



## Protection for the Powerless: Political Economy History Lessons for the Animal Welfare Movement

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*In the last several decades, animal agriculture has experienced a dramatic shift in production methods, from family farms to concentrated industrial operations, with societal consequences comparable to the Industrial Revolution of the nineteenth century. The new confinement operations raise significant moral questions regarding the humane treatment of animals subject to modern methods that emphasize economics over animal welfare. The success of the animal welfare movement, however, hinges on whether society will adopt*

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*regulations, based on moral considerations, that are directly opposed to its economic self-interest. The situation is remarkably similar to the plight of child laborers caught in the transformation of manufacturing methods during the Industrial Revolution. This article uses the history of child labor reform to construct a model for how society enacts protections for politically powerless groups, such as children and animals. Using the insights of new social movement theory, the article concludes that animal welfare reform will require a complex mixture of resources, including the difficult task of norm development. While the path to such reform is long, the child labor history shows that success is possible.*

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*How does a man rest at night knowing that in this strawless dungeon of pens are all of these living creatures under his care, never leaving except to die, hardly able to turn or lie down, horror-stricken by every opening of the door, biting and fighting and going mad?*

Matthew Scully, *Dominion* 2002

*Children of all ages, down to three and four, were found in the hardest and most painful labor, while babes of six were commonly found in large numbers in many factories. Labor from twelve to thirteen and often sixteen hours a day was the rule. Children had not a moment free, save to snatch a hasty meal or sleep as best they could. From earliest youth they worked to a point of extreme exhaustion, without open-air exercise, or any enjoyment whatever, but grew up, if they survived at all, weak, bloodless, miserable, and in many cases deformed cripples, and victims of almost every disease.*

William F. Willoughby, *Child Labor* 1890

## Introduction

The animal welfare movement paints a chilling picture of helpless creatures caught in the machinery of agriculture's industrialization, victims of a relentless economic revolution that results in deteriorating confinement conditions in pursuit of the cheapest production costs. Corporate owners defend against cries for government control by invoking free market principles and stoking fears of economic disaster due to foreign competition. The animals themselves, of course, have no voice in the political system that will decide their fate; instead, their case must be made by proxy, through reformers typically motivated by ideology rather than economic self-interest.

We have been down this road before. As the above excerpts starkly remind us, the last wave of industrialization resulted in the increasing abuse of another powerless group - children. In nineteenth century Britain, many thousands of pre-teen children worked at hard

labor in factories, mills, and coal mines.<sup>1</sup> Even younger children were not spared: in 1851, census figures showed that 49,000 British children between the ages of 5 and 9 were employed. As historian E.P. Thompson put it, “the exploitation of little children [during the Industrial Revolution] was one of the most shameful events of our history.”<sup>2</sup> Reform came slowly, proceeding incrementally over three-quarters of a century. In the end, however, child labor in the industrialized world has been largely eradicated, although it remains an intractable problem in lesser developed countries.<sup>3</sup>

The abuse of child laborers during the Industrial Revolution is strikingly similar to the animal welfare concerns arising from what may be called the “Industrialized Agricultural Revolution,” a term I use to refer to the increasing dominance of concentrated, corporate agriculture in the late twentieth century.<sup>4</sup> Like children in the 1800s, animals

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<sup>1</sup> Because Britain was the first industrialized country to go through the cycle of exploitation and reform, this paper will focus on British labor history. However, it should be noted that the United States experienced similar child labor abuses and a similar progression of reform, although legislative efforts occurred in the first instance primarily at the state rather than federal level, which complicates the inquiry. *See infra* notes 212-18.

<sup>2</sup> E.P. THOMPSON, *THE MAKING OF THE ENGLISH WORKING CLASS* 384 (Penguin 1968) (1963). Peter Kirby suggests that earlier historians such as Thompson were excessively “pessimistic” about child labor. Modern historians, according to Kirby, believe that “the very coherence of family life often depended on the economic contributions of children.” PETER KIRBY, *CHILD LABOUR IN BRITAIN, 1750-1890* 2-3 (2003). Yet, his statistics show that thousands of children were employed in extremely demanding jobs, for long hours, at low pay. The fact that a family’s finances required their labor does not make this picture any prettier or less shameful.

<sup>3</sup> Some modern economists argue that at least some child labor is on balance beneficial and that the alternatives to working may be worse for many. *See, e.g.,* S. L. Bachman, *A New Economics of Child Labor: Searching for Answers Behind the Headlines*, 53 *J. OF INT’L AFF.* 545 (2000). This article does not attempt to resolve that debate.

<sup>4</sup> *See* Jodi Soyars Windham, *Putting Your Money Where Your Mouth Is: Perverse Food Subsidies, Social Responsibility & the 2007 Farm Bill*, 31 *ENVIRONS* 1, 9-10 (Fall 2007) (describing dominance of industrialized agriculture); Neil D. Hamilton, *The Way Ahead: Reaping What We Have Sown: Public Policy Consequences of Agricultural Industrialization and the Legal Implications of a Changing Production System*, 45 *DRAKE L. REV.* 289, 292 (1997); Darian M. Ibrahim, *A Return to Descartes: Property, Profit, and the Corporate Ownership of Animals*, 70 *LAW & CONTEMP. PROBS.* 89, 93-97 (2007) (describing vertical and horizontal integration in agriculture). The more general term “agricultural revolution” has been used in a variety of contexts, to refer to the Neolithic agrarian revolution and the British agricultural revolution of the 18<sup>th</sup> and

caught in the agricultural revolution have been subjected to worsening conditions due to the economic pressures of industrial concentration. Moreover, animals are powerless, in the sense of having no real choice in whether to accept the conditions of their confinement, just as children were unable to reject the conditions of their employment. Neither group can seek reform directly, because they have no direct access to the political system. Neither group is able to effectively organize and protest the conditions of their confinement/employment. And both groups have been the beneficiaries of a reform movement based largely on moral concerns.

Studying the history of child labor reform, therefore, allows us to develop a working model of how powerless groups obtain protection in our society, which should inform current efforts to protect animals from the abuses of increasingly industrialized agriculture. Remarkably, legal scholars traditionally pay little attention to the process of how law is made, or how reform may be achieved, preferring instead to examine the effectiveness of laws after they are enacted.<sup>5</sup> In the animal welfare context, there are numerous articles detailing what reforms should be enacted,<sup>6</sup> but virtually nothing regarding how those reforms may be accomplished. Yet, many lawyers are engaged in the precisely this type of social reform work and require better tools to accomplish the task more effectively. This article begins the process of understanding how social reform may be effected in the area of animal welfare.

The model presented here may in fact challenge those theories of political economy that suggest that the powerless do not obtain rights

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19<sup>th</sup> centuries, among others. See generally PETER BELLWOOD, *FIRST FARMERS: THE ORIGINS OF AGRICULTURAL SOCIETIES* (2005); MARK OVERTON, *AGRICULTURAL REVOLUTION IN ENGLAND: THE TRANSFORMATION OF THE AGRARIAN ECONOMY 1500-1850* (1996).

<sup>5</sup> Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 1-84 (2001) (“Social scientists do not involve themselves in the technical, seemingly arcane details of legal doctrine, legislative drafting, or administrative rulemaking. And legal scholars do not venture into the chaotic, empirical world of mobilization, recruitment, political strategy, and organizational behavior.”).

<sup>6</sup> See, e.g., Amy Mosel, Comment, *What About Wilbur? Proposing a Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 U. DAYTON L. REV. 133, 138-144 (2001) (describing failure of current law to protect animals in agriculture and proposing reform); Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 LAW & CONTEMP. PROBS. 325, 343-58 (2007).

or protection unless it becomes expedient for those in power.<sup>7</sup> Some theorists posit, for example, that civil rights for minorities were enacted only when dominant business interests desired a greater labor force or when increasing civil unrest threatened economic stability and decreased a nation's stature with trading partners.<sup>8</sup> Moreover, minority groups were not truly powerless; they did have the ability to organize, demonstrate, strike, and (eventually) vote. If this model is correct, the prospect for animal welfare reform, based solely on moral concerns, seems unlikely, if not impossible. Yet, these political economy theories cannot explain how powerless groups sometimes do obtain legal protection, even when reform runs counter to the economic interests of those in power.

This paper defines "powerless" to mean those who are without a voice in, or ability to influence, the political process except by proxy (that is, someone who will act on their behalf for altruistic reasons). Slaves do not precisely fit this definition, although they come close. While slaves did not have a direct voice in the political system, they did have the ability to speak, escape, organize and rebel, which may have influenced the path of reform. Endangered species, or wildlife in general, fit the definition of powerless, because they depend for their protection entirely on those willing to act on their behalf and have, literally, no voice in the political process. Domestic livestock meet this definition as well; they are below the rank of slaves in terms of their ability even to influence the conditions of their confinement. Children also can be defined as powerless; they have no vote or financial resources to influence politicians and lack the skills necessary to organize to pressure those in power for political change.

Nevertheless, despite their lack of power, each of these groups -- except for domestic livestock -- has eventually obtained significant legal protection. Through an abolition campaign arising out of moral indignation, slavery has been outlawed (although not eradicated) in all modern civilized societies, despite its apparent economic benefits to those in power.<sup>9</sup> At great cost to economic interests, most democratic

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<sup>7</sup> See *infra*, Section I.

<sup>8</sup> Anton D. Lowenberg, *Why South Africa's Apartheid Economy Failed*, 15 CONTEMPORARY ECON. POLICY 62 (1997).

<sup>9</sup> ADAM HOCHSCHILD, BURY THE CHAINS: PROPHETS AND REBELS IN THE FIGHT TO FREE AN EMPIRE'S SLAVES 5 (2005) (describing abolitionist movement as "the first time a large number of people became outraged, and stayed outraged for many years, over someone *else's* rights") (emphasis in original). Slavery in a wide variety of

societies have enacted significant, stringent legislation to protect endangered wildlife from extinction and have entered into international treaties for the same purpose.<sup>10</sup> Most countries have also enacted legislation to protect children from abuse in the home and at work, although child labor remains an enormous problem in many less-developed countries.<sup>11</sup>

The process through which the powerless gain legal protection follows a remarkably consistent path, exemplified by the story of child labor reform. In the industrial revolution, British children were swept into the labor pool and subjected to horrifying work conditions as competitive forces pushed factories to test the limits of human endurance. Despite the powerless position of these child laborers, the British Parliament gradually responded with regulations designed to alleviate these conditions. The history of child labor regulation provides striking parallels to the industrialization of agriculture and the resulting deterioration of animal welfare. If we can use that history to develop a model of how powerless groups gain protection, it may help us predict and influence the course of animal welfare regulation and other environmental protections.

This article will examine the history of child labor regulation in Britain in order to develop a model of political economy that explains how powerless groups obtain legislative protection. Throughout the analysis, I will compare the trajectory of child labor reform with events in the animal welfare context<sup>12</sup> to determine the accuracy of the model

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forms persists in the modern world, despite its illegality. U.S. DEP'T OF STATE, TRAFFICKING IN PERSONS REPORT 2010, <http://www.state.gov/documents/organization/142979.pdf>.

<sup>10</sup> See Convention on Int'l Trade in Endangered Species of Wild Fauna and Flora, Mar. 23, 1973, 999 U.N.T.S. 243; Int'l Union for Conservation of Nature and Natural Resources, The IUCN Red List of Threatened Species, <http://www.iucnredlist.org>.

<sup>11</sup> See 18<sup>th</sup> Int'l Conference of Labour Statisticians, *Report III - Child Labour Statistics*, Geneva, Switz., Dec. 5, 2008.

<sup>12</sup> I focus on the treatment of animals in industrialized agriculture, because that context provides the closest analogy to child labor. In so doing, I do not make any judgments about animal rights vs. animal welfare, or the proper extent or content of regulation, and I do not minimize the myriad other concerns of animal advocates. See, e.g., Neil D. Hamilton, *One Bad Day: Thoughts on the Difference Between Animal Rights and Animal Welfare*, 106 MICH. L. REV. FIRST IMPRESSIONS 138 (2008); Gary L. Francione, *Reflections on Animals, Property, and the Law and Rain Without Thunder*, 70 LAW & CONTEMP. PROBS. 9, 10-11 (2007) (discussing differences in animal rights and

and suggest how modern societal developments may affect the analysis. This article focuses primarily on how legal reform, mainly in the form of legislative action, may be achieved, although it recognizes that significant and possibly even more important change may occur outside that context. For example, legal reform may include judicially recognized rights (common law)<sup>13</sup> or even constitutional changes,<sup>14</sup> which may go beyond those achieved in the legislature. Moreover, the development of new ethical boundaries may reinforce and even transcend legal reform, finding concrete expression in powerful ways, such as consumer action forcing changes in company practices.<sup>15</sup>

The process of legislative reform proceeds in recognizable stages, although the stages may overlap. In the first stage, the need for protection of powerless groups arises when conditions begin to significantly deteriorate due to the economic pressures of market industrialization ("competitive deterioration"). The article explores the similarities in this competitive deterioration in the industrial and agricultural revolutions. In both situations, industrialists initially use free market ideology to tamp down protests and reform efforts.

In the second stage, however, pressure for reform grows as a new ethical/moral imperative develops. How such ethical change occurs is a complex subject, explored in great volumes of social science literature. This article uses the insights of new social movement theory to trace the development of a new norm to the combined influence of popular culture, triggering events, and the leadership of important historical figures. The new ethical imperative, however, must be coupled with the formation of an adequate interest group structure to achieve effective political pressure. In addition, progressive theorists help by articulating the language and philosophy necessary to counter

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animal welfare agendas). Rather, my inquiry is this: if one accepts that animals are being mistreated by humans to further economic ends, how might reform be achieved?

<sup>13</sup> See Paul Schiff Berman, *An Observation and a Strange But True "Tale": What Might the Historical Trials of Animals Tell Us About the Transformative Potential of Law in American Culture?*, 52 HASTINGS L.J. 123, 144-45 (2000) (describing courts' function of providing forum for competing narratives to facilitate changes in social norms).

<sup>14</sup> See Kate M. Natrass, Comment, "*...Und die Tiere*": *Constitutional Protection for Germany's Animals*, 10 ANIMAL L. 283 (2004) (discussing implications of Germany's constitutional amendment adding language protecting animals).

<sup>15</sup> See, e.g., ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).



free-market arguments. Finally, changes in the economic equation may be achieved by consumer action (boycotts, e.g.) and impact litigation, adding to the pressure for reform. Marshalling whatever economic forces may benefit by reform legislation may be crucial to significant reform.

Even after the initial legislative protection is achieved, however, the history of child labor reform reveals that the battle is far from over. In the final stage of the reform model, reformers must deal with the backlash from those economic interests threatened by change. In this stage, reformers must counter efforts to weaken legislation through exceptions or loopholes (by legislative amendment or administrative interpretation) or by the failure to provide funds for adequate enforcement. Even when effective domestic protection is achieved, the tendency to export the problem to foreign competitors shifts the reform effort to the international level, through treaties and trade restrictions. While the economic pressures for deterioration remain, the model has no true termination point – only a final stage of monitoring that effectively lasts forever, much like a cancer in remission.

The model, which is set out in graphical form at the end of this article, illustrates that reform in the case of powerless groups is never easy and never quick. Child labor reform efforts began in the early 1800s, but stretched over three-quarters of a century before effective domestic reform was achieved and the problem persists at the international level despite two centuries of effort. Yet, despite the obstacles, success did occur at the domestic level and progress is being made internationally. Thus, the history of child labor reform provides some useful lessons for modern reform efforts on behalf of animals.<sup>16</sup>

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<sup>16</sup> In constructing this reform model, I am mindful of Peter Schuck's observations:

Ambitious, broad-ranging theories about large social phenomena inevitably invite disappointment and disagreement. Creative, useful theory-building in social science demands radical simplification; realities must be stripped of their complexity. Finding the appropriate level of factual detail is one of the theorist's most difficult challenges. It is almost always possible to say of such theories, therefore, that they overgeneralize, overlooking important contextual details that render their hypotheses contingently, rather than universally, true.

## I. Theories of Political Economy

This article attempts to develop a model for how legislative reform on behalf of powerless groups, such as animals, may be achieved, primarily through an examination of the history of child labor reform. It will be helpful, therefore, to view this historical evidence through the lens (or lenses) of political science theories concerning how legislatures behave. This inquiry does not require us to adopt a universally descriptive theory of political economy; instead, each theory may add something to our understanding of the historical data and our ability to construct a predictive model. Because both animal welfare reform and child labor reform spring from moral grounds, we must first confront the debate within social science theory as to the role of altruistic motivations in political behavior.

### A. *Pluralist, Public Choice and Civic Republican Theory*

Traditional political science analysis begins with the pluralist view of the political process, which sees competing interest groups, none of whom command a majority, making law through a dynamic process requiring factions with distinct agendas to form coalitions to achieve legislative goals.<sup>17</sup> Because each person may identify with a diverse set of groups, no monolithic power structure can develop. In the child labor situation, pluralist theorists would emphasize that reform was achieved only when labor unions, representing the unemployment concerns of employed adults, joined with religious groups and others who sought reform based on moral concerns. The traditional pluralist view, however, tended to view the formation and

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Peter H. Schuck, *The Politics of Economic Growth*, 2 YALE L. & POL'Y REV. 359, 367 (1984) (review essay). Thus, I recognize that for purposes of this article the complex history of child labor, abolition, and animal welfare reforms have been "stripped of their complexity" to allow some useful generalizations to be made.

