VVB4-FCUF>] (describing how “[i]n order to produce milk, dairy cows have to give birth, which means they have to get pregnant every year” and detailing the process of artificial insemination, involving ordering semen from “genetics firms that ‘mate’ top-quality bulls with artificial cows to collect semen,” using synchronization treatments to cause cows to ovulate, thawing the semen, and inserting the semen using a “syringe-like inseminator through the [ovulating] cow’s cervix and vagina” while “insert[ing] a gloved hand through the cow’s rectum to manipulate the uterus through the rectal wall”).

<sup>51</sup> See *Go Vegan for Animals*, VEGAN SOC'Y, <https://www.vegansociety.com/go-vegan/why-go-vegan/egg-industry> [<https://perma.cc/EPR6-YMYJ>] (describing the egg industry’s treatment of hens and how, despite a life span of seven years, commercial hens are sent to slaughter after one year’s egg production).

uses of animals as resources, such as for entertainment and, more ambitiously, for medical experimentation.<sup>52</sup> Zoos, aquariums, marine parks, circuses, horse-drawn carriage rides, puppy mills, and research institutions conducting studies on animals are all considered problems to the devoted rights activist. Why? Because whenever we use an animal as a resource, we treat it as property—as a mere tool that exists to serve human needs, not as a sentient being with the right to live its life free from exploitation. To Abolitionists, this is fundamentally wrong, regardless of how humanely the animals are treated.

But how do Abolitionists in the legal field put their philosophy into practice? Abolitionist litigation groups face the oxymoronic task of figuring out how to use the law to stop the human use of animals within the confines of a legal system that sanctions their exploitation. Sure, lawyers can fight for vegan alternatives in specific contexts like prisons and schools, but these options are limited.<sup>53</sup>

To many Abolitionists, like Professor Francione, Abolitionists' use of law should, in fact, be minimal. Francione argues that “the first task of the animal-rights movement [i]s to educate society about why such a movement [i]s necessary in the first place,”<sup>54</sup> and therefore suggests that “the primary role of a progressive lawyer [i]s to protect the rights of those in society who [a]re trying to cause a paradigm shift in thinking.”<sup>55</sup> To this end, Abolitionist lawyers should advise and defend activists,<sup>56</sup> challenge laws that impede

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<sup>52</sup> See *Top Five Reasons to Stop Animal Testing*, PETA, <https://www.peta.org/blog/top-five-reasons-stop-animal-testing> [<https://perma.cc/T2AM-6EH3>] (describing five reasons animal testing needs to stop including that it is unethical, unnecessary, and wasteful).

<sup>53</sup> See David B. Rosengard, “*Three Hots and a Cot and a Lot of Talk*”: *Discussing Federal Rights-Based Avenues for Prisoner Access to Vegan Meals*, 23 ANIMAL L. 355, 357 (2017) (“[P]rison administrators typically deny prisoners access to vegan meals on the basis of security, efficiency, or financial concerns. Additionally, prison administrators who do recognize certain exceptions to the standard prison diet may not believe a given prisoner’s desire for vegan meals reaches an applicable exception’s threshold.”); Beth Greenfield, *Great Vegan Food Is Everywhere — Except in America’s Public Schools. Healthy-Lunch Advocates Explain Why.*, YAHOO LIFE (Dec. 7, 2021), <https://www.yahoo.com/lifestyle/vegan-food-everywhere-except-americas-public-schools-162140342.html> [<https://perma.cc/5ARD-XJP6>] (explaining how plant-based eating in public schools “faces a myriad of barriers, from food budgets and pandemic-related supply-chain problems to pressure from the meat and dairy industries”).

<sup>54</sup> FRANCIONE, *supra* note 11, at 122.

<sup>55</sup> *Id.* (crediting William M. Kunstler and explaining how “[Kunstler] did not see the lawyer as the primary engine for social change; rather, it was the social activist, the person who sought to educate, persuade, and change fundamental thinking about particular issues”).

<sup>56</sup> See, e.g., Leto Sapunar & Jordan Miller, *Animal Rights Activists Found Not Guilty on All Charges After Two Piglets Were Taken from Circle Four Farms in Utah*, SALT LAKE TRIB. (Oct. 9, 2022, 12:57 PM), <https://www.sltrib.com/news/2022/10/08/animal-rights-activists-charged> [<https://perma.cc/E8G4-UD7F>] (discussing trial at which a jury acquitted two animal-rights activists after they rescued piglets from a factory farm). Lawyers can also advise activists, ex ante, of where and how they can investigate and protest lawfully. See, e.g., *Legal Guide for Activists*,

advocates from gathering information and shaping public opinion, and use the law to obtain information about animal exploitation. For example, many organizations have brought First Amendment challenges to state “Ag-Gag” laws—laws aimed at preventing undercover investigations of animal farms and slaughterhouses.<sup>57</sup> By convincing courts to strike down Ag-Gag laws, these lawsuits empower animal activists to go undercover legally, film the disturbing realities of animal farming, and use the footage to convince consumers to stop eating animal products.<sup>58</sup> Organizations may also request from government agencies documents that expose the mistreatment of animals.<sup>59</sup> If these requests fail under the Freedom of Information Act (FOIA)<sup>60</sup> or analogous state sunshine laws, they may sue to compel disclosure.<sup>61</sup>

A similar practice to helping advocates expose the truth about animal exploitation is preventing the industry from spreading lies about its products. Therefore, animal rights groups bring lawsuits and administrative actions aimed at preventing meat or dairy companies from deceptively marketing their products as “humane,” “all-natural,” or “sustainable.”<sup>62</sup> These lawsuits

ANIMAL LEGAL DEF. FUND, <https://aldf.org/project/legal-guide-for-activists> [<https://perma.cc/87UP-RQEU>] (explaining, for educational purposes, basic legal principles applicable to activism such as planning a demonstration).

<sup>57</sup> See Nicole Pallotta, *Though Ruled Unconstitutional, Industry Continues Pushing Ag-Gag Laws: Updates in North Carolina, Kansas, Iowa, and Ontario*, ANIMAL LEGAL DEF. FUND (Sept. 15, 2020), <https://aldf.org/article/though-ruled-unconstitutional-industry-continues-pushing-ag-gag-laws-updates-in-north-carolina-kansas-iowa-ontario> [<https://perma.cc/FTA5-YHQC>] (discussing the Animal Legal Defense Fund’s First Amendment challenges and arguing that “[t]he antithesis of transparency, [Ag-Gag] laws create a special—and unconstitutional—shield for the animal agriculture industry to keep its practices, which involve millions of living, feeling animals, hidden from public scrutiny”); see, e.g., *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547, 558 (M.D.N.C. 2020) (ruling on PETA’s challenge to North Carolina’s Ag-Gag law).

<sup>58</sup> It is impossible to watch undercover footage of livestock facilities and, at the same time, fail to recognize the horrors of how humans treat so many animals. Animal Outlook’s recent undercover footage of Bravo Packing and the treatment of a downed cow—a cow that is unable to walk—is one of the many examples. Animal Outlook, *Cow, Unable to Walk, Suffers through Multiple Head Traumas at Slaughterhouse*, YOUTUBE (July 21, 2021), <https://www.youtube.com/watch?v=MxFAp5LjBJA> [<https://perma.cc/FPC4-RECA>].

<sup>59</sup> *Protecting Animals Using the Freedom of Information Act: Exposing and Ending Animal Abuse*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/protecting-animals-using-the-freedom-of-information-act> [<https://perma.cc/WX96-3MUW>].

<sup>60</sup> Freedom of Information Act, 5 U.S.C. § 552 (2016).

<sup>61</sup> See, e.g., *Animal Legal Def. Fund v. U.S. Dep’t of Agric.*, 935 F.3d 858, 864 (9th Cir. 2019) (suing to require the Animal and Plant Health Inspection Service to post documents under FOIA’s “reading room” provision).

<sup>62</sup> *Challenging Fairlife’s Deceptive Marketing Practices*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/case/challenging-fairlifes-deceptive-marketing-practices> [<https://perma.cc/R362-GFXH>] (describing how ALDF “[brought] a class action lawsuit against [the dairy company] Fairlife LLC . . . alleg[ing] deceptive marketing practices designed to ‘humane-wash’ Fairlife’s products”); Complaint at 1–2, *Animal Outlook v. Cooke Aquaculture, Inc.*, No. 2020 CA 002908

further the Abolitionist agenda of showing that there is no humane or sustainable way to raise, exploit, and slaughter animals.<sup>63</sup>

But what about litigating directly on behalf of animals? In a legal system that severely under-protects animals, is it simply off the table for Abolitionists? Some litigation on behalf of animals does call for a paradigm shift in how the law treats nonhuman animals.<sup>64</sup> For example, the Nonhuman Rights Project (NhRP) brings lawsuits seeking legal rights for the most intelligent animals thought to be the most similar to humans, such as great apes, elephants, dolphins, and whales.<sup>65</sup> These lawsuits rest on the theory that self-aware, autonomous animals have legal personhood and a right to bodily liberty—and therefore freedom from detention under habeas corpus law.<sup>66</sup> This theory does not perfectly align with the animal rights philosophy, since

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B (D.C. Super. Ct. June 28, 2020) (alleging that Cooke Aquaculture deceptively markets its salmon products as sustainably farmed); *see, e.g.*, Animal Legal Def. Fund v. Hormel, FARMSTAND, <https://farmstand.org/case/animal-legal-defense-fund-v-hormel> [<https://perma.cc/PHG3-U4VU>] (describing “a joint lawsuit . . . against Hormel Foods, alleging the company was misleading consumers through the advertising of its Natural Choice® brand of lunch meats and bacon”); Mariann Sullivan, *Animal Law Podcast #49: The Case of Pilgrim’s Pride’s Shame*, OUR HEN HOUSE (June 26, 2019), <https://www.ourhenhouse.org/animal-law-podcast-49-the-case-of-pilgrims-prides-shame> [<https://perma.cc/Y3JR-W3LC>] (describing efforts of the Humane Society of the United States “to address false and deceptive advertising from Pilgrim’s Pride regarding their treatment of chickens” by filing complaints with the Federal Trade Commission, the Securities and Exchange Commission, state consumer commissions, and state attorneys general); *see also infra* Part IV (expounding on the benefits of false-advertising litigation).

<sup>63</sup> *See Investigation of Tyson Grower Reveals Mass, Systemic Cruelty*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/investigation-of-tyson-grower-reveals-mass-systemic-cruelty> [<https://perma.cc/4VUB-TK3F>] (describing an undercover investigation “at Jannat Farm in Virginia, a facility contracted by Tyson Foods to raise chickens for meat,” where “[a] Tyson representative and the Jannat Farm manager speak frankly about—and mock—the very notion of raising chickens ‘free range’”; the representative states that the imagery of free range chickens roaming outside is “strictly for commercial purposes”). *See also* Nadia Schilling, *Stand Up to Fairlife’s Deceptive Animal Welfare Advertising*, IN DEF. OF ANIMALS (June 22, 2018), <https://www.idausa.org/campaign/farmed-animal/latest-news/stand-up-to-fairlifes-deceptive-animal-welfare-advertising> [<https://perma.cc/2X22-WZFW>] (discussing Fairlife’s deceptive advertising practices and the reality of conditions on Fairlife farms, and calling for consumers to respond by “ditch[ing] dairy for good”).

