

WHO THE JUDGE ATE FOR BREAKFAST: ON THE LIMITS OF CREATIVITY IN ANIMAL LAW AND THE REDEEMING POWER OF POWERLESSNESS

By
Matthew Liebman*

Drawing upon various schools of legal thought, this Essay explores how ideological and non-legal factors influence the adjudication process in animal law cases. The Legal Realist and Critical Legal Studies movements highlighted the indeterminacy present in legal doctrine and undermined trust in judges' ability to arrive at "correct" answers to legal questions. In the midst of such indeterminacy, where legal texts do not predetermine legal outcomes, judges tend to render decisions that are consistent with pervasive societal norms and existing distributions of political power. Starting from these premises, the Author questions whether innovative and creative impact litigation by the animal law movement can succeed in fundamentally challenging speciesism through a legal system that is pervasively hostile to the interests of animals. Although incremental and meaningful gains are possible through litigation, we must recognize the limits of legal reform in the short-term. Although such limitations are typically seen as cause for despair, the Author argues that recognizing our powerlessness can be a source of compassion and an opportunity to experience our shared existential vulnerability with animals.

I. INTRODUCTION	134
II. THE ROLE OF CREATIVITY IN ANIMAL LAW	136
III. THE PROBLEM OF INDETERMINACY	138
IV. THE FEAR OF POWERLESSNESS AND THE POWER OF VULNERABILITY	145
V. CONCLUSION	150

* © Matthew Liebman 2011. Matthew Liebman is a staff attorney at the Animal Legal Defense Fund (ALDF). The views and opinions expressed in this Essay are the author's own and do not necessarily reflect those of ALDF. Matthew would like to thank Chris Berry, Taimie Bryant, Jon Cantu, Josh Clark, Maneesha Deckha, Carter Dillard, Amy Hirsh, John Maher, Joel Page, Craig Segall, and Joyce Tischler for reading and commenting on an early draft of this Essay, and the editors at Animal Law for their helpful suggestions and revisions. This Essay is dedicated to Marti Kheel, Derrick Bell, Poly Styrene, and Monkey.

I. INTRODUCTION

“The law is what the judge ate for breakfast.” Thus goes the common caricature of Legal Realism.¹ The quotation, often erroneously attributed to the Realist scholar Jerome Frank,² is a parodic oversimplification of a basic tenet of Legal Realism: that “non-legal” factors, such as personal preferences and postprandial disposition, influence the outcome of cases just as much as “legal” factors, such as binding precedent and canons of statutory construction.³

Like the Realists, the Critical Legal Studies movement highlighted the indeterminacy of legal doctrine and the aporetic contradictions that cast doubt on the ostensible objectivity of judicial decision-making.⁴ Critical Legal Studies took Realism’s critique a step further, however, arguing that adjudication was colored not only by personal disposition and historical contingencies, but also by more pervasive ideological and political constructions of liberalism, legal reasoning, and judicial identity.⁵ For the critical legal scholars, the act of judging

¹ William W. Fisher III et al., *Introduction*, in *American Legal Realism* vi, xiv (William W. Fisher III et al. eds., Oxford U. Press 1993) (“The realist credo is often caricatured as the proposition that how a judge decides a case on a given day depends primarily on what he or she had for breakfast . . . [b]ut most of their writings on the character of adjudication and on other issues were vastly more sophisticated.”); Brian Leiter, *American Legal Realism*, in *A Companion to Philosophy of Law and Legal Theory* 249, 259 (Dennis Patterson ed., 2d ed., Blackwell Publ. 2010) (“Note, however, that no one in the idiosyncrasy wing actually adhered to the view, often wrongly attributed to realism, that ‘what the judge ate for breakfast’ determines the decision.”).

² John Lawrence Hill, *The Political Centrist* 113 (Vanderbilt U. Press 2009). For a discussion of the origins of the breakfast quotation, see Charles M. Yablon, *Justifying the Judge’s Hunch: An Essay on Discretion*, 41 *Hastings L.J.* 231, 236 n.16 (1990) (“While this is perhaps the most popular formulation of the strong rule-skeptical position, and is still widely used, I have not been able to locate its precise origins. I suspect, however, that it may derive from a statement by [Roscoe] Pound in which he contrasts a system of law to the arbitrariness of ‘cadi’ justice.”).

³ See generally Leiter, *supra* n. 1, at 249 (“How a judge responds to the facts of a particular case is determined by various psychological and sociological factors, both conscious and unconscious. The final decision, then, is the product not so much of ‘law’ . . . but of these various psychosocial factors, ranging from political ideology to the institutional role to the personality of the judge.”).

⁴ See generally Guyora Binder, *Critical Legal Studies*, in *A Companion to Philosophy of Law and Legal Theory*, *supra* n. 1, at 267 (“As an intellectual movement, critical legal studies combined the concerns of legal realism, critical Marxism, and structuralist or poststructuralist literary theory.”). For specific analyses of doctrinal ambiguities and contradictions, see Mark Kelman, *Interpretive Construction in the Substantive Criminal Law*, 33 *Stan. L. Rev.* 591, 591 (1981) (“I want to challenge the falsely complacent sense that the arguments [in criminal cases] . . . are deduced and derived in a rational and coherent fashion once the purposes are settled.”); Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 *Harv. L. Rev.* 1685, 1685 (1976) (“The opposed rhetorical modes lawyers use reflect a deeper level of contradiction. At this deeper level, we are divided, among ourselves and also within ourselves, between irreconcilable visions of humanity and society, and between radically different aspirations for our common future.”).

⁵ See Note, *‘Round and ‘Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 *Harv. L. Rev.* 1669, 1677 (1982) (“The work of the critical legal

inevitably takes place within a network of social and ideological values that tend to support the existing distributions of power.⁶

Relying on these critiques of the political and ideological nature of judging, this Essay asks how successful the animal law movement can be in deploying groundbreaking and creative legal theories when the ultimate arbiters of those novel theories are embedded in, and acculturated to, a legal system that is pervasively speciesist.⁷ Can we realistically expect judges to render trail-blazing pro-animal decisions in the afternoon when they dined on animals' flesh (or the products of animals' labor) in the morning?

Perhaps the law *is* what the judge ate for breakfast—not because of the effect of bacon or eggs or cow's milk on the judge's digestion, but because of where this consumption locates him or her in the contested ideological field of human–animal relations.⁸ We might reformulate the old Realist caricature this way: animal law is *who* the judge had for breakfast.

This critique of adjudication has sobering implications and raises troubling questions about how successful we can be with using creative and innovative impact litigation that fundamentally challenges speciesism. Nevertheless, confronting such questions is necessary because by recognizing the political aspects of judging, we may also demystify our illusions of effective advocacy, thus creating new ways of measuring success and new pathways for action. Even where the problem of indeterminacy exposes our inability to intervene to stop animal suffering, the critique still has value. As I discuss in this Essay's final Part, to the extent the political nature of judging exposes our powerlessness to make fundamental change in the near future, it also forces us to dwell with that powerlessness, a process that ultimately

scholars can be understood as the maturation of these Realist methodologies—a maturation in which critical scholars explore incoherences at the level of social or political theory and critical scholarship is linked, not to reformist policy programs, but to a radical political agenda.”); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Fla. St. U. L. Rev. 195, 197 (1987) (“The CLS writers have tried to resurrect some of the Legal Realists’ more substantial scholarship, to appropriate it to their own purposes, and to generalize it into a critique of mainstream modes of liberal-legal thought more far-reaching than anything the Legal Realists themselves had in mind.”).

