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**COMMENT**

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# A CASE STUDY ON CRUELTY TO FARM ANIMALS: LESSONS LEARNED FROM THE HALLMARK MEAT PACKING CASE

*Nancy Perry and Peter Brandt*\* †

## INTRODUCTION

*“I need the public to understand that my office takes all cases involving animal cruelty very seriously . . . [and i]t doesn’t matter whether the mistreated animal is a beloved family pet or a cow at a slaughterhouse. Unnecessary cruelty will not be tolerated and will be prosecuted to the fullest extent allowed by law.”*

San Bernardino County  
District Attorney  
Michael A. Ramos (February 15, 2008)

One morning in January 2008, images of horrific animal cruelty were blasted by Internet, television, and print media throughout the country. The story was all the more shocking in that the animals at issue were cows at a commercial slaughter plant—a place from which Americans usually avert their gaze.

The images of dairy cows so ill or injured that they could not stand, being battered, shocked, and nearly drowned to force them into the kill box, struck a chord with the American public. Abusing downed animals is at odds with our venerable national public policy against torturing animals.

The reaction was swift and far-reaching. The Hallmark Meat Packing plant was closed indefinitely, the U.S. Department of Agriculture (“USDA”) initiated the largest meat recall in U.S. history, and two of the plant’s employees were arrested and charged with animal cruelty. The case at the Hallmark plant is remarkable—both for the degree of cruelty and sadism recorded, as well as the vigor of the response to such cruelty by the public, the media, and state and federal officials. The case also reflects a changing trend in the United States.

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The American public is no longer averting its gaze when it comes to farm animal cruelty. In fact, U.S. consumers and policy makers are taking a long-overdue, hard look at the way we treat animals raised for food, and the moral and practical consequences of the abusive industrial farming system that has developed over the last fifty years. As discussed herein, *Hallmark* may or may not turn out to be a turning point in the humane movement, but it certainly provides an illuminating case study of how the regulatory system addresses farm animal treatment and the limits and loopholes that need to be remedied at both the state and federal levels.

### I. FARM ANIMAL WELFARE IN THE UNITED STATES

Though no less capable of suffering than their domestic and wild counterparts, animals raised for meat, eggs, and milk in the United States have long been denied any meaningful protection while enduring the most egregious forms of mistreatment at all stages of their lives. Since the 1950s, a commercial obsession with high-yield production methods and mechanization has replaced the traditional farming practices many still imagine when we think of life on a farm. Farmers, faced with pressures to produce in greater quantities and at lower prices, succumbed to increasingly harsh and industrial techniques that treat animals as machines, rather than living, breathing individuals with natures, instincts, and needs.

Recently, however, consumers have become more interested in organic foods and in the welfare of the animals they are consuming. Trends in favor of “cage-free” eggs and other less inhumane production standards have been on the rise. Schools, universities, communities, and well-known businesses—such as Ben & Jerry’s Ice Cream and Wolfgang Puck Companies—have adopted higher animal welfare policies for their operations. In 2002, voters in Florida passed a ballot measure banning the use of gestation crates (a confinement practice for breeding pigs that immobilizes sows for the majority of their pregnancies). In Arizona in 2006, a similar measure passed banning both gestation and veal crates. Shortly after, Smithfield Foods, Inc., the world’s largest pork producer, announced a phase-out of its use of gestation crates, citing concerns regarding animal welfare. Nearly 800,000 Californians signed petitions to place a measure banning gestation crates and veal crates, as well as battery cages for egg-laying hens, on the November 2008 ballot. The writing is on the wall and consumer demand, as well as legislative trends, will help to eliminate some of the most egregious confinement and intensive farming practices that came into vogue in the last several decades.

### II. LITTLE ON-FARM PROTECTION CURRENTLY AVAILABLE

While more than ten billion land animals are raised for consumption annually by the U.S. meat, egg, and dairy industries, nearly all of those animals are not afforded even basic welfare protections for the vast majority of their lives. They are entirely excluded from the federal Animal Welfare

Act. State laws may protect them, but such state laws are rare and typically weak, such as the New Jersey “humane regulations” that actually codify as “humane” some of the cruelest factory farming practices in the world, rather than providing any meaningful protections. A challenge to these regulations is currently pending before the New Jersey Supreme Court.