<sup>17</sup> William J. Chambliss, *On Lawmaking*, in MAKING LAW: THE STATE, THE LAW, AND STRUCTURAL CONTRADICTIONS 4 (William J. Chambliss & Marjorie S. Zatz eds., 1993); Schuck, *supra* note 16, at 360-62; DANIEL A. FARBER & PHILIP P. FRICKEY, LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION 13-14 (1991).

operation of interest groups as a relatively "open, unimpeded process," which would naturally lead to "socially desirable equilibria."<sup>18</sup>

Critiques of the pluralist vision focused on the skewed nature of this process. For example, scholars noted that, far from a freely available legislative market, interest group politics was skewed toward "narrow economic interests."<sup>19</sup> One branch of this approach produced instrumental ruling class theory, which posits that dominant class interests are behind changes in legislation.<sup>20</sup> Legislation often may placate minority groups while still serving the interests of the power elite. For example, revisionist historian Gabriel Kolko suggested that sanitary measures in the meat-packing industry came about not because of concern for health, but because larger firms believed that the cost of increased regulation would give them a competitive advantage over smaller firms.<sup>21</sup> Many environmental laws could be analyzed similarly; larger firms had the ability to install expensive pollution control equipment and pass those costs on to consumers, while smaller firms did not.<sup>22</sup> To the extent that morality comes into the equation, it is typically seen as merely justifying the economic exploitations of the ruling class. The working class is of course not powerless in this equation, because it has the ability to protest, strike, and otherwise gum up the machinery of the ruling class.<sup>23</sup>

More broadly, public choice theorists conclude that most legislation results from the rent-seeking efforts of well-organized interest groups.<sup>24</sup> All of the participants in the legislative process,

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<sup>18</sup> Schuck, *supra* note 16, at 360.

<sup>19</sup> Farber & Frickey, *supra* note 17, at 19 (noting that "[t]here are few lobbyists for consumers, but many for producers").

<sup>20</sup> Chambliss, *supra* note 17, at 4-5.

<sup>21</sup> GABRIEL KOLKO, *THE TRIUMPH OF CONSERVATISM: A RE-INTERPRETATION OF AMERICAN HISTORY* (1963).

<sup>22</sup> See Chambliss, *supra* note 17, at 20 (law may be "used as a subtle means of increasing monopoly by creating law which gives an advantage to the largest firms in a particular industry"). Similarly, in legal scholarship, "[p]ublic choice theorists trace most or all regulation to rent-seeking, arguing that any ostensibly public-regarding regulation that does emerge must have been designed to favor rent-seeking concentrated interests, such as subgroups of the regulated industry attempting to burden their rivals." Jonathan Baert Weiner, *On the Political Economy of Global Environmental Regulation*, 87 *GEO. L.J.* 749, 754-55 (1999).

<sup>23</sup> Chambliss & Zatz, *supra* note 17, at 20.

<sup>24</sup> Weiner, *supra* note 22, at 754-55 ("Public choice theorists trace most or all regulation to rent-seeking, arguing that any ostensibly public-regarding regulation

including special interest groups, lobbyists, and legislators, are presumed to be "rational self-interest maximizers."<sup>25</sup> Thus, individuals will actively pursue legislative goals only when the benefits to them exceed the costs of doing so.<sup>26</sup> Mancur Olson's work on rational choice posited that ordinary citizens seeking broadly dispersed public benefits will refrain from activism, because the costs of participation would clearly outweigh the individual benefits, especially if those benefits could be expected to accrue anyway from the work of others.<sup>27</sup> Under this theory, politics should be dominated by groups with a narrow self-interest, seeking direct benefits to themselves ("rent-seeking") that outweigh the costs of political action.<sup>28</sup> Pure economic public choice models reject ideology as a "significant factor in the political process."<sup>29</sup>

The insights of public choice theory can help explain the difficulty of enacting legislative reform, such as child labor or animal welfare regulation, despite broad public support, when industrialists with concentrated economic self-interests dominate the political landscape. Certainly, any social welfare movement focused on benefits to powerless groups should be doomed to fail under this theory of rational self-interested behavior. Nevertheless, the empirical evidence from many political events, such as the civil rights era, indicates that not all legislative action results from economic self-interest.<sup>30</sup> At least some public choice theorists recognize that citizens may derive satisfaction from helping others and, in fact, may be more willing to pursue altruistic goals in political decisions than in market decisions,

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that does emerge must have been designed to favor rent-seeking concentrated interests, such as subgroups of the regulated industry attempting to burden their rivals."). See, e.g., Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1392-93 (1993) (noting that many public choice theorists attribute Wagner Act to rent-seeking behavior by labor groups).

<sup>25</sup> Maxwell L. Stearns, *The Public Choice Case Against the Item Veto*, 49 WASH. & LEE L. REV. 385, 399 (1992).

<sup>26</sup> *Id.* at 400.

<sup>27</sup> MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (1965). One indication of Olson's influence in legal academia: a Westlaw search of his name generates 1829 hits in the JLR (journals and law reviews - US) database (last searched 11/22/2010). And now, of course, there will be one more.

<sup>28</sup> Farber & Frickey, *supra* note 17, at 892-93.

<sup>29</sup> *Id.* at 893.

<sup>30</sup> Herbert Hovencamp, *Legislation, Well-Being and Public Choice*, 57 U. CHI. L. REV. 63, 88 (1990).

where the individual cost is higher.<sup>31</sup> Thus, while public choice theory emphasizes economic self-interest, there is grudging recognition that ideological motives may also play an important role in political action.<sup>32</sup>

Civic republican theorists go further, arguing that government actors themselves play a crucial role in shaping or changing public preferences, in furtherance of societal good.<sup>33</sup> "Rather than mechanically processing preferences, government involves an intellectual search for the morally correct answer."<sup>34</sup> Whereas public choice theory may be unable to explain legislation that seems antithetical to economic interests, civic republicans believe that voters, and politicians, are motivated by a broader range of preferences, many of which may further altruistic principles that trump individual economic interests.<sup>35</sup>

The success of animal welfare reform thus may depend on whether civic republican theory is correct: whether there is any hope for legislation based on moral values that threatens entrenched economic interests. Paradoxically, animal welfare reform theory is usually housed in the larger sphere of environmental activism, which seems in the last two decades to have been heavily influenced by the public choice approach. The origins of the modern environmental movement, in contrast, rested more explicitly on an ethical basis.<sup>36</sup>

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<sup>31</sup> See Michael E. DeBow & Dwight R. Lee, *Understanding (and Misunderstanding) Public Choice: A Response to Farber and Frickey*, 66 TEX. L. REV. 993 (1988). This may suggest, perhaps, that individuals may be more willing to vote for humane animal treatment regulations than to pay double the price at the market for humanely-raised products.

<sup>32</sup> *Id.* at 1002 ("Ideological convictions and private interests interact in ways that the public choice approach can examine fruitfully"). Nevertheless, the authors concede that people who "are willing to make large personal sacrifices for their political ideals" are not accounted for in the public choice model. *Id.* at 996-97.

<sup>33</sup> Farber & Frickey, *supra* note 17, at 44.

<sup>34</sup> *Id.*

<sup>35</sup> See, e.g., Frank Michelman, *Politics and Values or What's Really Wrong With Rationality Review?*, 13 CREIGHTON L. REV. 487, 509 (1979).

<sup>36</sup> Aldo Leopold, for example, based his call for environmental change on the development of a new land ethic. ALDO LEOPOLD, *A SAND COUNTY ALMANAC* 201-226 (Oxford Univ. Press 1989) (1949) (chapter: "The Land Ethic"). While Rachel Carson's call to arms contained appeals to human health and other anthropocentric arguments, it is also peppered with moral arguments. In one representative passage, she asks "whether any civilization can wage relentless war on life without destroying itself, and without losing the right to be called civilized." RACHEL CARSON, *SILENT*

Even into the 1980s, leading environmental theorists argued for change based on ethics rather than economics.<sup>37</sup>

For the most part, however, modern environmentalists seem to have given up hope that significant reform will be founded on morality. Instead, they seem intent on fitting environmental goals into the market-based equation.<sup>38</sup> Environmental regulation is explained, under a form of public choice analysis, as resulting from "a hybrid coalition of populist agenda-setters and parochial rent-seekers."<sup>39</sup> While ideological concerns may be the main impetus behind the law (clean air or water, e.g.), corporate rent-seekers control the details of the legislation, which the public does not have the ability or inclination to monitor.<sup>40</sup>

As a result of this shift in emphasis, environmental theory has become increasingly occupied with ensuring that the true value of environmental goods is accurately reflected in cost-benefit analysis. For example, scholars have developed non-market valuation techniques to ensure that societal decision-making takes full account of the functions provided by ecosystems and biodiversity.<sup>41</sup> Researchers have begun, according to one of the leading texts, "to fill in the very large hole of knowledge surrounding how ecologically important ecosystem attributes are economically valuable services to humans."<sup>42</sup> The logical

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SPRING 99 (1962). After describing the "horrible" deaths of "innocent" creatures, she concludes: "By acquiescing in an act that can cause such suffering to a living creature, who among us is not diminished as a human being?" *Id.* at 100.

<sup>37</sup> See, e.g., MARK SAGOFF, *THE ECONOMY OF THE EARTH: PHILOSOPHY, LAW AND THE ENVIRONMENT* (1988) (arguing that market failure is not the basis for social regulation such as environmental law); PAUL V. TAYLOR, *RESPECT FOR NATURE: A THEORY OF ENVIRONMENTAL ETHICS* (1986) (arguing for biocentric theory of environmental ethics).

<sup>38</sup> See e.g., NICK HANLEY, JASON F. SHOGREN, & BEN WHITE, *ENVIRONMENTAL ECONOMICS: IN THEORY AND PRACTICE* (2007); Tseming Yang, *Melding Civil Rights and Environmentalism: Finding Environmental Justice's Place in Environmental Regulation*, 26 HARV. ENVTL. L. REV. 1, 11 (2002) (environmental regulation based on market failure theory).

<sup>39</sup> Weiner, *supra* note 22, at 761.

<sup>40</sup> *Id.* at 760. See also B. Peter Pashigan, *The Effect of Environmental Regulation on Optimal Plant Size and Factor Shares*, 27 J. L. & ECON. 1, 26 (1984) (environmental regulation places "disproportionate burden" of compliance on smaller plants).

<sup>41</sup> *Id.* at 356-82.

<sup>42</sup> J.B. RUHL, STEVEN E. KRAFT & CHRISTOPHER L. LANT, *THE LAW AND POLICY OF ECOSYSTEM SERVICES* 24 (2007) (emphasis in original).

extension of this approach involves finding economic gains in preserving wildlife or preventing deforestation through ecotourism.<sup>43</sup>

It is undoubtedly important to ensure that society recognizes the economic benefits of environmental protection. The ecosystem services literature, in particular, helps society to fully appreciate the consequences of allowing destruction of our resources. Nevertheless, the emphasis on economic balancing may indirectly undermine reforms, such as animal welfare regulation, that are based almost entirely on morality. Does society have a responsibility to protect animals, for example, even if there is no discernable economic benefit, or even when it is demonstrably contrary to our economic self-interest?<sup>44</sup> The choice of argument might be altered if it were more fully informed by historical analysis of how altruistic reform efforts were able to succeed.

### ***B. New Social Movement Theory***

Modern social movement theories explain the political process in ways that provide more complex, but ultimately more useful, information for future reformers. For example, modern sociologists have built upon rational choice ideas to create a “resource mobilization” theory of collective action. Resource mobilization focuses on “rational actors engaged in instrumental action through formal organization to secure resources and foster mobilization.”<sup>45</sup> Whereas traditional theory assumed that collective action was a direct result of some deprivation or grievance, the new theory recognizes that the feelings of individual citizens are insufficient in themselves to create political change. Instead, action requires the creation of a

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<sup>43</sup> Katherine Mapes, *Expanding Ecotourism: Embedding Environmental Sustainability in Panama’s Burgeoning Tourism Industry*, 33 HARV. ENVTL L. REV. 225 (2009); Marla Kerr, *Ecotourism: Alleviating the Negative Effects of Deforestation on Indigenous Peoples in Latin America*, 14 COLO. J. OF INT’L ENVTL L. & POL’Y 335 (2003).

<sup>44</sup> In recent years, Hope Babcock has at least begun the inquiry into how we might influence individual behavior regarding the environment through development of new norms. Hope M. Babcock, *Assuming Personal Responsibility For Improving the Environment: Moving Toward a New Environmental Norm*, 33 HARV. ENVTL. L. REV. 117 (2009) (exploring role of norms as method of influencing behavior).

<sup>45</sup> Steven M. Beuchler, *New Social Movement Theories*, 36 SOC. Q. 441, 441 (Summer 1995) (calling resource mobilization the “dominant paradigm for studying collective action in the United States”).

process, including organizations to carry forward group goals, attract financial support, and create political relationships.<sup>46</sup>

Rational choice models rely, however, on the faulty assumption that individuals always can be expected to act in ways that maximize their own benefits or reduce their own costs. The economic model seems to ignore the importance of other motivators of human behavior, such as culture or ideology.<sup>47</sup> In response to this shortcoming, some sociologists are using new social movement theory to explain collective behavior that is motivated by interests other than simple material gain.<sup>48</sup> Ironically, new social movement theory developed initially in response to the economic reductionism of Marxism, “the assumption that a single economic logic provides the unity of a social formation and determines its political and ideological processes.”<sup>49</sup>

Part of the effort to link ideology with the organizations and political processes central to resource mobilization theory is the concept of “framing.”<sup>50</sup> Critical to building support for a political idea, “framing” consists of a process in which “enterprising agents within social movements draw from existing mentalities and political culture to manipulate the symbols necessary for creating action-oriented frames of meaning that will mobilize others on behalf of movement goals.”<sup>51</sup> In order to convince people that action is necessary, activists construct their own narrative of events and create symbols to quickly and efficiently carry their ideas to the public and link them to “themes

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<sup>46</sup> Eduardo Canel, *New Social Movement Theory and Resource Mobilization Theory: The Need for Integration*, in COMMUNITY POWER AND GRASSROOTS DEMOCRACY: THE TRANSFORMATION OF SOCIAL LIFE 189 (M. Kaufman & H. Dilla Alfonso eds., 1997), [http://www.idrc.ca/en/ev-54446-201-1-DO\\_TOPIC.html](http://www.idrc.ca/en/ev-54446-201-1-DO_TOPIC.html).

<sup>47</sup> Ideology may be defined as “systems of ideas which couple understanding of how the world works with ethical, moral, and normative principles that guide personal and collective action.” Pamela E. Oliver & Hank Johnston, *What a Good Idea! Ideologies and Frames in Social Movement Research*, in FRAMES OF PROTEST: SOCIAL MOVEMENTS AND THE FRAMING PERSPECTIVE 185, 192 (Hank Johnston & John A. Noakes eds., 2005).

<sup>48</sup> Rubin, *supra* note 5, at 1; Beuchler, *supra* note 45, at 442; Ronald Inglehart, *Values, Ideology and Cognitive Mobilization in New Social Movements*, in CHALLENGING THE POLITICAL ORDER: NEW SOCIAL AND POLITICAL MOVEMENTS IN WESTERN DEMOCRACIES 43 (Russell J. Dalton & Manfred Kuechler eds., 1990).

<sup>49</sup> Canel, *supra* note 46; Beuchler, *supra* note 45, at 441-42.

<sup>50</sup> Oliver & Johnston, *supra* note 47, at 185.

<sup>51</sup> Carol McClurg Mueller, *Building Social Movement Theory*, in FRONTIERS IN SOCIAL MOVEMENT THEORY 3, 14 (Aldon D. Morris & Carol McClurg Mueller eds., 1992).



or values in the cultural stock."<sup>52</sup> Similarly, Grattet suggested that how a legal change takes shape "depends on the mobilization of material and symbolic power."<sup>53</sup> Material resources include institutions and organizations that distribute information and points of view. Symbolic resources include monikers like "social justice" that can be used to mobilize political power.<sup>54</sup> For example, as discussed below, factory farms have been able to frame the animal welfare issue in terms of free market ideals and the continuing myth of agriculture's "husbandry" ethic. Reform may depend on the welfare movement's ability to re-frame the issue in symbolic terms of equivalent cultural power.

Scholarship on the dynamic interaction between positive law and social norms can also aid the inquiry.<sup>55</sup> These sociologists view human society as a complex social system, in which individual, decentralized interactions result in system-level phenomena, such as the emergence of new norms.<sup>56</sup> Palma Strand uses this scholarship to illustrate the cyclical interaction between law and community, in which the collaborative development of societal norms takes place.<sup>57</sup> In her "law-as-story" description, "the substantive content of a story and its ultimate ratification lie with the community."<sup>58</sup> Unlike some of the discouraging implications of public choice theory, this concept of norm development suggests a constructive roadmap for individuals seeking to change society.<sup>59</sup>

Thus, new social movement theories can help us analyze instances, such as animal welfare and child labor, in which the group to be protected is truly powerless and those seeking reform are primarily motivated by moral concerns rather than economic self-interest. By

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<sup>52</sup> John A. Noakes & Hank Johnston, *Frames of Protest: A Road Map to a Perspective*, in *FRAMES OF PROTEST: SOCIAL MOVEMENTS AND THE FRAMING PERSPECTIVE*, *supra* note 47 at 1, 9.