<sup>64</sup> Steven M. Wise, *The Evolution of Animal Law Since 1950*, in THE STATE OF THE ANIMALS II, at 102–03 (Deborah J. Salem & Andrew N. Rowan, eds., 2003) (describing how U.S. law, in the tradition of ancient Greek and Roman law, has long treated nonhuman animals as property with no rights, and arguing that animals in the U.S. could gain legal personhood and rights through “a change in the common law” because “the common law is meant to be flexible, adaptable to changes in public morality, and sensitive to new scientific discoveries”); *see also* *About Us*, NONHUM. RTS. PROJECT, <https://www.nonhumanrights.org> [<https://perma.cc/UQ2X-CCVR>] (“Our groundbreaking work challenges an archaic, unjust legal status quo that views and treats all nonhuman animals as legal ‘things’ with no rights.”).

<sup>65</sup> *Litigation*, NONHUM. RTS. PROJECT, <https://www.nonhumanrights.org/litigation> [<https://perma.cc/R27R-WCBA>] (“Our first lawsuits demand recognition of the legal personhood and fundamental right to bodily liberty of individual great apes, elephants, dolphins, and whales held in captivity across the US.”).

<sup>66</sup> *Id.*

Abolitionists such as Professor Francione believe that sentience alone (not self-awareness or autonomy) should be enough to warrant full moral consideration. However, the animal law community typically views such cases as rights-based efforts because their goal is opening the door for courts to recognize the rights of at least some nonhuman animals,<sup>67</sup> and they explicitly reject welfarism.<sup>68</sup> Other organizations have advanced different legal theories that would allow courts to recognize rights for animals on bases other than self-awareness. For example, the Animal Legal Defense Fund (“ALDF”) filed a lawsuit on behalf of a horse named Justice, seeking to persuade Oregon courts to recognize legal standing for Justice on the basis that horses are sentient beings considered victims under Oregon criminal law.<sup>69</sup> These lawsuits are Abolitionist because they seek legal recognition that animals have inherent rights. But they are few and far between.

Sometimes Abolitionist litigation is so ambitious that it can backfire, specifically when it proposes a paradigm shift that contrasts too sharply with public sentiment. Recently, NhRP lost a case in New York’s highest state court, which held in a 5-2 decision that Happy, an elephant confined in the Bronx Zoo, did not have a legal right to petition for his freedom because he is not a person under the law.<sup>70</sup> Some believe that, regardless of this loss, the case made notable progress for animals. For example, it garnered two dissenting votes, proving that animal-rights theories can sway high-court judges and are no longer considered “off-the-wall” arguments.<sup>71</sup> Amicus briefs from leading constitutional law scholars like Laurence Tribe add to the cause’s legal legitimacy.<sup>72</sup> And apart from its legal impact, the case

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<sup>67</sup> *Id.* (“We view [self-awareness and autonomy] as sufficient, but not necessary, for recognition of common law personhood and fundamental rights. In other words, self-awareness and autonomy are a starting point for our long-term litigation campaign: the most effective starting point, in our view.”).

<sup>68</sup> *Id.* (“With the support of world-renowned scientists and other experts, we argue that common law courts must free these self-aware, autonomous beings to appropriate sanctuaries not out of concern for their welfare, but respect for their rights.”).

<sup>69</sup> Complaint, *Justice v. Vercher*, 518 P.3d 131 (Or. Ct. App. 2022) (No. 18CV17601), 2018 WL 3997811; *Animal Legal Defense Fund Appeals Dismissal of Groundbreaking Lawsuit for Abused Horse*, ANIMAL LEGAL DEF. FUND (Jan. 22, 2019), <https://aldf.org/article/animal-legal-defense-fund-appeals-dismissal-of-groundbreaking-lawsuit-for-abused-horse> [<https://perma.cc/6XTN-EWDG>].

<sup>70</sup> *Nonhum. Rts. Project, Inc. v. Breheny*, 197 N.E.3d 921 (N.Y. Ct. App. 2022).

<sup>71</sup> See Balkin, *supra* note 42 (differentiating “on-the-wall” from “off-the-wall” arguments).

<sup>72</sup> See Brief for Amicus Curiae Laurence H. Tribe in Support of Petitioner-Appellant, *In re Nonhum. Rts. Project, Inc. v. Breheny*, 38 N.Y.3d 555 (2022) (No. 2020-02581) (arguing that restricting habeas to human beings is illogical and contrary to historical practice); see also Lauren Choplin, *Laurence Tribe Supports Elephant Rights Case*, NONHUM. RTS. PROJECT (July 14, 2020), <https://www.nonhumanrights.org/blog/laurence-tribe-supports-elephant-rights-case> [<https://perma.cc/TF8D-VCCU>].



garnered public attention, drawing eyes to the suffering of animals.<sup>73</sup> On the flip side, the case largely foreclosed habeas cases on behalf of animals in New York and established adverse persuasive precedent nationwide.<sup>74</sup>

In perhaps the most infamous animal law case, People for the Ethical Treatment of Animals (“PETA”) argued that SeaWorld unconstitutionally “enslaved” four orcas under the Thirteenth Amendment of the U.S. Constitution.<sup>75</sup> The theory that the Thirteenth Amendment, which abolished slavery, extends to nonhuman animals came across as culturally clueless to some, and outrageous to others. To many, PETA’s lawsuit encouraged analogizing people of color to nonhuman animals<sup>76</sup> and “both denigrate[d] people and disrespect[ed] the animals that they anthropomorphise.”<sup>77</sup> Many lawyers also viewed PETA’s approach as legally flawed, arguing that precedent has already made clear that the Thirteenth Amendment applies only to humans.<sup>78</sup> Of course, whether the SeaWorld case was good or bad for public opinion is largely subjective: one could argue that media attention drew more eyes to the horrifying confinement of orcas, which ultimately outweighs the drawbacks. But the takeaway remains that Abolitionist lawsuits can backfire.

In short, existing legal frameworks simply do not provide much support for the idea that animals have rights, or that animal-exploiting industries should cease to exist. Abolitionists must therefore stick to advancing activism or undertaking creative approaches to litigation, which are sometimes so creative that they do more harm than good. As the examples

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<sup>73</sup> Michael Gold, *Is Happy the Elephant Lonely? Free Her, the Bronx Zoo Is Urged*, N.Y. TIMES (Oct. 3, 2018), <https://www.nytimes.com/2018/10/03/nyregion/bronx-zoo-elf-ant-lawsuit-happy.html> [<https://perma.cc/WSN8-6LNQ>]; Jill Lepore, *The Elephant Who Could Be a Person*, ATLANTIC (Nov. 16, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/happy-elf-ant-slavery-zoo-nhrp-lawsuit/620672> [<https://perma.cc/8QG7-5S6L>].

<sup>74</sup> Nonhum. Rts. Project, Inc., 197 N.E.3d at 921.

<sup>75</sup> See Greg Miller, *Judge Dismisses PETA’s Constitutional Argument to Free SeaWorld Orcas*, SCIENCEINSIDER (Feb. 9, 2012), <https://www.sciencemag.org/news/2012/02/judge-dismisses-petas-constitutional-argument-free-seaworld-orkas> [<https://perma.cc/QDD3-5RXL>] (summarizing the case, observing that “some groups that support legal rights for animals say PETA’s case may end up hurting the cause,” and detailing criticism of the lawsuit by Steven Wise of the Nonhuman Rights Project); *Legal Bid to Free Killer Whales is ‘Strategic Error’, Says Conservationist*, GUARDIAN (Feb. 5, 2012, 6:42 AM), <https://www.theguardian.com/world/2012/feb/05/seaworld-whales-enslavement-legal-challenge> [<https://perma.cc/787C-PVB2>]; Elie Mystal, *PETA’s Animal Slavery Constitutional Test Case Is Just Stupid*, ABOVE THE LAW (Oct. 26, 2011, 2:49 PM), <https://abovethelaw.com/2011/10/petas-animal-slavery-constitutional-test-case-is-just-stupid> [<https://perma.cc/Y9BM-BYFY>].

<sup>76</sup> See Wesley J. Smith, *PETA Sues to Declare Orcas “Slaves” Under the 13th Amendment*, FIRST THINGS (Oct. 25, 2011), <https://www.firstthings.com/blogs/firstthoughts/2011/10/peta-sues-to-declare-orkas-slaves-under-the-13th-amendment> [<https://perma.cc/C799-TP56>] (discussing PETA’s case and arguing that “KKK-style racists used to compare people of color to animals,” and that “it is just as odious when it is done the other way around”).

<sup>77</sup> Mystal, *supra* note 75.

<sup>78</sup> See Miller, *supra* note 75.

above illustrate, they may alienate the public and/or entrench adverse laws that restrict animals' rights. Even when animal-rights litigation does not backfire *per se* by upsetting the public or setting adverse precedent, if it is unsuccessful, then it still is arguably a waste of resources that could otherwise be used to tangibly improve animals' welfare.

But if purely Abolitionist litigation on behalf of animals does not work, the traditional Abolitionist response has been that animal rights lawyers must bite the bullet and litigate fewer cases; for the reasons discussed *infra* Part II, under this traditional Abolitionist framework, less litigation is preferable to Welfarist legal advocacy.<sup>79</sup>

## II

### ABOLITIONIST CRITIQUES OF WELFARISM

Because of the relative simplicity and broad appeal of Welfarist legal advocacy and the limitations on Abolitionist approaches, even those who believe animals have rights may take a Welfarist approach out of pragmatism.<sup>80</sup> If we cannot abolish the meat industry overnight, why not improve it? The idea is that in the foreseeable future, people will continue to consume animal products, go to zoos, and experiment on animals despite the best efforts of animal rights advocates, so we might as well reduce the amount of suffering involved. By bringing lawsuits enforcing welfare legislation or imposing new humane treatment standards, advocates can help exploited animals live better lives. In fact, according to "New Welfarists," this incremental progress is the best path to eventually attaining rights for animals.<sup>81</sup> But even if they are wrong, isn't improving conditions better than nothing? Shouldn't Abolitionists want to improve the lives of animals today?

Unfortunately, the logic is not quite so sound because welfare measures can have their drawbacks for abolitionism. Primarily, welfare reform may "make animal exploitation more . . . socially acceptable," ultimately

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<sup>79</sup> See Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 468 (1996) (arguing that "welfarist reforms will generally only facilitate the efficient exploitation of animal property").

<sup>80</sup> Professor Francione refers to such advocates as "new welfarists." Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 L. & CONTEMP. PROBS. 9, 40 (2007); *New Welfarism, HOW TO DO ANIMAL RTS.*, <https://www.animalethics.org.uk/new-welfarism.html> [<https://perma.cc/7DHS-DK82>] ("New welfarism is the view that the best way to prevent animal suffering is to abolish the causes of animal suffering, but that abolition is an ideal long-term goal and meanwhile we must be pragmatic and improve the conditions of animals by advancing their welfare.").

