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# Why Was Lochner Wrong

David A. Strauss

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basis was the oxymoronic notion of “substantive due process.” There is no problem, on this account, when courts enforce rights that are in the Constitution; the problem arises when they enforce rights that they have just made up themselves.

This attack on *Lochner* appears in Chief Justice Hughes’s majority opinion in *West Coast Hotel Co.*:<sup>24</sup> “What is this freedom? The Constitution does not speak of freedom of contract.”<sup>25</sup> But the most important proponent of this view was Justice Hugo Black. Black and Frankfurter were the two most influential appointees of President Franklin Roosevelt, and both were sworn opponents of *Lochner*, but they derived sharply differing lessons from *Lochner*’s failure. Their disagreement dominated constitutional law for many years. Between the two, it seems fair to say that Black has prevailed in a rout. Black’s principal campaign, to apply the provisions of the Bill of Rights to the states, has essentially succeeded; Frankfurter’s judicial abstinence is nowhere to be found on the Court today.

Perhaps as a result, the criticism of *Lochner* that is associated with Black has been enormously and persistently influential. It was the basis of what is still perhaps the most prominent criticism of *Roe*: that the right to reproductive choice is simply not found in the Constitution.<sup>26</sup> This same account of the vice of *Lochner* was echoed as late as 1986, almost 50 years after the end of the *Lochner* era, in Justice Byron White’s opinion for the Court in *Bowers v Hardwick*:<sup>27</sup>

The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930’s, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments.<sup>28</sup>

But this view—that the courts should confine themselves to rights that are in some sense explicit in the text of the Constitution—has also not prevailed. *Roe*, of course, has withstood many attacks and has been reaffirmed.<sup>29</sup> But even the controversy over *Roe* gives a mislead-

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<sup>24</sup> 300 US at 379, 398–99.

<sup>25</sup> *Id.* at 391.

<sup>26</sup> See, for example, Bork, *Tempting of America* at 112–16 (cited in note 10); Ely, *Democracy and Distrust* at 15 (cited in note 10); John Hart Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale L J 920, 943 (1973).

<sup>27</sup> 478 US 186 (1986).

<sup>28</sup> *Id.* at 194–95.

<sup>29</sup> See, for example, *Planned Parenthood of Southeastern Pennsylvania v Casey*, 505 US 833, 869 (1992).

ingly favorable impression of the status of Black's literalism. There were other things about *Roe* that many people found objectionable, in particular, *Roe's* account of why the state's interest in protecting fetal life was not sufficient to sustain laws restricting abortion. The argument that the right to abortion is not in the Constitution was surely, for many people, just a means of attacking a decision that was objectionable mostly because of its treatment of fetal life. The rhetoric was available because of the supposed lesson of the *Lochner* era, but the deeper objection lay elsewhere.

The view that the Court should refuse to recognize "unenumerated" constitutional rights has, in fact, never been accepted by a majority of the Court. *Griswold v Connecticut*<sup>30</sup> struck down a law forbidding the use of contraceptives by married couples on the basis of an unenumerated right to privacy, over a vigorous dissent by Black that explicitly accused the majority of doing what the *Lochner* Court had done.<sup>31</sup> That decision now appears to have become thoroughly accepted. *Griswold* and subsequent cases relied on two *Lochner*-era precedents, *Meyer v Nebraska*<sup>32</sup> and *Pierce v Society of Sisters*;<sup>33</sup> the Court reconceptualized these decisions as cases about a family's (unenumerated) right to autonomy, instead of freedom of contract.

In its cases dealing with the "right to die," a majority of the Court has carefully refrained from endorsing the view that unenumerated rights should not be recognized.<sup>34</sup> In fact, a majority of the Court showed a willingness to engage in a careful inquiry into what unenumerated rights should be enforced.<sup>35</sup> In a number of lesser-known cases, the Court has seemed quite untroubled by the prospect of recognizing unenumerated rights.<sup>36</sup> It has gone about determining the contours of substantive rights that had no clear textual basis, without even entertaining the possibility that such rights should not be recognized at all.

Today, therefore, it seems fair to say that the attack on *Lochner* as "outside the mainstream" cannot rely on the argument that freedom of contract is not enumerated in the Constitution, any more than it can rely on a general skepticism about judicial review. This is not to say that the view associated with Justice Black has been decisively refuted, any more than one can say that about the Thayer view. But it is

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<sup>30</sup> 381 US 479 (1965).

