

Michigan Law Review

Volume 111 | Issue 6

2013

Neither Sad nor Strange: Recovering the Logic of Anticruelty Organizations in Gilded Age America

Bryn Resser Pallesen
University of Michigan Law School

Follow this and additional works at: <https://repository.law.umich.edu/mlr>



Part of the [Animal Law Commons](#), [Juvenile Law Commons](#), [Legal History Commons](#), and the [Social Welfare Law Commons](#)

Recommended Citation

Bryn R. Pallesen, *Neither Sad nor Strange: Recovering the Logic of Anticruelty Organizations in Gilded Age America*, 111 MICH. L. REV. 1213 (2013).

Available at: <https://repository.law.umich.edu/mlr/vol111/iss6/17>

This Book Notice is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.

BOOK NOTICE

NEITHER SAD NOR STRANGE: RECOVERING THE LOGIC OF ANTICRUELTY ORGANIZATIONS IN GILDED AGE AMERICA

*Bryn Resser Pallesen**

THE RIGHTS OF THE DEFENSELESS: PROTECTING ANIMALS AND CHILDREN IN GILDED AGE AMERICA. By *Susan J. Pearson*. Chicago and London: The University of Chicago Press. 2011. Pp. ix, 200. \$45.

INTRODUCTION

In 1877, the American Humane Association (“AHA”) incorporated as one of the first national organizations dedicated to the protection of animals.¹ Nine years later, it amended its constitution to include the protection of children in its chartered mission.² By 1908, there were 354 anticruelty organizations in the United States, 185 of which were, like the AHA, humane societies invested in the welfare of both animals and children (pp. 2–3). As primary source documents reveal, Gilded Age humanitarians viewed the joint pursuit of child and animal protection as entirely sensible (p. 5). One of the Illinois Humane Society’s founding directors, for example, professed that the “prevention of cruelty to children and to dumb beasts, are part and parcel of the same work”³ By midcentury, however, the logic informing Gilded Age anticruelty reform had been lost, and child welfare professionals began to criticize the merger of child protection with animal protection as an illogical ordering of welfare priorities (p. 5). “It is a sad commentary,” wrote Dr. Vincent J. Fontana, founder of the Vincent J. Fontana Center for Child Protection in New York City, “that it took a society for the prevention of cruelty to animals to protect the first recorded case of a maltreated child.”⁴

In *The Rights of the Defenseless: Protecting Animals and Children in Gilded Age America*, Professor Susan J. Pearson⁵ sets herself the task of

* J.D., May 2011, University of Michigan Law School. Associate, White & Case LLP. Many thanks to the *Michigan Law Review* editors for their hard work and thoughtful comments. Thanks also to my family and to Emily Marr.

1. *History and Milestones*, AM. HUMANE ASS’N, <http://www.americanhumane.org/assets/pdfs/about/history-milestones.pdf> (last visited Sept. 2, 2012).

2. *Id.*

3. ILL. HUMANE SOC’Y, FOURTEENTH ANNUAL REPORT 17 (1884).

4. VINCENT J. FONTANA, *THE MALTREATED CHILD: THE MALTREATMENT SYNDROME IN CHILDREN* 8–9 (1964).

5. Associate Professor of History, Northwestern University.

recovering the now-forgotten logic of anticruelty reform and the development of humane societies in Gilded Age America. Her resulting history demonstrates that the union of child and animal protection was “neither sad nor strange, but was instead tightly bound to the crosshatched threads of sentimentalism and liberalism” (p. 20). Specifically, Pearson argues that Gilded Age anticruelty reform was a “hybrid” movement—simultaneously derivative and constitutive of the American state. Drawing on anticruelty reform publications, popular literature, and histories of antebellum and postbellum America, she shows how the rhetorical and institutional innovations of anticruelty reform both shaped and were shaped by an ideology of what she terms “sentimental liberalism.” By “[s]peaking a language of sympathy while deploying legal power,” Pearson explains, “anticruelty reformers transformed not only sentimentalism, but also the reach and role of the state” (p. 13).