<sup>53</sup> Ryken Grattet, *Structural Contradictions and the Production of New Legal Institutions: The Transformation of Industrial Accident Law Revisited*, in *MAKING LAW: THE STATE, THE LAW, AND STRUCTURAL CONTRADICTIONS*, *supra* note 17, at 404, 407.

<sup>54</sup> *Id.* at 412-413.

<sup>55</sup> Robert M. Cover, *Nomos and Narrative*, 97 HARV. L. REV. 4 (1983); Palma Joy Strand, *Law as Story: A Civic Concept of Law (with Constitutional Illustrations)*, 18 S. CAL. INTERDISC. L. J. 603, 620-24 (2009).

<sup>56</sup> See generally, R. KEITH SAWYER, *SOCIAL EMERGENCE: SOCIETIES AS COMPLEX SYSTEMS* (2005).

<sup>57</sup> Strand, *supra* note 55, at 620-24.

<sup>58</sup> *Id.* at 626.

<sup>59</sup> *Id.* at 647, n. 232 (stressing importance of civic organizing).

examining the stages of child labor reform through the social movement lens, we can identify how symbolic and material resources gradually accumulated, finally leading to legislative action.

## II. Protection for the Powerless: The Stages of Reform

The story of how children during the Industrial Revolution in Britain came to be exploited by industry and ultimately rescued by Parliament provides an excellent model for how protection for powerless groups may be achieved. This section will trace through each stage in this reform process, comparing the history of child labor regulation with the modern campaign for animal welfare protection.

“Child labor” is a vague term that could refer to kids mowing the lawn, milking the cows on the farm, or sacking groceries down at the local supermarket. At some point, however, the labor of children can turn from beneficial after-school chores to abusive exploitation. The International Labor Organization (“ILO”) defines “child labor” to be “work that deprives children of their childhood, their potential and their dignity, and that is harmful to physical and mental development.”<sup>60</sup> A number of factors may be used to determine whether work is harmful, including the type of work performed, the number of hours worked, the age of the child, and the conditions of the employment. A key indicator is whether it interferes with the child’s opportunity to attend school. This article will use the ILO definition in referring to child labor.

During the Industrial Revolution, thousands of children were employed in Britain’s factories, in jobs and under conditions that few would argue were healthy or appropriate. The 1851 census in Britain indicated that over 36% of boys and almost 20% of girls between the ages of 10 and 14 were working.<sup>61</sup> About a third of those boys were employed in agriculture and fisheries, where working conditions in some cases may have been less detrimental, but large percentages were in workshops, factories, mines and quarries. About half of the girls

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<sup>60</sup> International Programme on the Elimination of Child Labour, International Labour Organization, *About child labour*, <http://www.ilo.org/ipecc/facts/lang-en/index.htm>.

<sup>61</sup> Kaushik Basu & Pham Hoang Van, *The Economics of Child Labor*, 88 AM. ECON. REV. 414 (1998).

were employed in textile factories and workshops.<sup>62</sup> All told, about 76,000 boys aged 10-14 were employed in mines or factories and around 74,000 girls aged 10-14 were employed in factories that year.<sup>63</sup> Even younger children could be used; in 1851, some 42,000 children from ages 5 to 9 were working.<sup>64</sup>

In Britain, legislative attempts to regulate child labor began in 1802, with a bill to improve conditions for apprentices, although significant reform did not occur until the Factory Acts of 1819 and 1833.<sup>65</sup> Even then, the legislation was relatively narrow and not effectively enforced.<sup>66</sup> The legislative response stretched, by fits and starts, until the late 19th century.<sup>67</sup> In the U.S., the cycle of abuse and legislative reform came later; state legislatures acted first, in the late 1800s and early 1900s, enacting a variety of age and hour limitations, along with compulsory education requirements.<sup>68</sup> The federal government did not become involved until the New Deal era, enacting child labor restrictions as part of the Fair Labor Standards Act in 1938.

While the U.S. and Britain have largely eradicated abusive child labor, the problem has been exported, in effect, to less developed countries. Worldwide some 191 million children aged 5-14, or about one-sixth of that age group, were engaged in some kind of economic activity in 2004.<sup>69</sup> While this represents about 20 million fewer working

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<sup>62</sup> Kirby, *supra* note 2, at 52-53.

<sup>63</sup> *Id.* at 54.

<sup>64</sup> *Id.* at 112.

<sup>65</sup> William F. Willoughby, *Child Labor*, 5 PUBL'N OF THE AM. ECON. ASS'N 5 (1890). See also B.L. HUTCHINS AND A. HARRISON, A HISTORY OF FACTORY LEGISLATION 7 (2nd ed. 1911); Palma Joy Strand, *The Factory Act of 1819*, at 5-6 (1975) (unpublished paper on file with author).

<sup>66</sup> S.G. CHECKLAND, THE RISE OF INDUSTRIAL SOCIETY IN ENGLAND, 1815-1885 246 (1964) (Factory Act of 1819 applied only to cotton mills and contained only modest restrictions on working hours, which were almost never enforced); Willoughby, *supra* note 65, at 20 (criticizing 1833 Act); Kirby, *supra* note 2, at 104-110 (describing failure of early Factory Acts).

<sup>67</sup> Kirby, *supra* note 2, at 94 (detailing the narrow impact of 19th century child labor regulation until 1870s).

<sup>68</sup> Carolyn M. Moehling, *State Child Labor Laws and the Decline of Child Labor*, 36 EXPLORATIONS IN ECON. HIST. 72 (1999) (noting that by 1910, 32 U.S. states had enacted a minimum age limit of 14 for manufacturing operations); E. Watson Kenyon, *Child Labor*, 2 AM. POL. SCI. REV. 54-55 (1907).

<sup>69</sup> Federico Blanco Allais & Frank Hagemann, *Child Labour and Education: Evidence from SIMPOC Surveys 1* (International Labour Organization, Working Paper, 2008), [www.ilo.org/ipecinfor/product/download.do?type=document&id=8390](http://www.ilo.org/ipecinfor/product/download.do?type=document&id=8390).

children than four years earlier, the number is still staggering. In addition, 75 million children of primary school age worldwide were out of school in 2006 (improved from 103 million in 1999).<sup>70</sup>

In 1816, Sir Robert Peel testified before Parliament that children employed in the factories and mills were sent there either by parents or guardians who could no longer afford their care, or by the local parish, which wanted to relieve its welfare rolls.<sup>71</sup> The children, Peel noted, "are not parties to any contract; they are of too tender an age to make any agreement; the agreement must be made by others, by an overseer, or by the poor mother who has no husband, or by the father."<sup>72</sup> Similarly, William F. Willoughby described the powerless state of working children in his exposition of the child labor problem:

[T]here is a rapidly growing class of laborers who are not in a position to demand anything from their employers. Children, weak, helpless and uneducated are immured at the tenderest years in mills and workshops, to undergo severe and tenuous toil. Incapable of organization they grow up in ignorance and crime; unaccustomed to anything but the lowest condition, they are without ability or ambition to improve their situation. The state alone is in a position to remedy this by suitable legislation and to put them in a position where they can help themselves.<sup>73</sup>

Thus, children were "powerless" in that they were unable to seek reform of the system on their own, just as animals are today.

In this first section, I will describe how competitive pressures during the Industrial Revolution led to increasing abuse of child laborers and how industrialists were able counter any reform efforts with free market rhetoric. This stage of competitive deterioration of

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<sup>70</sup> *Id.*

<sup>71</sup> House of Lords, Sessional Papers 1801-33, vol. 92 (1818), at 136 (testimony of Sir Robert Peel). In the case of pauper children, the parish workhouse might appropriated the children's wages. Kirby, *supra* note 2, at 39.

<sup>72</sup> Sessional Papers, *supra* note 71, at 136.

<sup>73</sup> Willoughby, *supra* note 65, at 9.

course parallels the condition of animals in the modern industrialized agriculture revolution.

### A. *Industrialization*

The dramatic shift from the family farm to industrialized agriculture that has occurred over the last several decades, with the concomitant upheavals in rural society, in many ways mirrors the shift to factory labor in Britain in the late eighteenth and early nineteenth centuries. Prior to 1760, most manufacture, of everything from cloth to furniture, was done in the home or in small enterprises. Society was primarily agrarian, with small landholdings providing basic food needs. In a traditional family, every member had his or her job to do, from milking the cow to gathering fuel. While one can have no romantic notions concerning the hardship of daily life, the family was largely self-employed and independent. During the Industrial Revolution, production shifted from small towns to larger factories in big cities, resulting in a complete “remaking of society.”<sup>74</sup>

The causes of the Industrial Revolution have been exhaustively treated elsewhere; for the purpose of this article, they can be briefly summarized to illustrate the similarities to the modern agricultural revolution. Several developments in the late 1700s drove the transformation of society. First, inventions made it possible to do by machine what before required hand labor, making factories possible. For example, the invention of the spinning machine in 1767 began a profound change in the way manufacturing of textiles would thereafter be conducted.<sup>75</sup> The improvement of machinery (e.g., the power loom in 1787, the cotton gin in 1793) and the subdivision of labor into small, repetitive tasks allowed children to perform as effectively as adults.<sup>76</sup>

Second, market forces contributed to industrialization by increasing production needs and making it economically desirable to convert common land into private land (enclosure). The enclosure of common land, which increased significantly from 1760 to 1840, deprived countless commoners of access to land necessary for their

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<sup>74</sup> Checkland, *supra* note 66, at 3.

<sup>75</sup> Sir Edward Baines, *History of the Cotton Manufacture in Great Britain*, in E. Royston Pike, *HARD TIMES: HUMAN DOCUMENTS OF THE INDUSTRIAL REVOLUTION* 31-32 (1966).

<sup>76</sup> Willoughby, *supra* note 65, at 11.

sustenance, in turn driving them to cities and providing a labor pool that would both produce factory goods and consume them. Common rights had allowed a villager to graze cattle on a common pasture, gather wood, gorse or peat for fuel on the manor's wasteland, or turn out pigs into fields after harvest to glean the remaining grain. These valuable rights were lost during the conversion of common land into private property, leaving villagers with no means of support other than to join the industrial labor force.<sup>77</sup>

The Industrial Revolution completely changed the way in which people worked, including the employer-employee relationship. In the transformation from an agrarian to an industrialized society, "the pace and context [of work] were no longer tied to the traditional tempo and conditions of nature."<sup>78</sup> Instead, the conditions were determined solely by the employer, who had neither the time nor inclination to worry about workers' needs and health. Moreover, the workers themselves, at least before labor unions were formed, were relatively helpless to combat the inhumane conditions. Instead of the close tie between master and apprentice, the new breed of employer employed hundreds of workers, who were for the most part complete strangers, and as a result personal relationships provided no check on the treatment of the worker.<sup>79</sup>

Similarly, the industrialization of agriculture that occurred over the last half of the 20<sup>th</sup> century completely transformed rural society and the nature of farming. In 1935, there were 6.8 million farms in the United States; in 2002, only 2.1 million remained. The average acreage per farm increased from 155 to 441 over the same period.<sup>80</sup> Livestock is now raised primarily in large confinement operations; for example, the number of farm operations raising hogs dropped from around 325,000 in 1988 to around 56,000 in 2007. The majority of hogs in the United

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<sup>77</sup> Jerry L. Anderson, *Britain's Right to Roam: Redefining the Landowner's Bundle of Sticks*, 19 GEO. INT'L ENVTL L. REV. 375, 383-90 (2007). See also Checkland, *supra* note 66 (proportion of working population engaged in farming fell from 35 per cent to 16 per cent between 1801 and 1851).

<sup>78</sup> Checkland, *supra* note 66, at 244.

<sup>79</sup> Arnold Toynbee, LECTURES ON THE INDUSTRIAL REVOLUTION IN ENGLAND: POPULAR ADDRESSES, NOTES, AND OTHER FRAGMENTS 88 (1884).

<sup>80</sup> U.S. Dep't of Agric., Econ. Res. Serv., *Structure and Finances of U.S. Farms: 2005 Family Farm Report*, EIB-12 (2006), <http://www.ers.usda.gov/publications/EIB12/EIB12.pdf>.

States (54 % in 2007) are now raised by operators who own over 50,000 head.<sup>81</sup>

Just as employers lost a personal relationship with their employees in the industrial revolution, the rise of corporate agriculture severed the link between farmer and animal. The typical farmer in the early twentieth century knew every animal on the farm. The hogs ate the remains of the family's own meal; the milk from the cow and the eggs from the hens would be breakfast.<sup>82</sup> In the modern confinement operation, food and water is provided mechanically and hired help checks in periodically, but the average corporate CAFO operator has no more personal relationship with the thousands of animals in his care (labeled "inputs" in the agricultural literature now) than the average industrial factory owner had with the girl running the loom. As a result, the stage was set for deterioration of animal welfare conditions, mirroring the abuse of workers in the industrial revolution.

### 1. *Competitive Deterioration*

As the industrial revolution shifted production to factories, competition resulted in a significant deterioration of working conditions. The labor environment in most early industrial factories has been characterized as abominable, horrifying and disgusting.<sup>83</sup> Workers in British cotton mills, for example, labored fourteen-hour days in extreme heat, locked in rooms without a breath of fresh air and minimal access to water. Even pregnant women worked back-breaking hours and were fined by the supervisor for taking any rest. Accidents were frequent, causing "dreadful mutilations,"<sup>84</sup> and of course factory owners were not responsible for an injured worker's medical treatment or subsequent survival.

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<sup>81</sup> U.S. DEP'T OF AGRIC., NAT'L AGRIC. STATISTICS SERV., FARMS, LAND IN FARMS, AND LIVESTOCK OPERATIONS 2007 SUMMARY 33 (2008), <http://usda.mannlib.cornell.edu/usda/nass/FarmLandIn//2000s/2007/FarmLandIn-02-02-2007.pdf>.

<sup>82</sup> Arran Stibbe, *As Charming as a Pig: The Discursive Construction of the Relationship Between Pigs and Humans*, 11 SOCIETY & ANIMALS 375 (2003) (describing close relationship between people and pigs in Victorian Britain).

<sup>83</sup> P.P. Lords, *Reports on the Sanitary Condition of the Labouring Population*, in HARD TIMES: HUMAN DOCUMENTS OF THE INDUSTRIAL REVOLUTION, *supra* note 75, at 72; William Cobbett, *Political Register*, in HARD TIMES: HUMAN DOCUMENTS OF THE INDUSTRIAL REVOLUTION, *supra* note 75, at 60-61.

<sup>84</sup> Lords, *supra* note 83, at 72.

Most prominent among the abuses was the use of child labor. Pauper children were forced into factories at very young ages and worked long hours at back-breaking tasks. Twelve to sixteen hour days were the rule.<sup>85</sup> In one mill, for example, children as young as seven years old worked from 5 a.m. to 8 p.m. Monday through Saturday all year round, with just half an hour for breakfast and half an hour for lunch.<sup>86</sup> On Sunday, they had to work only six hours. They stood at their places the whole day, never sitting, and frequently crushed their fingers in the machinery.<sup>87</sup> The hard labor deformed many of the children and many were beaten savagely to force them to work.<sup>88</sup>

In British coal mines, where in the early 1800s about one-third of all laborers were under eighteen, children crawled through narrow seams underground, dragging heavily loaded cars of coal, or were used as trappers, operating the underground ventilation system.<sup>89</sup> In its 1842 Mines Report, Parliament reported that even children under five years old worked as trappers for up to twelve hours a day and pre-teen girls repeatedly carried such heavy baskets of coal that their spines became deformed.<sup>90</sup>

Reform was a long time in coming, primarily because the oppressed workers, and in particular the children, did not hold much power in Parliament. Parents did not push for reform, because the family's economic survival often depended on the children's income. Even when reform was proposed, industrialists argued that the use of child labor was both necessary economically and not so bad for the kids. Sir Edward Baines, for example, wrote a defense of child labor, arguing that although factory work required long hours, it was not too arduous. Sometimes the children could sit down on the job, he wrote, and although being shut up for long hours without air or sun "makes

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<sup>85</sup> Willoughby, *supra* note 65, at 16.

<sup>86</sup> *Report on Children in Manufactories*, in *HARD TIMES: HUMAN DOCUMENTS OF THE INDUSTRIAL REVOLUTION*, *supra* note 75, at 85-86. See also *Sessional Papers*, *supra* note 71, at 145 (children at factories in Manchester worked from 5 a.m. to 8 p.m. with 40 minutes for dinner; 82 hours per week) (testimony of Thomas Whitelegg).

<sup>87</sup> *Report on Children in Manufactories*, *supra* note 86, at 86.

<sup>88</sup> *HARD TIMES: HUMAN DOCUMENTS OF THE INDUSTRIAL REVOLUTION*, *supra* note 75, at 75-204 (collecting many first-hand accounts of the treatment of children in the factories and mines and reports of the deformities occasioned by the hard labor at a young age).

<sup>89</sup> Willoughby, *supra* note 65, at 17; Kirby, *supra* note 2, at 78.

<sup>90</sup> National Museum of Wales, *Children in Coal Mines: The 1842 Report*, <http://www.museumwales.ac.uk/en/2191/>.