<sup>31</sup> See *id.* at 514–15, 523–24.

<sup>32</sup> 262 US 390 (1923).

<sup>33</sup> 268 US 510 (1925).

<sup>34</sup> See *Washington v Glucksberg*, 521 US 702, 727 (1997); *Cruzan v Missouri Department of Health*, 497 US 261, 278–79 (1990).

<sup>35</sup> See *Glucksberg*, 521 US at 720–21; *Cruzan*, 497 US at 278–79.

<sup>36</sup> See, for example, *Washington v Harper*, 494 US 210, 221–22 (1990).

to say that *Lochner*'s status as a case that defines what it is to be outside the mainstream cannot rely on Black's kind of literalism.

### III. FREEDOM OF CONTRACT

If the rejection of *Lochner* cannot rest on the proposition that courts should not systematically enforce constitutional rights, including unenumerated rights, then there must be something problematic about the particular right that *Lochner* enforced. This, too, was a prominent line of criticism of *Lochner*. It can take several forms. One argument was that while some unenumerated rights can legitimately be enforced by the courts, freedom of contract lacks any constitutional roots. Another argument was that freedom of contract is simply not a valuable enough right: It is, on some accounts, merely a property right, not a personal right like freedom of speech.

These arguments, too, are much less compelling now than they might have been in the New Deal era. Freedom of contract—at least the freedom to contract to work at a particular job—turns out to be a plausible candidate for protection as a constitutional right. The origins of *Lochner*-era constitutional law have been traced to the ideology of the antislavery movement—which, for obvious reasons, emphasized the importance of allowing all individuals to sell their own labor on the terms that they saw fit—and, even earlier, to Jacksonian opposition to “class legislation.”<sup>37</sup> In these ways, freedom of contract was not merely a fabrication of a business-oriented Supreme Court in the early twentieth century; there are plausible historical reasons for viewing freedom of contract as part of the liberty protected from substantive limitation by the Due Process Clause, or as one of the privileges or immunities of citizens of the United States. Normatively, too, it is hard to dispute the importance of freedom of contract in some settings. A law that precludes a person from working at a particular occupation can be terribly burdensome—a serious material burden, an affront to the individual's autonomy, and something that significantly affects the quality of a person's life.

There is also, today, a more prevalent understanding of the value of freedom of contract to society as a whole than there was at the time

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<sup>37</sup> See Howard Gillman, *The Constitution Besieged* 6, 212 n 25 (Duke 1993); William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 Wis L Rev 767, 800; Charles W. McCurdy, *The Roots of Liberty of Contract Reconsidered: Major Premises in the Law of Employment, 1867–1937*, 1984 S Ct Hist Socy Yearbook 20, 27; David M. Gold, *Redfield, Railroads, and the Roots of “Laissez-Faire Constitutionalism”*, 27 Am J Legal Hist 254, 265 (1983); Eric Foner, *Abolitionism and the Labor Movement in Antebellum America*, in *Politics and Ideology in the Age of the Civil War* 57, 64–65 (Oxford 1980); William E. Nelson, *The Impact of the Antislavery Movement upon Styles of Judicial Reasoning in Nineteenth-Century America*, 87 Harv L Rev 513, 557 (1974).

*Lochner* was overturned. Today there is a widespread consensus on the basic importance of market mechanisms, suitably regulated. During the New Deal, the consensus was not as clear. Some prominent figures at the time thought that significant elements of the economy should be centrally planned, and the *Lochner* emphasis on the importance of free markets in labor may have seemed obsolete then.<sup>38</sup> Today the centrality and importance of free markets is more widely recognized.

What, then, was wrong with the courts' enforcing freedom of contract in the way the *Lochner*-era courts did? The right is valuable to individuals and to society; it has plausible constitutional roots; and neither the lack of an explicit reference in the text of the Constitution, nor the fact that the right would be enforced by courts against democratic majorities, are insuperable obstacles. Part of the problem—as has been powerfully argued—may lie in the *Lochner* Court's unwillingness to recognize that a market ordering governed by freedom of contract is not a natural, pre-political state of affairs, but is as much a choice of government policy as any regulatory scheme.<sup>39</sup> But that argument, which captures something important about the *Lochner* Court's intellectual outlook, only gets us part of the way to an account of why *Lochner* was wrong. A defender of the *Lochner* Court might acknowledge that enforcing freedom of contract was not “natural” at all but was a deliberate, conscious policy choice—and then plausibly insist that it was a good choice, a better choice than restrictions on freedom of contract, from the point of view of both constitutional legitimacy and moral desirability.