Although Pearson tags *Rights of the Defenseless* as an “intellectual and cultural history” (p. 8), it should also be recognized as a *legal* history—and an important one at that. Indeed, *Rights of the Defenseless* is, in many ways, more a history of the transformation of American legal liberalism (albeit one told through the voices and actions of Gilded Age humanitarians) than it is a history of Gilded Age anticruelty reform.⁶ Accordingly, this Notice engages *Rights of the Defenseless* on those terms—that is, as a history of American legal liberalism. It proceeds in three parts. First, this Notice delivers a summary of Pearson’s argument, paying particular attention to her discussion of liberalism and leaving her discussion of sentimentalism more or less aside. Second, it criticizes Pearson’s surprisingly abridged treatment of the relationship between anticruelty reformers’ successful expansion of welfare rights and the Fourteenth Amendment. Finally, it concludes with an argument that *Rights of the Defenseless* is nonetheless an important legal history because of the work it does to combat the pervasive and persistent myth of the weak American state.

I. CONTRIBUTIONS

Pearson describes *Rights of the Defenseless* as an investigation into “the connection between—and consequences of—animal and child protection” in Gilded Age America (p. 8). This investigation reveals that the leaders of anticruelty societies accomplished more than simply the legal protection of animals and children. Through their strategic efforts to establish recognized and enforceable legal protections (i.e., rights) for animals and children,

6. For more traditional histories of Gilded Age anticruelty reform, see DIANE L. BEERS, *FOR THE PREVENTION OF CRUELTY: THE HISTORY AND LEGACY OF ANIMAL RIGHTS ACTIVISM IN THE UNITED STATES* (2006); SHERRI BRODER, *TRAMPS, UNFIT MOTHERS, AND NEGLECTED CHILDREN: NEGOTIATING THE FAMILY IN NINETEENTH-CENTURY PHILADELPHIA* (2002); LINDA GORDON, *HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE* (1988); ROSWELL C. MCCREA, *THE HUMANE MOVEMENT* (1910); and JAMES TURNER, *RECKONING WITH THE BEAST: ANIMALS, PAIN, AND HUMANITY IN THE VICTORIAN MIND* (1980).

these men and women also enlarged the reach and role of the American state. As Pearson explains, by “[f]reely mixing the language of traditional liberalism with that of sentimentalism, animal welfare reformers groped toward a newer, more expansive vision of the rights-bearing community that would include . . . the helpless and dependent” (p. 101).

Pearson begins her history of anticruelty reform and the development of humane societies in Gilded Age America with a critical examination of why Gilded Age humanitarians tended to consolidate child and animal protection under one institutional mantle. To the extent that humane society leaders addressed the decision to merge child and animal protection functions, they typically appealed to expedience or, less frequently, the shared helplessness of children and animals (pp. 21–22, 56). Pearson, however, suggests an alternative explanation for the union of child and animal protection. After introducing evidence that the protection of children did not, in practice, so easily meld with the protection of animals (pp. 25–28), she argues that Gilded Age anticruelty reformers’ tendency to join child and animal protection is best explained by nineteenth-century domestic ideology. “Over the course of the nineteenth century,” she writes, “the legal and cultural status of both children and animals changed as each was transformed from an economic to a sentimental investment, from being adjuncts in the family economy to the center of family affections” (pp. 28–29). In Pearson’s view, it was this perception of children and animals “as natural intimates and family-constituting beings” rather than arguments about efficiency or shared helplessness that most fully accounts for the institutional consolidation of child and animal protection in Gilded Age America (p. 56).

Further, at the same time that children and animals were being transformed into objects of sentimental value, new ideas about discipline were being “shuttled back and forth across the species line” (p. 29). Emerging tides in intellectual thought and religious doctrine reenvisioned children and animals as inherently innocent and good rather than marked by original sin, and parents’ obligations to their children and owners’ obligations to their animals were correspondingly reshaped into duties to preserve goodness rather than beat out badness (p. 46). Harnessing these new ideas of discipline, anticruelty reformers insisted that the infliction of abuse on a child or an animal would destroy that individual’s inherent innocence and adversely affect his or her “character and habits in ways that would shape him or her for life” (p. 90). These reformers further maintained that individual instances of cruelty exacted harm on the collective social body and thus were socially problematic. “[A]nimal and child protectionists,” Pearson explains, “saw violence toward animals and children as linked in spirit and practice and they connected that violence to social disorder—domestic violence, murder, mayhem” (p. 58).

Although Pearson argues that Gilded Age anticruelty reformers conceived of cruelty to children and animals as a social problem, she takes care to emphasize that Gilded Age humanitarians, unlike their more contemporary Progressive cousins, identified cruelty’s origins as personal. That is, Gilded Age anticruelty reformers “seldom understood cruelty in impersonal or

institutional terms” (p. 186), but instead clung to the idea that “cruelty toward both [children and animals] stemmed from the same dark place in the human heart” (p. 56). Accordingly, anticruelty reformers sought to protect children and animals from individual “cruelists” (and, by extension, to protect society from social disorder) by establishing rights for these dependent and defenseless populations (p. 99). As Gilded Age humanitarians saw it, “to end cruelty was also to establish rights” (p. 97).