⁶ Mark Kelman, *A Guide to Critical Legal Studies* 297 n.1 (Harv. U. Press 1987) (“[L]aw is an instrument of social, economic, and political domination, both in the sense of furthering the concrete interests of the dominators *and* in that of legitimating the existing order.”) (quoting the CLS movement’s “initial outreach letter” from January 1977) (emphasis in original).

⁷ Speciesism is defined as prejudice or discrimination based on species; especially: discrimination against animals. *Merriam-Webster’s Collegiate Dictionary* 1198 (11th ed., Merriam-Webster 2004).

⁸ Michael Tobias, *Rage and Reason* 131–32 (AK Press 1998) (“[I]t’s never simply a question of . . . precedent. . . . It comes down to the judge. What he had for breakfast—meat and potatoes, or vegetables? . . . [H]istory, the validation of personal ethics, of a whole life, could easily come down to what side of the bed our judge and executioner woke up on. Whether he was a meat eater, or a vegetarian.”).

brings us closer to the lived experiences of animals by exposing our shared existential vulnerability.

II. THE ROLE OF CREATIVITY IN ANIMAL LAW

The animal law movement places a high premium on creativity and innovation, as it must, given the profound substantive and procedural legal obstacles to protecting animals through litigation.⁹ Substantively, most animal protection laws are severely limited in scope. For example, the Federal Animal Welfare Act (AWA) regulates animal research, yet exempts birds, rats, and mice, who collectively make up 90% of the animals used in experiments.¹⁰ The Federal Humane Methods of Slaughter Act (HMSA) requires that animals be rendered insensible to pain prior to slaughter, yet does not apply to birds, 9 billion of whom are killed for food every year in the United States.¹¹ Most state anti-cruelty laws exempt institutionalized animal suffering, such as agricultural practices and animal research.¹²

Procedurally, neither the AWA nor the HMSA contains a citizen-suit provision, so animal lawyers cannot directly sue violators.¹³ Enforcement is the responsibility of the U.S. Department of Agriculture,

⁹ See Voiceless, *The Animal Law Toolkit* 8 (available at <http://www.mydarlingtheo.org/storage/Voiceless%20the%20Animal%20Protection%20Institute.pdf> (Dec. 2009) (accessed Dec. 19, 2011)) (“Ultimately, more ‘creative’ lawyering is needed to ensure that animal protectionists are able to advocate for the interests of animals.”).

¹⁰ 7 U.S.C. § 2132(g) (2010); see Bruce A. Wagman et al., *Animal Law: Cases and Materials* 506–07 (4th ed., Carolina Academic Press 2010) (stating that 20 to 25 million birds, rats, and mice are used in research, comprising 90% of total sentient beings used in research facilities).

¹¹ 7 U.S.C. § 1902(a) (2010) (applying protections to “cattle, calves, horses, mules, sheep, swine, and other livestock”); *Levine v. Conner*, 540 F. Supp. 2d 1113, 1121 (N.D. Cal. 2008) (holding that “Congress intended to exclude poultry from the categorical word ‘livestock’” in the HMSA), *vacated sub nom. Levine v. Vilsack*, 587 F.3d 986, 988 (9th Cir. 2009) (dismissing the case for lack of standing).

¹² Gary L. Francione, *Animals, Property and Legal Welfareism: “Unnecessary” Suffering and the “Humane” Treatment Of Animals*, 46 Rutgers L. Rev. 721, 768 (1994) (“The protection of institutionalized animal exploitation, which reflects property concerns, is effected by . . . broad exemptions for virtually all of the activities that traditionally involve animal suffering and death, such as hunting, fishing, animal husbandry, and biomedical research.”); see also Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 Animal L. 69, 75–79 (1999) (discussing common exemptions in animal protection laws); Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 J. Animal L. & Ethics 175, 180 (2006) (“[M]any of these statutes exclude from coverage the very activities that cause the vast amount of animal suffering, including food production, a category that alone constitutes approximately 98% of animal use nationwide, or approximately 9.5 billion farm animals slaughtered per year. Other numerically significant activities that are commonly exempted from coverage include animal experimentation, hunting, trapping, fishing, and forms of animal entertainment such as rodeos, zoos, and circuses.”).

¹³ 7 U.S.C. § 2146 (2006) (assigning enforcement of the AWA to the Secretary of Agriculture); 21 U.S.C. § 603(b) (2006) (assigning enforcement of the HMSA to the Secretary of Agriculture); *Int'l. Primate Protec. League v. Inst. for Behavioral Research, Inc.*, 799 F.2d 934 (4th Cir. 1986) (holding that Congress did not intend to create a private right of action to enforce the AWA).

which has historically shown little interest in rigorously enforcing these laws.¹⁴ State anti-cruelty laws are criminal, meaning they typically grant enforcement power only to government prosecutors, many of whom deprioritize animal cases.¹⁵ Animal protection cases also face the significant procedural hurdle of standing, which requires litigants to have a concrete stake in the outcome of the case.¹⁶ Because an animal's suffering does not count as an injury for standing purposes, animal lawyers must find a human plaintiff who has been injured herself.¹⁷

Given these inadequacies, animal protection lawyers must search for new and innovative interpretations of existing statutes and precedent to promote the interests of animals. The Animal Legal Defense Fund (ALDF), for instance, describes its goal as the "develop[ment of] creative legal strategies that allow us to improve and expand upon current law."¹⁸ Justin Goodman, the associate director of laboratory investigations for People for the Ethical Treatment of Animals, states, "We're always looking for novel ways to prosecute people who are harming animals."¹⁹ Pamela Frasch, Assistant Dean of the Animal Law Program at Lewis & Clark Law School, writes that "[i]t is from th[e] wellspring of creative legal analysis that true change will begin to occur."²⁰ ALDF's founder Joyce Tischler puts it succinctly: "We have to be creative, incredibly creative."²¹

Creativity and innovation are essential to effective animal law practice. It was creative lawyering that led to the use of an obscure North Carolina statute to remove more than 300 dogs from ghastly

¹⁴ See e.g. Katharine M. Swanson, Student Author, *Carte Blanche for Cruelty: The Non-Enforcement of the Animal Welfare Act*, 35 U. Mich. J. L. Reform 937, 949–57 (2002) (discussing the USDA's failure to promulgate adequate regulations under the AWA, the inadequacy of agency inspections of laboratories, and the agency's lax prosecution of violators).

¹⁵ Wagman, *supra* n. 10, at 93–94.

¹⁶ Elizabeth L. DeCoux, *In the Valley of the Dry Bones: Reuniting the Word "Standing" with its Meaning in Animal Cases*, 29 Wm. & Mary Envtl. L. & Policy Rev. 681, 682 (2005); Delcianna J. Winders, *Confronting Barriers to the Courtroom for Animal Advocates: Legal Standing for Animals and Advocates*, 13 Animal L. 1, 6–7 (2006).