We can get a better sense of the real problem with *Lochner* by comparing it to some of the Supreme Court's twentieth-century success stories, that is, to lines of doctrine that have been accepted by the legal culture and society at large even though they invalidated significant amounts of legislation and other government action. Why have the Court's decisions enforcing First Amendment rights, for example, become so thoroughly mainstream? Part of the answer seems to be that the courts have developed legal principles that reflect both the value of free expression and the legitimate limits that can be placed on free expression.

This did not happen easily, or overnight. Some early First Amendment decisions, for example, suggested that no restrictions on speech could be upheld unless they were needed to prevent a “clear

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<sup>38</sup> See Laurence H. Tribe, 1 *American Constitutional Law* 1358–59 (Foundation 3d ed 2000); William E. Leuchtenburg, *Franklin D. Roosevelt and the New Deal* 22, 30, 33–35 (Harper & Row 1963).

<sup>39</sup> See Sunstein, 87 *Colum L Rev* at 882 (cited in note 10).

and present danger” of a serious harm.<sup>40</sup> If that approach had been rigorously applied, it would have produced a state of affairs at least as intolerable as that produced during the *Lochner* era. It might have drawn into question many sensible and necessary laws regulating the time and place of demonstrations, restricting the speech of government employees, compensating people for defamation, and so on. Instead, the courts have developed an elaborate doctrinal structure designed to protect the core values of free speech while allowing the government greater latitude where those values are not threatened or when they can be legitimately overridden.

This is the kind of thing the *Lochner*-era Supreme Court failed to do. The problem was not that that Court protected freedom of contract in a wholly indiscriminate way; its doctrine was complex, and it rejected challenges to economic regulation as often as it sustained them.<sup>41</sup> But the Court lacked an understanding of freedom of contract that might have enabled it to develop a plausible legal regime.

Freedom of contract is valuable for essentially two reasons. First, when parties freely agree to do something, there is a presumption that the agreement reflects a choice that benefits both of them. To the extent that is true, then interfering with freedom of contract gratuitously reduces well being, unless a third party is somehow affected. Second, a restriction on freedom of contract may be inconsistent with autonomy; it denies people the right to control an important aspect of their lives.<sup>42</sup>

Sometimes one or both of these conditions will not hold. The obvious cases—recognized of course by the *Lochner* Court—are cases of incapacity (as with children) or coercion. Incapacity undermines the premise, necessary to sustaining the argument for freedom of contract, that an individual’s choices reflect his or her own best interests. Coercion does the same. Equally obviously, when an agreement has harmful externalities—effects on a third party—those effects can justify a restriction on freedom of contract. The *Lochner*-era Court of course recognized this, too, in principle.<sup>43</sup>

A properly formulated conception of freedom of contract, however, must go beyond these basics. Incapacity can take a variety of forms beyond the obvious cases of infancy and mental disability. An individual might lack the information needed to make a choice, or—

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<sup>40</sup> See *Terminiello v Chicago*, 337 US 1, 4 (1949); *Bridges v California*, 314 US 252, 263 (1941); *Cantwell v Connecticut*, 310 US 296, 308 (1940); *Thornhill v Alabama*, 310 US 88, 104–05 (1940); *Schneider v State*, 308 US 147, 160–61 (1939).

<sup>41</sup> See Wright, *The Growth of American Constitutional Law* ch 8 (cited in note 6).

<sup>42</sup> See, for example, Michael J. Trebilcock, *The Limits of Freedom of Contract* ch 1 (Harvard 1993).