[the children] pale, and reduces their vigour, . . . it rarely brings on disease.”<sup>91</sup> Others noted that work at least was better than starvation for the children, and besides, it kept them out of trouble.<sup>92</sup>

In his history of the Industrial Revolution in England, S.G. Checkland labels this inevitable march toward declining working conditions “competitive deterioration,”<sup>93</sup> also known as a “race to the bottom.” Unchecked, the forces of capitalism led factories to seek ever cheaper means to produce ever more goods. This meant longer hours at lower wages, increasingly poor accommodations and conditions, and increasing reliance on the cheapest laborers, i.e. children.

Just as competitive forces led to the deterioration of working conditions in the Industrial Revolution, livestock agriculture has experienced the competitive deterioration of animal welfare.<sup>94</sup> The most prominent change in production is the confinement of animals indoors for their entire lives, in cages or pens that restrict their movements. In a typical egg-laying operation today, for example, chickens are kept by the millions in stacks of battery (group) cages within huge windowless warehouses.<sup>95</sup> The cages are small, allowing

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<sup>91</sup> Baines, *supra* note 75, at 213.

<sup>92</sup> W. Cooke Taylor, *Factories and the Factory System*, in *HARD TIMES: HUMAN DOCUMENTS OF THE INDUSTRIAL REVOLUTION*, *supra* note 75, at 210-11. The attempts to justify the use of child labor continue even among modern writers. For example, Clark Nardinelli argues that the employment of children freed them from abusive parents and difficult economic circumstances. He concludes: “Industrialization, far from being the source of the enslavement of children, was the source of their liberation.” CLARK NARDINELLI, *CHILD LABOR AND THE INDUSTRIAL REVOLUTION* 102 (1990). See also Kirby, *supra* note 2, at 3 (“the very coherence of family life often depended upon the economic contributions of children”). While it is important to recognize the difficult circumstances from which most of the working children came, the availability of cheap child labor made parents worse off by putting downward pressure on adult wages. And even if employment of children was an economic necessity, it did not require fourteen-hour days in unventilated rooms with scarcely a break for food or rest.

<sup>93</sup> Checkland, *supra* note 66, at 245.

<sup>94</sup> Matheny & Leahy, *supra* note 6, at 327-28 (describing developments that led to factory farming: modern genetics allowing breeding of more productive animals; protein-dense nutrition; CAFO design; vaccines, antibiotics, and vitamins to counteract the health impacts of confinement and dietary changes).

<sup>95</sup> See, e.g., Laurie Welch, *Proposed Chicken, Egg Processing Plants Would Bring Hundreds of Jobs, Controversy to Mini-Cassia*, *MAGIC VALLEY TIMES-NEWS*, Feb. 28, 2010, available at [http://www.magicvalley.com/news/local/article\\_fc565a88-6899-59e3-a46f-f8d418e198b0.html](http://www.magicvalley.com/news/local/article_fc565a88-6899-59e3-a46f-f8d418e198b0.html). The article discusses a county ordinance that limited the number of birds per poultry facility to 4.2 million. A neighboring county has no such

each bird less space than a sheet of notebook paper, because cages are expensive, and larger buildings would be more expensive to build and maintain.<sup>96</sup> As Professor Ibrahim has described it, “[i]ntensive confinement of animals is simple economics, saving on corporate overhead costs by reducing the amount spent on land, feed, and labor.”<sup>97</sup> Because producing meat using these methods is cheaper, competition forces other producers to adopt factory farming or face extinction.<sup>98</sup>

It is easy to romanticize the living conditions of animals on traditional family farms, and conditions on modern farms can vary greatly by producer. Nevertheless, there can be no doubt that the intensive nature of modern production methods has resulted in the deterioration of living conditions for the vast majority of animals in agriculture. Other writers have exhaustively chronicled these abuses,<sup>99</sup> but a brief summary here will illustrate the similarity to child labor abuses of the Industrial Revolution. The practices most often criticized include the confinement of pigs in windowless buildings with concrete or slatted floors, thereby totally depriving them of access to the natural environment, in pens so small that they can’t move about (especially true of gestation crates used for pregnant sows).<sup>100</sup> Similarly, chickens are kept their entire lives crowded together in small cages, unable to forage for food or engage in other natural behavior.<sup>101</sup> Many operators de-beak the chickens, without anesthetic, because they tend to peck

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restriction, as county commissioner Robert Moore explained: “You can’t tell companies they can only have four million birds if they need eight million to be profitable.” See also Alan Johnson, *Strickland Pact Puts Union County Egg-Farm Deal in Doubt*, COLUMBUS DISPATCH, July 6, 2010, available at [http://www.dispatch.com/live/content/local\\_news/stories/2010/07/06/strickland-pact-may-put-union-county-egg-farm-in-doubt.html](http://www.dispatch.com/live/content/local_news/stories/2010/07/06/strickland-pact-may-put-union-county-egg-farm-in-doubt.html) (proposed facility would house 400,000 chickens per barn in 15 barns).

<sup>96</sup> Matheny & Leahy, *supra* note 6, at 329 (noting it is economically efficient to crowd poultry into smaller cages, because cages are more expensive than birds).

<sup>97</sup> Ibrahim, *supra* note 4, at 101.

<sup>98</sup> *Id.* at 99-105 (describing how mass production and integration lowered costs of production).

<sup>99</sup> For detailed discussion of abuses, see Ibrahim, *supra* note 4, at 100-05; Matheny & Leahy, *supra* note 6, at 328-32; Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 LAW & CONTEMP. PROBS. 117, 121 (2007).

<sup>100</sup> Ibrahim, *supra* note 4, at 100-01; see also Mosel, *supra* note 6 at 148-49.

<sup>101</sup> Ibrahim, *supra* note 4, at 100.

each other in response to the conditions of their confinement.<sup>102</sup> Some producers routinely give their animals antibiotics, before any symptoms of illness appear, due to a higher propensity for sickness in confined conditions.<sup>103</sup> They may also routinely use hormones to artificially stimulate growth.<sup>104</sup> The picture of the child laborer whose humanity was sacrificed to the needs of the industry is very similar to the picture of the average animal in industrial agriculture, which has become no more than an “input” in the production process.

## 2. *Ideological Arguments against Regulation*

Public choice theory predicts that special interests seeking economic gain will cloak their arguments in some kind of public interest rhetoric.<sup>105</sup> Interestingly, in response to cries for reform, corporate agriculture raises the same basic defenses to government intervention as industrialists did in the nineteenth century. First, of course, factory owners made an economic argument—that the evolution of the factory was dictated by economic necessity and any interference would wreak economic havoc, threatening to undermine industrial profits, leading to job loss and general depression.<sup>106</sup> Moreover, they argued that any attempt at domestic regulation would force industry to shift production abroad, in order to compete with countries with lower standards. Willoughby called the argument regarding foreign competition the “chief objection to any prohibition of [industry’s] right to employ children.”<sup>107</sup>

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<sup>102</sup> Mosel, *supra* note 6, at 169.

<sup>103</sup> *Id.* at 146.

<sup>104</sup> *Id.* at 147.

<sup>105</sup> As explained by Professors DeBow and Lee:

Politically successful programs always will have some plausible connection with a worthy social objective such as helping the poor, saving the family farm, increasing employment opportunities, or protecting environmental quality. Whether or not the programs actually promote these objectives, the private interests served by them will be adept at arguing that their programs promote great public good and prevent great public harm.

DeBow & Lee, *supra* note 31, at 1004.

<sup>106</sup> Checkland, *supra* note 66, at 247.

<sup>107</sup> Willoughby, *supra* note 65, at 54.

Similarly, agriculture industry advocates argue that many proposed animal welfare restrictions are “economically infeasible and unrealistic in a competitive world market.”<sup>108</sup> Consumers demand consistency, owners argue, which requires factory-like conditions to ensure that the meat has a consistent color, texture, and leanness.<sup>109</sup> Owners of livestock operations are driven almost wholly by market considerations; as the number of production units rise, the cost per unit falls.<sup>110</sup> Scully identifies economics as the central cause of abusive animal conditions—the so-called “race to the bottom” in which market competition forces companies to cut costs and increase production, leaving questions of animal welfare in the dustbin. The economic imperative—if something can be done, it must be—proceeds without consideration of the moral implications or larger societal ramifications. If one corporation balks at an inhumane, but cost-saving, change in conditions, another company will surely do it and undercut the competition.<sup>111</sup> Just as parents were reluctant to oppose child labor, due to their economic dependence on the system, many of the remaining farmers are now dependent on corporate agriculture for their economic survival.

Second, nineteenth-century factory owners claimed that government control would infringe on their civil liberties, especially their basic right to control their property and business as they saw fit. Freedom of contract constituted the basic ideological argument against child labor reform. In the initial stages of industrialization, the powerful rhetoric of laissez-faire capitalism prevented government intrusion into the private affairs of business. Adam Smith first published his *Wealth of Nations* in 1776, popularizing the theory of economic capitalism just as the industrial age began. The economic benefits of free competition could be readily discerned and the

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<sup>108</sup> Angela J. Geiman, *It's the Right Thing to Do: Why the Animal Agriculture Industry Should Not Oppose Science-Based Regulations Protecting the Welfare of Animals Raised for Food*, 106 MICH. L. REV. FIRST IMPRESSIONS 128, 131 (2008).

<sup>109</sup> MATTHEW SCULLY, *DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY* 247-86 (2002) (Chapter 6: Deliver Me from My Necessities).

<sup>110</sup> See Ibrahim, *supra* note 4, at 101 (citing numerous agricultural articles suggesting techniques such as debeaking, limiting space, and limiting exercise to cut production costs).

<sup>111</sup> Scully, *supra* note 109, at 271.

industrial age took full advantage.<sup>112</sup> Smith's theories provided a "great apology for individual initiative against the prohibitions of authority"<sup>113</sup> and society put its faith in economic self-interest.

Although opinions differ on the extent to which Classical economists embraced laissez-faire and the precise dates of its dominant influence over British politics, there is no doubt that the Industrial Revolution was fueled by the belief that "the less government intervention there was in any sphere the better."<sup>114</sup> During the debates on the various child labor reforms proposed in the early nineteenth century, the "general emphasis placed by Classical political economy on freedom of contract between master and man supplied an intellectual basis to which opponents of legislation could and did make appeal."<sup>115</sup> While the laissez-faire arguments could not, in the end, prevent child labor reform, for at least half a century they slowed its progress and limited its scope.<sup>116</sup> In this atmosphere, when Parliament finally enacted a prohibition on using children under the age of ten in underground coal mines, an opponent described it as "perhaps the most high-handed interference with industry enacted by the State in the nineteenth century," despite the fact that the law appointed just one inspector to ensure its enforcement.<sup>117</sup>

Eventually, the force of the free market argument began to wane in the face of clear evidence of abuse. Kirby suggests that "by the 1830s many political economists had recognized industrial child labour as a growing social problem and gave at least their passive support to the limited forms of regulation proposed at that time. As a leading supporter of the short-time movement observed, 'as men, they could not longer screw up their minds and hearts so far as to sacrifice any more limbs and lives of infants [but] the science would not suffer them

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<sup>112</sup> Checkland, *supra* note 66, at 382.

<sup>113</sup> *Id.* at 383.

<sup>114</sup> L.C.A. KNOWLES, *THE INDUSTRIAL AND COMMERCIAL REVOLUTIONS IN GREAT BRITAIN DURING THE NINETEENTH CENTURY* 12 (1921).

<sup>115</sup> ARTHUR J. TAYLOR, *Laissez-Faire and State Intervention in Nineteenth-Century Britain* 43 (1972). For examples of free market arguments made during Parliamentary debates on child labor reform, *see* Sessional Papers, *supra* note 71, at 16, 38.

<sup>116</sup> Taylor, *supra* note 115, at 44.

<sup>117</sup> *Id.* at 58 (quoting Hutchins & Harrison, *supra* note 65, at 82).

to invade the 'freedom of industry' by involving the adults in that protection which they were obliged to give the child."<sup>118</sup>

Slavery presented the same sort of direct clash between morality and economics presented by the child labor issue. As the movement to end slavery began in the late 1700s, abolitionists confronted the same arguments based on economic freedom and fears of disaster. Without slavery, the general wisdom ran, "the British Empire's economy would collapse."<sup>119</sup> One trader summarized the importance of the slave trade as "the foundation of our commerce, the support of our colonies, the life of our navigation, and first cause of our national industry and riches."<sup>120</sup> The free market rhetoric began to lose force, however, when economists began to formulate counter-theories. For example, Adam Smith himself saw slavery as antithetical to his idea that men who labor to obtain property are the most productive.<sup>121</sup> In his view, a system dependent on forced labor could never be as economically productive as one based on free labor. This view not only spread to other economists, but also strongly influenced British politicians who now had an answer to the economic arguments espoused by slave traders.<sup>122</sup>

Animal agriculture is at a very similar stage now. Traditionally, family farms in the U.S. have been cottage industries, independent operations free of government regulations. The Jeffersonian ideal held that "to preserve democracy, we must maintain the predominance of the small landowning farmer,"<sup>123</sup> which helped to insulate them from the regulations encountered by other businesses. As farms consolidated and became industrialized, this agricultural "exemption" from regulation was used to prevent significant government intrusion. Moreover, economic independence forms the chief argument against animal welfare regulation.

Third, apologists for child labor argued that children were actually better off working in factories, even in horrible conditions,

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<sup>118</sup> Kirby, *supra* note 2, at 96 (quoting CHARLES WING, EVILS OF THE FACTORY SYSTEM EXPOSED 17 (1836)).

<sup>119</sup> Hochschild, *supra* note 9, at 7.

<sup>120</sup> *Id.* at 14 (quoting AN AFRICAN MERCHANT, A TREATISE UPON THE TRADE FROM GREAT BRITAIN TO AFRICA, HUMBLY RECOMMENDED TO THE ATTENTION OF THE GOVERNMENT (1772)).

<sup>121</sup> LEO D'ANJOU, SOCIAL MOVEMENT AND CULTURAL CHANGE: THE FIRST ABOLITION CAMPAIGN REVISITED 99 (1996).

<sup>122</sup> *Id.* at 99-100.

<sup>123</sup> J. I. Falconer, *Farming and Democracy*, 63 POL. SCI. Q. 629 (1948).

rather than living in the street or in abject poverty. They touted the increase in family income and the fact that the child had a place to sleep and food to eat.<sup>124</sup> The Parliamentary hearings on the Factory Acts were replete with industry witnesses who testified about the healthy living conditions for children in the factories, despite widespread knowledge to the contrary.<sup>125</sup> Historically, the public feared the idleness, more than over-work, of children because it could lead to crime and the failure to be adequately prepared for the labor market.<sup>126</sup> Similarly, slavery advocates argued that many Africans enjoyed better living conditions working on sugar plantations in America than they would face at home.<sup>127</sup>

These arguments are echoed in industrial agriculture's position that animals are better off in state-of-the-art confinement facilities, environmentally controlled, with access to food and water whenever they want it.<sup>128</sup> The United Egg Producers claims that hens raised in cages "typically have fewer diseases" and that cages "provide for better overall bird health and welfare."<sup>129</sup> "Modern cage systems," the UEP states, "allow hens to stand comfortable (sic), turn around, lie down, groom and stretch their wings."<sup>130</sup> Incredibly, the UEP guidelines on

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<sup>124</sup> Sessional Papers, *supra* note 71, at 31 (arguing that parents of "lower classes" have less affection for their children than upper classes and find it harder to care for children, especially if they are sick).

<sup>125</sup> *Id.* at 6 (manager of cotton factory testifying that health of working children under age 10 "very good" despite working 12-hour days), at 10, 15 (statements regarding children's general welfare), at 30 (doctor's statement regarding health of child workers). In fact, some witnesses testified that many children in ill health actually improved by working in the factory. *Id.* at 50 (testifying that sickly children got better because of good food and more "regular habits" of factory life).

<sup>126</sup> Matthias Doepke & Fabrizio Zilibotti, *The Macroeconomics of Child Labor Regulation*, 95 AM. ECON. REV. 1492 (2005). See also, Sessional Papers, *supra* note 71, at 37 (discussing the fear of "idleness" if children were not employed and its effect on family finances).

<sup>127</sup> Hochschild, *supra* note 9, at 140 (slave ship owners claimed that the most crowded slave ships were the most healthy and that the voyage to the colonies was "the happiest part of a negro's life").

<sup>128</sup> Scully, *supra* note 109, at 258-259. See generally National Pork Board, *Sow Housing*, <http://www.pork.org/Resources/977/SowHousing.aspx> (last visited Nov. 22, 2010) (stating the advantages of confinement housing for sows).

<sup>129</sup> United Egg Producers, *Modern Cage Production*, <http://www.uepcertified.com/program/quality-safety/categories/cage-prod> (last visited Nov. 22, 2010) (regarding housing for chickens and how these types of cages are best for the birds).

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

which these claims are based require cages to provide only 67 to 88 square inches of cage space per bird.<sup>131</sup> A standard piece of copy paper, by comparison, has 93.5 square inches of space. The National Pork Producers Council, similarly, argues that gestation crates actually benefit the pregnant sows by protecting them from "aggression and competition" and the "detrimental effects associated with environmental extremes."<sup>132</sup> On the other hand, some of the most powerful arguments for better animal treatment are based not on the welfare of the animal, but on the argument that improved environmental conditions result in better-quality meat.<sup>133</sup>

Thus, the industrialized agricultural revolution has undergone a stage of competitive deterioration, driven by market forces, similar to conditions resulting in the abuse of child laborers during the Industrial Revolution. While free market rhetoric sustained the deplorable institution of child labor for many years during the 1800s, pressure to reform increased until effective legislation was eventually enacted. By studying this next stage, we can discern similar currents of reform in the animal welfare situation today.