In the second half of *Rights of the Defenseless*, Pearson shifts her attention away from the question of why Gilded Age anticruelty reformers saw a need for the protection of children and animals to the question of how these reformers went about establishing and then enforcing rights for children and animals. One of the biggest challenges anticruelty reformers confronted in their campaign to establish rights for children and animals was how to reconcile dependence with rights since “the designation of ‘dependence’ has worked to mark the boundaries of citizenship, individual rights, and claims on the state under both feudal and liberal, premodern and modern political regimes” (p. 102). Drawing on a close reading of anticruelty propaganda, Pearson argues that anticruelty reformers were able to overcome the significant political limitations that typically attached to the designation of dependence by identifying an alternative basis for rights: sentience (i.e., the ability to feel). Because children and animals could feel the physical pain of abuse and neglect, Gilded Age humanitarians contended that they should be protected from such suffering. “In basing rights on sentience rather than reason or independence, and in attempting to reconcile rights with dependence,” she explains, “anticruelty reformers developed a vision of rights based on protection rather than liberty” (p. 133).

Whatever their foundation, however, rights are essentially meaningless unless they are both enforceable and enforced. Unlike other Gilded Age reform and charity groups, most humane societies, though privately organized, were authorized to engage in the law enforcement activities necessary to carry out their protective functions (pp. 3, 151–52).⁷ Writing in 1885, one leader of anticruelty reform identified these delegated police powers as essential to the success of Gilded Age anticruelty reform efforts. “[I]n this case,” he stated, “the dove has claws—sharp claws—and uses them, too, as it has occasion” (p. 152; internal quotation marks omitted). In her final chapter, Pearson also argues that the delegation of police powers was crucial to anticruelty organizations’ ability to protect the rights of the defenseless because the delegation of police powers allowed anticruelty organizations to translate action into sympathy backed by the power of the state. In other words, while Gilded Age anticruelty organizations relied on sentiment to enact anticruelty legislation, they relied on their police powers to enforce such legislation (pp. 138, 151–52).

By using the law and law enforcement to protect the rights of children and animals, anticruelty reformers transformed the very machinery they deployed. As Pearson writes, “Without developing a theory, as some later

⁷ As Pearson puts it, “they distributed arrest warrants rather than alms” (p. 3).

progressive reformers would, about state responsibility for animal and child protection, anticruelty activists had nonetheless succeeded in insinuating their priorities in the machinery and the identity of the states in which they operated" (p. 181). What is more, by using law to effect anticruelty reform, Gilded Age humanitarians "stood at the crossroads of postbellum transformations in governance" (p. 138) and helped give shape to the modern American state and its understanding of rights for both the powerful and the defenseless.

II. CRITIQUE

In 1869, Professor George Ticknor reflected on the fundamental dissimilitude between pre- and post-Civil War America: "It does not seem to me as if I were living in the country in which I was born, or in which I received whatever I ever got of political education or principles."⁸ Nearly sixty years later, Professors Charles and Mary Beard echoed Ticknor's sapient observation in describing the Civil War as the "Second American Revolution."⁹ Today, historians of nineteenth- and twentieth-century America continue to identify the Civil War as the point of departure of the modern American state. In his book on law and regulation in nineteenth-century America, for example, Professor William Novak writes that "[t]he Civil War played midwife to the American liberal state."¹⁰

In *Rights of the Defenseless*, Pearson also identifies the Civil War as a turning point in the story of legal liberalism and the American state. "[T]he Civil War," she writes, "lent a renewed vigor to the language of rights and reopened questions about the entailments of many of the keywords in the American political lexicon: freedom, rights, independence, and citizenship" (p. 101; internal quotation marks omitted). Further, she recognizes that the reopening of these questions provided Gilded Age anticruelty reformers with the opportunity to expand the country's understanding of rights to include entitlements for children and animals: "For animal [and child] protectionists, framing their claims in rights language was not only a strategic choice to deploy a dominant idiom, but also a way of intervening in the postbellum debate about the grounding and the content of rights" (p. 101).