<sup>43</sup> See, for example, *McLean v Arkansas*, 211 US 539, 547–48 (1909); *Muller v Oregon*, 208 US 412, 421 (1908).

more significantly, because raw information could, in theory, just be provided—individuals' rationality in making certain choices might be bounded. In such circumstances, a restriction on freedom of contract might benefit a party. Monopoly power in a market, such as a labor market, undermines the autonomy justification for freedom of contract and, importantly, can have distributive consequences that might be rectified by a restriction on freedom of contract. Information asymmetries may lead to agreements that are not mutually beneficial and that restrictions on freedom of contract might improve. The category of harmful externalities is potentially quite large; psychic effects and effects on people's status can be real harms, and significant restrictions on freedom of contract may be needed to prevent them. Individuals' preferences might be questioned in some ways, such as when they have adapted their desires to unjust circumstances and stopped seeking something that was wrongfully denied to them. In some circumstances, even the very idea of an exchange might seem inappropriate, as with the sale of sex, or of children.<sup>44</sup>

This is only a superficial sketch of the kinds of concerns that might justify restricting freedom of contract. Each, of course, presents complexities. The result is that, in many instances, it will be unclear whether a particular prohibition on certain kinds of contracts is inconsistent with the core values of freedom of contract. Occupational health and safety laws, the category to which *Lochner* arguably belongs, might be upheld (or might not) on the ground that information failures and bounded rationality prevent employees from accurately assessing the risks they run. Minimum wage laws, as well as other limits on the employment relationship, might be a way of dealing with markets in which employers have monopoly power; the laws have the same effect as a labor union, reducing competition among employees so that a bilateral monopoly is created, with distributive effects that benefit the employees. Anti-discrimination laws did not exist during the *Lochner* era but would certainly be challenged as abridgments of freedom of contract today if *Lochner* survived.<sup>45</sup> They might be justified on the ground that discrimination inflicts a kind of externality on all members of the victim group whose status is adversely affected; they might also be justified, sometimes, as dealing with a problem of asymmetric information. (In a freedom of contract regime, an employee might refuse to seek protection against certain kinds of discriminatory conduct—sexual harassment, for example—because she fears the employer will label her a troublemaker. As a result, the par-

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<sup>44</sup> See generally Trebilcock, *Limits of Freedom of Contract* (cited in note 42); Cass R. Sunstein, *Legal Interference With Private Preferences*, 53 U Chi L Rev 1129 (1986).

<sup>45</sup> See Richard A. Epstein, *Forbidden Grounds: The Case Against Employment Discrimination Laws* 99 (Harvard 1992).

ties might not reach mutually beneficial agreements.) In some circumstances, notably when the civil rights laws were first passed, there were serious problems of coercion, often in the form of social and extra-legal sanctions that kept employers and employees from contracting freely. In these circumstances the civil rights laws actually enhanced freedom of contract.<sup>46</sup>

In addition, freedom of contract need not be treated as inviolable. Minimum wage legislation—consistently disapproved by the *Lochner*-era Court—provides an example. On standard economic assumptions, minimum wage laws increase unemployment; an employer who would have hired, at a low wage, an employee whose productivity was very low, will find it unprofitable to hire that employee at the mandated minimum wage. In that way, minimum wage laws may harm people at the very bottom of the ladder in order to benefit those a few rungs above them.

It is not clear, however, that the legislature should be precluded from making this choice. Even in this situation—which will not always exist—the legislature might be warranted in concluding that, despite the regressive effect of the minimum wage, the gains to those who benefit from it outweigh the harm to those who lose out. The legislature might decide, for example, that a minimum wage law is needed to provide economic security to large numbers of working class families, and that the burden on the less well-off people who will lose jobs is worth the gain. Such a decision could certainly be questioned as a matter of social policy, but it is not obvious that the value of freedom of contract (even freedom to obtain a job) is great enough to justify the courts in overturning this decision. Also, the legislature may be able to provide benefits—such as cash or in-kind payments, or education and training—to those who lose their jobs because of the minimum wage. The *Lochner*-era Court was systematically unwilling to entertain this kind of defense of regulatory legislation.

Some restrictions on parties' ability to enter into contracts, then, may serve the underlying values of freedom of contract; restrictions that do impair freedom of contract may nonetheless be justified either because they serve more important values or because the legislature can provide substitutes. Obviously these are difficult and complex questions. It is entirely possible that they are too difficult for courts to sort out, and that in the end the only protection for freedom of contract will be provided by legislatures. But it is not wholly out of the question that this right might be judicially enforceable.<sup>47</sup> The problem

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<sup>46</sup> See James J. Heckman and Houtt Verkerke, *Racial Disparity and Economic Discrimination Law: An Economic Perspective*, 8 Yale L. & Pol. Rev. 276, 290 (1990).