<sup>81</sup> See, e.g., Norm Phelps, *In Praise of "The New Welfarism"*, ALL-CREATURES (Dec. 2009), <https://www.all-creatures.org/articles/ar-praise.html> [<https://perma.cc/2DET-6FK8>] ("In the real world . . . you campaign for what it is realistic to think you might be able to get. And when you get it, you use that as a platform to get more. And you keep advancing in that fashion . . . until you reach your goal.").

preventing animal industries from becoming obsolete.<sup>82</sup> Humane products allow people who care about animals to feel good about themselves while still supporting animal exploitation, preventing consumers from foregoing animal products altogether. Take a hypothetical shopper, Sally, who aspires to be an ethical consumer. She goes to the grocery store and sees “happy chicken” free-range eggs with a picture of happy-looking chickens in a field of green grass on the carton. She buys the eggs, thinking they are the ethical option, and feels good about her purchase. In her mind, she can “do good” without changing her diet to omit eggs,<sup>83</sup> and welfare measures enabled her to think this way. In fact, the higher prices on “cruelty-free” products likely enhance Sally’s false perception that the eggs she buys are substantially better than regular eggs.<sup>84</sup> Meanwhile, the egg industry can increase its

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<sup>82</sup> Francione, *supra* note 80, at 12.

<sup>83</sup> Many people wonder why producing eggs is *inherently* cruel. The first major concern—and one that is easily overlooked—is that it is impossible to have an egg industry without killing chickens. This is because only female chickens lay eggs. So, every time a company needs new egg-laying hens, workers called “sorters” will sort the male and female chicks; the company will then keep 50% of the chicks (female) and discard the other half (male). See Maneka Gandhi, *Everyone Who Eats an Egg Has Taken Part in the Killing*, STATESMAN (Apr. 15, 2019, 3:59 PM), <https://www.thestatesman.com/supplements/everyone-who-eats-an-egg-has-taken-part-in-the-killing-1502745602.html> [<https://perma.cc/VG5L-G2RX>] (“Once hatched, the newborn chicks pass down a production line to be sexed and sorted. Small or weak female chicks and all male chicks are separated from the healthy female chicks and then killed. . . . The average life of a male chick, in the egg industry, is one day.”). Typically, the male chicks are thrown into a grinder alive, or they are thrown into trash bags to suffocate. *Id.* (describing the different ways of killing male chicks, all of which are legal). These male chickens are rarely, if ever, even raised for meat, because they do not grow fast enough; chickens raised for meat come from separate breeding stock that the industry calls “broilers.” *Id.*; see also Tove K. Danovich, *Why the US Egg Industry is Still Killing 300 Million Chicks a Year*, VOX (Apr. 12, 2021, 2:30 PM), <https://www.vox.com/future-perfect/22374193/eggs-chickens-animal-welfare-culling> [<https://perma.cc/ASN2-W3VR>] (“The males from the leaner breeds used in egg production cost more to feed and house than they would ever sell for as meat, so they’re economically useless to the industry.”). In addition, egg-laying hens are destined for a painful life—no matter how well they are treated—because humans have bred them to lay unnatural numbers of eggs. See Julia Magnus & Mckenzie Griffler, *Chickens: How We Got Here*, OPEN SANCTUARY (May 11, 2022), <https://opensanctuary.org/chickens-how-we-got-here> [<https://perma.cc/TAW8-M6LZ>] (“[C]hickens bred for their egg-laying ability produce a significantly larger amount of eggs annually than their wild counterparts . . . . The Red Junglefowl lays approximately 10 to 15 eggs in an entire year . . . . A modern ‘egg-laying’ hen has been bred to lay between 250 and over 300 large eggs in a year.”); see also A. Bruce Webster, *Welfare Implications of Avian Osteoporosis*, 83 POULTRY SCI. 184, 184 (2004) (“Osteoporosis appears to be inevitable in highly productive caged laying hens. . . . The welfare implications of osteoporosis stem from pain, debility, and mortality associated with bone fracture.”). The question, of course, by focusing on inherent cruelty does not account for heinous standard practices in the egg industry such as confining birds in battery cages and cutting off their beaks.

<sup>84</sup> See C. Victor Spain, Daisy Freund, Heather Mohan-Gibbons, Robert G. Meadow & Laurie Beacham, *Are They Buying It? United States Consumers’ Changing Attitudes toward More Humanely Raised Meat, Eggs, and Dairy*, ANIMALS 1 (July 25, 2018), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6116027> [<https://perma.cc/VK7J-KNT5>] (“The majority of [survey] respondents would be willing to pay extra for foods with a trustworthy welfare

profits by charging higher prices that are disproportionate to added input costs—or even without altering input costs if the industry can deceive consumers about what welfare practices entail.<sup>85</sup> This is why rights advocates have reason to hesitate before expending resources on policy campaigns and lawsuits to force companies to implement such measures.<sup>86</sup> Consumers will feel better about paying more to purchase “better” animal products, and animal exploitation will persist into perpetuity.<sup>87</sup> To Abolitionists, therefore, Welfarists should accept that any form of animal use is impossible to carry out humanely, and like Abolitionists, should focus their efforts on promoting and living a vegan lifestyle.

So, which is correct? Is welfarism inherently progress towards abolition? Or should Abolitionists fear welfarism because it can slow—and even prevent—animals from ever having rights? The truth is, within the confines of the traditional debate, we have no idea. It is difficult for anyone to know without the benefit of hindsight.<sup>88</sup> But this debate, as described so

certification both in supermarkets and in restaurants.”); Eric Ralls, *Most Choose Free-Range Eggs for Nutrition over Ethical Reasons*, EARTH.COM (May 18, 2017), <https://www.earth.com/news/free-range-eggs-nutrition-ethical> [https://perma.cc/4PUS-GW3U] (“The most common motivations for purchasing free-range eggs were that they were viewed as being higher quality, more nutritious, and safer to eat. Also, participants emphasized trying to avoid ‘industrialized’ food.”).

<sup>85</sup> Labels like “humane” or “ethically raised” are almost ubiquitously humane washing. See Jessica Scott-Reid, *The “Humanewashing” of America’s Meat and Dairy, Explained*, VOX (Dec. 21, 2021, 8:00 AM), <https://www.vox.com/22838160/animal-welfare-labels-meat-dairy-eggs-humane-humanewashing> [https://perma.cc/9ZBK-JA9Z] (“[F]ar too many major meat producers are attempting to assuage consumer concerns by merely changing their packaging and advertising with claims of sustainable farms and humane treatment.”); ANIMAL OUTLOOK, *supra* note 63 (showing a Tyson representative describing how “free range” is staged “strictly for commercial [advertising] purposes”); *Hormel Settles in Deceptive Advertising Lawsuit Over “Natural Choice®” Products*, ANIMAL LEGAL DEF. FUND (Nov. 14, 2022), <https://aldf.org/article/hormel-settles-in-deceptive-advertising-lawsuit-over-natural-choice-products> [https://perma.cc/V5YE-63V9] (“Hormel advertises these products as ‘natural’ . . . even though the animals in Natural Choice® brand products are also raised in factory farms, and given antibiotics, including bambermycin and/or virginiamycin, and other chemicals such as chlorine and Termin-8 acid, a feed disinfectant containing formaldehyde and propionic acid.”).

<sup>86</sup> We note that some animal rights activists will go as far as to *oppose* welfare measures. See, e.g., Phelps, *supra* note 81 (“FARM, which is one of the most active groups in the US opposing animal agriculture, refused to support a California ballot initiative in the 2008 election—known as Proposition 2—to ban battery cages and gestation crates because it was a ‘welfarist’ measure.”).

<sup>87</sup> See Melissa Thibault, Sharon Pailler & Daisy Freund, *Why Are They Buying It?: United States Consumers’ Intentions When Purchasing Meat, Eggs, and Dairy With Welfare-Related Labels*, 7 FOOD ETHICS 12, 16 (2022) (finding that, among shoppers who had purchased products with “humane” or similar labels, “89% did so because they thought the label indicated higher-welfare production practices, and 79% consciously paid more for [the product with] the label because they thought that the label indicated higher-welfare production practices”).

<sup>88</sup> See Justin Marceau & Doug Kysar, *The Supreme Court’s Ruling on Prop 12 Is a Win Against Factory Farming. But the Pigs’ Lives Will Still Suck.*, VOX (May 12, 2023, 2:45 PM), <https://www.vox.com/future-perfect/23721488/prop-12-scotus-pork-pigs-factory-farming->

far, considers only moral progress while eliding economic considerations. As discussed below, we argue that economic considerations historically played no material role in the rights-welfare debate. What we propose, however, is that with the influx of Alternatives to animal products, welfare measures can further abolition through market forces. This development can, and should, help the rights-welfare debate to evolve.

### III

#### THE NEW ECONOMICS OF WELFARISM

For decades, Welfarists have argued that welfare measures increase the costs of animal exploitation and therefore benefit an Abolitionist agenda.<sup>89</sup> In short, the argument goes that animal-exploiting companies must expend money to abide by welfare regulations; then, they must either shoulder the costs of these expensive welfare measures or pass them on to consumers by raising prices. Either way, according to Welfarists, this hurts the industry. If the industry passes price increases to consumers, consumers will demand fewer products, and fewer animals will be exploited and/or die.<sup>90</sup>

While theoretically sound, this argument has not historically been correct. It is true that under a basic demand curve, when price increases, consumers will buy less quantity. But this analysis requires a fundamental assumption that demand is elastic, meaning that price and quantity are inversely related.<sup>91</sup>

Price is elastic with respect to almost all consumer goods, namely luxury goods. Think about your favorite gum. At \$1.00 per pack, you might purchase a couple of packs per week and chew gum all the time. But if the price goes up to \$3.50 a pack, you might become a bit choosier. By \$20.00 per pack, you are probably not buying gum anymore. Price goes up, quantity goes down.

But for certain goods, demand is *inelastic*. With respect to inelastic goods, as price increases, the quantity of goods consumers will purchase remains the same.<sup>92</sup> A number of factors dictate the elasticity of demand, but

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california-bacon [https://perma.cc/K4QE-UWYH] (“Only time and research can tell whether incremental law reform projects will increase public concern about the consumption of pig meat or prematurely end the debate.”).

<sup>89</sup> Gary Francione, however, has argued that welfare measures actually make animal exploitation more efficient and therefore *more* profitable. We address these arguments *infra* Part IV.

<sup>90</sup> See STEVEN A. GREENLAW, DAVID SHAPIRO & DANIEL MACDONALD, PRINCIPLES OF ECONOMICS 3E at 49 (3d ed. 2022) (“A rise in price of a good or service almost always decreases the quantity demanded of that good or service.”).

<sup>91</sup> See *id.* at 112–13 (“The price elasticity of demand is the percentage change in the quantity demanded of a good or service divided by the percentage change in the price.”).

<sup>92</sup> See *id.* at 113 (“Elasticities that are less than one indicate low responsiveness to price changes and correspond to inelastic demand or inelastic supply.”).

“[t]he main reason for change in the elasticity of demand with change in price of some goods is the availability of their competing substitutes.”<sup>93</sup> The more a good’s close substitutes are available in the market, the greater the elasticity for that good will be. If Trident raises gum prices and Doublemint makes the same flavor, people can just switch to Doublemint—but they might pay more for Trident if no other gum company makes a similar flavor of gum.

In addition, whether a good is a necessity or luxury impacts its price elasticity of demand. Necessities are more inelastic because people need to buy them, regardless of their price.<sup>94</sup> So, consider a (not so unrealistic) world in which potable water is limited, and everyone must purchase bottled water. Whether water sells for \$1.00, \$10.00, or \$100.00, people will buy it because they need it to survive.<sup>95</sup>

The demand for animal products has historically been inelastic.<sup>96</sup> This is because there have been very few substitutes for animal products that offer the same taste, texture, and nutritional value, and also because most people (thanks to outstanding marketing and advertising by the meat and dairy

<sup>93</sup> 9 *Factors That Influence Price Elasticity of Demand*, ECON. DISCUSSION, <https://www.economicdiscussion.net/elasticity-of-demand/9-factors-that-influence-price-elasticity-of-demand/3493> [<https://perma.cc/YA96-HHXQ>].