¹⁷ See e.g. *Am. Socy. for Prevention of Cruelty to Animals v. Ringling Bros.*, 317 F.3d 334, 338 (D.C. Cir. 2003) (holding that a former elephant handler had standing to challenge the abusive treatment of the elephants with whom he had worked "based upon his desire to visit the elephants . . . his experience with the elephants, [and] his alleged ability to recognize the effects of a mistreatment").

¹⁸ ALDF, *Farmed Animals and the Law*, <http://www.aldf.org/article.php?id=1027> (accessed Dec. 19, 2011).

¹⁹ Erica Westly, *Animal Rights Activists Try a More Creative Legal Tactic*, 16 Nat. Med. 501 (2010) (available at <http://www.nature.com/nm/journal/v16/n5/full/nm0510-501.html> (accessed Dec. 19, 2011)).

²⁰ Pamela D. Frasch, *Finding Our Voice: Challenges and Opportunities for the Animal Law Community*, 14 Animal L. 1, 4 (2007).

²¹ Dave Williams, *'Mother of Animal Law' Ready for the Long Fight*, The Community Voice (May 26, 2011) (available at <http://www.thecommunityvoice.com/article.php?id=3032> (accessed Dec. 19, 2011)).

hoarding conditions in *ALDF v. Woodley*.²² Creative lawyering produced a judicial decision finding probable cause to charge researchers at the University of Wisconsin with animal cruelty for sheep decompression experiments—one of the only applications of animal cruelty laws to animal research.²³ In *ALDF v. Glickman*, creative lawyering firmly established the doctrine of aesthetic standing, which recognizes injuries caused by observing animals in inhumane conditions, precedent still regularly used by animal protection litigators.²⁴

But we must recognize that the success of our creativity hinges on forces beyond ourselves and beyond our control. It is simply not the case that with enough legal creativity, intelligence, dedication, and time spent combing the codebooks and reporters, we will abolish animals' property status. Would that it were true, because the animal law movement is flush with creative, intelligent, and dedicated advocates who are willing to put in time and effort to promote the interests of animals. However, as the next Part argues, these ingredients alone are incapable of changing the law in ways that significantly and fundamentally challenge dominant social beliefs. Judges are not unbiased arbiters who adjudicate in a vacuum, but rather human beings reared on the ideologies and values of a legal system and a society that are profoundly speciesist.

III. THE PROBLEM OF INDETERMINACY

Animal law exemplifies Robert Cover's provocative observation that "legal interpretation takes place in a field of pain and death."²⁵ Judicial interpretation is never an objective deduction of plain meaning or congressional intent, but rather the interplay of normative judgments, biases, and subjective values. As Pierre Schlag has observed, "[O]nce we recognize the violence implicit in the enterprise of judging, we are poised to understand that judges, far from having a 'neutral' or a 'detached' perspective on law, have instead a highly interested, partial perspective on law."²⁶ In the ostensibly neutral act of reading a statute or applying precedent, a judge may consign millions of animals to unmitigated cruelty and mass slaughter.²⁷

This insight is traceable to the Legal Realists of the 1920s and 1930s, who rejected the formalist account of legal reasoning.²⁸ The formalist account held that the solutions to legal questions follow from

²² *ALDF v. Woodley*, 640 S.E.2d 777, 777–78 (N.C. App. 2007).

²³ Bill Lueders, *Judge Opens Door to Criminal Charges over UW-Madison Sheep Experiments*, The Daily Page (June 2, 2010) (available at <http://www.thedailypage.com/daily/article.php?article=29398> (accessed Dec. 19, 2011)).

²⁴ *ALDF v. Glickman*, 154 F.3d 426, 428 (D.C. 1998).

²⁵ Robert M. Cover, *Violence and the Word*, 95 Yale L.J. 1601, 1601 (1985–1986).

²⁶ Pierre Schlag, *Clerks in the Maze*, 91 Mich. L. Rev. 2053, 2054 (1993).

²⁷ See Cover, *supra* n. 25, at 1601 ("A judge articulates her understanding of a text, and as a result, somebody loses his freedom . . . even his life.").

²⁸ Thomas J. Miles & Cass R. Sunstein, *The New Legal Realism*, 75 U. Chi. L. Rev. 831, 832 (2008).

the scientific application of objective rules and principles.²⁹ Rejecting this deductive and rationalist image of the law, the Legal Realists drew attention to doctrinal ambiguities and contradictions and called into question a judge's ability to come to a single, correct answer to a legal question.³⁰ The Realists demonstrated that judges reach legal conclusions not by rigorous application of neutral legal principles, but by drawing on social norms, policy outcomes, utilitarian concerns, intuition, prejudice, emotions, moods, and acculturation, on "a chaotic set of contingent forces."³¹ Sometimes this process is outside of conscious reasoning; sometimes it is not.

What makes such a subjective process possible is legal indeterminacy. Put succinctly, the problem of indeterminacy posits that in at least a significant number of cases, the tools of legal analysis do not definitively determine the outcome.³² Legal outcomes are indeterminate because various rules of legal construction can be either brought to the foreground and used, or relegated to the background and discarded, to justify entirely contradictory positions.³³ The selective emphasis of facts, norms, precedents, and canons of construction can justify either outcome in many, if not all, legal disputes. By emphasizing one fact instead of another, by appealing to one norm instead of another, by citing one case instead of another, by employing one canon of interpretation instead of another, a judge could rule in favor of either party.

²⁹ *Id.*; but see Brian Z. Tamanaha, *The Bogus Tale about the Legal Formalists*, St. John's Leg. Studies Research Paper No. 08-0130, at 6 (Apr. 2008) (available at <http://ssrn.com/abstract=1123498> (updated Aug. 20, 2008) (accessed Dec. 19, 2011)) (refuting the traditional narrative about the scholarly shift from formalism to realism: "The pervasive influence [the traditional story of the shift from formalism to realism] exercises on contemporary thought about judging is all the more extraordinary when one considers that the story about the legal formalists is almost entirely false.").

³⁰ See Elizabeth Mensch, *The History of Mainstream Legal Thought*, in *The Politics of Law: A Progressive Critique* 23, 34 (David Kairys ed., 3d ed., Pantheon Bks. 1998) ("The realists pointed out that no two cases are ever exactly alike. . . . Thus the 'rule' of a former case can never simply be applied to a new case; rather, the judge must *choose* whether or not the ruling in the former case should be extended to include the new case.") (emphasis in original).

³¹ Note, *'Round and 'Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, *supra* n. 5, at 1673.

³² See e.g. Mark Tushnet, *Defending the Indeterminacy Thesis*, 16 *Quinnipiac L. Rev.* 339, 341 (1996) ("[A] proposition of law (or legal proposition) is indeterminate if the materials of legal analysis—the accepted sources of law and the accepted methods of working with those sources such as deduction and analogy—are insufficient to resolve the question, 'Is this proposition or its denial a correct statement of the law?'); Charles M. Yablon, *The Indeterminacy of the Law: Critical Legal Studies and the Problem of Legal Explanation*, 6 *Cardozo L. Rev.* 917, 917 (1985) (explaining that CLS theorists "reject the notion that legal doctrine can ever compel determinate results, in a deductive sense, in concrete cases").