<sup>47</sup> For similar suggestions, see Jerry L. Mashaw, *Greed, Chaos, and Governance* 50–80 (Yale 1997); Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation*



of enforcing freedom of speech might have seemed equally daunting at one point: How can the courts possibly deal with all the varied questions raised by laws that in some way limit speech? While of course the courts' decisions in First Amendment cases can be criticized, few would say that they are, taken as a whole, the kind of disaster that the *Lochner*-era is generally thought to have been.

The question is not whether a court could, in one stroke, design a comprehensive matrix that would determine the outcome of every possible case involving restrictions on freedom of contract. Rather, it is whether, proceeding case by case, but with a more complete understanding of the nature of freedom of contract and its limitations, courts might design a workable doctrine. Some of the post-*Lochner* cases that rejected freedom of contract claims might have been good places to start because their outcomes seem nearly indefensible. The laws involved in *Williamson v Lee Optical Co*<sup>48</sup> and *Ferguson v Skrupa*,<sup>49</sup> for example, seem very hard to justify. Other decisions have been persuasively attacked by commentators.<sup>50</sup> If some relatively easy cases can be identified, then perhaps a workable legal regime could be elaborated. But it would have to be built step by step, with careful attention to the competing demands and an understanding of when freedom of contract could properly be limited or overridden.

The failings of the *Lochner* era may, in the end, have been more quotidian than is generally supposed. The problem was not that the Court misconceived the judicial role or did not understand how to interpret the Constitution. The justices' failure was in a sense a lack of humility: an inability, or refusal, to understand that although they were vindicating an important value, matters were more complicated than they thought. There is a time for judicial crusades on behalf of principles of the highest importance; the Warren Court's campaign against racial discrimination is an example. More often, though, judicial review requires courts to recognize the complexity of the issues they confront and to develop doctrines that, while vindicating constitutional rights, also accommodate values that are in tension with those rights. *Lochner* presented the latter, but the Court treated it as the former, and that is why *Lochner* deserves the reputation it has today.

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and *Reburial*, 1962 S Ct Rev 34, 60.

<sup>48</sup> 348 US 483, 487-91 (1955).

<sup>49</sup> 372 US 726, 726-27, 731-32 (1963).

<sup>50</sup> See, for example, Mashaw, *Greed, Chaos, and Governance* at 56 (cited in note 47); Geoffrey P. Miller, *The True Story of Carolene Products*, 1987 S Ct Rev 397, 399.

# The Rights of Animals

Cass R. Sunstein†

## I. DOGS, CATS, AND PRINCIPLE

There are nearly sixty million domestic dogs in the United States, owned by over thirty-six million households. Over half of these households give Christmas presents to their dogs. Millions of them celebrate their dog's birthday. If a family's dog were somehow forced to live a short and painful life, the family would undoubtedly feel some combination of rage and grief. What can be said about dog owners can also be said about cat owners, who are more numerous still. But through their daily behavior, people who love those pets, and greatly care about their welfare, help ensure short and painful lives for millions, even billions of animals that cannot easily be distinguished from dogs and cats. Should people change their behavior? Should the law promote animal welfare? Should animals have legal rights? To answer these questions, we need to step back a bit.

Many people think that the very idea of animal rights is implausible. Suggesting that animals are neither rational nor self-aware, Immanuel Kant thought of animals as "man's instruments," deserving protection only to help human beings in their relation to one another: "[H]e who is cruel to animals becomes hard also in his dealings with men."<sup>1</sup> Jeremy Bentham took a different approach, suggesting that mistreatment of animals was akin to slavery and racial discrimination:

The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. . . . [A] full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even month, old. But suppose the case

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† Karl N. Llewellyn Distinguished Service Professor of Jurisprudence, Law School and Department of Political Science, The University of Chicago. I am grateful to Emily Buss, Gary Francione, Martha Nussbaum, Richard Posner, Janet Radcliffe Richards, and David Wolfson for valuable comments on a previous draft. Alexandra Baj provided valuable research assistance.