<sup>94</sup> See GREENLAW, SHAPIRO & MACDONALD, *supra* note 90, at 118 (“[W]hile perfectly inelastic demand is an extreme case, necessities with no close substitutes are likely to have highly inelastic demand curves.”).

<sup>95</sup> Electricity is a prime, realistic example of an inelastic good. In the past, public utilities had regional energy monopolies and, because of the absence of competition and assured consumer demand, could essentially charge whatever they wanted for energy. See Grace Brosofsky, Note, *Affordable Renewables - Unjust and Unreasonable?*, 105 CORNELL L. REV. 227, 234–35 (2019). To address this, Congress passed the Federal Power Act (FPA), which gave the Federal Power Commission (FPC) and its successor, the Federal Energy Regulatory Commission (FERC), the responsibility of ensuring that electricity rates are “just and reasonable.” *Id.* at 233. After the passage of the FPA, the FPC, and later FERC, would require utilities to charge just and reasonable rates determined by the Commission in ratemaking proceedings. *Id.* at 234–35. Later, FERC restructured energy markets to introduce competition and began using competition as the means of producing just and reasonable rates, but the Commission still plays an active role in regulating energy markets. *Id.* at 235.

<sup>96</sup> See Rafael Bakhtavoryan, Vardges Hovhannissyan, Stephen Devadoss & Jose Lopez, *An Empirical Evaluation of Egg Demand in the United States*, 53 J. AGRIC. & APPLIED ECON. 280, 293 (2021) (concluding that while U.S. consumers will substitute different types of nonconventional eggs, demand for conventional eggs is price-inelastic); Kazi Tamim Rahman, Md. Ruhul Amin & M. Salauddin Palash, *Demand for Selected Animal Sourced Protein Food Items in United States*, 4 OPEN AGRIC. 585, 588 (2019) (finding demand for meat is inelastic because, while consumers may substitute different types of meat, like beef and pork, they do not readily substitute meat and non-meat items); KUO S. HUANG & BIING-HWAN LIN, ESTIMATION OF FOOD DEMAND AND NUTRIENT ELASTICITIES FROM HOUSEHOLD SURVEY DATA 11, 20–30 (2000) (finding the meat categories analyzed—beef, pork, poultry, and fish—to all have negative price elasticities); see also *Elastic and Inelastic Demand*, ENCYCLOPEDIA.COM, <https://www.encyclopedia.com/finance/encyclopedias-almanacs-transcripts-and-maps/elastic-and-inelastic-demand> [<https://perma.cc/H3YA-34WK>] (using “meat” as an example of an inelastic good).

lobbies) were raised to view animal products as a dietary necessity—they simply cannot imagine meals without consuming some amount of meat, dairy, or eggs.<sup>97</sup> Insofar as the demand curve for animal products is inelastic, even if welfare measures increase industry costs, the industry will pass on the costs to consumers and will not suffer any monetary loss because consumers will continue purchasing the same amount of animal products. In economics terms, because pricing is inelastic, increases in price will have only a small effect on demand (and the number of animals exploited and/or killed).<sup>98</sup>

But all of this may be changing. For the first time in history, the marketplace has, and is continuing to develop, close substitutes for animal products, with plant-based milks leading the way.<sup>99</sup> From 2021 to 2022, plant-based milk accounted for 15% of all dollar sales of total milk in the U.S.<sup>100</sup> And from 2019 to 2022, plant-based milk unit sales grew 19% compared to animal-based milk, which saw unit declines of 4%.<sup>101</sup> Oat milk alone has seen an increase in retail sales of 50.52%, becoming the second-most popular plant-based milk.<sup>102</sup> Plant-based meats are likewise breaking into the market. Beyond Meat’s 2019 IPO became the “best-performing public offering by a major U.S. company in almost two decades.”<sup>103</sup> Its competitor, Impossible Foods, was dubbed the “fastest-growing plant-based meat company in retail” in 2021 after it raised almost \$2 billion since its

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<sup>97</sup> See Deena Shanker, *The US Meat Industry’s Wildly Successful, 40-Year Crusade to Keep its Hold on the American Diet*, QUARTZ (Oct. 22, 2015), <https://qz.com/523255/the-us-meat-industrys-wildly-successful-40-year-crusade-to-keep-its-hold-on-the-american-diet> [https://perma.cc/RQ36-BREA] (describing how “[t]he meat industry has influenced the dietary guidelines for decades” and “[m]eat will always be at the center of the American diet, whether it’s healthy or not”); see also Helena Bottemiller Evich, *Meat Industry Wins Round in War Over Federal Nutrition Advice*, POLITICO (Jan. 7, 2016, 11:28 AM), <https://www.politico.com/story/2016/01/2015-dietary-guidelines-217438> [https://perma.cc/A9RY-TJZ8] (“In the face of furious lobbying by the meat industry, the 2015 Dietary Guidelines do not explicitly urge Americans to eat less meat – as an expert panel advising the government had recommended last February.”).

<sup>98</sup> See *Price Elasticity of Demand: Meaning, Types, and Factors That Impact It*, INVESTOPEDIA.COM (Oct. 31, 2023), <https://www.investopedia.com/terms/p/pricelasticity.asp> [https://perma.cc/43RV-2A5N].

<sup>99</sup> See Megan Poinski, *Oat Milk Surges to Second Most Popular in Plant-Based Dairy*, FOOD DIVE (Sept. 30, 2020), <https://www.fooddive.com/news/oat-milk-surges-to-second-most-popular-in-plant-based-dairy/586010> [https://perma.cc/A8PC-SRES].

<sup>100</sup> Emma Ignaszewski & Ben Pierce, *U.S. Retail Market Insights for the Plant-Based Industry*, GOOD FOOD INST. (2023), <https://gfi.org/marketresearch> [https://perma.cc/M67S-BZZ5].

<sup>101</sup> *Id.*

<sup>102</sup> Anna Staropoli, *New Data Shows Oat Milk Is Skyrocketing to the Top of the Industry*, TASTINGTABLE (July 26, 2022), <https://www.tastingtable.com/941269/new-data-shows-oat-milk-is-skyrocketing-to-the-top-of-the-industry> [https://perma.cc/7HQF-V7HG].

<sup>103</sup> Mike Murphy, *Beyond Meat Soars 163% in Biggest-Popping U.S. IPO Since 2000*, MKT. WATCH (May 5, 2019), <https://www.marketwatch.com/story/beyond-meat-soars-163-in-biggest-popping-us-ipo-since-2000-2019-05-02> [https://perma.cc/KY6H-Z57D].

founding in 2011.<sup>104</sup> And these products continue improving in taste and texture.<sup>105</sup> Finally, cell-based meat may be on the horizon in the not-so-distant future. The Food and Drug Administration (“FDA”) and the United States Department of Agriculture (“USDA”) jointly regulate the cell-based meat space.<sup>106</sup> The cultivated meat company Upside Foods recently received the FDA’s first-ever regulatory approval for cultivated meat in the United States and will next seek USDA approval.<sup>107</sup>

Currently, Alternative products are more expensive than animal products—in part because production occurs on a much smaller scale<sup>108</sup> and because the government pumps money into the meat industry in a variety of underhanded ways.<sup>109</sup> But plant-based foods may be on the fast track to becoming cheaper than animal products.<sup>110</sup> And why wouldn’t they? Plants are significantly cheaper and more efficient sources of food than animal products; after all, for humans to eat animals, animals must first eat plants until they are large enough to slaughter for profit. Indeed, to produce one pound of chicken, pork, or beef for human consumption, the respective

<sup>104</sup> *Impossible Foods Bags Another \$500M Becoming the Fastest-Growing Plant-Based Meat in Retail*, VEGCONOMIST (Nov. 23, 2021), <https://vegconomist.com/top-stories/impossible-foods-secures-500m-becoming-the-fastest-growing-plant-based-meat-company-in-retail> [<https://perma.cc/6ZYD-6RVN>].

<sup>105</sup> *See, e.g.*, Elizabeth Crawford, *Breeding, Technological Advances Enhance Taste, Texture and Nutrition of Plant-Based Protein*, FOODNAVIGATOR-USA (May 1, 2023, 1:42 PM), <https://www.foodnavigator-usa.com/Article/2023/05/01/breeding-technological-advances-enhance-taste-texture-and-nutrition-of-plant-based-protein> [<https://perma.cc/GT4U-B8UZ>].

<sup>106</sup> *See* Megan Poinski, *Upside Foods Gets FDA Greenlight for Cultivated Chicken*, FOODDIVE (Nov. 16, 2022), <https://www.fooddive.com/news/upside-foods-fda-approval-cultivated-cell-based-chicken/636735> [<https://perma.cc/43SX-6RZU>].

<sup>107</sup> *Id.*

<sup>108</sup> Lizzy Rosenberg, *Plant-Based Meat Prices Are Finally About to Plummet (Updated)*, GREENMATTERS (Feb. 8, 2022, 1:01 PM), <https://www.greenmatters.com/p/why-is-plant-based-meat-so-expensive> [<https://perma.cc/4DR3-LNTM>] (highlighting how the smaller scale of plant-based burger patty production is one of the reasons why these alternatives have been more expensive than beef); Jacob Bunge & Heather Haddon, *Plant-Based Meat Makers Compete on Price*, WALL ST. J. (Mar. 3, 2020, 10:10 AM), <https://www.wsj.com/articles/plant-based-meat-makers-compete-on-price-11583233200> [<https://perma.cc/2RE6-PT9K>] (explaining that increases in scale and efficiency of alternative meat production are now enabling cost-competitiveness).

<sup>109</sup> *See, e.g.*, Erica Shaffer, *USDA to Pump More Funding into Meat, Poultry Processing Expansion*, MEAT + POULTRY (Nov. 2, 2022), <https://www.meatpoultry.com/articles/27520-usda-to-pump-more-funding-into-meat-poultry-processing-expansion> [<https://perma.cc/AX58-LKAM>] (describing how government subsidies to meat and poultry processors seek to keep consumer prices low).

<sup>110</sup> *See* Liz Specht, *Why Plant-Based Meat Will Ultimately Be Less Expensive Than Conventional Meat*, GOOD FOOD INST. (June 18, 2019), <https://gfi.org/blog/plant-based-meat-will-be-less-expensive> [<https://perma.cc/HX2Q-666C>] (arguing that plant-based meats will become cost-competitive once they have enough market power to cheaply access raw materials and increase production efficiencies). Cell-based products should also become cheaper than animal products, albeit on a slower timeline. *See* Nicole Axworthy, *Plant-Based Meat Will Be Cheaper Than Animal Meat Sooner Than You Think*, VEGNEWS (Feb. 4, 2022), <https://vegnews.com/vegan-news/technology/cheaper-plant-based-meat> [<https://perma.cc/S74N-V6E4>].



animals must eat an estimated 4.5 pounds, 9.4 pounds, and 25 pounds of plants.<sup>111</sup>

Put differently, to raise and slaughter animals for consumption, humans raise 4.5 to 16 times as many feed crops as we would need to sustain our population on a plant-based diet. In short, plant- and cell-based products are becoming viable alternatives for animal products, and are therefore—for the first time in history—leaving animal products susceptible to demand elasticity.