³³ See e.g. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 *Vand. L. Rev.* 395, 401–06 (1950) (classifying various rules of legal construction as "thrusts" and "parries" that provide "the technical framework for maneuver").

Much has been written about the scope of the indeterminacy problem.³⁴ Radical versions of the thesis argue that every case is indeterminate, because indeterminacy stems from fundamental contradictions at the heart of liberal political philosophy, from the wide range of interpretive tools available to judges, or from the unanchored nature of semiotics and the inherent emptiness of signifiers.³⁵ More modest versions of the thesis may concede that some cases are sufficiently “easy” to be determinate, but that there remains “an analytically interesting range of ‘cases’” or “a ‘fair mount’ of legal propositions” that are indeterminate.³⁶

Given the existence of indeterminacy, non-legal factors seep into adjudication, perhaps the most significant being the tendency to countenance or solidify existing power relations along axes of race, class, gender, ability, and species.³⁷ Interpretation in the midst of indetermi-

³⁴ See Ken Kress, *Legal Indeterminacy*, 77 Cal. L. Rev. 283, 283–84 (1989) (arguing that the scope of indeterminacy is exaggerated by critical legal scholars).

³⁵ See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 Yale L.J. 997, 1007 (1985) (“[W]e need first to understand more concretely how doctrinal inconsistency necessarily undermines the force of any conventional legal argument, and how opposing arguments can be made with equal force.”) (emphasis added); Gary Peller, *The Metaphysics of American Law*, 73 Cal. L. Rev. 1152, 1167–68 (1985) (“[M]eaning is indeterminate to the extent that it is never positively present in an expression; it is always deferred or absent. The attempt to fix the meaning of an expression leads to an infinite regress. . . . Meaning does not ‘exist’ anywhere; it is constructed in differential relations, in the blank spaces and silences of communications.”); see also Arthur Allen Leff, *Unspeakable Ethics, Unnatural Law*, 1979 Duke L.J. 1229, 1249 (1980):

To put it concisely, if the applicable God is going to insist on being incoherent, we really have no choice but to be arbitrary.

. . .

As things now stand, everything is up for grabs.

Nevertheless:

Napalming babies is bad.

Starving the poor is wicked.

Buying and selling each other is depraved.

Those who stood up to and died resisting Hitler, Stalin, Amin, and Pol Pot—and General Custer too—have earned salvation.

Those who acquiesced deserve to be damned.

There is in the world such a thing as evil.

[All together now:] Sez who?

God help us.

But see Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. Chi. L. Rev. 462, 471 (1987) (refuting the radical indeterminacy thesis of critical legal scholars).

³⁶ Tushnet, *supra* n. 32, at 341. But even the distinction between “easy” cases with ostensibly determinate outcomes and “hard” cases with ostensibly indeterminate outcomes is a product of social power. *Id.* at 345 (“[Legal propositions] will become first professionally respectable and then reasonably powerful as their social or political power increases.”).

³⁷ David Kairys, *Introduction*, in David Kairys, *The Politics of Law* 1, 14–15 (David Kairys ed., 3d ed., Basic Bks. 1998) (“[L]aw . . . enforces, reflects, constitutes, and legitimizes dominant social and power relations”); Karl E. Klare, *Critical Theory and*

nacy is political: “[I]n a world where there is no one ‘natural,’ ‘rational’ or hermeneutically ascertained meaning and where power infiltrates every nook of social being, the attribution of meaning is inescapably an act of power.”³⁸ Such acts of judicial power regularly occasion violence, both tacit and explicit, whether it is the caging of criminal defendants or the validation of severe confinement of farmed animals.³⁹ “If it seems a nasty thought that death and pain are at the center of legal interpretation, so be it.”⁴⁰

Animal law in particular lays bare the morbid and painful implications of interpretation. Animal lawyers bring cases that challenge some of the most blood-spattered practices, some of which involve billions of animals.⁴¹ When we lose—that is, when our proposed interpretation of the applicable law fails to convince a judge—animals die.

Just as in cases involving race, gender, ability, or class, interpretation in animal law cases is suffused with ideology. Speciesism and anthropocentric humanism are woven deeply into our society, so it should be no surprise that they suffuse the legal system in structural ways.⁴² These ideologies are part of the basic law school curriculum that socializes future lawyers and judges.⁴³ Attempts to question humanism in legal education meet resistance, and “animal-related post-humanist content is still perceived as marginal to the law school

Labor Relations Law, in David Kairys, *The Politics of Law* at 545 (“[C]ritical legal theory has traditionally aspired to show how legal orders systematically reflect, generate, and/or reinforce poverty, class inequality, and patriarchal, homophobic, and racial domination.”).

³⁸ Mark Burton, *Determinacy, Indeterminacy and Rhetoric in a Pluralist World*, 21 *Melb. U. L. Rev.* 544, 576 (1997).

³⁹ *N.J. Socy. for Prevention of Cruelty to Animals v. N.J. Dept. of Agric.*, 955 A.2d 886, 913 (N.J. 2008) (upholding as “humane” regulations permitting the use of gestation crates for pregnant pigs and veal crates for calves).

⁴⁰ Cover, *supra* n. 25, at 1628.

⁴¹ See e.g. *Levine v. Vilsack*, 587 F.3d at 995 (case seeking to expand protections to birds slaughtered for food dismissed for lack of standing).

⁴² Matthew Calarco, *Zoographies: The Question of the Animal from Heidegger to Derrida*, 131 (Colum. U. Press 2008) (“[M]odern legal institutions will simply never regard animals as full legal subjects. . . . And this should come as no surprise, given that traditional legal and moral discourse emerges out of an anthropocentric and metaphysical horizon that is grounded on human chauvinism and exceptionalism.”); Joyce Tischler, *Building Our Future*, 15 *Animal L.* 7, 7 (2008) (“Animal advocates are shackled by a legal system that supports the status quo and by a society that either ignores or acquiesces in the abuse.”); Steven M. Wise, *Rattling the Cage: Toward Legal Rights for Animals*, 47 (Perseus Bks. 2000) (“Despite the slow turning-out of the ancient cosmologies, twentieth-century judicial decisions have confirmed and reconfirmed the legal thinghood of animals. But none have ever tried to justify this anachronism because judges fail to realize that it requires justification. They mechanically cite earlier cases, which cite still earlier cases that inevitable reach back to Kent or Blackstone or further still to Locke and Hobbes, then to Coke, and Bracton, until we arrive at Justinian and the Old Testament.”).