<sup>1</sup> Immanuel Kant, *Lectures on Ethics* 240 (Hackett 1963) (Louis Infield, trans).

were otherwise, what would it avail? the question is not, Can they reason? Nor, Can they talk? But, Can they suffer?<sup>2</sup>

John Stuart Mill concurred, repeating the analogy to slavery.<sup>3</sup>

Most people reject that analogy. But in the last ten years, the animal rights question has moved from the periphery and toward the center of political and legal debate. The debate is international. In 2002, Germany became the first European nation to vote to guarantee animal rights in its constitution, adding the words “and the animals” to a clause that obliges the state to respect and protect the dignity of human beings.<sup>4</sup> The European Union has done a great deal to reduce animal suffering.<sup>5</sup> Within the United States, consumer pressures have been leading to improved conditions for animals used as food.<sup>6</sup> Notwithstanding its growing appeal, the idea of animal rights has been disputed with extraordinary intensity. Some advocates of animal rights think that their adversaries are selfish, unthinking, cruel, even morally blind. Some of those who oppose animal rights think that the advocates are fanatical and even bizarre, willing to trample on important human interests for the sake of rats and mice and salmon.

In this Essay I have three goals. The first is to reduce the intensity of the debate by demonstrating that almost everyone believes in animal rights, at least in some minimal sense; the real question is what that phrase actually means. My second goal is to give a clear sense of the lay of the land—to show the range of possible positions, and to explore what issues separate reasonable people. In this way, I attempt to provide a kind of primer for current and coming debates. The third goal is to defend a particular position about animal rights, one that, like Bentham’s, puts the spotlight squarely on the issues of suffering and well-being.<sup>7</sup> This position requires rejection or qualification of

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<sup>2</sup> Jeremy Bentham, *The Principles of Morals and Legislation* 310–11 n 1 (Prometheus 1988).

<sup>3</sup> See John Stuart Mill, *Whewell on Moral Philosophy*, in John Stuart Mill and Jeremy Bentham, *Utilitarianism and Other Essays* 228, 252 (Penguin 1987) (Alan Ryan, ed) (drawing parallels between arguments advanced against Bentham’s statement above and arguments of slaveholders in the Americas).

<sup>4</sup> John Hooper, *German Parliament Votes to Give Animals Constitutional Rights*, *The Guardian* (London) 2 (May 18, 2002) (voting 543 to 19 in favor of the clause with 15 abstentions).

<sup>5</sup> See note 22.

<sup>6</sup> See John Keilman, *Food Retailers Press for Humane Farming; Industry, Animal Activists Reaching Some Suppliers*, *Chi Trib* 9 (June 26, 2002) (describing efforts by trade groups to develop and implement guidelines designed to promote improved treatment of animals by food producers).

<sup>7</sup> By putting the spotlight there, I do not mean to resolve a hard question: Whether an animal that is subject to a life of deprivation, and that entirely adapts to that life, is nonetheless being treated in a way that violates its rights. In brief, I believe that like a human being, an animal that adapts to deprivation has a reasonable ground for complaint, if the deprivation means that its life is much worse than it might be. But I cannot discuss that issue here.

some of the most radical claims by animal rights advocates, especially those that stress the “autonomy” of animals, or that object to any human control and use of animals. But my position has radical implications of its own. It strongly suggests, for example, that there should be extensive regulation of the use of animals in entertainment, scientific experiments, and agriculture. It also suggests that there is a strong argument, in principle, for bans on many current uses of animals. In my view, those uses might well be seen, one hundred years hence, as a form of unconscionable barbarity. In this respect, I suggest that Bentham and Mill were not wrong to offer an analogy between current uses of animals and human slavery.

## II. WHAT ANIMAL RIGHTS MIGHT ENTAIL

### A. The Status Quo

If we understand “rights” to be legal protection against harm, then many animals already do have rights, and the idea of animal rights is not at all controversial. And if we take “rights” to mean a moral claim to such protection, there is general agreement that animals have rights of certain kinds. Of course some people, including Descartes, have argued that animals are like robots and lack emotions—and that people should be allowed to treat them however they choose.<sup>8</sup> But to most people, including sharp critics of the idea of animal rights, this position seems unacceptable. Almost everyone agrees that people should not be able to torture animals or to engage in acts of cruelty against them. And indeed, state law contains a wide range of protections against cruelty and neglect. We can build on existing law to define a simple, minimal position in favor of animal rights: *The law should prevent acts of cruelty to animals.*

In the United States, state anticruelty laws go well beyond prohibiting beating, injuring, and the like, and impose affirmative duties on people who have animals in their care. New York contains a representative set of provisions. Criminal penalties are imposed on anyone who transports an animal in a cruel or inhumane manner, or in such a way as to subject it to torture or suffering, conditions that can come about through neglect.<sup>9</sup> People who transport an animal on railroads or cars are required to allow the animal out for rest, feeding, and water every five hours.<sup>10</sup> Nonowners who have impounded or confined an animal are obliged to provide good air, water, shelter, and food.<sup>11</sup>

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<sup>8</sup> See Gary L. Francione, *Introduction to Animal Rights: Your Child or the Dog?* 2, 73 (Temple 2000).