What does this new marketplace mean for animal advocacy and the rights-welfare divide? It means that welfarism now has an opportunity to play the role that Welfarists have long asserted it plays in the animal-rights movement. As demand for animal products becomes increasingly elastic, then as welfare reforms drive up prices for animal-exploiting industries, they will start to drive people away from animal products.

But product improvement and price parity are not the only puzzle pieces. In our view, some portion of the public will refuse to accept Alternatives as legitimate substitutes for animal products; no matter how accurately they replicate animal products in taste, texture, and nutrition, many people may inherently view them as options, not replacements.<sup>112</sup> Therefore, while Alternatives have the *potential* to make demand for animal products elastic, they will only accomplish this for a fraction of consumers. This is where Abolitionists—particularly lawyers—come in. In Part IV, we argue that Abolitionist legal advocacy is the most promising avenue for making the public, as a whole, view plant- and cell-based alternatives as true substitutes for animal products and treat animal products as an elastic good.

#### IV

##### WHY ABOLITIONIST LAWYERS ARE A KEY PIECE OF THE PUZZLE

What will make consumers view Alternatives as true substitutes for animal products and therefore make the market for animal products elastic? As discussed, some percentage of consumers will accept plant- and cell-based foods as substitutes based on market forces alone. They will see products with similar taste, texture, nutritional value, and prices as animal products, and they will treat these products as interchangeable. (This is already happening, to some degree, with oat milk).<sup>113</sup> But the rest will need

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<sup>111</sup> *Feed-To-Meat – Conversion Inefficiency Ratios*, A WELL FED WORLD, <https://awellfedworld.org/feed-ratios> [<https://perma.cc/6MK4-MDZW>].

<sup>112</sup> See Elizabeth Crawford, *Meat Sales at Retail Surge Despite Rise of Plant-Based Options and Fewer Consumers Identifying as Meat Eaters*, FOODNAVIGATOR-USA (Mar. 30, 2021, 4:41 PM), <https://www.foodnavigator-usa.com/Article/2021/03/30/Meat-sales-surge-despite-rise-of-plant-based-options-and-fewer-consumers-identifying-as-meat-eaters> [<https://perma.cc/7AE6-UV9U>].

<sup>113</sup> See *supra* note 102 and corresponding text.

convincing.

In our view, Abolitionists hold the key to the remainder of the marketplace. Specifically, they must prove two points to consumers: (1) animal products are not preferable, let alone necessary, food choices—they can be replaced; and (2) even if people do not view plant- and cell-based alternatives as *perfect* substitutes, they are sufficient—and sufficient is good enough when there is no ethical way to consume animals.

Regarding the first point, scientific proof is mounting that animal products are not dietary necessities.<sup>114</sup> Athletes such as Venus Williams, Colin Kaepernick, and Kyrie Irving are promoting plant-based diets, showing that meat is not integral to strength and fitness.<sup>115</sup> Animal products are increasingly linked to health issues such as heart disease, colon cancer, and type 2 diabetes,<sup>116</sup> and organizations including the World Health Organization, the Academy of Nutrition and Dietetics, and Dietitians of

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<sup>114</sup> See, e.g., Winston J. Craig & Ann Reed Mangels, *Position of the American Dietetic Association: Vegetarian Diets*, 109 J. AM. DIETETIC ASS'N 1266, 1266 (2009), [https://www.sciencedirect.com/science/article/pii/S0002822309007007?ref=pdf\\_download&fr=R-R-2&rr=8264d7ca1ea54343](https://www.sciencedirect.com/science/article/pii/S0002822309007007?ref=pdf_download&fr=R-R-2&rr=8264d7ca1ea54343) [<https://perma.cc/CEJ2-ER73>] (“It is the position of the American Dietetic Association that appropriately planned vegetarian diets, including total vegetarian or vegan diets, are healthful, nutritionally adequate, and may provide health benefits in the prevention and treatment of certain diseases.”); Philip J. Tusso, Mohamed H. Ismail, Benjamin P. Ha & Carole Bartolotto, *Nutritional Update for Physicians: Plant-Based Diets*, 17 PERMANENTE J. 61, 61 (2013) (“[P]lant-based diets are cost-effective, low-risk interventions that may lower body mass index, blood pressure, HbA1C, and cholesterol levels. They may also reduce the number of medications needed to treat chronic diseases and lower ischemic heart disease mortality rates.”).

<sup>115</sup> See Alan Dawson, *These 19 Elite Athletes Are Vegan — Here’s What Made Them Switch Their Diet*, BUSINESS INSIDER (Nov. 1, 2018), <https://www.businessinsider.com/vegan-athletes-and-why-they-changed-their-diet-11> [<https://perma.cc/WJC6-3YRB>]; Hailey Welch, *These 20 Athletes Swear by a Plant-Based Diet for Better Performance. Should You?*, THE BEET (Aug. 24, 2020), <https://thebeet.com/these-20-athletes-swear-by-a-plant-based-diet-for-better-performance-should-you> [<https://perma.cc/F5SV-W3F6>]; Animal Outlook, *Vegan Strong Athlete Series*, YOUTUBE (Sept. 23, 2022), <https://www.youtube.com/watch?v=MEkxbCoTEKE&list=PLXhyC8X15obsHVEUe80tUO2VwbGnmI9T3> [<https://perma.cc/M74X-W93H>].

<sup>116</sup> See, e.g., Evelyne Battaglia Richi, Beatrice Baumer, Beatrice Conrad, Roger Darioli, Alexandra Schmid & Ulrich Keller, *Health Risks Associated with Meat Consumption: A Review of Epidemiological Studies*, 85 INT’L J. VITAMIN NUTRITION RSCH. 70, 70 (2015) (“[T]he long-term consumption of increasing amounts of red meat and particularly of processed meat is associated with an increased risk of total mortality, cardiovascular disease, colorectal cancer and type 2 diabetes, in both men and women.”); Keren Papier, Georgina K. Fensom, Anika Knuppel, Paul N. Appleby, Tammy Y. N. Tong, Julie A. Schmidt, Ruth C. Travis, Timothy J. Key & Aurora Perez-Cornago, *Meat Consumption and Risk of 25 Common Conditions: Outcome-Wide Analyses in 475,000 Men and Women in the UK Biobank Study*, BMC MED. (2021), <https://bmcmecicine.biomedcentral.com/articles/10.1186/s12916-021-01922-9> [<https://perma.cc/2V7L-FDZ5>] (“[P]articipants who reported consuming meat regularly (three or more times per week) had more adverse health behaviours and characteristics than participants who consumed meat less regularly, and most of the positive associations observed for meat consumption and health risks were substantially attenuated after adjustment for body mass index (BMI).”).

Canada are endorsing plant-based diets.<sup>117</sup> Now, lawyers must play the crucial role of embedding this message in the law—because it is the law that, above all else, legitimizes ideas.<sup>118</sup>

One way that Abolitionist lawyers can accomplish this goal is through consumer-protection lawsuits. For example, in August 2022, Animal Outlook sued the American Heart Association (“AHA”) alleging that, in exchange for a fee, AHA allows companies to display the AHA mark on certain meat products and market them as “heart healthy” when, in fact, they are not.<sup>119</sup> In this way, Animal Outlook is working to correct consumers’ misconceptions about the health benefits of meat consumption.

Regarding the second point, Abolitionist lawyers must hammer home the idea that there is no ethical way to raise and slaughter animals for food. As discussed *infra* Part II, the animal agriculture industry has done an excellent job of “humane-washing,” or misrepresenting to consumers that they can buy animal products without condoning animal suffering—and that if they spend a bit more money, they can even purchase products that come from pampered animals. Because people don’t like to change habits, even bad ones,<sup>120</sup> they are happy to accept that there are ethical ways to consume animal products. But if people accept that purchasing animal products can be an ethical option, they will be less incentivized to consider different types of substitutes, namely plant-based, fermentation-derived, and cell-based products.

Accordingly, Abolitionists must continue to show the public that animal products are never humane. They can accomplish this by investigating and

<sup>117</sup> Nicholas Hallows, *10 Top Health Organisations that Endorse a Plant-based Diet*, VIVA! (Mar. 3, 2022), <https://viva.org.uk/health/blog-health/10-top-health-organisations-that-endorse-a-plant-based-diet> [<https://perma.cc/WC9D-GJ5Q>].

<sup>118</sup> See Le Chang & David Machin, *The Law and Critical Discourse Studies*, 20:3 CRITICAL DISCOURSE STUD. 243, 244 (2023) (“The law shapes, legitimizes and naturalizes social practices. This language formalizes and naturalizes discourses disseminated by other institutions in society . . . .”); Mary L. Dudziak, *The Court and Social Context in Civil Rights History*, 72 U. CHI. L. REV. 429, 431 (2005) (discussing the view that Brown was a “reconsecration of American ideals”); see also *Political Legitimacy*, STANFORD ENCYC. PHIL. (Apr. 24, 2017), <https://plato.stanford.edu/entries/legitimacy> [<https://perma.cc/6R7Q-RF9W>] (discussing the concept, function, and sources of political and legal legitimacy).

<sup>119</sup> *Press Release: Organization Challenges American Heart Association Over “HEALTHY” Certification Seal*, ANIMAL OUTLOOK (Aug. 29, 2022), <https://animaloutlook.org/press-release-organization-challenges-american-heart-association-over-healthy-certification-seal/#:~:text=This%20lawsuit%20from%20Animal%20Outlook,counter%20to%20AHA`s%20prior%20statements> [<https://perma.cc/QXC6-EGGV>].

<sup>120</sup> See, e.g., *Breaking Bad Habits: Why It’s So Hard to Change*, NEWS IN HEALTH 1 (Jan. 2012), <https://newsinhealth.nih.gov/2012/01/breaking-bad-habits> [<https://perma.cc/BL4Q-2LKT>] (quoting University of Texas at Austin neurobiologist Dr. Russell Poldrack) (describing how even when habits are self-acknowledged as bad, they’re nevertheless difficult to change because, among other reasons, habits are beneficial for the brain since they free up brain space; if the habits are enjoyable and release dopamine, then that strengthens the habit).

exposing the inherent cruelty at facilities that advertise as “free range,” “cage-free,” “all natural,” and “humane.” In turn, lawyers must validate investigations by holding facilities accountable for fraudulent representations of higher welfare. In addition, lawyers should pursue legal action revealing that cruelty is inherent in animal agriculture. For example, criminal cruelty charges against owners and managers of animal agriculture facilities, rather than their lower-level employees, help to prove that cruelty is systemic and is not just isolated acts of a few bad apples.<sup>121</sup>

By proving to consumers how inherently cruel animal agriculture is to animals, Abolitionist lawyers are sending a message to consumers that Alternatives—whether perfect replications of animal products or not—*must be* good enough market substitutes. Put differently, Abolitionists must show consumers that if they can switch to a plant-based product, even one they like slightly less than its animal-product counterpart, it’s a no-brainer to make the switch—because using animal products is not, and can never be, an ethical decision. Once consumers open their minds to Alternatives, welfare-measures that induce price parity can sway a larger percentage of consumers.