### ***B. Pressure to Reform***

The central question of this paper is how society moves from the stage of unfettered capitalism to the advent of government regulation, given the powerless political position of the reform's beneficiaries. The history of child labor reform suggests that the development of a new ethical imperative is the primary spur to action. How such ethical change occurs is, of course, the subject of much scholarly debate. The child labor history points to key ingredients such as the influence of popular culture, the leadership of key figures, and the occurrence of

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<sup>131</sup> United Egg Producers, *Key UEP Animal Husbandry Guidelines*, <http://www.uepcertified.com/program/guidelines/categories/housing-space-feed-water> (last visited Nov. 22, 2010).

<sup>132</sup> National Pork Producers Council, *Sow Housing*, <http://www.nppc.org/issues/sowhousing.htm> (last visited Nov. 22, 2010).

<sup>133</sup> See, e.g., D. Álvarez, M.D. Garrido, S. Bañón, *Influence of Pre-Slaughter Process on Pork Quality: An Overview*, 25 FOOD REVIEWS INT'L 233, 244 (2009) ("There is no doubt that poor environmental conditions during pre-slaughter handling . . . can irreversibly affect the quality of the meat."). See also Sam Millet, *Performance, meat and carcass traits of fattening pigs with organic versus conventional housing and nutrition*, 87 LIVESTOCK PRODUCTION SCIENCE 109 (May 2004).



triggering events. Even when public opinion shifts, however, reform requires the formation of a permanent structure, in the form of interest groups, to leverage this sentiment and sustain political action. Finally, economic interests may align, at least temporarily, with the ideological interests to provide sufficient political power to achieve regulatory outcomes.

Because protection of the powerless requires this “perfect storm” of societal developments, it is not surprising that regulation is slow, often lagging significantly behind public opinion. As the next section details, Britain began to take legislative action on child labor in 1802, but as late as 1874, eight-year-old children were still permitted to work half-time in factories. Chimney sweep apprentices received protection only in 1875, after a century of public agitation over their treatment.<sup>134</sup> As Alan Watson noted, the law is constantly out of phase with society’s desires, which he attributed primarily to the forces of inertia.<sup>135</sup> Nor is it surprising that regulations to protect the powerless, once enacted, become difficult to enforce, or start to erode with exceptions, as the coalition of interest groups that supported reform begins to fragment or fade, unless a new norm has been firmly established.

This section examines the elements needed to produce effective regulation for the powerless.

### *1. Ethical development*

Although many laws are based on morality, ideological bases are often perceived to be window-dressing for the economic interests truly at stake. With respect to protection for the powerless, however, the absence of an economic impetus makes the development of a new ethic the only (or at least the most important) driver of change. Ethical change appears to arise when there is a heightened public awareness of immoral conditions, often through popular culture, combined with the development of theory and language by the prominent shapers of public opinion to provide the movement with legitimacy.

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<sup>134</sup> Kirby, *supra* note 2, at 94.

<sup>135</sup> Alan Watson, SOCIETY AND LEGAL CHANGE 8 (1977). Sociologists refer to this delay as “cultural lag.” William F. Ogburn, SOCIAL CHANGE WITH RESPECT TO CULTURE AND ORIGINAL NATURE 200 (1950). On the other hand, much of this lag can be legitimate time for study of a problem and investigation of suitable solutions. Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 76 (1967).

The process by which new norms arise in a complex social system occupies a vast space in sociological literature.<sup>136</sup> New social movement theory recognizes that there is a "framing" process, during which a collective interpretation emerges from individual stories and encounters.<sup>137</sup> Palma Strand has explored how the community's shared story then interacts with the accepted, formalized "legal story" that emanates from courts and legislatures in a continuous cycle of modification.<sup>138</sup>

Thus far, the collective story regarding factory farming is dominated by lingering perceptions of farmers who "care about their animals" and laissez-faire economic policy. Producers articulate their story through advertising, web sites, and even YouTube videos that tout the sanitary, healthy conditions for animals and the high quality of the resulting product. The courts reinforce this story by employing standing limitations, which preclude anyone from challenging industrial farming conditions. Legislatures confirm the story by exempting agricultural animals from cruelty laws. The emergence of a new norm may depend on "multiple individual experiences and stories about those experiences" which begin to alter the accepted collective understanding of the situation.<sup>139</sup>

One example of this process is the response to a news story posted on the internet about 11,000 hogs killed in a confinement operation fire.<sup>140</sup> The news story itself gives us the "accepted" frame for this story; the main concerns seem to be human - how much property the owner lost, whether the farm's employees will keep their jobs, and how potentially hazardous material will be disposed of. On the other hand, numerous comments to the story posted by others attempt to change the focus of the story to the suffering of the animals. One by "Old Way Farmer" provides a good example, lamenting that modern corporate confinements are worse than prisons and create conditions that make disasters like this more likely.<sup>141</sup> Unlike the old days, Old

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<sup>136</sup> See generally Sawyer, *supra* note 56.

<sup>137</sup> *Id.* at 210-11. See also Babcock, *supra* note 44, at 143; Cass R. Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 909 (1996).

<sup>138</sup> Strand, *supra* note 55, at 620-24.

<sup>139</sup> *Id.* at 621 (diagram).

<sup>140</sup> WGEM, *Estimated 11K pigs killed in hog confinement fire*, Apr. 22, 2009, <http://www.wgem.com/global/story.asp?s=10233491>.

<sup>141</sup> The comment of Old Way Farmer in full (typographical errors in original):

Way Farmer complains, "poor hogs are doomed to live their lives in buildings and never have the enjoyment of rooting around in a mud bog." Mothers (the sows), the post continues, "are confined in a bathtub

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I spotted the heavy smoke rise from this fire as if a bomb exploded. I was near the scene watching the fire and it brought tears to my eyes. Not from the smoke, but from the thought of all those poor pigs trapped inside. We raised hogs on our farm for many years and they were never confined. Most of our neighbors also raised hogs. You could travel around the area and see the hogs resting in their huts or out milling around in lots and pastures. I don't ever recall a time when our hogs were sick or in some sort of danger. When the BIG corporations decided to take over the hog business, it put the small farmers out of the hog business. Now the poor hogs are doomed to live their lives in buildings and never have the enjoyment of rooting around in a mud bog. With so many hogs confined in such close quarters, not only are they mistreated, (In prison) they are not even given 24 hour care. Why aren't there large sprinkler systems in these hog confinements? Why aren't there personal attendants on duty 24 hours a day? What, no smoke alarms? Maybe escape hatches should be available so hogs could be let out in case of a fire? Even hardened criminals in prisons get to come out of their cells each day to exercise. I'm sure all prisons have smoke alarms and sprinkler systems also. Why should animals not have the same kindness. After all, they didn't do anything wrong! It breaks my heart when I see livestock treated worse than vegetables. Hmmm? Even tomatoes are handled with care! Think about it! As soon as your baby is born, put it in a small crib with a dozen other babies and leave it there until it is a toddler. Then move it to a small cell with 2 dozen other toddlers. You never get to hold your baby, touch your baby, play with your baby or watch your baby grow. Your baby never gets to enjoy life. It just gets to eat until it is ready to be loaded into a truck headed for market. Oh yes, did I forget to mention that you the Mother are also confined to an even worse fate. You are confined in a bathtub for your life. (The size of the crate the sow lives in) Never to move around or even turn. Just stand or lie down. I don't usually talk out against things like this, but I am very upset that nobody was on duty at the time of the fire. This is not right! Would a prison be left alone all night with all the prisoners locked up in their cells? I think more rules need to be laid out for these hog prisons! I guess I'm just upset that these poor hogs never had a chance to get out of the burning building or enjoy life! Sorry for the long read.

*Id.*

for ... life. Never to move around or even turn. Just stand or lie down."<sup>142</sup> The combined effect of farmers or others expressing this revulsion may eventually result in the collective emergence of a new "frame" for this type of story, which in turn will impact the way the law approaches the issue.<sup>143</sup>

The development of a new ethic toward child labor required a combination of several important elements. New social movement theorists point to the development of "symbolic" resources - in other words, the language and arguments that resonate with society and link the argument to the society's storehouse of previously accepted ideas.<sup>144</sup> Child labor reformers, for example, had to develop arguments to counter the laissez-faire philosophy relied upon by factory owners, which preached that private enterprise must remain unfettered by government regulation. There was a sense that "universal unrestricted competition" was absolutely necessary for the economy to function, "from which it was regarded as little short of immoral to depart."<sup>145</sup>

In response, progressive theorists had to create a language and philosophy to justify government intervention. Prominent thinkers recognized that capitalism, completely unchecked, could lead to abuses, necessitating societal control. In one of the first scholarly treatments of the Industrial Revolution, Arnold Toynbee remarked: "Competition, we have now learnt, is neither good nor evil in itself; it is a force which has to be studied and controlled; it may be compared to a stream whose strength and direction have to be observed, that embankments may be thrown up within which it may do its work harmlessly and beneficially."<sup>146</sup> By recognizing that pure capitalism could be as destructive as pure socialism, these scholars provided the

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<sup>142</sup> *Id.*

<sup>143</sup> Professor Strand provides fruitful examples of how social change occurs through this process in areas such as gay rights, gun control and abortion. Palma Joy Strand, *Harvey Milk, Jane Roe, and James Brady: A Civic Perspective on Gay Rights, Abortion, and Gun Control*, available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1719763](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1719763) (last visited Nov. 22, 2010). The biggest obstacle to this process is the exclusion of alternative stories from the modern jurisprudential process. Strand, *supra* note 55, at 628-30. The internet, however, is much more inclusive and therefore may help evade this obstacle to change.

<sup>144</sup> Hope Babcock also identifies the importance of constructing "linkages" to norms that are more established. Babcock, *supra* note 44, at 144.

<sup>145</sup> Toynbee, *supra* note 79, at 87.

<sup>146</sup> *Id.*

forces of morality with the rhetorical ammunition they needed to achieve legislative progress.

Similarly, animal welfare theory is beginning to gain critical mass among progressive scholars, who provide the language and arguments for public discourse. Discussion of reform has become so well-accepted in academic circles that animal rights courses are now offered at about 100 American law schools and an increasing number of established scholars are contributing significant research to the subject.<sup>147</sup> Animal welfare theorists have begun to establish better linkages between the desired animal welfare norms and more established normative concepts that resonate with public opinion. While agricultural producers rely on slogans such as "free market" and "foreign competition" that call forth accepted, persuasive concepts in the public's storehouse of symbolic resources, animal welfare advocates counter with "stewardship" language, sometimes linking those concepts with accepted religious norms.<sup>148</sup> The stewardship norm seems to resonate more successfully than rhetoric based on "rights" for animals, which many people may find threatening and inconsistent with their accepted view of animal-human relationships.<sup>149</sup>

In order to be more successful, animal welfare groups need to make further links with established social norms that make the animal welfare norm more acceptable.<sup>150</sup> For example, accepted norms against cruelty to companion animals can be called upon to make regulation of food animals more persuasive. Eventually, reformers may be able to make the link between the plight of animals in the industrialized agricultural revolution with the plight of other powerless groups, such

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<sup>147</sup> Animal Legal Defense Fund, *Animal Law Courses*, [http://aldf.org/userdata\\_display.php?modin=51](http://aldf.org/userdata_display.php?modin=51) (last visited Nov. 22, 2010). See also Jeff Welty, *Forward: Animal Law: Thinking About the Future*, 70 LAW & CONTEMP. PROBS. 1, 1-2 (2007) (discussing "remarkable growth" of animal law at American law schools).

<sup>148</sup> See, e.g., Scully, *supra* note 109, at v-vi (contents). A glance at the table of contents of Matthew Scully's influential book on animal welfare shows that it is saturated with religious references.

<sup>149</sup> See, e.g., JAMES P. STERBA, THREE CHALLENGES TO ETHICS: ENVIRONMENTALISM, FEMINISM, AND MULTICULTURALISM 27-49 (2001). Sterba argues that the positions of animal activists such as Peter Singer and Tom Regan do not account for the positive aspects of species partiality. Instead, he argues for a "biocentric" view that would allow the needs of other species to be ignored only when necessary to fulfill basic human needs.

<sup>150</sup> See also Strand, *supra* note 55, at 628-30 (discussing how system works to marginalize and denigrate stories that challenge dominant principles and standards).

as slaves and children, to utilize the symbolic resources those now-established norms provide.

Social change theorists also point to individuals, both politicians and civilians, who provide the leadership necessary to carry the ethical issue forward and give it legitimacy. Howard Becker coined the term "moral entrepreneur" for those who seek to convince others to adopt a new norm and Cass Sunstein noted the importance of such leaders in discussing how society adopts a new norm.<sup>151</sup> Although moral entrepreneurs outside the political system can be instrumental (think Martin Luther King, Jr.), the adoption of a moral cause by a political leader can be a crucial moment in the process of norm adoption. Although public choice theory emphasizes the dominant influence of economic interest groups in politics, government leaders do sometimes decide to act on behalf of the less powerful.<sup>152</sup> Civic republicans would certainly emphasize the role of such leaders, who can help lead a dialogue "to make the citizenry more virtuous by changing individual preferences."<sup>153</sup>

In the child labor area, civic-minded leaders such as Sir Robert Peel, Sr. and Robert Owen were clearly instrumental in spurring public scrutiny and shaping public opinion. Peel's 1802 bill governing the employment of apprentices in the cotton industry was derided as radical by industrialists and political economists alike, who were sure it would cause the ruin of British manufacturers.<sup>154</sup> Despite these objections, Peel pushed the bill forward. Although the 1802 Act was limited in scope and ultimately proved ineffective, it broke the ground for legislative control of industry. Similarly, in the early 1800s, British factory owner Robert Owen publicized the evils of the new industrial society and illustrated practically how goods could be manufactured while treating workers humanely.<sup>155</sup> His influence led to the Factory

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<sup>151</sup> Howard S. Becker, *Moral Entrepreneurs: The Creation and Enforcement of Deviant Categories*, in NANCY J. HERMAN, *DEVIANCE: A SYMBOLIC INTERACTIONIST APPROACH* 169 (1995). See also Sunstein, *supra* note 137, at 909.

<sup>152</sup> KAY LEHMAN SCHLOZMAN AND JOHN T. TIERNEY, *ORGANIZED INTERESTS AND AMERICAN DEMOCRACY* 402 (1986) ("At various times and under various circumstances, various governmental institutions and actors have adopted the causes of the less advantaged and broad publics.").

<sup>153</sup> Farber & Frickey, *supra* note 17, at 44 (discussing civic republicanism).

<sup>154</sup> Willoughby, *supra* note 65, at 18.

<sup>155</sup> G.D.H. COLE, *THE LIFE OF ROBERT OWEN* (2nd ed. 1930).

Act of 1819,<sup>156</sup> which continued the long, slow drive toward reform. Thus, significant changes in public opinion can be catalyzed by prominent political figures and moral entrepreneurs who legitimize and popularize the ideas behind reform.

One shortcoming of the animal welfare reform effort thus far is the failure to attract "norm leaders" of sufficient stature to signal the legitimacy of the new norm.<sup>157</sup> The antics of PETA<sup>158</sup> and the eco-terror activities of other animal rights groups<sup>159</sup> may have made it easier for the broader public to dismiss animal welfare stories as "fringe" or illegitimate and unworthy of consideration. While racy pictures of Pamela Anderson may generate publicity, they may at the same time detract from the credibility of the message and encourage mainstream political leaders to keep their distance. On the other hand, the writings of prominent legal scholars that make or rely on animal welfare arguments do the work of moral entrepreneurs in signaling legitimacy.

In the development of a new ethical imperative, the influence of popular culture cannot be overestimated.<sup>160</sup> In many cases, popular books have been influential in starting revolutions in public opinion followed by dramatic changes in the law. With regard to child labor, Charles Dickens' *Oliver Twist* (1838) was enormously popular and greatly increased the public's awareness of the conditions of the workhouse, while *Hard Times* (1854) painted a dark portrait of the

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<sup>156</sup> Checkland, *supra* note 66, at 246.

<sup>157</sup> Martha Finnemore & Kathryn Sikkink, *International Norm Dynamics and Political Change*, 52 INT'L ORG. 887, 901 (1998).

<sup>158</sup> CBC/Radio-Canada, *Pam Anderson PETA permit nixed by Montreal*, July 15, 2007, [www.cbc.ca/arts/media/story/2010/07/15/montreal-pam-anderson-advegetarian.html](http://www.cbc.ca/arts/media/story/2010/07/15/montreal-pam-anderson-advegetarian.html) (Montreal denied PETA permit for event launching campaign featuring risqué advertisement of Pam Anderson). Many comments to the story indicate that, while the event generated publicity, it did not add to the credibility of the organization.

<sup>159</sup> See, e.g., Federal Bureau of Investigation, *Eco-Terror Indictments: 'Operation Backfire' Nets 11*, Jan. 20, 2006, [www2.fbi.gov/page2/jan06/elf012006.htm](http://www2.fbi.gov/page2/jan06/elf012006.htm) (65-count indictment alleges involvement in 17 attacks, including arson at Vail Ski Resort and sabotage of power line in Oregon).

<sup>160</sup> ROBERT H. WALKER, *THE REFORM SPIRIT IN AMERICA* 303 (1976) (asserting that, though "very seldom do works of literature produce important tangible results, . . . every major reform campaign has benefited importantly from the contributions of creative artists").