⁴³ See e.g. one of the perennial cases of first-year property courses, *Pierson v. Post*, 3 *Cai. R.* 175, 180 (N.Y. Sup. Ct. 1805) (establishing the legal ideology that humans acquire dominion over animals and reduce them to property by wounding them).

learning curriculum.”⁴⁴ Professor Maneesha Deckha describes her attempt to bring animal ethics issues into her property law class: “[T]here was a palpable disregard for the materials. . . . This disregard, typically exhibited by white male students, took the form of openly talking when another student or I was talking, walking in and out of class, leaving class, and laughing audibly and incredulously at some parts of posthumanist theory while I was explaining it.”⁴⁵ Given the pervasiveness of speciesism in legal culture, cases that fundamentally challenge that ideology are not likely to succeed.⁴⁶

Lock v. Falkenstine, an Oklahoma Court of Criminal Appeals case from 1963, illustrates the problem of indeterminacy in the field of animal law.⁴⁷ In *Lock*, the defendants were charged with violating an Oklahoma animal cruelty statute for participating in cockfighting.⁴⁸ At the time of the prosecution, the statute provided: “Every person who maliciously, or for any bet, stake, or reward, instigates or encourages any fight between animals, or instigates or encourages any animal to attack, bite, wound or worry another, is guilty of a misdemeanor.”⁴⁹ The court was faced with the question of whether a gamecock was an “animal” under the statute.⁵⁰ Were one to interpret the statute using the lens of “plain meaning,” supplemented with a commitment to biological taxonomy, there could be no doubt that a rooster falls within the category of “any animal.”⁵¹ But the court found otherwise. Acknowledging that roosters are animals as a matter of biology, the court nevertheless held that “the man of ‘ordinary intelligence’” could not be certain that the statute covered roosters.⁵² Under the court’s reasoning, the application of the law to roosters would violate the principle

⁴⁴ Maneesha Deckha, *Teaching Posthumanist Ethics in Law School: The Race, Culture, and Gender Dimensions of Student Resistance*, 16 *Animal L.* 287, 295 (2009).

⁴⁵ *Id.* at 296. The number of animal law classes is growing rapidly, however, suggesting a shift towards greater institutional acceptance of animal law as an important field of study. See e.g. Tischler, *supra* n. 42, at 12 (“We stand now on the cusp of a new era of animal law education.”). Whether the prevalence of such classes will influence the next generation of judges remains to be seen.

⁴⁶ See Tushnet, *supra* n. 32, at 352 (“[J]udges are vehicles for a complex political and ideological agenda. Once again, the sociological elements of the indeterminacy thesis come into play. For just as lawyers may not be demographically representative and may be socialized in ways that make the democratic legitimacy of their views problematic, so too with judges.”).

⁴⁷ *Lock v. Falkenstine*, 380 P.2d 278, 280–81 (Okla. Crim. App. 1963).

⁴⁸ *Id.* at 280.

⁴⁹ *Id.*

⁵⁰ *Id.* at 282.

⁵¹ *Id.* at 280; *Black’s Law Dictionary* 1267 (Bryan A. Garner ed., 9th ed., West 2009) (defining plain meaning rule as “the rule that if a writing or a provision in a writing, appears to be unambiguous on its face, its meaning must be determined from the writing itself without resort to any extrinsic evidence”).

⁵² *Lock*, 380 P.2d at 282.

that criminal laws must be sufficiently definite to give a common person notice of the proscribed conduct.⁵³

Ultimately, the *Lock* court interpreted an animal protection statute in a way that facilitated the violent exploitation of roosters. It accomplished this by privileging one interpretive rule (lenity) while deemphasizing and ignoring another (plain meaning).⁵⁴ The court also chose to follow previous cases from other jurisdictions that agreed with its conclusion while dismissing those that did not, though it offered no principled reason for choosing one set of cases over the other.⁵⁵ In these moves, one sees clearly Llewellyn's point about the deployment of interpretive rules and precedent as parries and thrusts that a judge can use to reach a desired result.⁵⁶

The decision in *Lock* also illustrates the court's fear of a true and consistent commitment to the statute's underlying commitment to ending unnecessary suffering: "If the Statute is to be construed literally, it would be virtually impossible to exaggerate its limitations."⁵⁷ This fear is pervasive. In *Grise v. State*, the Arkansas Supreme Court proclaimed that "a literal construction" of anti-cruelty laws would "make them mere dead letters" because "[s]ociety . . . could not long tolerate a system of laws [that] might drag to the criminal bar . . . every man who might drown a litter of kittens, to answer there, and show that the act was needful."⁵⁸ In these fears, we see the desire to stabilize and maintain exploitation of animals, statutory language notwithstanding.

Of course, one could argue that *Lock* was simply wrongly decided, and that later cases and statutes that included roosters in the anti-cruelty laws illustrate its mistake. In *People v. Baniqued*, the California Court of Appeals held that roosters *are* animals under the state's anti-cruelty statute.⁵⁹ And in November 2002, Oklahoma voters used

⁵³ *Id.*; see also *St. v. Stockton*, 333 P.2d 735, 736 (Ariz. 1958) ("After a careful study of the [Arizona anti-cruelty] statute we confess we are unable to find from the words, context, subject matter, spirit or purpose of the act a clear indication of an intent on the part of the legislature to include a gamecock in the category of animals, or to make it a crime for a person or persons to conduct a cockfight wherein such gamecocks are subjected to needless suffering.").

⁵⁴ *Lock*, 380 P.2d at 282; *Black's Law Dictionary* at 1449 (defining the rule of lenity as "the judicial doctrine holding that a court, in construing an ambiguous criminal statute that sets out multiple or inconsistent punishments, should resolve the ambiguity in favor of the more lenient punishment").

⁵⁵ Compare *Lock*, 380 P.2d at 282–83 (relying on Arizona and New Mexico cases holding that cockfighting is not covered by those states' anti-cruelty laws) with *Lock*, 380 P.2d at 280 (recognizing that "several courts have construed numerous types of fowl to come within the term ['animal']").

⁵⁶ See Llewellyn, *supra* n. 33, at 403 (listing the "thrust" canon that "[i]f language is plain and unambiguous it must be given effect" with the "parry" canon: "Not when literal interpretation would lead to absurd or mischievous consequences or thwart manifest purpose.").

⁵⁷ *Lock*, 380 P.2d at 282.

⁵⁸ *Grise v. St.*, 37 Ark. 456, 459 (1881).

⁵⁹ *People v. Baniqued*, 101 Cal. Rptr. 2d 835, 840 (Cal. App. 2000).

the initiative process to explicitly outlaw cockfighting, a law upheld by the Oklahoma Supreme Court.⁶⁰

But these subsequent legal changes do not refute the indeterminacy thesis—they prove it. There is, as Mark Tushnet observed, a sociological component to indeterminacy: The appearance of determinacy is a function of political atmosphere that changes as social movements and other social actors alter the terrain of respectable legal arguments.⁶¹ The “professional respectability [of legal arguments] derives from a certain type of social or political power.”⁶² A social movement’s legal “arguments will become first professionally respectable and then reasonably powerful as their social or political power increases.”⁶³ It’s not that *Lock* was wrongly decided and *Baniqued* was rightly decided (as much as we would like to argue so); it’s that the social and political power of the animal protection movement increased dramatically between 1963 when *Lock* was decided and 2000 when *Baniqued* was decided.⁶⁴ The strength of a legal claim rests not on its platonic correspondence with the law, but rather on where it fits into the overlapping networks of social power within and outside the legal community. The line between what a legal system finds contemptible and what it finds contemptible is an ideological and sociological one.