Combining all the elements of our discussion, we visualize animal law advancing as follows: (1) as Alternatives come closer to replicating their animal-product counterparts, consumers will start to consider them as substitutes for animal products; (2) it is up to Abolitionist activists and lawyers to make the public—not just a portion of the public—accept Alternatives as viable substitutes for animal products, by showing that (a) animal products are not necessities, and (b) animal products can never be an ethical option; (3) as Alternatives become viable substitutes for animal products in the eyes of consumers, demand for animal products will become increasingly elastic; (4) as demand for animal products becomes more elastic, higher prices for animal products will mean that consumers purchase lower quantities of animal products because they will switch to substitute plant-based, fermentation-derived, or cell-based products; and (5) both welfare measures that drive up prices for animal-exploiting industries and litigation revealing the inherent cruelty in animal agriculture will drive people away from animal products and towards vegan products, ultimately advancing the Abolitionist agenda.

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<sup>121</sup> See, e.g., Kenny Torrella & Marina Bolotnikova, *Undercover Audio of a Tyson Employee Reveals “Free-Range” Chicken is Meaningless*, VOX (Aug. 2, 2023), <https://www.vox.com/future-perfect/23724740/tyson-chicken-free-range-humanewashing-investigation-animal-cruelty> [<https://perma.cc/P7ME-W36W>] (discussing how Animal Outlook’s investigation resulted in multiple counts of animal cruelty levied against a facility owner and manager); *PRESS RELEASE: Owner of Slaughterhouse Pleads Guilty Following Undercover Investigation*, ANIMAL OUTLOOK (Feb. 22, 2023), <https://animaloutlook.org/press-release-owner-of-slaughterhouse-pleads-guilty-following-undercover-investigation> [<https://perma.cc/WYS7-TSEG>].

## V

## CONSIDERATIONS FOR ABOLITIONISTS EMPLOYING WELFARE STRATEGIES

Abolitionists should not read this Article as arguing that all welfare reforms will now benefit an animal-rights mission. To the contrary, we think Abolitionists should remain cautious in choosing welfare strategies and deciding how to implement them. While practitioners may use a variety of criteria to evaluate strategies, we recommend that Abolitionists consider three primary factors when evaluating welfare measures: (1) whether the welfare reform economically harms the animal-exploiting industry; (2) whether the welfare reform can advance Abolitionist public messaging; and (3) whether the welfare measure can open doors for future Abolitionist reforms. We discuss each in turn.

*A. Does the Welfare Reform Economically Harm the Animal-Exploiting Industry?*

As an initial matter, when deciding whether to advance a welfare-based strategy, Abolitionists must distinguish between animal welfare reform that hurts animal-exploiting industries from reform that, paradoxically, may be economically advantageous to these industries.

Professor Francione has advanced strong arguments that “welfare standards are generally linked to what is required to exploit animals in an efficient manner. That is, animal welfare generally protects animal interests only to the extent that it provides economic benefits for humans.”<sup>122</sup> Put differently, animal welfare reforms can help make the industry more profitable.<sup>123</sup> As one illustration, Francione cites the Humane Society of the United States (“HSUS”) and PETA reports advocating for controlled-

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<sup>122</sup> Gary L. Francione, *The Four Problems of Animal Welfare: In a Nutshell*, ANIMAL RIGHTS: THE ABOLITIONIST APPROACH (May 2, 2007), <https://www.abolitionistapproach.com/the-four-problems-of-animal-welfare-in-a-nutshell> [<https://perma.cc/YR4P-GFMU>].

<sup>123</sup> Even reforms that do not make the industry more profitable may have a negligible impact. *See, e.g.*, Nat’l Pork Producers Council v. Ross, 598 U.S. 356, 360 (2023) (“Justice Gorsuch, joined by Justice Thomas, Justice Sotomayor, and Justice Kagan, concluded . . . that the allegations in the complaint were insufficient as a matter of law to demonstrate a substantial burden on interstate commerce.”).

atmosphere killing (“CAK”)<sup>124</sup> of poultry over live-hang slaughter<sup>125</sup> because it is more humane and also more cost effective for the industry.<sup>126</sup> Per the

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<sup>124</sup> See PETA, CONTROLLED-ATMOSPHERE KILLING VS. ELECTRIC IMMOBILIZATION (2021), <https://www.peta.org/wp-content/uploads/2021/06/CAKreport.pdf> [https://perma.cc/G72W-CYQC] (outlining the superiority of controlled-atmosphere killing from an animal welfare perspective). In a controlled-atmosphere killing system, a mixture of gases is used to kill the chickens before shackling, often while the birds are still in their transport crates. *Id.* at 13. Inert gases (such as nitrogen and argon) and/or carbon dioxide can be used, with inert gases being the less painful and traumatic option. *Id.* at 16. In a controlled-atmosphere *stunning* system, however, gases such as carbon dioxide are used merely to render the birds unconscious, not to kill them. *Id.* at 16–17. This system raises more welfare concerns than controlled-atmosphere killing because there remains the possibility that the animals could regain consciousness during later stages of slaughter and processing. See *id.* at 7. Because of the adverse effects of carbon dioxide, some welfare advocates refuse to categorize controlled-atmosphere killing as a humane method of slaughter, but still, it has advantages over live-hang slaughter with electric immobilization. See *id.* at 16–17. Other animal rights scholars refuse to regard CAK/CAS as humane because the process still results in “a period when the animal feels a sense of suffocation.” Natalie Kinsley, *No Advantage to CAK Chicken Slaughter*, POULTRY WORLD (Feb. 18, 2009), <https://www.poultryworld.net/Home/General/2009/2/No-advantage-to-CAK-chicken-slaughter-WP003605W> [https://perma.cc/4EMV-PLUU].

<sup>125</sup> Live-hang slaughter with electric immobilization is a brutal process that is difficult to describe, let alone watch, without feeling distraught on behalf of the animals. See *Amick Farms: High-Speed Chicken Slaughterhouse Exposed*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/amick-farms> [https://perma.cc/EP5F-ULU4]; Animals Australia, *How Slaughterhouses Kill Thousands of Chickens an Hour*, YOUTUBE (Nov. 25, 2020), <https://www.youtube.com/watch?v=uJXSYMhtwvU&t=131s> [https://perma.cc/NU5S-9BBN]. Workers shackle live, conscious chickens and hang them upside-down on an overhead conveyor, which drags their heads through electrified water. See PETA, *supra* note 121, at 13 (quoting Dr. Bruce Webster, a poultry welfare scientist as saying that “[t]he hanging process causes fear and struggle and creates risk of injury. The experience of hanging by the legs in a metal shackle is undoubtedly uncomfortable.”). The electrified water eventually paralyzes the chickens but may leave them conscious and capable of feeling pain. Sara J. Shields & A. B. M. Raj, *A Critical Review of Electrical Water-Bath Stun Systems for Poultry Slaughter and Recent Developments in Alternative Technologies*, 13 J. APPLIED ANIMAL WELFARE SCI. 281, 288 (2010) (“Observations of these outward physical signs have led to the suggestion that some electrically stunned birds may not be unconscious following attempts to stun them in an electrified water-bath but are rather in a state of electrically induced paralysis.”); see also *The Case for Controlled-Atmosphere Killing*, PETA, <https://www.peta.org/features/case-controlled-atmosphere-killing> [https://perma.cc/CXK5-TD7A] (arguing that *all* birds remain conscious after electric immobilization because electric current levels are too low). The conveyor then moves the (sometimes conscious) chickens out of the water and past automated blades, which slice the chickens’ throats, sometimes killing them on the first try and sometimes missing. Shields & Raj, *supra* note 125 at 289–90. When the chickens are bleeding out from the cuts in their necks, they often regain consciousness even if they were effectively stunned by the electrified water; if this is the case, workers slit their throats manually. *Compl. for Declaratory and Injunctive Relief* ¶ 54, *Animal Legal Def. Fund v. Foster Poultry Farms*, No. 20CV-02493 (Cal. Sup. Ct. Sept. 2, 2020). The conveyor then delivers the chickens—hopefully, but not necessarily, dead—to the final step, where they are submerged in scalding water for “defeathering”; they remain submerged for a long enough time to die from drowning or scalding. *Id.*

<sup>126</sup> See Francione, *supra* note 122. Taking into account only the economic benefits of increased meat yield (and none of the other economic benefits, including improved quality and shelf-life of meat; reduced refrigeration and energy costs; and reduced labor costs), the PETA report estimates

economic principles discussed in Part II *supra*, if Professor Francione is correct, then welfare reforms such as a switch from live-hang slaughter to CAK do not serve Abolitionist ends any more in today's economy than they did decades ago before the expansion of plant-based alternatives.

Identifying and categorizing all possible welfare reforms based on their economic impact is beyond the scope of this paper, so for illustration, we note several examples of welfare reforms that likely hurt the industry's bottom line. The first is an ongoing battle to reduce (or even maintain) the maximum rate at which animals can be slaughtered. In October 2019, the Food Safety and Inspection Service, a subset of the USDA, adopted the New Swine Inspection System ("NSIS").<sup>127</sup> The NSIS was "an optional program that implemented several reforms, including the elimination of evisceration line speed limits."<sup>128</sup> In addition to raising concerns about worker safety and the environment, the changes worsened the already-horrifying slaughterhouse conditions for pigs. Animal Outlook's 2015 undercover investigation of Quality Pork Processors revealed "workers beating, shocking, and dragging animals as they struggle[d] to keep up with line speeds."<sup>129</sup> This should hardly be surprising since the Hormel supplier slaughtered "approximately 1,300 pigs each hour—or one pig every 5 seconds."<sup>130</sup>

One could formulate theoretical arguments that eliminating line-speed requirements is economically deleterious for the pork industry. For example, faster line speeds seem to correlate with more pork that is unfit for human consumption,<sup>131</sup> which could mean more recalls and more consumer lawsuits. But the industry likely took all of these factors into account in presenting its strong adverse reaction when a federal court in Minnesota vacated the rule "insofar as it eliminate[d] line speed limits."<sup>132</sup> Although the

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that for a facility with a capacity to slaughter 128,000 birds per day, it would take around thirteen to sixteen months to recoup the costs of switching from electric immobilization to a controlled-atmosphere killing system. PETA, *supra* note 124, at 26–27. After thirteen to sixteen months, the facility would begin making around an additional \$1 million to \$1.3 million profit per year just from increases in meat yield. *Id.* at 28. For a company the size of Tyson, the increased profits would range from \$47 million to \$64 million per year. *Id.*

<sup>127</sup> Modernization of Swine Slaughter Inspection, 84 Fed. Reg. 52,300, 52,300 (Oct. 1, 2019) (to be codified at 9 C.F.R. pts. 301, 309, 310).

<sup>128</sup> *United Food & Com. Workers Union v. U.S. Dep't of Agric.*, 532 F.Supp.3d 741, 748–49 (D. Minn. 2021).

<sup>129</sup> *USDA Deregulates Pig Slaughterhouses Despite Horrible Consequences for Animals*, ANIMAL OUTLOOK (Sept. 17, 2019), <https://animaloutlook.org/usda-deregulates-pig-slaughterhouses> [<https://perma.cc/3PGJ-6UMV>].

<sup>130</sup> *Id.*

<sup>131</sup> *See id.* (discussing how Animal Outlook's undercover investigation found "pigs covered in feces and pus-filled abscess processed for human consumption—with a USDA inspection seal of approval").

<sup>132</sup> *See United Food & Com. Workers Union*, 532 F.Supp.3d at 782.