Industrial Revolution.<sup>161</sup> American Harriet Beecher Stowe's *Uncle Tom's Cabin* (1852), of course, inspired and bolstered the abolition movement by its vivid depiction of the conditions of slavery. The book aroused popular sentiment that helped to justify the Civil War and the ultimate abolition of slavery. Similarly, *The Jungle* (1906), by Upton Sinclair, which exposed the treatment of workers and the unsafe, unsanitary conditions of American meat-packing plants, led to unprecedented government regulation of industry, in the Meat Inspection Act and in the Pure Food and Drug Act.<sup>162</sup> John Steinbeck's *The Grapes of Wrath* (1939) publicized the plight of migrant workers, while Rachel Carson's bestseller describing the dangers of pesticides, *Silent Spring* (1962), is credited with helping to launch a generation of environmental regulation.

In the animal welfare context, many nonfiction books have influenced public opinion significantly, adding to public awareness of the issue and developing the language necessary for norm acceptance. Early on, Albert Schweitzer proposed a new ethic toward animals, arguing that "only a universal ethics which obliges us to be occupied with all beings puts us in a complete relation with the universe and the will manifested in it."<sup>163</sup> As an accepted "moral entrepreneur" of enormous stature, Schweitzer's argument should have been influential. Yet, when Peter Singer published *Animal Liberation* in 1975, his argument for greater rights for animals was a lonely voice. A decade later, Tom Regan presented a coherent philosophical approach supporting a new moral stance toward animals, in *The Case for Animal Rights*, which provided much of the language and legitimacy the movement needed. Nevertheless, because these books took what many considered to be "radical" positions regarding our relationship with animals, popular opinion still marginalized, to a large extent, those clamoring for reform.

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<sup>161</sup> Indeed, Dickens wrote articles on the horrors of child labor that appeared alongside the serial version of *Hard Times*. Charles Dickens, *Ground in the Mill*, HOUSEHOLD WORDS Apr. 22, 1854, at 224-27.

<sup>162</sup> Of course, the legislation was aimed at providing safe consumer products rather than improving the plight of the workers or animals. See Federal Meat Inspection Act, 21 U.S.C.A. § 601 (2008); Federal Food, Drug, and Cosmetic Act, 21 U.S.C.A. § 301 (2009).

<sup>163</sup> Albert Schweitzer, *The Evolution of Ethics*, 202 ATLANTIC MONTHLY, Nov. 1958, at 73.



Matthew Scully's book, *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy*, which appeared in 2002, was significant not only in its detailed and disturbing account of the abusive conditions endured by animals in industrialized agriculture, but also in the moral case it made for better treatment. The fact that Scully emerged from the ranks of the conservative establishment, having served as a speechwriter for President George W. Bush, gave his argument influence with a societal group previously not disposed to favor farm regulation.<sup>164</sup> By emphasizing welfare concerns, the book seemed to make the ethical case less radical and more accessible to a greater segment of the public.

While these books, among many others,<sup>165</sup> have provided the animal welfare reform movement with legitimacy, language and arguments, the reform effort has yet to produce a broadly-influential work of popular fiction, like *Oliver Twist* or *Uncle Tom's Cabin*. Interestingly, factory farm opponents continue to rely on *The Jungle*, noting that conditions in meat-packing plants have not changed significantly since its publication over a century ago, which illustrates the power of a fictional narrative in shaping public opinion. However, modern platforms for social interaction, including Facebook and Youtube, have been used effectively by animal welfare groups,<sup>166</sup> and may replace or at least supplement, the role of literature in forming new ethical norms. Moreover, films such as *Food, Inc.*,<sup>167</sup> can be enormously effective in creating a "critical mass," defined as "a

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<sup>164</sup> Similarly, economist Adam Smith's stance against slavery as ultimately less efficient than free labor helped to blunt *laissez faire* arguments against abolition. ADAM SMITH, *THE WEALTH OF NATIONS* 80 (Penguin 1986) (1776).

<sup>165</sup> See, e.g., JONATHAN SAFRON FOER, *EATING ANIMALS* (2009); GENE BAUR, *FARM SANCTUARY: CHANGING HEARTS AND MINDS ABOUT ANIMALS AND FOOD* (2008).

<sup>166</sup> See, e.g., *Compassion Over Killing, Help for the Hopeless*, <http://www.youtube.com/watch?v=Q10hx8nS5DA> (last visited Nov. 22, 2010) (describing abuse in the chicken industry); *Animal Aid, Undercover Investigation at Intensive Pig Farm*, <http://www.youtube.com/watch?v=YIkxc37gwXo&feature=related> (last visited Nov. 22, 2010) (describing abuse at hog confinement). Of course, producers have responded with their own postings attempting to show animals kept in better conditions. See, e.g., *Familyfarmer, The Truth about Modern Pork Production on Family Farms*, [http://www.youtube.com/watch?v=Cy\\_0zsAkbG8](http://www.youtube.com/watch?v=Cy_0zsAkbG8) (last visited Nov. 22, 2010) ("Learn from a mother and farmer how the environment & livestock are cared for today in modern barns. Farmers care for their animals today just like farmers did generations ago. Farmers know healthy animals produce healthy food.").

<sup>167</sup> *FOOD, INC.* (Robert Kenner 2009).

sufficient number of people who agree with the new norm to create an impression of broad-based adoption."<sup>168</sup>

2. *Formation of interest groups: structure for public pressure*

Ideological concern may be insufficient to drive reform without an organizational context.<sup>169</sup> Organizations provide a platform and means to transform deeply held beliefs into action. Moreover, organizations can provide a structure for constant political pressure and oversight that even committed individuals cannot emulate. Organizations allow the pursuit of reform goals over long periods of time, between peaks of public interest and involvement, and allow the movement to take advantage quickly of new opportunities for mobilization.<sup>170</sup> As one social scientist explained:

Bureaucratic organization helps a group with the problem of pattern maintenance. By creating a structure of roles with defined expectations in the place of diffuse commitments, a challenging group can better assure that certain tasks will be routinely performed. It gives the challenging group a higher readiness for action.<sup>171</sup>

Although fully exploring the nuances of interest group theory is beyond the scope of this article, it is clear that the formation of an issue organization can be a significant development in a social reform movement's history.<sup>172</sup>

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<sup>168</sup> Babcock, *supra* note 44, at 143 (citing Finnemore & Sikkink, *supra* note 157, at 901).

<sup>169</sup> Rubin, *supra* note 5, at 28-30 (discussing the importance of organizational structures in reform movements).

<sup>170</sup> David S. Meyer, *Introduction: Social Movements and Public Policy: Eggs, Chicken and Theory*, in ROUTING THE OPPOSITION: SOCIAL MOVEMENTS, PUBLIC POLICY AND DEMOCRACY 1, 9-10 (2004).

<sup>171</sup> WILLIAM A. GAMSON, THE STRATEGY OF SOCIAL PROTEST 91 (1975). See also Walker, *supra* note 160, at 426 ("[T]he success or failure of a reform movement depends on the existence of sustained, organized effort. . . . Reform may have its moments of high art and high drama; but its progress depends on such unglamorous daily activities as going to press, selling pamphlets, organizing chapters, raising money, and getting out the vote.").

<sup>172</sup> See generally FRANK R. BAUMGARTNER & BETH L. LEECH, BASIC INTERESTS: THE IMPORTANCE OF GROUPS IN POLITICS AND IN POLITICAL SCIENCE (1998); Frank R. Baumgartner & Christine Mahoney, *Social Movements and the Rise of New Issues*, in ROUTING THE OPPOSITION, *supra* note 170, at 65.

In the United States, at least, social organizations to support animal welfare existed before organizations to prevent child labor. For example, in New York City the American Society for the Prevention of Cruelty to Animals was founded in 1866, while the New York Society for the Prevention of Cruelty to Children, said to be the first child protection organization anywhere, came into existence about 10 years later.<sup>173</sup> In the child labor reform effort, religious organizations provided important structural support.<sup>174</sup> Similarly, in the slavery context, religious institutions (notably the Quakers) gave vital organizational structure to the abolition movement, which historians believe was crucial to its success.<sup>175</sup>

When workers organized and unions began serious agitation in the mid-1800s,<sup>176</sup> their support also was critical to the success of child labor reform. In fact, the larger context of labor reform provided fertile ground for effective child labor restrictions because it furthered the idea that employers did not have *carte blanche* concerning the conditions of employment. The history of child labor reform therefore illustrates the need to stitch together the support of groups with a variety of interests who may support a particular reform based on diverse motives.

Many American organizations now support animal welfare reform, including People for the Ethical Treatment of Animals,<sup>177</sup> the Humane Society of the United States,<sup>178</sup> Farm Sanctuary,<sup>179</sup> Compassion Over Killing,<sup>180</sup> and the Society for the Prevention of Cruelty to

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<sup>173</sup> American Soc. for the Prev'n of Cruelty to Animals, *History*, [www.aspca.org/about-us/history.html](http://www.aspca.org/about-us/history.html) (last visited Nov. 22, 2010); New York Soc. for the Prev'n of Cruelty to Children, *History*, [www.nyspcc.org/nyspcc/history/](http://www.nyspcc.org/nyspcc/history/) (last visited Nov. 22, 2010).

<sup>174</sup> Kirby, *supra* note 2, at 97-98.

<sup>175</sup> Hochschild, *supra* note 9, at 213.

<sup>176</sup> Checkland, *supra* note 66, at 372 (detailing reforms in the 1860s and 1870s). Not until 1880, for example, with the Employers Liability Act, was the first attempt made to transfer the risk of accident on the job to the employer rather than the worker. *Id.* at 374.

<sup>177</sup> People for the Ethical Treatment of Animals, *About PETA*, <http://www.peta.org/about/default.aspx> (last visited Nov. 22, 2010).

<sup>178</sup> Humane Society of the United States, *About us*, <http://www.humanesociety.org/about/> (last visited Nov. 22, 2010).

<sup>179</sup> Farm Sanctuary, *About us*, <http://www.farmsanctuary.org/about/> (last visited Nov. 20, 2010).

<sup>180</sup> Compassion Over Killing, *About*, <http://www.cok.net/about> (last visited Nov. 22, 2010).

Animals.<sup>181</sup> Although the proliferation of such groups indicates an increasing level of public support in general for animal protection goals, the sheer number of groups raises the question of whether they are too fragmented to provide sufficient political power for major reform.<sup>182</sup> Other groups, such as the Sierra Club and the Humane Farming Association, also oppose industrial farming but may have different agendas. For example, the Sierra Club may be most interested in factory farm control from a pollution-control perspective, while certain farm groups may focus on the impact of corporate agriculture on small farmers. The division between animal rights and animal welfare principles also weakens the overall reform effort. Some animal rights activists, for example, believe that animal welfare reform may actually undermine their agenda, by making exploitation of animals more palatable to the general public.<sup>183</sup> Thus, these two groups, which seem to have much to gain by cooperation, may not be able to find enough common ground to achieve their goals. Social movement scholars note that cooperation among such groups may wax and wane as circumstances and resources change.<sup>184</sup> Success may depend on cobbling together sufficient interest groups with common interests to achieve critical mass.

### 3. *Triggering events*

Much as an earthquake releases stored-up pressure and adjusts the relationship between tectonic plates, triggering events are catalysts for dramatic shifts in public policy. Significant changes in the law can often be traced to dramatic occurrences that coalesce public sentiment. In the United States, disasters often lead to major environmental legislation: the Cuyahoga River fire in 1969 helped inspire Congress to enact the federal Clean Water Act in 1972; the discovery of toxic waste in Love Canal and Times Beach in the late 1970s led to the federal

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<sup>181</sup> Soc. for the Prev'n of Cruelty to Animals International, *About Us*, <http://www.spcai.org/about-us.html> (last visited Nov. 22, 2010).

<sup>182</sup> See Welty, *supra* note 147, at 3 (discussing divisions among animal law advocates).

<sup>183</sup> Gary L. Francione, *supra* note 12, at 10-11 (noting animal welfare agenda may actually undermine animal rights agenda by making exploitation more palatable).

<sup>184</sup> Meyer, Jenness & Ingram, *supra* note 170, at 9 (stating that, ironically, cooperation tends to be highest when more public attention is paid to an issue, so coalition dynamics tend to follow and accentuate the dynamics of a protest cycle).

hazardous waste cleanup system; and the Bhopal Union Carbide explosion in 1984 directly resulted in legislation regarding emergency planning for toxic disasters.<sup>185</sup> The 1989 Exxon Valdez oil spill triggered the 1990 Oil Pollution Act<sup>186</sup> and the recent BP oil disaster in the Gulf of Mexico has focused Congress's attention once again on the subject.

Political scientists define "triggering events" as "those immediate factors in the political setting which provide the link between demands for action and public policy."<sup>187</sup> Although the term is sometimes defined broadly to include interest group activities and election year politics, clearly a catastrophic event or sensational court case is a powerful trigger that can quickly catalyze government action.<sup>188</sup> In the labor area, the most prominent example was the Triangle Shirtwaist Factory fire in 1911, which killed 146 employees, mostly young girls, and brought the deplorable working conditions of immigrants in the garment district into the public view. "The tragedy focused attention upon the ghastly factories in which most immigrants worked"<sup>189</sup> and served as a wake-up call to the public: "For the first time in the history of New York's garment industry there were indications that the public was beginning to accept responsibility for the exploitation of the immigrants."<sup>190</sup>

A problem like the abuse of immigrant laborers can easily be hidden away from public consciousness until a tragedy like the Triangle Shirtwaist fire occurs. Because almost all industrialized agriculture takes place in closed, windowless buildings, with strictly limited public access, most people have only a vague idea of where their meat comes from. In the animal welfare context, there has not

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<sup>185</sup> See Jerry L. Anderson, *The Environmental Revolution at Twenty-five*, 26 RUTGERS L.J. 395, 414 (1995).

<sup>186</sup> Oil Pollution Act of 1990, 33 U.S.C. §§2710-62. See William H. Rodgers, Jr., 2 ENVTL. L. (West) §4:37A (noting *Exxon Valdez* spill has been called the "Pearl Harbor" of environmental improvement).

<sup>187</sup> Edmund F. McGarrell & Thomas C. Castellano, *Social Structure, Crime, and Politics: A Conflict Model of the Criminal Law Formation Process*, in MAKING LAW: THE STATE, THE LAW, AND STRUCTURAL CONTRADICTIONS, *supra* note 17, at 347, 361.

<sup>188</sup> *Id.* at 353.

<sup>189</sup> Bonnie Mitelman, *Rose Schneiderman and the Triangle Fire*, 16 AM. HIST. ILLUS. 38, 41 (1981).

<sup>190</sup> *Id.* at 45. See also JOSEPH G. RAYBACK, A HISTORY OF AMERICAN LABOR 263 (1959) (noting safety and health regulations were revised and enforcement was bolstered as a result of the Triangle disaster).

been a similar “triggering event” to capture the attention of the public. There have been confinement operation catastrophes, in which hundreds or even thousands of animals have been killed; in one disaster in Illinois, noted above, 11,000 hogs were incinerated.<sup>191</sup> Because the animals are confined in large numbers, with sometimes sporadic supervision, the potential for large-scale destruction is greater than in traditional farming operations. Nevertheless, these tragedies caused hardly a ripple of public concern, despite the fact that they resulted from an industrial form of animal confinement in which human contact is largely absent. Perhaps because the animals were soon to be killed anyway, their deaths did not trigger as much outrage.

Another type of triggering event in industrialized agriculture is the “exposé” video, which shows the public graphic images of what goes on behind the closed doors of confinement operations.<sup>192</sup> The mainstream media has sometimes given these undercover videos significant attention.<sup>193</sup> Thus far, however, the videos have been insufficient to trigger legislative action.

In August 2010, a potential triggering event occurred when half a billion eggs were recalled due to salmonella contamination that resulted in over 1600 illnesses.<sup>194</sup> For several weeks, the public’s attention was focused on egg-production methods, which most people had presumably never given much thought to before. However, because the event involved human health concerns, much of the resulting pressure for reform arose not from the altruistic motives of animal welfare protection but rather from self-interest, and Congress focused on the need to enact further human safety legislation rather

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<sup>191</sup> WGEM, *supra* note 140. See also Mark Geary, *Crews Battle Fire at Hog Confinement Building*, KCRG-TV9, Apr. 14, 2008, <http://www.kcrg.com/news/local/17668804.html>.

<sup>192</sup> Mercy for Animals has gone undercover and posted many of these videos on its website. Mercy for Animals, <http://www.mercyforanimals.org> (last visited Nov. 22, 2010).

<sup>193</sup> See, e.g., Julia Preston, *Kosher Plant Is Accused of Inhumane Slaughter*, NEW YORK TIMES, Sept. 4, 2008, at A21, available at [http://www.nytimes.com/2008/09/05/us/05immig.html?\\_r=1&ref=agriprocessors\\_inc](http://www.nytimes.com/2008/09/05/us/05immig.html?_r=1&ref=agriprocessors_inc) (reporting on PETA undercover video showing slaughter methods at Agriprocessors’ plant).