<sup>9</sup> See NY Agr & Mkts Law § 359(1) (McKinney 1991 & Supp 2002).

<sup>10</sup> See *id.* at § 359(2).

<sup>11</sup> See *id.* at § 356.

Those who abandon an animal in public places, including a pet, face criminal penalties.<sup>12</sup> Another provision forbids people from torturing, beating, maiming, or killing any animal, and also requires people to provide adequate food and drink.<sup>13</sup> Indeed, it is generally a crime not to provide necessary sustenance, food, water, shelter, and protection from severe weather.<sup>14</sup> New York, like most states, forbids overworking an animal, or using the animal for work when she or he is not physically fit.<sup>15</sup> Compare in this regard the unusually protective California statute, which imposes criminal liability on negligent as well as intentional overworking, overdriving, or torturing of animals.<sup>16</sup> “Torture” is defined not in its ordinary language sense, but to include any act or omission “whereby unnecessary or unjustifiable physical pain or suffering is caused or permitted.”<sup>17</sup>

If taken seriously, provisions of this kind would do a great deal to protect animals from suffering, injury, and premature death. But animal rights, as recognized by state law, are sharply limited, and for two major reasons.<sup>18</sup> First, enforcement can occur only through public prosecution. If horses and cows are being beaten and mistreated at a local farm, or if greyhounds are forced to live in small cages, protection will come only if the prosecutor decides to provide it. Of course prosecutors have limited budgets, and animal protection is rarely a high-priority item. The result is that violations of state law occur every day. The anticruelty prohibitions sharply contrast, in this respect, with most prohibitions protecting human beings, which can be enforced both publicly and privately. For example, the prohibitions on assault and theft can be enforced through criminal prosecutions, brought by

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<sup>12</sup> See *id.* at § 355.

<sup>13</sup> See *id.* at § 353.

<sup>14</sup> See *State v Groseclose*, 67 Idaho 71, 171 P2d 863, 864–65 (1946) (holding that a statute defining failure to give “proper care and attention” to animals as a misdemeanor was not void for vagueness); *Griffith v State*, 116 Ga 835, 43 SE 251, 252 (1903) (holding that a conviction could be sustained even if cruelty to the animal was the result of willful omission or negligence); *Commonwealth v Lufkin*, 89 Mass (7 Allen) 579, 581 (1863) (stating that malicious intent is not required for finding animal cruelty); *Reynolds v State*, 569 NE2d 680, 682 (Ind App 1991) (upholding misdemeanor conviction for failure to provide adequate shelter, food, and water to a variety of animals).

<sup>15</sup> See NY Agr & Mkts Law § 353. See also *State v Goodall*, 90 Or 485, 175 P 857, 858 (1918) (upholding a misdemeanor conviction for saddling, riding, and driving a horse with an ulcerated sore on its back); *State v Prince*, 77 NH 581, 94 A 966 (1915) (upholding the constitutionality of a state statute prohibiting sale or exchange of animals unfit for labor); *Commonwealth v Wood*, 111 Mass 408, 410 (1873) (stating that conviction is appropriate if the defendant knowingly and willingly overdrove his horse; intent to torture or abuse was not necessary).

<sup>16</sup> See Cal Penal Code §§ 597(b), 599b (West 1999).

<sup>17</sup> Cal Penal Code § 599b.

<sup>18</sup> I do not discuss here the difficulties introduced by the fact that some statutes allow otherwise unlawful acts if they are “necessary” or “justifiable.”

public officials, and also by injured citizens, proceeding directly against those who have violated the law.