Court found at trial that the industry had failed to establish that eliminating *only* line speed limits (as opposed to striking down the entire federal rule, which included other provisions) would have “disruptive consequences,”<sup>133</sup> Iowa State Professor Dermot Hayes’s subsequent analysis concluded that “[e]ven with possible mandatory overtime to compensate for lost capacity, the industry will lose 2.5 percent of overall harvest capacity.”<sup>134</sup> Relying on Professor Hayes’s analysis, the National Pork Producers Council (“NPPC”) called the decision “disastrous” for small pork producers<sup>135</sup> and urged the government to appeal the court’s ruling.<sup>136</sup>

Slaughter speed limits are not the only Welfarist position that animal-exploiting industries have vehemently opposed on economic grounds. Perhaps the most famous animal welfare laws were enacted through California’s Proposition 2,<sup>137</sup> Assembly Bill 1437,<sup>138</sup> and Proposition 12.<sup>139</sup> First, Proposition 2 “prohibit[ed] California farmers from tethering or confining pregnant pigs, veal calves, and egg-laying hens in a way that prevent[ed] them from lying down, standing up, fully extending their limbs, or turning around freely.”<sup>140</sup> Subsequently, Assembly Bill 1437 added a prohibition against “selling eggs in California that are produced by hens confined under conditions that do not meet the confinement requirements of Proposition 2.”<sup>141</sup> Finally, Proposition 12 “prohibit[ed] the sale in California of ‘whole veal meat’ and ‘whole pork meat’ that a seller ‘knows or should

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<sup>133</sup> See *id.* at 780. (“USDA’s attorney acknowledged that the agency had not differentiated between the disruption of vacating the entire rule and only that provision. Without an analysis of what consequences are specific to the line speed limit elimination, it is difficult to evaluate the disruptive consequences cited by amici and USDA.”). We note, however, that while the district court equivocated about the extent to which requiring the USDA to re-impose line speed limits would economically harm the pork industry, it never entertained the possibility that line speed limits could actually *benefit* the industry.

<sup>134</sup> DERMOT HAYES, ECONOMIC IMPACT OF THE RECENT DISTRICT COURT RULING REGARDING LINE SPEEDS ON THE U.S. PORK INDUSTRY, [https://www.agripulse.com/ext/resources/pdfs/NPPC\\_NSIS\\_Hayes\\_report.pdf](https://www.agripulse.com/ext/resources/pdfs/NPPC_NSIS_Hayes_report.pdf) [<https://perma.cc/P7NM-ACUC>].

<sup>135</sup> USDA Directs Pork Line Speeds to Slow Down Effective June 30, 2021, NAT’L PROVISIONER (May 31, 2021), <https://www.provisioneronline.com/articles/111067-usda-directs-pork-line-speeds-to-slow-down-effective-june-30-2021> [<https://perma.cc/VNX8-BSQT>].

<sup>136</sup> *Lawmakers Urge Administration to Quickly Appeal Damaging Court Ruling*, NAT’L PORK PRODUCERS COUNCIL (June 3, 2021), <https://nppc.org/press-releases/lawmakers-urge-administration-to-quickly-appeal-damaging-court-ruling> [<https://perma.cc/PG4G-L2XK>].

<sup>137</sup> CAL. HEALTH & SAFETY CODE § 25990 (West 2015) (*amended by* 2018 Cal. Legis. Serv. Prop. 12 (West)); CAL. HEALTH & SAFETY CODE § 25991 (West 2018); CAL. HEALTH & SAFETY CODE § 25992 (West 2018); CAL. HEALTH & SAFETY CODE § 25993 (West 2018); CAL. HEALTH & SAFETY CODE § 25994 (West 2015).

<sup>138</sup> CAL. HEALTH & SAFETY CODE § 25995 (West 2011); CAL. HEALTH & SAFETY CODE § 25996 (West 2014); CAL. HEALTH & SAFETY CODE § 25996.3 (West 2016) (originally enacted as CAL. HEALTH & SAFETY CODE § 25997).

<sup>139</sup> CAL. HEALTH & SAFETY CODE § 25990 (West 2018).

<sup>140</sup> *N. Am. Meat Inst. v. Becerra*, 420 F.Supp.3d 1014, 1018 (C.D. Cal. 2019).

<sup>141</sup> *Id.*



know is the meat of a covered animal who was confined in a cruel manner’ as defined by Proposition 2.”<sup>142</sup> Cumulatively, these laws ensure that breeding pigs, egg-laying hens, and veal calves in California have freedom of movement, and that animal products sold in California come from animals afforded the same freedom of movement required in California.

Notably, animal-exploiting industries spent years challenging California’s laws. However, the Ninth Circuit Court of Appeals upheld Proposition 12 against separate Dormant Commerce Clause challenges by the North American Meat Institute (“NAMI”)<sup>143</sup> and the NPPC.<sup>144</sup> And in early 2023, the United States Supreme Court affirmed the Ninth Circuit.<sup>145</sup>

While there has been controversy over the economic impacts of gestation crates on the pork industry,<sup>146</sup> it is difficult to imagine industry representatives challenging welfare laws like California’s if they did not have a significant negative impact on pork producers.<sup>147</sup> These representatives argued in court that California’s laws imposed significant costs on animal-exploiting industries,<sup>148</sup> and according to the Iowa-based NPPC and the American Farm Bureau Federation, the compliance cost for the industry is in the range of \$290 and \$350 million.<sup>149</sup>

Even single-issue welfare campaigns, such as those targeting fur or leather, may impact the cost of exploiting animals, despite industry claims to the contrary. For example, in a Position Statement on Leather Alternatives, the leather industry argues that consumers are not helping animals if they stop buying leather.<sup>150</sup> According to the industry, the same cows will be

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<sup>142</sup> *Id.* at 1019 (quoting CAL. HEALTH & SAFETY CODE § 25990 (West 2018)).

<sup>143</sup> The North American Meat Institute is a national trade association of meat packers and processors. *See id.* at 1017.

<sup>144</sup> Nat’l Pork Producers Council v. Ross, 6 F.4th 1021, 1033–34 (9th Cir. 2021).

<sup>145</sup> Nat’l Pork Producers Council v. Ross, 598 U.S. 356, 391 (2023).

<sup>146</sup> *See* Francione, *supra* note 122 (describing how certain welfare organizations claim that gestation crate alternatives will “increase productivity and producer profits” while personally contending that a shift to such alternatives is limited).

<sup>147</sup> *See* Marceau & Kysar, *supra* note 88 (“[T]hat the industry vigorously fought Prop 12, deploying members of Congress to scare the public about the prospect of expensive bacon, may be enough to conclude that the Supreme Court ruling represents an important breakthrough . . . . It’s doubtful that a \$28 billion-per-year industry doesn’t know what’s good for its bottom line.”).

<sup>148</sup> N. Am. Meat Inst., 420 F.Supp.3d at 1034 (“The gravamen of NAMI’s ‘substantial burden’ argument is therefore ultimately a complaint about the cost of complying with Proposition 12’s requirements.”).

<sup>149</sup> *See* Beau Bowman, *Iowa Pork Producers React After Supreme Court Rejects Challenge to California Pork Law*, KCCI DES MOINES (May 11, 2023), [https://www.kcci.com/article/iowa-pork-producers-react-supreme-court-rejects-challenge-california-law/43869533?utm\\_campaign=snd-autopilot# \[https://perma.cc/5BKV-T8NY\]](https://www.kcci.com/article/iowa-pork-producers-react-supreme-court-rejects-challenge-california-law/43869533?utm_campaign=snd-autopilot# [https://perma.cc/5BKV-T8NY]).

<sup>150</sup> *See* *Global Leather Industry Position Statement on Leather Alternatives*, VDL (July 19, 2021), [https://vdl-web.de/wp-content/uploads/2021/11/2021\\_07\\_19\\_Global-leather-industry-statement-on-leather-alternatives-16072021.pdf \[https://perma.cc/5GLD-JWLM\]](https://vdl-web.de/wp-content/uploads/2021/11/2021_07_19_Global-leather-industry-statement-on-leather-alternatives-16072021.pdf [https://perma.cc/5GLD-JWLM]) (explaining that the leather industry uses hides and skins left over from the food sector which would otherwise be discarded).

killed anyway for meat and the leather will go to waste. But this argument, while clever, ignores basic tenets of supply and demand.<sup>151</sup> If people stop buying leather, then leather manufacturers will demand fewer cow skins and hides. This means the companies that raise and slaughter cows for meat will lose a source of income, and to account for the lost income, they will either raise meat prices or lower output, hurting their bottom line.<sup>152</sup> In this way, single-issue campaigns such as those levied against the leather industry can economically damage the animal agriculture industry as a whole.

Finally, whether welfare reforms help or hurt the profitability of animal exploitation hinges not only on the nature of the reform, but also on the strategy used to implement it. As an example, we return to the claim that CAK is economically more profitable for the poultry industry than the much crueler practice of live-hang slaughter.<sup>153</sup> Assuming this is correct, a sweeping legislative reform favoring CAK over live-hang slaughter could make the industry more profitable.<sup>154</sup>

Consider, by contrast, ALDF's lawsuit challenging the use of live-hang

<sup>151</sup> Separately, it ignores the fact that leather products come from animals other than those raised for food. Nobody is making alligator coats because there were leftover alligator skins. *See e.g.*, Julia Williams, *How States Are Hurting Alligators—and Lying About It*, ONE GREEN PLANET (2023), <https://www.onegreenplanet.org/animals/how-states-are-hurting-alligators-and-lying-about-it> [<https://perma.cc/3VGZ-CFW3>] (describing how it is legal to hunt alligators for their hides in parts of the United States).

<sup>152</sup> The same arguments apply with respect to industries that use animal byproducts for pet food and other purposes. If animal agriculture can profit from these byproducts, then eliminating the products will hurt the industry. *See* DANIEL L. MARTI, RACHEL J. JOHNSON & KENNETH H. MATHEWS, U.S. DEP'T AGRIC., WHERE'S THE (NOT) MEAT? BYPRODUCTS FROM BEEF AND PORK PRODUCTION 1 (2011), [https://www.ers.usda.gov/webdocs/outlooks/37427/8801\\_ldpm20901.pdf](https://www.ers.usda.gov/webdocs/outlooks/37427/8801_ldpm20901.pdf) [<https://perma.cc/R3FD-8GAL>] (explaining that “animal byproducts contribute to the bottom line of the U.S. meat industry” in the sense that the industry sells these byproducts).

<sup>153</sup> *See* Francione, *supra* note 122. Practices for slaughtering chickens are often the cruelest because, amazingly, federal animal welfare laws exclude chickens from any form of protection. Specifically, the Humane Slaughter Act (7 U.S.C. §§ 1901–1907), the Animal Welfare Act (7 U.S.C. §§ 2131–2160), the Animal Fighting Prohibition Enforcement Act of 2007 (amending 18 U.S.C. § 49 and 7 U.S.C. § 2156 of the Animal Welfare Act), and the Twenty-Eight Hour Law (49 U.S.C. § 80502, which requires that animals being transported longer than twenty-eight consecutive hours be unloaded to rest for at least five consecutive hours) all exclude chickens even though chickens make up “[o]ver 90% of the 10 billion animals used in animal agriculture in the United States.” Veronica Hirsch, *Overview of the Legal Protections of the Domestic Chicken in the United States and Europe*, ANIMAL LEGAL & HIST. CTR. (2003), <https://www.animallaw.info/article/overview-legal-protections-domestic-chicken-united-states-and-europe> [<https://perma.cc/Y9FY-W35S>] (stating that the Humane Slaughter Act, the Animal Welfare Act, and the Twenty-Eight Hour Law do not protect chickens); *see also* Claire Hamlett, *The Animal Welfare Act Actually Doesn't Protect Most Animals*, SENTIENT MEDIA (July 12, 2023), <https://sentientmedia.org/animal-welfare-act> [<https://perma.cc/A4KZ-NE8J>] (explaining that despite amendments to the Animal Welfare Act such as the Animal Fighting Prohibition Enforcement Act of 2007, chickens “remain unprotected”).