<sup>194</sup> Mary Claire Jalonick, *Egg Company Chiefs Give Congress Few Answers*, ASSOCIATED PRESS, Nov. 8, 2010, available at [http://news.yahoo.com/s/ap/us\\_tainted\\_eggs](http://news.yahoo.com/s/ap/us_tainted_eggs).

than welfare regulation.<sup>195</sup> In that regard, the public reaction is very similar to the response to Upton Sinclair's *The Jungle* in the early 1900s; despite the book's powerful depiction of exploited workers and abused animals, to Sinclair's dismay the public focused on the possibility of contaminated food, resulting in Congress enacting the Food Inspection Act rather than protecting animals or workers.

Thus, it is difficult to imagine what kind of event would provide the sudden impetus often required to bring reform efforts to fruition. The absence of a triggering event, however, may not be fatal to reform efforts. Child labor reform cannot be traced to one major event that captured and focused public attention. Instead, success was due to the steady accumulation of the sources of material and symbolic power. The videos and confinement disasters noted above contribute to the overall process of norm development necessary to achieve reform, and events such as the salmonella outbreak should at least raise public awareness of significant concerns with the industrialized agriculture model.

#### 4. Economics

Historians emphasize that economic factors as much as moral concerns led to the legislative restrictions on child labor. Although many families depended economically on their children's employment, during periodic downturns in the economy unions naturally supported limited hours or other child labor regulations to reduce the oversupply of labor.<sup>196</sup> Economists studying countries that continue to rely significantly on child labor stress that the laboring class remains ambivalent about reform, even to protect their own children. A recent study concludes that "workers' attitudes regarding [child labor regulation] depend not only on the degree to which they compete with children in the labor market, but also on the extent to which their family income relies on child labor."<sup>197</sup>

Advances in economic theory were crucial to the success of child labor reform in Britain. Although the free-market theories of Adam

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<sup>195</sup> *Id.* (discussing proposed legislation that would give FDS more power to recall tainted products, require more inspections of facilities, and impose stricter safety standards).

<sup>196</sup> W. W. ROSTOW, *BRITISH ECONOMY OF THE NINETEENTH CENTURY* 118-20 (1948).

<sup>197</sup> Doepke & Zilibotti, *supra* note 126, at 1493.

Smith stifled reform attempts early in the Industrial Revolution, political economists began to modify their views as they gained more experience with the societal impacts of unchecked competition. One historian, William Willoughby, noted this in his 1890 treatise on child labor: “Although every political economist who wrote before 1850 was uncompromisingly opposed to this legislation, not one who has written since 1865 has ventured to deny the advisability of the Factory acts.”<sup>198</sup> Willoughby himself made the case for regulating child labor in economic terms. He argued that child labor restrictions should result in higher wages due to a tighter labor market, thereby reducing the impact on family income. For employers, the cost of increased wages would be offset by the increased efficiency of older workers and the ability to introduce labor-saving machinery.<sup>199</sup> Thus, the argument for child labor reform was not purely moral in the end.

Appeals to economic self-interest have garnered the necessary support for the protection of powerless objects in other contexts. For example, debates over wilderness or endangered species protection often reference expected economic benefits of preservation to the area from increased tourism.<sup>200</sup> Economic arguments played a large role in building opposition to slavery as well. While some Southern antebellum political economists defended the economic benefits of a system built on “free labor,”<sup>201</sup> Adam Smith himself opposed slavery on the ground that it produced laborers who were actually less efficient and more expensive, due to their lack of economic incentive for hard work.<sup>202</sup> Moreover, the debate over abolition, even in the North, had to address economic concerns alongside moral arguments.<sup>203</sup>

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<sup>198</sup> Willoughby, *supra* note 65, at 23.

<sup>199</sup> *Id.* at 57.

<sup>200</sup> See *supra* note 43. For example, the Florida manatee is a protected species that brings in eco-tourism dollars every year to Florida. See Barry D. Soloman et. al, *The Florida Manatee and Eco-Tourism: Towards a Safe Minimum Standard*, ECOLOGICAL ECON., Sept. 2004, at 101.

<sup>201</sup> Jay R. Carlander & W. Elliot Brownlee, *Antebellum Southern Political Economists and the Problem of Slavery*, 7 AM. NINETEENTH CENTURY HIST. 389 (Sept. 2006).

<sup>202</sup> Smith, *supra* note 164, at 80.

<sup>203</sup> T. STEPHEN WHITMAN, CHALLENGING SLAVERY IN THE CHESAPEAKE: BLACK AND WHITE RESISTANCE TO HUMAN BONDAGE, 1775-1865 40 (2007) (describing the interplay between economic and moral concerns about slavery among white abolitionists).



Some animal welfare advocates have attempted to frame their argument, at least in part, in economic terms. Consumer demand for cage-free eggs or free-range meat, which can be sold at higher prices, helps convince producers of the economic benefits of non-factory methods. Animal welfare advocates may argue that animals raised in humane conditions result in a better quality product: “a happy pig is a tasty pig.”<sup>204</sup> Moreover, if there is adequate disclosure of production methods, the free market may provide both a platform for expressing welfare concerns and a more acceptable alternative to government regulation.<sup>205</sup>

Animal rights advocates, however, tend to believe that a vegetarian or vegan lifestyle is the only way to achieve their goals, and therefore consider these economic arguments illegitimate. Steven Wise and Tom Regan, leading figures in the animal rights movement, make the case almost purely in moral terms.<sup>206</sup> When economics are acknowledged, it is only by reference to examples such as slavery, which provide encouragement that “a powerful and profitable evil can be overcome.”<sup>207</sup>

History indicates, however, that the ultimate success of animal welfare reform efforts may depend on aligning the moral argument with an economic one. For example, animal welfare restrictions may actually help smaller producers, who may find it easier to comply with stricter regulations; if so, they may be mobilized to provide crucial support. Even climate change arguments that attempt to reveal the full “imbedded” environmental costs of products may help animal reform advocates, because making this connection tends to favor locally produced products, which not only reduce transportation impacts,<sup>208</sup> but also may be more humanely raised.

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<sup>204</sup> Francione, *supra* note 12, at 15 (noting that animal welfare programs sometimes equate humane treatment with better quality product and greater efficiency) (citation omitted).

<sup>205</sup> Leslie & Sunstein, *supra* note 99, at 124-25.

<sup>206</sup> See Steven M. Wise, *An Argument for the Basic Legal Rights of Farmed Animals*, 106 MICH. L. REV. FIRST IMPRESSIONS 133 (2008); TOM REGAN, DEFENDING ANIMAL RIGHTS (2001).

<sup>207</sup> Wise, *supra* note 206, at 137 (emphasis added) (citation omitted).

<sup>208</sup> RICH PIROG & REBECCA RASMUSSEN, “FOOD, FUEL AND THE FUTURE: CONSUMER PERCEPTIONS OF LOCAL FOOD, FOOD SAFETY AND CLIMATE CHANGE IN THE CONTEXT OF RISING PRICES” (2008), <http://www.leopold.iastate.edu/pubs/staff/consumer2/consumer2.pdf>.

Nevertheless, undue reliance on economic arguments may ultimately blunt the force of the moral argument. It may indeed be economically advantageous, for example, to stuff a million chickens into cages in a warehouse than to raise them cage-free, with adequate access to natural materials. Moreover, most consumers – even with better information regarding production methods – may be simply unwilling to pay more for humanely raised products.<sup>209</sup> Yet, the reform movement's best argument is that morality must trump economics.<sup>210</sup> If the public believes that reform should be required only if and to the extent that it is economically advantageous, significant reform will not occur. The history of child labor and slavery reform teaches that economic arguments must be addressed, but cannot supplant the moral basis for reform.

The history of child labor reform indicates that protection for powerless groups occurs only when sufficient societal pressure arises to overcome entrenched economic interests. Change occurs through a complex mixture of ingredients, the most important of which is the development of a new ethical imperative. The ethical norm, however, must be sustained and carried forward by interest group structure. Triggering events may provide the final impetus for reform. Finally, reform efforts can be facilitated by aligning economic arguments with the moral case, to the extent possible.

### C. *Response to Pressure*

When pressure for reform reaches sufficient strength, the next stage of response begins. The focus of this article, and the primary response desired by most reformers, is some form of legislative regulation. The next section of the article details the lengthy course of domestic legislative reform in the child labor area. However, equally significant reform may occur outside the legislative context, through consumer action and impact litigation, which are discussed in subsequent sections.

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<sup>209</sup> See Patrick DePelsmacker, Liesbeth Driesen & Glenn Rayp, *Do Consumers Care About Ethics? Willingness to Pay for Fair-Trade Coffee*, 39 J. OF CONS. AFFAIRS 363, 364 (2005) (consumers' expressed preference for ethical products does not translate into increased demand, due to "attitude-behavior gap").

<sup>210</sup> See Ibrahim, *supra* note 4, at 91 ("[a]nimal welfare is very expensive" and therefore requires "shifting societal preference").

### 1. Domestic legislation

Although child labor reform in England began early in 19<sup>th</sup> century, it took almost a century of effort to fully address the problem. Sixteen pieces of child labor regulatory legislation, called Factory Acts, were enacted between 1802 and 1878; in addition, other acts in the public health and education area impacted child labor. While this article will not provide a comprehensive treatment of the child reform legislation, a summary of the legislative efforts illustrates the tortuous course of reform.

The extent of child labor abuse in the early Industrial Revolution period is reflected in the Factory Act of 1819, which prohibited children younger than nine from working in the cotton mills. The legislation also limited younger workers to 12-hour days. By today's standards, this seems a rather modest limitation, but given common work shifts of 14 or 16 hours, it was at least a beginning. Nevertheless, this legislation was typical of early attempts at reform: it was limited in scope, applied only to the cotton industry, and suffered from an almost total lack of enforcement.<sup>211</sup>

Historians deem the 1833 Factory Act to be the first significant reform, as it extended the nine-year-old age minimum to all textile mills, except silk, and limited children under 12 to nine-hour days and 48-hour weeks.<sup>212</sup> Significantly, this legislation also required pre-teen children to attend school, which resulted in many firms setting up "factory schools" of varying quality. Again, however, enforcement was difficult and regulations were regularly evaded.<sup>213</sup>

A decade later, the 1844 Factory Act, applicable to all industries, lowered the minimum working age to eight, but also restricted the employment of children under 13 to half-days (i.e., 6.5 hours), with the other half day spent in school.<sup>214</sup> Three decades after that, the 1874 Factory Act raised the minimum working age to ten, and limited the hours of those under 14. Finally, in 1878, teenage employees from 14 to 18 were limited to 12-hour days with two hours for meals. Importantly, the Act also provided adequate inspection and enforcement provisions.<sup>215</sup> Thus, legislative reform came gradually, with progress

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<sup>211</sup> Checkland, *supra* note 66, at 246.

<sup>212</sup> Nardinelli, *supra* note 92.

<sup>213</sup> Willoughby, *supra* note 65, at 20.

<sup>214</sup> *Id.*

<sup>215</sup> *Id.* at 22.

made only as exceptions and loopholes were closed and the enforcement mechanism improved. When Parliament realized that early reforms did not result in economic disaster, as opponents predicted, they were more willing to enact further restrictions.

Animal welfare law is just beginning down a similar road of regulatory control. As in the child labor area, initial legislation may be focused narrowly on only the worst abuses, such as the use of gestation crates or the size of battery cages. Similar to the early Factory Acts, these regulations may suffer from inadequate enforcement mechanisms and funding. Once the principle of government intervention in animal care standards is established, however, the path to further reform may be smoother. The child labor history teaches that legislative reform will probably be a gradual process of establishing footholds, which slowly help to re-adjust the accepted norms. Thus, there is a feedback loop between government regulation and norm development.<sup>216</sup>

In the United States, another significant characteristic of child labor reform was the willingness (or necessity) of state legislatures to act long before the federal government did.<sup>217</sup> Connecticut and Massachusetts passed laws limiting children to ten-hour days in 1842, and Pennsylvania enacted a minimum working age of 12, almost a century before the federal government took action.<sup>218</sup> Between 1880 and 1910, 36 American states set minimum age restrictions for employees;<sup>219</sup> in 1907 alone, 16 American states enacted some form of child labor restriction.<sup>220</sup> In contrast, significant federal action did not take place until the New Deal era.<sup>221</sup> In 1916, the Keating-Owen Act would have regulated most child labor abuses,<sup>222</sup> but the Supreme Court struck it down (over a powerful dissent by Justice Oliver

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<sup>216</sup> Strand, *supra* note 55, at 620-22 (discussing the cyclical relationship between law and culture).

<sup>217</sup> Some might say “necessity” rather than “willingness,” as states’ rights arguments were a major impediment to federal action. *See generally*, HUGH D. HINDMAN, CHILD LABOR: AN AMERICAN HISTORY 64-65 (2002) (federal action suffered from doubts as to its constitutionality).

<sup>218</sup> *Id.*

<sup>219</sup> *See* Miriam Wasserman, *Eliminating Child Labor*, 10 REGIONAL REV. 8 (2000).

<sup>220</sup> E. Watson Kenyon, *Child Labor*, 2 AM. POL. SCI. REV. 54, 54 (1907).

<sup>221</sup> Most significant was the Fair Labor Standards Act of 1938 (codified at 29 U.S.C. 8 (1938)), which prohibited many forms of child labor.

<sup>222</sup> 39 Stat. 685 (1916).

Wendell Holmes) as going beyond federal authority under the interstate commerce power.<sup>223</sup>

In the animal welfare area, states have similarly taken the lead: states have now taken action, either by legislation or ballot initiative, to ban gestation crates, veal crates, and battery cages.<sup>224</sup> The ability of individual states to act relatively quickly may help provide other states and the federal government with evidence regarding the feasibility of reform measures. Similarly, other countries' experience with efforts to regulate animal welfare will be instructive.<sup>225</sup>

## 2. Consumer action

Consumer action may take the form of product boycotts or, more mildly, the form of consumer choice of products produced in the preferred manner. Consumer choice is facilitated by the dissemination of information regarding targeted goods.<sup>226</sup> For example, the law requiring country of origin labeling (COOL) for many agricultural products allows consumers to exercise a preference for domestic products.<sup>227</sup>

In the context of child labor, there seems to be no evidence to suggest that consumer choice was a widespread first-stage response to the problem, either in Britain or the United States. Perhaps the institutional structure to support consumer choice with information and encouragement was not yet in place or perhaps there were no alternative choices for these products. More recently, however,

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<sup>223</sup> *Hammer v. Dagenhart*, 247 U.S. 251, 273 (1918). The Supreme Court overruled this case in upholding the Fair Labor Standards Act in *United States v. Darby Lumber Co.*, 312 U.S. 100, 115 (1941).

<sup>224</sup> See, e.g., ME. REV. STAT. ANN. tit. 17, §1039 (2009) (criminal ban against veal calf and sow gestation confinement); ME. REV. STAT. ANN. tit. 7, § 4020 (2009) (civil ban against veal calf and sow gestation confinement); OR. REV. STAT. §600.150 (2007) (restrictive confinement of pigs); MICH. COMP. LAWS ANN. § 287.746 (West 2009) (battery cages); Assemb. B. 1437, 2009-2010 (Cal. 2010) (battery cages; gestation crates); Nancy Perry & Peter Brandt, *A Case Study on Cruelty to Farm Animals: Lessons Learned From the Hallmark Meat Packing Case*, 106 MICH. L. REV. FIRST IMPRESSIONS 117, 118 (2008) (citing further examples in Arizona and California).

<sup>225</sup> James Moynagh, *EU Regulation and Consumer Demand for Animal Welfare*, 3 J. AGRICULTURE, FOOD & ENVIRONMENT 107 (2000) (detailing European regulations regarding animal transport, battery cages, and veal calves, among others), available at [www.agbioforum.org/v3n23/v3n23a06-moynagh.pdf](http://www.agbioforum.org/v3n23/v3n23a06-moynagh.pdf).

<sup>226</sup> See generally Leslie & Sunstein, *supra* note 99.

<sup>227</sup> 19 U.S.C. §1304 (1999).

consumer action has been seen as an important, if somewhat controversial, remedy for the latter-stage problem of foreign competition undermining domestic child labor legislation.<sup>228</sup>

In the case of slavery, however, consumer action was a critical part of the abolitionists' arsenal. In response to Parliament's 1791 rejection of an abolition bill, several hundred thousand Britons began boycotting sugar grown in the West Indies using slave labor.<sup>229</sup> The action not only hurt the slave traders economically, but also raised public awareness of the issue and helped cement in the minds of Brits the connection between slave labor and their daily lives.<sup>230</sup> Therefore, just as in the case of legal reform, consumer action is both a factor in norm development and a consequence of it.

In the animal welfare area, consumer action has come before significant legislative response, at least in the United States.<sup>231</sup> Because the rhetoric of consumer choice competes most easily with the producer's rhetoric of economic freedom, it may be most realistic to begin with legislative action that facilitates consumer choice, such as expanding labeling laws to include information regarding production methods.<sup>232</sup> Unfortunately, consumer information laws in the U.S. may run into several roadblocks, including claims that forcing companies to include information on their labels violates their First Amendment rights.<sup>233</sup> Action at the state level may also be challenged as violating federalism principles, under which national labeling laws preempt any attempts by individual states to require more or different information.<sup>234</sup> Even voluntary information provided by humane

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<sup>228</sup> See, e.g., Bachman, *supra* note 3; Wasserman, *supra* note 219.

<sup>229</sup> Hochschild, *supra* note 9, at 192-96.

<sup>230</sup> *Id.* at 194.

<sup>231</sup> See Hamilton, *supra* note 12, at 140.