If the range of respectable legal argument is hemmed in by dominant ideologies, what can we expect of the creativity so valued by animal law practitioners? On the positive side, we can expect our arguments to gain traction as social attitudes about animals improve, and empirical evidence suggests we are making progress in that regard.⁶⁵ As Taimie Bryant writes, “legislation and litigation . . . can slowly and

⁶⁰ Okla. Stat. tit. 21 §§ 1692.1–1692.2 (2002); *Edmondson v. Pearce*, 91 P.3d 605, 640–41 (Okla. 2004).

⁶¹ Tushnet, *supra* n. 32, at 345.

⁶² *Id.*

⁶³ *Id.*

⁶⁴ See Lawrence Finsen & Susan Finsen, *The Animal Rights Movement in America: From Compassion to Respect* 55–71 (Twayne Publishers 1994) (tracing the historical roots of the modern animal rights movement to social developments in the 1960s, 70s, and 80s); Robert Garner, *Animals, Politics and Morality*, 80–81 (2d ed., Manchester U. Press 2004) (“[S]ince the 1970s, there has been a greatly increased concern about the treatment of animals and part of this concern has manifested itself in the revitalization of existing groups and the formation of many new ones, all of whom found a public which has become more attentive to the issues they raise.”).

⁶⁵ Jonathan Lovvorn cites numerous polls indicating widespread support for welfare reforms:

More than two-thirds of Americans find it unacceptable that there are no federal laws that protect the welfare of animals on the farm. More than four-fifths believe there should be effective laws that protect farm animals against cruelty. And nearly three-quarters of Americans believe there ought to be federal inspections of farms to ensure humane treatment. . . . [A] national poll found that the vast majority of Americans favor humane slaughter methods for chickens, turkeys, and ducks who are raised for food, as opposed to current U.S. Department of Agriculture policy allowing these animals to be slaughtered without first rendering them insensible to pain. So there is undoubtedly a gap, and a quite large one, between the current cruelties visited upon animals and where society is ready to go in terms of reform.

laboriously shift the contours of the relations between humans and animals, if there is already sufficient sociocultural ‘space’ in the conceptual boundary between humans and animals, a boundary that is currently based to some extent on uncritical, ostensibly amoral killing of animals.”⁶⁶ But when it comes to large scale, industrial exploitation of animals or broader ideological challenges to human exceptionalism and anthropocentrism, the outlook is more discouraging.⁶⁷

To further compound the problem, it is not just that judges are resistant to anti-speciesist or posthumanist ideology; the prevailing ideology of judicial restraint makes even sympathetic judges resistant to creative legal arguments generally. As Professor Alan Dershowitz observed in the context of the struggle to gain legal rights for chimpanzees: “In the absence of [positive law], one has to use creative jurisprudential arguments. . . . When you live in a world of judicial restraint as we do today, making the argument in the first instance to the judge is not going to be the most persuasive or compelling place to make it.”⁶⁸

So this is where we find ourselves: We are in the midst of a legal system that denies animal interests at almost every turn. Animal lawyers can come up with creative, reasonable, defensible legal arguments that would, if accepted, improve the lives of animals, but the acceptance of those arguments is in the hands of judges who are socialized to be both restrained and anthropocentric. Where indeterminacy reigns, judges have an “out” to avoid the creative, pro-animal holding. Thus the inescapable conclusion: We can be as creative as we want, but in the short term, we are powerless to stop the systematic exploitation that subjects billions of animals to extreme pain, suffering, and death.

How we might deal with this powerlessness is the subject of the next Part.

IV. THE FEAR OF POWERLESSNESS AND THE POWER OF VULNERABILITY

The implications of the indeterminacy problem, coupled with a clear-eyed recognition of the widespread speciesism of the legal system, induce a feeling of powerlessness. One comes reluctantly to the

Jonathan Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 *Animal L.* 133, 137–38 (2006).

⁶⁶ Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 *Rutgers L.J.* 247, 300 (2008).

⁶⁷ See e.g. *id.* (“I do not believe that legal reform is likely to create such a space where none yet exists.”); see also Lovvorn, *supra* n. 65, at 136–37 (“A 2003 Gallup poll painted an even bleaker picture of the prospects for this society embracing legal rights for animals. Nearly two-thirds of Americans oppose banning all medical research on laboratory animals. Sixty-one percent oppose banning all product testing on laboratory animals. And a whopping seventy-six percent oppose banning all hunting. A 2004 Gallup Poll found that sixty-three percent of Americans feel that buying and wearing clothes made of animal fur is acceptable.”).

⁶⁸ Alan M. Dershowitz, Symposium Remarks, *The Evolving Legal Status of Chimpanzees* (Harv. L. Sch., Cambridge, Mass. Sept. 30, 2002), in 9 *Animal L.* 1, 63 (2003).

frightening realization that in many cases, our creative, sound legal theories will fail, not because they are wrong, but because we are fighting a deeply systemic prejudice. That sense of powerlessness typically results in despair, but in this final Part, I argue that our feelings of hopelessness and vulnerability can help us reconnect with the lived experiences of animals.

To prepare for an interview about animal cruelty in the dairy industry, I have just finished watching stomach-churning undercover videos of a calf ranch in Texas and dairies in Ohio and New York.⁶⁹ The videos depict some of the most gruesome (though sadly routine) cruelty I have ever seen: baby calves bludgeoned repeatedly in the head with pickaxes and hammers, yet still twitching and clinging to life;⁷⁰ calves stomped on, kicked in the face, and picked up and body-slammed onto the ground;⁷¹ cows chained to stalls, struggling in vain to escape as they are beaten on the head with a crowbar;⁷² young calves suffering as their horns are burned off and the tips of their tails are cut off, both without anesthesia;⁷³ cows tethered and restrained while the fists of angry, frustrated workers pummel their faces;⁷⁴ cows stabbed in the face with a pitchfork;⁷⁵ filthy stalls covered in feces;⁷⁶ untreated infections;⁷⁷ a prolapsed uterus;⁷⁸ a mother cow crying out in confusion and anguish as her newborn calf is taken from her so humans can steal the milk she will produce for him.⁷⁹

I feel sick, sad, shell-shocked. Most of all, I feel powerless. Powerless to stop what I know is happening right now, all over the world: The emotional torment of babies torn from their bellowing mothers, the violent appropriation of female reproductive systems, the bloody slaughter of those who have exhausted their utility to the industry.

⁶⁹ Mercy For Animals, YouTube, *Cruelty at New York's Largest Dairy Farm* (posted Jan. 25, 2010) (available at <http://www.youtube.com/watch?v=6RNFFRGz1Qs> (accessed Dec. 19, 2011)) [hereinafter *New York Dairy Farm*]; Mercy For Animals, YouTube, *No Mercy—Calf Farm Cruelty Exposed* (posted Apr. 26, 2011) (available at <http://www.youtube.com/watch?v=Ki57eFs7XFo> (accessed Dec. 19, 2011)) [hereinafter *Calf Farm*]; Mercy For Animals, YouTube, *Ohio Dairy Farm Brutality* (posted May 25, 2010) (available at <http://www.youtube.com/watch?v=gYTkM1OHFQg> (accessed Dec. 19, 2011)) [hereinafter *Ohio Dairy Farm*].