<sup>154</sup> *See* PETA, *supra* note 124, at 4 (quoting Dr. Stanley E. Curtis from the University of Illinois Department of Animal Sciences as stating that “[a] variety of systems have been proved to be effective and profitable in [controlled atmosphere stunning] of poultry”).

slaughter at Foster Farms in California. ALDF argues that Article X, Section 2 of the California State Constitution, which prohibits the “waste or unreasonable use” of water, outlaws live-hang slaughter because the practice requires copious amounts of water in a drought-ridden area.<sup>155</sup> Because of its slaughter methods, Foster Farms must purchase its water from Livingston, and the facility uses “three to four million gallons of drinkable water each day—more than all other water users in the City of Livingston combined—to slaughter and process chickens to sell for meat.”<sup>156</sup> As ALDF alleges, Foster Farms could instead use CAK, which requires significantly less water, making Foster Farms’ use of live-hang slaughter “waste or unreasonable use” of water under the state Constitution.<sup>157</sup>

One might ask why, if CAK is more profitable than live-hang slaughter,<sup>158</sup> a company like Foster Farms would defend a lawsuit about its slaughter methods rather than making the change of its own volition. One likely explanation is that the up-front cost is too great for Foster Farms to bear and would force the slaughterhouse to shut down. Put differently, economic analyses of live-hang slaughter versus CAK examine economic efficiencies over time; they do not account for the impact of transition costs, specifically on individual facilities. Therefore, ALDF’s lawsuit could hurt the industry even if an overall transition to CAK would be economically advantageous. The circumstances surrounding a particular challenge to a cruel practice can, in this way, dictate how advantageous the challenge is for an Abolitionist agenda.

### *B. Can the Welfare Reform Advance Abolitionist Public Messaging?*

In addition to economic concerns, Abolitionists should be more willing to advance welfare-based policies and lawsuits that naturally lend themselves to Abolitionist messaging. While this may seem paradoxical, Abolitionist organizations and lawyers have power to control public narratives surrounding their work. The public messaging need not, and should not, perfectly match the legal or policy agenda.

Consider the following examples. Animal Outlook advocates for the

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<sup>155</sup> CAL. CONST. art. X, § 2; Compl. for Declaratory and Injunctive Relief, *supra* note 125, ¶ 55 (arguing that controlled-atmosphere killing uses less water than live-hang slaughter). In addition to being one of the cruelest standard slaughter practices, live-hang/electric immobilization requires the use of large water tanks and requires workers to spray water on the chickens’ bodies after they die to remove the vomit and feces the birds release during the torturous process. *See id.*

<sup>156</sup> Compl. for Declaratory and Injunctive Relief, *supra* note 125, ¶ 1.

<sup>157</sup> *Id.* ¶ 55. *See People ex rel. State Water Res. Control Bd. v. Forni*, 54 Cal. App. 3d 743, 750 (Ct. App. 1976) (noting that determining what constitutes reasonable water use under the California Constitution is a fact-specific inquiry since “[w]hat is a beneficial use [of water] at one time may, because of changed conditions, become a waste of water at a later time”) (quoting *Tulare Irrigation Dist. v. Lindsay-Strathmore Irrigation Dist.*, 45 P.2d 972, 1007 (Cal. Sup. Ct. 1935)).

<sup>158</sup> *See Francione supra* note 122.

enforcement of animal cruelty laws in California's live markets.<sup>159</sup> The goal of such enforcement is to shut down live market proprietors, or at least increase their cost of doing business and reduce their sale of animals.<sup>160</sup> To Animal Outlook, this is worthwhile as a legal goal—but to be sure, law enforcement can only work with statutes on the books, all of which prohibit only the cruelest practices. Therefore, Animal Outlook could easily slip into Welfarist messaging through claims such as: *the fish tanks were too small, we succeeded by making them bigger; the fish tanks were too dirty, we succeeded by making them cleaner; or animals were being suffocated, now they're being killed less cruelly.* And promoting any of these Welfarist “victories” would send the wrong messaging. But the legal action in live markets also lends itself to Abolitionist messaging: namely that all animals—even the fish and frogs and turtles that are so often overlooked—are sentient beings that suffer, and animals have an inherent right not to suffer because they are sentient.<sup>161</sup> Therefore, cruelty to all animals—not just the charismatic ones—needs to end, and people should keep all animals off their plates.<sup>162</sup> In short, Animal Outlook is working to address live markets within the confines of welfare laws, but publicly, the organization can use its legal action to draw attention to important Abolitionist messages.

Animal Outlook promotes similar messaging about a case against Maine's Department of Agriculture, Conservation, and Forestry (“DACF”). While the organization sued DACF for failing to enforce the state's anti-cruelty laws in aquaculture facilities, the Abolitionist messaging is that fish are sentient beings and cannot be—but regularly are—left out of

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<sup>159</sup> *Cold-Blooded Cruelty at Live Markets: Ugly Abuse in One of America's Most Beautiful Cities*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/live-market-cruelty> [<https://perma.cc/P7E3-FVP6>] (exposing animal cruelty through the organization's investigation of eighteen live markets in the California Bay Area).

<sup>160</sup> Animal Outlook has similarly engendered the closure of a hatchery and enjoinder of a slaughterhouse's pet food production by showing that these facilities violated cruelty laws. *See, e.g., COK Victory: Animal Cruelty Lawsuit Is Settled, Cal-Cruz Hatcheries Is Closed*, ANIMAL OUTLOOK (June 11, 2012), <https://animaloutlook.org/cal-cruz-hatcheries-closed> [<https://perma.cc/7FTF-Q3MF>] (describing the settlement which mandated permanent hatchery closure, as well as prohibiting the hatchery from keeping or having charge of any animal in the future); Consent Decree of Permanent Injunction ¶ 6, *U.S. v. Bravo Packing Inc.*, No. 22-CV-1380 (D.N.J. 2022) (permanently enjoining a slaughterhouse from selling, manufacturing, and distributing certain products until it was able to meet several strict sanitation requirements).

<sup>161</sup> *See supra* note 11.

<sup>162</sup> *See* Dina Fine Maron, *Live Animal Markets in San Francisco Accused of Mistreatment*, NAT'L GEOGRAPHIC (Aug. 15, 2022), <https://www.nationalgeographic.com/animals/article/live-animal-markets-in-san-francisco-accused-of-mistreatment> [<https://perma.cc/426N-VSJ3>] (describing one goal of Animal Outlook's investigations, according to the director of investigations Scott David, as “rais[ing] awareness about the exploitation of animals ‘no matter if they are fish, frogs, turtles, cows, or pigs.’”).

conversations about protecting animals.<sup>163</sup> The public messaging has, and should have, nothing to do with animal welfare standards of care in aquaculture facilities and how they help animals. The messaging is, rather, that fish matter too.

These examples highlight one pattern of welfare reforms—those aimed at protecting the least protected animals—that lends itself more readily to Abolitionist messaging about sentience and animal rights. But Abolitionist organizations can put a rights-based spin on even the most welfare-oriented reforms. For instance, the fight to defend Proposition 12, one of the most public welfare-focused cases,<sup>164</sup> is commonly framed something like: *gestation crates are bad and eliminating them makes animals happier*. But there are alternative rights-oriented framings as well, such as: *states must have power to increase protections for animals, and gestation crate bans are just a first step*.

Framing may not solve all the Abolitionist's dilemmas about welfare measures, but it helps. Therefore, Abolitionists should choose welfare strategies they can frame more beneficially and should take steps to control the public narrative.

### *C. Does the Welfare Measure Enable Future Abolitionist Reforms?*

The final consideration for Welfarist reforms should always be, *what's next?* If a specific welfare challenge is successful, does it lend itself to another, and another after that? And if these challenges progress successfully, is the endgame Abolitionist?

Compare for example, on the one hand, welfare reforms about cage sizes or the use of anesthetics in castration, with reforms, on the other hand, about artificial insemination practices or the use of nets in commercial fishing. The first two examples, while perhaps effective for the reasons discussed above, do not target indispensable agricultural practices; the agriculture industry can raise and slaughter animals using smaller cages, larger cages, or no cages at all and regardless of the use of anesthetics. Therefore, even if these reforms are maximally successful, they will not further Abolitionist ends. The second two examples, by contrast, target essential practices; the agriculture industry could not function on a large scale without artificial insemination and the commercial fishing industry

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<sup>163</sup> *PRESS RELEASE: Animal Protection Org, Maine Voters Sue State Over Fish Farms*, ANIMAL OUTLOOK (Feb. 23, 2023), <https://animaloutlook.org/press-release-animal-protection-org-maine-voters-sue-state-over-fish-farms> [<https://perma.cc/8WTU-5YRF>] (describing Animal Outlook's position that "fish and other aquatic animals . . . are routinely overlooked by even the minimal laws applied to other animals"). In addition, by using a Citizen Petition to get the lawsuit underway, Animal Outlook promotes grassroots messaging that individuals can use the law to make a difference for animals. *See id.*

<sup>164</sup> *See Nat'l Pork Producers Council v. Ross*, 598 U.S. 356 (2023).

could not operate without the use of trawlers and seiners. Therefore, welfare reforms that are steps towards banning these practices should be preferable to Abolitionists.

In addition to considering the factual nature of a practice they are challenging, Abolitionists should also contemplate the legal basis for a challenge, giving special attention to the precedent that it can set. Consider, for example, the Foster Farms case discussed in Part IV, where ALDF argues that Foster Farms' use of water for live-hang slaughter is "unreasonable" under California's Constitution because CAK is a viable alternative that uses less water. If live-hang slaughter is unreasonable in light of CAK, what happens if cell-based chicken reaches the marketplace and is, in all material respects, the same product as chicken meat from slaughtered chickens . . . and requires significantly less water to produce? Abolitionist lawyers may one day argue that slaughtering chickens with CAK is unreasonable because there are viable cell-based alternatives.

The takeaway, then, is that when weighing Welfarist cases and policies, attorneys should always think several steps ahead. They should ask themselves questions like: *what will the industry look like without a certain practice* and *will Welfarist legal precedents be valuable in an impending marketplace with price-competitive Alternatives?* If the welfare-based litigation is a step in a bigger strategy, we should be more inclined to view the case as advancing the Abolitionist agenda.

#### CONCLUSION

Animal law is evolving—at least, that is what we hope to have conveyed throughout this Article. For practical purposes, the divide between abolitionism and welfarism is, to a large degree, collapsing, and the movement has room to become more synergistic than ever before. The influx of plant-based, fermentation-derived, and cell-based alternatives to animal products has been an exciting development in the marketplace, but it is equally exciting for impact litigation; it opens doors for animal lawyers to implement new strategies and use old strategies more effectively. These new tools are both promising and necessary for the movement. Billion dollar industries do not, after all, crumble easily, and every day more animals are suffering.