8. 2 GEORGE TICKNOR, *LIFE, LETTERS, AND JOURNALS OF GEORGE TICKNOR* 485 (George Stillman Hillard ed., 7th ed., Boston, James R. Osgood & Co. 1877).

9. 2 CHARLES A. BEARD & MARY R. BEARD, *THE RISE OF AMERICAN CIVILIZATION* 54 (MacMillan Co. rev. ed. 1937); see also *id.* at 53 ("[A]t bottom the so-called Civil War . . . was a social war, ending in the unquestioned establishment of a new power in the government, making vast changes in the arrangement of classes, in the accumulation and distribution of wealth, in the course of industrial development, and in the Constitution inherited from the Fathers.").

10. WILLIAM J. NOVAK, *THE PEOPLE'S WELFARE: LAW & REGULATION IN NINETEENTH-CENTURY AMERICA* 241 (1996). See generally LAURA F. EDWARDS, *GENDERED STRIFE AND CONFUSION: THE POLITICAL CULTURE OF RECONSTRUCTION* (1997); AMY DRU STANLEY, *FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION* (1998).

But Pearson's analysis does not go far enough. *Rights of the Defenseless's* central argument—that Gilded Age anticruelty reformers enlarged the reach and role of the American state through their efforts to secure a positive, individual right (i.e., the right to protection) for two rights-less populations—is inextricably related to the complex history of the Reconstruction Amendments, and in particular the Fourteenth Amendment. Yet nowhere in *Rights of the Defenseless's* otherwise well-researched and tightly argued pages does Pearson meaningfully attend to the constitutional underpinnings that transformed the meaning and substance of rights in Gilded Age America and thereafter. She does not, for example, explain how the letter and spirit of the Fourteenth Amendment fundamentally transformed our conception of rights to mean individual rather than collective liberties.¹¹ Nor does she discuss how the Supreme Court's subsequent interpretations of the Fourteenth Amendment left uncertain the meaning and reach of its protections.¹² Indeed, Pearson mentions the Fourteenth Amendment only a handful of times, and when she does, she ignores years of legal debate and precedent by matter-of-factly stating that “the Fourteenth Amendment incorporated the Bill of Rights to the states.”¹³

If Pearson had intended for *Rights of the Defenseless* to be a straightforward history of anticruelty organizations at the turn of the twentieth-century, her failure to address the Fourteenth Amendment in substantive terms would, most likely, not even merit mention. But because of Pearson's admirable aspiration to attach her history of anticruelty reform in the Gilded Age to the larger narrative of American legal liberalism, her superficial treatment of the Fourteenth Amendment and its complicated history is unfortunate. In particular, her discussion of the Fourteenth Amendment perpetuates the common misconception that the Bill of Rights meant the same thing in pre-Civil War America that it does today.¹⁴ Moreover, by failing to substantively address the Fourteenth Amendment, Pearson forfeits an opportunity to even more concretely connect her history of anticruelty reform to the history of American legal liberalism and the transformation of the meaning and content of those rights.

11. See AKHIL REED AMAR, *THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION* xiii (1998) (“[T]he Reconstruction Amendment transformed the nature of the original Bill of Rights, leaving us with something much closer to the Bill as conventionally understood today.”); NOVAK, *supra* note 10, at 244 (“But the Thirteenth, Fourteenth, and Fifteenth Amendments were no simple textual revisions. Much like the *sic utere tuo* and *salus populi* maxims they ultimately replaced, the constitutional clauses ‘involuntary servitude,’ ‘privileges or immunities,’ ‘due process,’ ‘equal protection,’ and ‘right of citizens of the United States’ embodied a wholly new political philosophy. The heart of that philosophy was a radical reconstruction of individual rights.”).

12. MICHAEL KENT CURTIS, *NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 197–99* (1986) (summarizing the Fuller, White, and Taft Courts' Fourteenth Amendment jurisprudence).

13. P. 101; see also p. 165 (“[T]he Fourteenth Amendment made the Bill of Rights applicable to the states . . .”).

14. See *supra* note 10.

III. RESUSCITATION

Despite Pearson's much-abridged treatment of the Fourteenth Amendment, *Rights of the Defenseless* is an important legal history. Namely, Pearson's history of Gilded Age anticruelty reform profoundly undermines the intertwined narratives of the laissez-faire Gilded Age and the weak American state and presents an alternative (and more accurate) picture of how law and the state functioned in Gilded Age America.