<sup>232</sup> Leslie & Sunstein, *supra* note 99, at 117 (arguing that a consumer disclosure regime would be the easiest method of achieving significant improvement in welfare).

<sup>233</sup> *International Dairy Foods Ass'n v. Amestoy*, 92 F.3d 67 (2d Cir. 1996) (holding that a Vermont statute requiring disclosure of growth hormone caused irreparable harm to dairy manufacturers and that consumer concern was an insufficient state interest to justify restricting commercial speech).

<sup>234</sup> See Nutrition Labeling and Education Act of 1990, 104 Stat. 2353, which added Section 403A to the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343-1(a) (prohibiting state or local "standard of identity" requirements on foods subject to federal standard of identity); Organic Foods Production Act, 7 U.S.C. § 6507 (express preemption of state organic certification programs that do not meet federal

farmers, such as “cage-free” eggs or “free range” beef, is useful in facilitating consumer choice. However, without standards and oversight, consumers may question the veracity or value of such information.

Consumer action must be part of the equation in modern reform efforts. It can be faster than legislation and more powerful in giving producers an incentive to change methods. However, studies show that consumers are typically more willing to express a preference for humanely raised products than actually to pay more for them at the market.<sup>235</sup> Other studies suggest, similarly, that the public may be more willing to enact legislative restrictions on agriculture than to vote for such products with their dollars.<sup>236</sup> Consumers may feel that a uniform restriction, raising the price for everyone, is fairer and may result in lowering the price of humane products through greater competition. In any event, consumer action alone is unlikely to constitute the sole, or even the greatest, response to the animal welfare issue.

### 3. *Impact litigation*

Litigation may be used not only as a way of changing the law, but as a method of building support in the community for a particular cause. The visibility of a lawsuit can provide “a way of creating a collective identity,”<sup>237</sup> or create a rallying point for generating financial and organizational resources. Of course, the lawsuit may create new law, serving as precedent for important new directions in common law or statutory interpretation. But even if the lawsuit is ultimately

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requirements); *National Broiler Council v. Voss*, 44 F.3d 740 (9th Cir. 1994) (state law regulating “fresh” label on poultry preempted by federal Poultry Inspection Act). *But see* *Lockwood v. Conagra Food, Inc.*, 597 F. Supp. 2d 1028 (N.D. Cal. 2009) (consumers’ claims that pasta sauce was misleadingly advertised as “all natural” was not preempted by Nutrition Labeling and Education Act).

<sup>235</sup> See generally DePelsmacker et al., *supra* note 209. The authors note that organic products, for example, typically amount to 1% or less of market share. See also Simon M. Shane, *Conventional eggs preferred 40-1 over cage-free*, EGG INDUSTRY (July 2010), available at [www.wattagnet.com/Egg\\_Industry/16367.html](http://www.wattagnet.com/Egg_Industry/16367.html) (observing that even though a third of Americans say they support cage-free production methods, cage-free eggs account for only 2 to 3% of market share).

<sup>236</sup> DeBow & Lee, *supra* note 31, at 998 (arguing that people are more likely to vote for government poverty reduction programs than they are to make private charitable contributions to the poor).

<sup>237</sup> Rubin, *supra* note 5, at 71.

unsuccessful, and sometimes because it is unsuccessful, it may raise public awareness regarding the issue and serve as a "triggering event" for legislative action.

Litigation does not seem to have played a significant role in the historical development of British child labor regulation, but in the United States, a legal defeat ultimately may have furthered the reform cause. As noted above, in 1918 a closely divided Supreme Court struck down the Keating-Owen Act, which had attempted to regulate interstate commerce in goods produced with child labor.<sup>238</sup> Federal action was preferable to state legislation, reformers believed, because some states were reluctant to alienate industry with intrusive regulation.<sup>239</sup> Although the Dagenhart ruling was a setback, the case served to galvanize reformers and to bring the issue to public attention.<sup>240</sup> More recently, well-publicized lawsuits have alleged the illegal use of child labor by Bridgestone Firestone at plantations in Liberia<sup>241</sup> and by chocolate importers on cocoa farms in the Ivory Coast.<sup>242</sup>

In the abolitionist movement, one landmark case played a key role. In the Somerset case, in the early 1770s, a slave brought to England escaped and was recaptured by his master. In a suit on a writ of habeas corpus, Lord Mansfield declared that English law did not allow a runaway slave to be seized on English soil.<sup>243</sup> The case thus served to increase public consciousness of the evils of slavery and was a triggering event for further reform. As one commentator put it: "The Somerset case together highlighted the anomalies and contradictions of slavery, brought the abstract and distanced evils of slavery to the

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<sup>238</sup> Hammer v. Dagenhart, 247 U.S. 251 (1918).

<sup>239</sup> WALTER I. TRATTNER, CRUSADE FOR CHILDREN: A HISTORY OF THE NATIONAL CHILD LABOR COMMITTEE AND CHILD LABOR REFORM IN AMERICA 115-16, 122 (1970) (describing slow progress of state legislation and observing that competitive advantage enjoyed by states without more lenient child labor laws made national legislation necessary).

<sup>240</sup> *Id.* at 138 (describing "outpouring of popular demands" for reform in wake of *Dagenhart*).

<sup>241</sup> Roe v. Bridgestone Corp., No. CV05-8168 JFW (FMOx) 2005 WL 4136164 (C.D. Cal.) (Class Action Complaint filed Nov. 17, 2005).

<sup>242</sup> Doe v. Nestle, S.A., No. CV 05-5133 SVW (JTLx) 2009 WL 2921081 (C.D. Cal.) (First Amended Class Action Complaint filed July 22, 2009). *But see* No. CV 05-5133 SVW (JTLx) 2010 WL 3969615 (first amended complaint dismissed Sept. 8, 2010 pursuant to FED. R. CIV. P. 12(b)(6) for failure to state a claim).

<sup>243</sup> R. v. Knowles, ex parte Somerset, (1772) 12 Geo 3, KB Loft 1.



people's doorstep, gave slavery its ugly face, and enlarged the public consciousness about the injustice and undesirability of slavery."<sup>244</sup>

Lawsuits on behalf of animals have been a significant resource in solidifying the animal rights/welfare movement, in addition to advancing legal protections.<sup>245</sup> For example, in the 1990s the Animal Legal Defense Fund challenged the U.S. Department of Agriculture's regulations setting minimum requirements for the psychological well-being of primates.<sup>246</sup> Although the litigation was ultimately unsuccessful in overturning the challenged regulations,<sup>247</sup> the lawsuit raised awareness concerning the confinement conditions of primates.<sup>248</sup> Similarly, a lawsuit filed in 2000 by animal welfare groups (including the ASPCA) alleging abuse of elephants by the Ringling Brothers and Barnum & Bailey's circus operation eventually was dismissed.<sup>249</sup> The lawsuit did, however, result in significant publicity regarding these practices, which may affect consumer behavior and government oversight.<sup>250</sup>

#### D. *Post-reform Reaction*

Social scientists have long recognized that the enactment of major legislation is really only the first step toward social reform. Statutory reform may result from a temporary coalition of interest

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<sup>244</sup> D'Anjou, *supra* note 121, at 146-47.

<sup>245</sup> See, e.g., Perry & Brandt, *supra* note 224, at 117.

<sup>246</sup> Animal Legal Defense Fund, Inc. v. Glickman, 204 F.3d 229 (D.C. Cir. 2000).

<sup>247</sup> See Collette L. Adkins-Giese, Comment, *Twenty Years Wasted: Inadequate USDA Regulations Fail to Protect Primate Psychological Well-Being*, 1 J. ANIMAL L. & ETHICS 221 (2006).

<sup>248</sup> See, e.g., Adam Kolber, Note, *Standing Upright: The Moral and Legal Standing of Humans and Other Apes*, 54 STAN. L. REV. 163, 164 (2001) (describing the "Great Ape Project," a coalition of scholars, scientists and activists calling for greater rights for great apes); Deawn A. Hersini, *Can't Get There From Here . . . Without Substantive Revision: The Case for Amending the Animal Welfare Act*, 70 UMKC L. REV. 145, 147 (2001) (discussing ALDF role in challenging primate regulations).

<sup>249</sup> American Soc. for Prev'n of Cruelty to Animals v. Feld Entertainment, Inc., 677 F.Supp.2d 55 (D.D.C. 2009).

<sup>250</sup> David Montgomery, *PETA, Ringling Bros. at odds over the treatment of baby circus elephants*, WASH. POST (Dec. 16, 2009), available at <http://www.washingtonpost.com/wp-dyn/content/article/2009/12/15/AR2009121504988.html>. See also Animal Legal Defense Fund v. Mendes, 160 Cal. App. 4th 136, 72 Cal.Rptr. 3d 553 (Cal. App. 2008) (challenging treatment of cattle).

groups, supported by intensive media focus and triggering events. Once the built-up pressure for reform has been released by legislative action, those coalitions then may disintegrate, especially in areas like environmental reform where the general public has only a diffuse interest and there are significant free-rider concerns. On the other hand, the concentrated economic interests opposing reform have staying power and can undermine subsequent efforts to implement and enforce the law.<sup>251</sup> As public choice theorists explain:

In contrast to members of the general public, who quickly forget the legislation once it is enacted, the affected special interests will attempt unrelentingly to influence the day-to-day details of enforcing the legislation. Legislative attempts to protect the environment, protect the consumer, and regulate business pricing and practices exemplify special interest groups' subversion of public interest legislation initially motivated by ideological conviction.<sup>252</sup>

The history of child labor reform in Britain illustrates the staying power required to overcome entrenched and organized economic interests. Addressing the child labor problem required almost a century of effort, including numerous legislative enactments that were touted as progress, but which failed to accomplish the task. Early Factory Acts were limited to the most egregious abuses, but even those failed due to lack of enforcement and implementation.<sup>253</sup> For example, the budget for factory and mine labor inspection remained a paltry amount even twenty years after the 1833 Factory Act imposed its requirements. Age limitations could not be enforced without a reliable system of age verification. Employers quickly became adept at finding ways to evade the legislative edicts.<sup>254</sup> A solid organizational structure is necessary to sustain reform efforts once legislation has placated the initial ardor for change.

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<sup>251</sup> J.Q. WILSON, *POLITICAL ORGANIZATIONS* (1973); JOEL F. HANDLER, *SOCIAL MOVEMENTS AND THE LEGAL SYSTEM: A THEORY OF LAW REFORM AND SOCIAL CHANGE* (1978).

<sup>252</sup> DeBow & Lee, *supra* note 31, at 1001.

<sup>253</sup> Checkland, *supra* note 66.

<sup>254</sup> Kirby, *supra* note 2, at 105-107.

Similarly, the abolition of slavery met with "blowback" in the form of Jim Crow laws that circumvented and undermined the promise of equality contained in the 13th, 14th and 15th Amendments.<sup>255</sup> The Reconstruction and post-Reconstruction periods teach us that reform that flies in the face of entrenched power requires a sustained effort to change, and legal reform without the support of a concomitant change in social norms will be ineffective.<sup>256</sup>

In the animal welfare context, a similar pattern of reform and compromise has already begun. For example, Gary Francione claims that many of the "victories" claimed by animal welfare advocates in recent years have been at best ineffective and at worst counterproductive.<sup>257</sup> For example, one supposed reform increased the space allotted to a hen in a battery cage from a square with 7.8 inches per side to 8.5 inches per side, hardly much improvement but still touted as such.<sup>258</sup> Francione notes that activists such as Peter Singer, the author of *Animal Liberation*, and groups such as PETA profess to be encouraged and pleased with reforms that, in his view, are merely window-dressing.<sup>259</sup> His complaint in fact describes a classic process of co-option<sup>260</sup> in which reformers embrace incremental improvements and end up reinforcing the very institutions they set out to resist. Critiques of labor reform, for example, have concluded that the National Labor Relations Act, while touted as "a great victory for labor interests,"<sup>261</sup> actually blunted the activism and potential gains of workers:

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<sup>255</sup> See generally C. VANN WOODWARD & WILLIAM S. MCFEELY, *THE STRANGE CAREER OF JIM CROW* (2001).

<sup>256</sup> Interestingly, the Jim Crow system persisted despite the majority voting position, in many states, of its principal beneficiaries. Gabriel J. Chin & Randy Wagner, *The Tyranny of the Minority: Jim Crow and the Counter-Majoritarian Difficulty*, 43 HARV. C.R.-C.L. L. REV. 65 (2008) (describing how violence, fraud, and unconstitutional activity allowed minority to prevail).

<sup>257</sup> Francione, *supra* note 12, at 13-32.

<sup>258</sup> *Id.* at 16.

<sup>259</sup> *Id.* at 14.

<sup>260</sup> For a discussion of co-option, see Orli Lobel, *The Paradox of Extralegal Activism: Critical Legal Consciousness and Transformative Politics*, 120 HARV. L. REV. 937, 939 (2007) ("As they engage with the law, social reform groups become absorbed by the system even as they struggle against it.").

<sup>261</sup> *Id.* at 943.

The most strident critics claimed that codified collective bargaining had become “an institutional structure not for expressing workers' needs and aspirations but for controlling and disciplining the labor force and rationalizing the labor market.” Those critics concluded that, paradoxically, the apparent legal success of the New Deal social reform struggles enabled the deradicalization and pacification of labor movement activism.<sup>262</sup>

This phase is reminiscent of early child labor legislation, which heaped the most urgent calls for reform but in reality did very little to address the problem. Although some argue that this phenomenon illustrates the limitations of the legal system as a vehicle for social reform, the history of child labor shows that legal regulation coupled with norm development did in fact result in positive change.

Even when domestic reform is finally accomplished, the increased cost of production inevitably results in greater foreign competitive pressure. Domestic legislation may merely have the effect of exporting the problem to other countries. Today, more than a century after domestic child labor reform virtually eliminated the abuse in Britain, international statistics show that millions of young children continue to work at hard labor.<sup>263</sup> The reform effort continues, therefore, through a combination of attempts to strengthen international agreements, trade sanctions, political pressure, and consumer action (e.g., boycotts of products made with child labor). In the U.S., for example, Senator Tom Harkin proposed (unsuccessfully) the Child Labor Deterrence Act to ban the importation of goods produced with child labor.<sup>264</sup> As in the area of endangered species protection or rainforest destruction, the economic incentives to use child labor mean that the battle will never be over and constant effort will be required to keep the problem in check.

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<sup>262</sup> *Id.* at 945 (quoting Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265, 267-69 (1977)).

<sup>263</sup> 18<sup>th</sup> Int'l Conference of Labour Statisticians, *supra* note 11; Basu & Van, *supra* note 61.

<sup>264</sup> Child Labor Deterrence Act of 1999, S. 1551, 106th Cong. (1999).

There is no reason to suppose that the animal welfare reform effort will be different. Already scholars have noted that "[i]nternational trade represents a special problem for animal-welfare legislation."<sup>265</sup> Any attempt simply to ban imports not meeting similar animal welfare standards will run into World Trade Organization arguments regarding unlawful barriers to free trade.<sup>266</sup>

## Conclusion

The history of child labor reform illustrates that it is possible to achieve protection for powerless groups, even when such protection is detrimental to society's economic self-interest. Because the impetus for reform is moral, the development of a new ethic is crucial. This will not happen overnight, but the combined efforts of many moral entrepreneurs, who disseminate the stories that resonate in the societal conscience, can eventually make a difference. In addition, the progress of reform depends on a number of other elements, including the development of an array of symbolic resources, such as the language and intellectual argument to counter the free-market ideology of industrialized agriculture, and structural resources, including the collaborative efforts of animal welfare organizations. This model of reform applies beyond the context of child labor and animal welfare, of course - it should be instructive for any effort to obtain protection for powerless groups.

One important question is whether moral concerns alone can bring about meaningful reform, when powerful economic forces clearly favor the status quo. Even in cases like child labor and slavery, subjects more central to the average citizen's moral compass than animal welfare, reformers relied not only on moral suasion, but also developed economic arguments to counteract the laissez faire arguments of factory owners and slaveholders. However, the history also shows that reform can be motivated largely by altruistic, moral concerns. Moreover, once a new ethic is firmly established - toward child labor or slavery, e.g. - it can be at least as powerful as legal reform in changing behavior.

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<sup>265</sup> Matheny & Leahy, *supra* note 6, at 348.

<sup>266</sup> *Id.* at 349-55 (discussing arguments under the General Agreement on Tariffs and Trade (GATT) for import restrictions based on animal welfare).

Without this ethical shift, in fact, mere legislative reform will probably be ineffective.

The complex forces necessary to effect change seem to be swirling around us, and the success of reform efforts depends on whether they can be marshaled correctly. William Shakespeare, perhaps as adept a political scientist as he was a poet, noted long ago: "There is a tide in the affairs of men, / Which taken at the flood, leads on to fortune."<sup>267</sup> We seem to be on the brink of such a rising tide in the area of animal welfare reform. Even a decade ago, the stream was practically bone-dry. But each of the elements of reform discussed above have contributed a trickle to what has now become a steady flow driving the boats for reform. Whether reform advocates can capitalize on this rising tide before it wanes remains to be seen. The history of child labor reform provides a template that should help a new generation of reformers who seek to improve the welfare of animals impacted by the industrial agricultural revolution.

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<sup>267</sup> WILLIAM SHAKESPEARE, JULIUS CAESAR, Act 4, Scene 3, lines 218-19.

### Model: Path to Reform for the Powerless