⁷⁰ *Calf Farm*, *supra* n. 69, at 0:21 to 0:28, 0:38 to 0:51; *Ohio Dairy Farm*, *supra* n. 69, at 0:25 to 0:40, 1:50 to 1:56, 2:13–219.

⁷¹ *Calf Farm*, *supra* n. 69, at 1:13 to 1:28; *Ohio Dairy Farm*, *supra* n. 69, at 0:06 to 0:13, 1:00 to 1:03.

⁷² *Calf Farm*, *supra* n. 69, at 2:02 to 2:07, 2:26 to 2:36; *Ohio Dairy Farm*, *supra* n. 69, at 0:23 to 0:40.

⁷³ *Calf Farm*, *supra* n. 69, at 1:38 to 1:53; *New York Dairy Farm*, *supra* n. 69, at 0:11 to 0:13; 0:33 to 1:35.

⁷⁴ *Ohio Dairy Farm*, *supra* n. 69, at 1:08, 1:29 to 1:33.

⁷⁵ *Id.* at 0:50, 1:17 to 1:25.

⁷⁶ *Calf Farm*, *supra* n. 69, at 2:37 to 2:46; *New York Dairy Farm*, *supra* n. 69, at 7:07, 7:13.

⁷⁷ *New York Dairy Farm*, *supra* n. 69, at 0:15 to 0:18, 0:33 to 2:43.

⁷⁸ *Id.* at 0:15 to 0:17.

⁷⁹ *Id.* at 3:11 to 4:17.

And animal protection lawyers have tried to stop it. In *ALDF v. Mendes*, we sued a calf ranch that confines thousands of calves bound for the dairy industry in crates so small they cannot turn around or lie down in a natural position.⁸⁰ Although the California anti-cruelty law requires those who confine animals to “provide [them] with an adequate exercise area,”⁸¹ which the Mendes Calf Ranch did not do, the court dismissed the case for lack of standing.⁸² The court held that the anti-cruelty law lacked a private right of action that would give ALDF standing to enforce the exercise requirement, and that the individual consumer plaintiffs could not sue for unfair business practices, in part because their injury in purchasing cruelly produced dairy products was “moral” and not “economic,” as required by the unfair competition law.⁸³ Again we return to the indeterminacy problem: Is spending money on products whose chain of production included illegal animal cruelty a moral injury, or an economic one? When the people answering that question are judges in a community and a district where the dairy industry is well established, we should not be surprised that they opted to characterize the injury as “moral,” and thus inadequate for standing.

Thus, indeterminacy prompts feelings of powerlessness. We see cruel confinement that is not only unethical, but also illegal, yet we cannot overcome the legal obstacles to enforcing the law. In these moments, despair sets in. I can reduce my personal complicity by not consuming dairy products; I can encourage others to go vegan; I can support undercover investigations like those in the aforementioned videos by donating to animal protection groups. But there is nothing I can do to stop this industry entirely; no matter what I do or how I respond, farmed animals will suffer miserably. In that sense, I am powerless.

In the grip of this feeling of powerlessness, it strikes me that this raw feeling of depression and hopelessness might be something like what the mother in this video felt as she bellowed while her young calf was dragged away. Of course, her grief is magnitudes beyond my own and her powerlessness is much more abject. I, after all, still have the species-privilege of being a human in a thoroughly speciesist world, not to mention the social privileges of being gendered male and racialized white. But in this moment, when I want to help but know I cannot, I understand her desperation a little bit better.

I recently read a news story about a mother bear on a bile farm in China.⁸⁴ Bear bile is an ingredient in traditional Chinese

⁸⁰ *ALDF v. Mendes*, 72 Cal. Rptr. 3d 553, 555 (Cal. App. 5th Dist. 2008).

⁸¹ Cal. Penal Code Ann. § 597t (West 2010).

⁸² *Mendes*, 72 Cal. Rptr. 3d at 561.

⁸³ *Id.*

⁸⁴ AsiaOne, *Mother Bear Kills Cub and Then Itself*, <http://news.asiaone.com/News/Latest%2BNews/Asia/Story/A1Story20110805-292947.html> (Aug. 5, 2011) (accessed Dec. 19, 2011) [hereinafter *Mother Bear*].

medicine.⁸⁵ The demand for it has led to the creation of “farms” on which captive bears are restrained and live with open fistulas on their sides so their gallbladders can be milked for the valuable bile.⁸⁶ According to the article, the mother bear heard the cries of her cub, who was about to have his abdomen punctured for bile milking.⁸⁷ She broke free of her own restraints and strangled her cub to spare him the horrors she had endured.⁸⁸ She then committed suicide by throwing herself into a wall.⁸⁹ This mercy-killing/suicide speaks to a sheer desperation and utter hopelessness that I cannot fathom. However, I catch glimpses of it when I consider how powerless I am, as an individual, to stop this suffering.

We clamor to object: “That is just defeatism. There is plenty you can do: write a letter to the Chinese government, send a donation to Animals Asia, encourage your friends and family to boycott Chinese products, use your legal skills to come up with a lawsuit.” Such responses are understandable, but they reflect what Majid Rahnema calls our “compulsive ‘actomania.’”⁹⁰ In constantly trying to do something (anything!) to fix problems, we too often skip over the important stage of dwelling with grief and understanding the depths of the problem.⁹¹ Do we grasp for impotent solutions because it forestalls the hor-

⁸⁵ *Id.*; Judy Mills & Christopher Servheen, *The Asian Trade in Bears and Bear Parts: Impacts and Conservation Recommendations*, in *Bears: Their Biology and Management*, vol. 9, pt. 1, 161, 161(Intl. Assn. of Bear Research & Mgt. 1994).

⁸⁶ Mills & Servheen, *supra* n. 85, at 165.

⁸⁷ *Mother Bear*, *supra* n. 84.

⁸⁸ *Id.*

⁸⁹ *Id.* Of course, it is impossible to know definitively the bear’s state of mind. Accusations of anthropomorphism are inevitable when one attributes mercy and suicide to animals. But I will stand behind the characterization and return accusations of anthropomorphism with accusations of “anthropodenial.” See Frans de Waal, *Are We in Anthropodenial?* *Discover Magazine* 50, 52 (July 1997) (defining anthropodenial as “a blindness to the humanlike characteristics of other animals, or the animal-like characteristics of ourselves”); see generally *Thinking With Animals: New Perspectives on Anthropomorphism* (Lorraine Daston & Gregg Mitman eds., Colum. U. Press 2005) (exploring different approaches to anthropomorphic thinking).

⁹⁰ Majid Rahnema, *Towards Post-Development: Searching for Signposts, A New Language and New Paradigms*, in *The Post-Development Reader* 377, 392 (Majid Rahnema & Victoria Bawtree eds., U. Press Ltd. 1997, David Phillip Publishers 1997, Fernwood Publg. 1997, Zed Bks. 1997).