As the typical American history student learns, the orthodox history of the United States draws a sharp distinction between the laissez-faire Gilded Age and the well-regulated Progressive Era.¹⁵ Over the years, a number of voices have challenged the veracity of this distinction, especially the characterization of Gilded Age America as a relatively deregulated society. In 1887, for example, Dr. Albert Shaw of Minneapolis argued against the assertion "that *laissez-faire* is the practical rule in the United States, and state interference the rare exception,"¹⁶ noting that there was really nothing new for future legislatures to regulate.¹⁷ And in 1944, Karl Polanyi also dissented from the orthodox story by professing that the emergence of the market economy was in no way a product of laissez-faire governance but instead was the product of frequent government interventions.¹⁸ More recently, William Novak and others of the same persuasion have continued to challenge the myth of the weak American state. "The nineteenth century," Novak argues, "was not an era of laissez-faire or statelessness where public inertia and political naiveté just happened to provide the perfect conditions for a burgeoning private market economy and a self-generating civil democracy."¹⁹ Rather, nineteenth-century America was a "well-regulated society" in which there was a remarkable amount of governmental activity throughout the United States, much of it occurring at the local and state level.²⁰

Echoing the critiques put forth by these scholars, Pearson concludes that Gilded Age America was "hardly a stateless society" (p. 177). Indeed, her

15. See NOVAK, *supra* note 9, at 250 nn. 7–9 (listing authorities adhering to the orthodox history).

16. *Comment and Criticism*, 9 SCI. 503, 503 (1887) (attributing this assertion to George J. Goschen, Chancellor of the British Exchequer); see also Albert Shaw, *The American State and the American Man*, 51 CONTEMP. REV. 695 (1887) (noting Goschen's argument and rebutting it).

17. See Shaw, *supra* note 16, at 710.

18. KARL POLANYI, *THE GREAT TRANSFORMATION* 136–38 (Beacon Press 2001) (1944) (discussing the British government's acts to encourage economic growth). Although *The Great Transformation* is about the rise of the market economy in Britain, its contentions apply with equal force to American economic history.

19. NOVAK, *supra* note 10, at 236 ("The nineteenth century was not an era of laissez-faire or statelessness where public inertia and political naiveté just happened to provide the perfect conditions for a burgeoning private market economy and a self-generating civil democracy."); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870–1960*, at 9–10 (1992) (noting that laissez-faire was inapplicable to common law); William J. Novak, *The Myth of the "Weak" American State*, 113 AM. HIST. REV. 752, 753–54 (2008) (criticizing the traditional view of the American state as weak).

20. NOVAK, *supra* note 9, at 1–2, 235–37.

study of anticruelty reform and the development of humane societies in Gilded Age America provides considerable support for the thesis that legal regulation and positive statecraft permeated nineteenth-century America. Specifically, Pearson shows that Gilded Age anticruelty reformers actively depended on the law and the power of the state to first establish and then enforce rights of the defenseless. “[H]umane societies had no doubt,” she argues, “that the law—as an idea and as a set of institutions—was critical to their mission” (p. 166).

In addition to work it does in rethinking the orthodox history of the United States, Pearson’s history provides some explanation for why the orthodox history has proved so durable despite an increasing volume of dissenting scholarship. Gilded Age anticruelty organizations were private associations separate from the state. Yet, as described in *Rights of the Defenseless*, it was these organizations rather than public Officials that “secur[ed] legislation that specified, in ever more detail, how animals and children were to be governed” (p. 181). And it was anticruelty reformers rather than a formal police force that “roamed the streets wearing badges that entitled them to arrest violators of state anticruelty statutes and relevant municipal ordinances” (p. 152). In effect, Gilded Age anticruelty societies expanded governmental power under private auspices at the local and state level, allowing the image of American voluntarism to overshadow the American state.

CONCLUSION

In *Rights of the Defenseless*, Pearson undertakes to write a history of anticruelty reform and the development of humane societies in Gilded Age America. Drawing on a careful study of primary and secondary source material, her subsequent history recovers the logic informing anticruelty organizations’ later-criticized joint pursuit of child and animal protection and explains how Gilded Age anticruelty reformers went about establishing and then enforcing the right to protection for children and animals. But Pearson does not stop there. Instead, she attaches her history of anticruelty reform to the larger history of the transformation of American legal liberalism, adding appreciably to our understanding of how law and regulation functioned in Gilded Age America. As this Notice has suggested, Pearson more than accomplishes the impressive task she had set for herself.