Second, the anticruelty provisions of state law contain extraordinarily large exceptions. They do not ban hunting, and generally they do not regulate hunting in a way that is designed to protect animals against suffering. Usually, they do not apply to the use of animals for medical or scientific purposes. To a large degree, they do not apply to the production and use of animals as food.<sup>19</sup> The latter exemption is the most important. About ten billion animals are killed for food annually in the United States; indeed, 24,000,000 chickens and some 323,000 pigs are slaughtered every day.<sup>20</sup> The cruel and abusive practices generally involved in contemporary farming are largely unregulated at the state level.<sup>21</sup> Because the overwhelming majority of animals are produced and used for food, the coverage of anticruelty laws is exceedingly narrow.

#### B. Enforcing Existing Rights

If the suffering of animals matters—and every reasonable person seems to think that it does—we should be greatly troubled by these limitations. The least controversial response would be to narrow the “enforcement gap,” by allowing private suits to be brought in cases of cruelty and neglect. Reforms might be adopted with the limited purpose of stopping conduct that is already against the law, so that the law actually means, in practice, what it says on paper. Here, then, we can find a slightly less minimal understanding of animal rights. On this view, *representatives of animals should be able to bring private suits to ensure that anticruelty and related laws are actually enforced*. If, for example, a farm is treating horses cruelly and in violation of legal requirements, a suit could be brought, on behalf of those animals, to bring about compliance with the law.

In a sense, this would be a dramatic proposal. It might even be understood to mean that animals should be allowed to sue in their own name—and whoever the nominal plaintiff, there would be no question that the suit was being brought to protect animals, not human beings. The very idea might seem absurd. But it is simpler and more conventional than it appears. Of course any animals would be represented by human beings, just like any other litigant who lacks

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<sup>19</sup> I am putting some complex interpretive questions to one side. The majority of state statutes do not apply to farming, but some of them could, on their face, be so applied.

<sup>20</sup> See David Wolfson, *How the Fox Came to Be the Guardian of the Hen House: Animals, Agribusiness and the Law: A Modern American Fable*, in Cass R. Sunstein and Martha C. Nussbaum, eds, *Animal Rights: Law and Policy* (forthcoming 2003).

<sup>21</sup> See Peter Singer, *Animal Liberation* 95–157 (Ecco 2002) (describing local farming conditions and standards).

ordinary (human) competence; for example, the interests of children are protected by prosecutors, and also by trustees and guardians in private litigation brought on children's behalf.

Why should anyone oppose an effort to promote greater enforcement of existing law, by supplementing the prosecutor's power with private lawsuits? Perhaps the best answer lies in a fear that some or many of those lawsuits would be unjustified, even frivolous. Perhaps animal representatives would bring a flurry of suits, not because of cruelty or neglect or any violation of law, but because of some kind of ideological commitment to improving animal welfare in a way that might go well beyond what the law actually says. Or perhaps this would be a poor use of the resources of the legal system in general. Perhaps other problems have more priority. If these are genuine risks, the best response would be not to ban those lawsuits, but to make those who bring frivolous ones pay the defendants' attorneys fees. It is hard to defend the claim that cruelty to or abuse of animals, when it occurs, has such low priority that it should not be addressed at all. Of course there would be issues in deciding on the identity of representatives and choosing the people who would pick them. But we are not yet in especially controversial territory. Many of those who ridicule the idea of animal rights typically believe in anticruelty laws, and they should strongly support efforts to ensure that those laws are actually enforced.

### C. Increased Regulation of Hunting, Science, Farming, and More

But I think that we should go further. We should focus attention not only on the "enforcement gap," but also on the areas where current law offers little or no protection. In short, *the law should impose further regulation on hunting, scientific experiments, entertainment, and (above all) farming to ensure against unnecessary animal suffering*. It is easy to imagine a set of initiatives that would do a great deal here, and indeed European nations have moved in just this direction. There are many possibilities.

Federal law might, for example, require scientists to justify experiments on animals by showing, in front of some kind of committee or board, that (a) such experiments are actually necessary or promising and (b) the animals involved will be subjected to as little suffering as possible. Some steps have already been taken in this direction, but it would be reasonable to go much further. If dogs or chimpanzees are going to be used to explore some medical treatment, it should be necessary to ensure that they will be decently fed and housed. Similar controls might be imposed on agriculture. If cows, hens, and pigs are going to be raised for use as food, they should be treated decently in terms of nutrition, space requirements, and overall care. European na-