⁹¹ Compulsive actomania also fails to call into question the acting, willing subject, with its presumed ability to master and manage any situation. This presumption is in part responsible for our exploitation of animals and the earth. See e.g. Ladelle McWhorter & Gail Stenstad, *Editors’ Introduction*, in *Heidegger & the Earth: Essays in Environmental Philosophy* ix, ix–x (Ladelle McWhorter & Gail Stenstad eds., 2d expanded ed., U. of Toronto Press 2009) (“[I]n the midst of . . . urgency, thinking ecologically . . . means rethinking the very notion of human action. It means placing in question the typical Western managerial approach to problems, our propensity for technological intervention, our belief in human cognitive power, our commitment to a metaphysics that places active human being over and against passive nature. For it is the thoughtless deployment of these approaches and notions that has brought us to the point of ecological catastrophe in the first place.”).

rific realization that maybe, in some cases, there really is nothing we can do?

Rahnema puts it this way: “[B]ecoming fully aware of our powerlessness in situations when nothing can be done . . . is perhaps the most authentic way of rediscovering our oneness with those in pain.”⁹² In refusing easy solutions, in dwelling with powerlessness, we “encounter the kind of deep and redeeming suffering that provides entry to the world of compassion and discovery of our true limits and possibilities.”⁹³

The connectedness that stems from acknowledging powerlessness is particularly salient in the context of animals. Contemporary turns in Continental philosophy regarding animal ethics are redirecting attention to the corporeal and somatic experiences of animality, vulnerability, and embeddedness.⁹⁴ The late French philosopher Jacques Derrida called the mortal capacity to suffer “the most radical means of thinking the finitude that we share with animals, the mortality that belongs to the very finitude of life.”⁹⁵ Not only does our mutual suffering expose our shared finitude with animals, it also opens us up “to the experience of compassion, to the possibility of sharing the possibility of

⁹² Rahnema, *supra* n. 90, at 393.

⁹³ *Id.*

⁹⁴ See generally e.g. Ralph R. Acampora, *Corporal Compassion: Animal Ethics and Philosophy of the Body* 5 (U. of Pitt. Press 2006) (“Where we begin . . . is always already caught up in the experience of being a live body thoroughly involved in a plethora of ecological and social interrelationships with other living bodies and people.”); Calarco, *supra* n. 42, at 118 (“[O]ne is perhaps less moved, ethically and even emotively speaking, by the recognition of an animal’s ‘ability’ or ‘capacity’ for suffering as by an encounter with an animal’s . . . fleshy vulnerability and exposure to wounding. . . . Derrida sees the embodied vulnerability of animals as the site where one’s egoism is called into question and where compassion is called for.”); Anat Pick, *Creaturely Poetics: Animality and Vulnerability in Literature and Film* 5 (Colum. U. Press 2011) (“The creature, then, is first and foremost a living body—material, temporal, and vulnerable.”); Frank Schalow, *The Incarnality of Being: The Earth, Animals, and the Body in Heidegger’s Thought* 114 (St. U. of N.Y. Press 2006) (urging an expansion of “the ethical landscape . . . in such a way as to include the materiality of our common ancestry [with animals], our ties to the earth, our shared vulnerability of the exposure of the flesh”); Stephen Thierman, *The Vulnerability of Other Animals*, 9 *J. Critical Animal Stud.* 182, 206 (2011) (“We must emphasize the embodied/world-bound existence that humans share with a variety of other animals and organisms, and recognize that all of these different bodies develop in rich, complex, and mutually constitutive ways. Human beings are not the only vulnerable beings that inhabit the world. Recognizing this is essential for sustaining a continued critique of a variety of human values and practices.”). For an argument for reorienting animal legal protections around vulnerability, see Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 *Animal L.* 65, 78 (2009) (“Human and nonhuman animals share universal vulnerability to suffering with respect to certain basic capabilities.”); see also Martha Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 *Yale J.L. & Feminism* 1 (2008) (developing a humanist theory of equality premised on universal vulnerability).

⁹⁵ Jacques Derrida, *The Animal That Therefore I Am (More to Follow)*, in *The Animal That Therefore I Am* 1, 28 (Marie-Louise Mallet ed., David Wills trans., Fordham U. Press 2008).

this nonpower, the possibility of this impossibility, the anguish of this vulnerability and the vulnerability of this anguish.”⁹⁶

Let me clarify that I do not think we are *always* powerless to improve the lives of animals, or that we should give up, dress in black, and sit in the corner listening to the Smiths on repeat until death liberates us from this mortal coil.⁹⁷ Far from it, there is a lot we can do (and we can do it dressed in black and listening to the Smiths). But we cannot do *everything*, which makes feelings of powerlessness inevitable. Unfathomable animal suffering will persist into the indefinite future, and it will make us feel low, vulnerable, and hopeless. Rather than fleeing from this vulnerability, we should consider holding onto it for a while, taking from it the window it offers on the lived experiences of disempowered animals.⁹⁸ This process deepens our commitment to defending animals, brings empathic serenity to situations that are beyond our power to change, and reorients our focus to more effective strategies and tactics.

V. CONCLUSION

The insights of Legal Realism and Critical Legal Studies shed light on the limits of creativity in animal law. Given the indeterminacy thesis and the politics of interpretation, we should not expect judges to adopt far-reaching and creative legal arguments that fundamentally challenge anthropocentrism. We can still win cases that make incremental gains in the direction of our ideals, and we can work institutionally and socially to lay the groundwork for future acceptance of anti-speciesist ideology. But in the short term, we have to acknowledge that there are problems we cannot fix. When we find ourselves in this position, in the gaze of a powerless animal, ourselves powerless to help, may we find solace in our shared existential vulnerability, calling to mind Derrida’s rejection and reformulation of Cartesian ontology: “I am inasmuch as I am *alongside* the animal.”⁹⁹

⁹⁶ *Id.*

⁹⁷ The Smiths, *Meat Is Murder*, on *Meat Is Murder* (Rough Trade Recs. 1985) (CD) (“It’s not comforting, cheery, or kind. It’s sizzling blood and the unholy stench of murder.”); The Smiths, *Unloveable*, on *The World Won’t Listen* (Warner Bros. 1987) (CD) (“I wear black on the outside ‘cause black is how I feel on the inside.”).

⁹⁸ I do not mean to suggest that animals are always vulnerable. As Jason Hribal has demonstrated, animals resist their powerlessness by actively revolting against exploitation. See generally Jason Hribal, *Fear of the Animal Planet: The Hidden History of Animal Resistance* (Counterpunch 2011). And I realize that we can recognize our shared somatic experiences with animals not only through suffering, but also through pleasure and joy. See Jonathan Balcombe, *Pleasurable Kingdom: Animals and the Nature of Feeling Good* 210–12 (Mcmillan 2006) (discussing the significance of pleasure to both human and animal values).

⁹⁹ Derrida, *supra* n. 95, at 10 (emphasis in original); see also Leonard Cohen, *The Stories of the Street*, on *Songs of Leonard Cohen* (Sony BMG Music Ent. 1967) (CD) (“And if by chance I wake at night and I ask you who I am/ Oh, take me to the slaughterhouse, I will wait there with the lamb.”).