Ironically the greatest protection afforded to farm animals usually comes on the day of their slaughter if they are fortunate enough to be included as a covered species. Unfortunately despite the reality that birds raised for meat and eggs comprise more than 95 percent of all land-based animals slaughtered for food, the U.S. Department of Agriculture does not include them under the coverage of the Humane Methods of Livestock Slaughter Act of 1978 (“HMLSA”). For those animals who are considered to be protected under HMLSA, those protections have long been utterly dependent on appropriate enforcement by the USDA—the very agency now under scrutiny for falling down on that job in the Hallmark case.

### III. THE HALLMARK CASE AND THE NEED FOR REFORM

The Hallmark Meat Packing plant supplied meat to the Westland Meat Company, which, in turn, was the second-largest supplier of beef to the USDA’s Commodity Procurement Branch. This branch provides beef not only to the National School Lunch Program, but also to needy families and the elderly. While the USDA and the livestock industry have tried to suggest that Hallmark was the exception—the “bad apple” among slaughter plants—this appears unlikely as the USDA designated Westland its “Supplier of the Year” in 2004–2005. If the level of protection documented in the film viewed by millions—helpless cows bellowing in pain and anguish as they are shocked in the eyes, rectum, and face repeatedly; run over with fork lifts; and otherwise tortured—is the best that farm animals may ever hope for, we must acknowledge that farm animals are, in effect, not protected at all.

In the Hallmark case, after careful and thorough documentation of the abuses inflicted on the cattle, the Humane Society of the United States (“HSUS”) contacted the appropriate authorities in the District Attorney’s office in San Bernardino County, California, to request prosecution under section 597 of California’s penal code, which prohibits “tortur[ing], torment[ing],” and “cruelly beat[ing], mutilat[ing], or cruelly kill[ing] any animal.” The HSUS also pushed for prosecution under California Penal Code section 599f, which requires that slaughter plant personnel take “immediate action to humanely euthanize” nonambulatory animals “or remove the animal from the premises” and that “a nonambulatory animal may not be dragged at any time, or pushed with equipment at any time.” Due to the pressing need to inform the public of the activities and illegalities at the Hallmark facility, the HSUS released the footage publicly.

Public disclosure spurred members of Congress to react with investigations and calls for greater protections of farm animals and for the people who consume them, and also apparently caused the USDA to accelerate its

reaction. For example, when the District Attorney announced his decision to file both felony and misdemeanor animal cruelty charges against one Hallmark manager and misdemeanor charges against another employee, the USDA apparently hastened its efforts, finally moving forward to interview the HSUS investigator late into that same Friday night. Within 48 hours of the USDA's interview with the HSUS investigator, on a Sunday afternoon of a holiday weekend, the USDA held a press conference to announce the massive meat recall, setting forward an even more intense wave of activity, including Congressional scrutiny and action.

#### IV. USDA LACKS AUTHORITY TO TRULY DETER FARM ANIMAL ABUSE AT SLAUGHTER PLANTS

The experience at Hallmark shows that the USDA's regulatory scheme is woefully inadequate in comparison with California's criminal animal cruelty laws and in light of consumers' reasonable hope that farm animals be treated even remotely humanely. The Hallmark case highlights one of the most significant shortcomings of the USDA's animal handling regulations. The agency lacks the power to criminally charge—or even civilly fine—offending individuals and/or companies. Thus, the agency simply has no authority to specifically target and punish those responsible for violating its humane handling regulations. In response to even the most horrific animal cruelty, the USDA only has the authority to write up a citation, to which management need only respond with a plan for corrective action, or *temporarily* shut down the slaughter plant that employs the abusers, an action rarely taken by the agency. The USDA cannot require the suspension or termination of employees—no matter how egregiously or regularly they abuse animals.

In the 2002 Farm Bill, Congress amended the HMLSA to give USDA the authority to punish the mishandling of nonambulatory animals at slaughter plants by civil complaint and by criminal charges. However, Congress set conditions on that grant of authority: first, USDA must investigate and report on the problem, and then, if the Secretary feels they are needed, the agency may promulgate regulations. The agency has done none of this. Thus no act of Congress currently empowers USDA to seek criminal penalties or civil fines for the abuse of nonambulatory animals documented at Hallmark.

A comparison to a similar federal inspection regulatory scheme, the Occupational Safety and Health Administration ("OSHA") regulations, puts the USDA's meager penalties in proper perspective. While the USDA lacks authority to punish individuals even when its inspectors catch them in the act of torturing animals, OSHA officials may seek both fines and jail time for an employee who merely tips off co-workers about an impending OSHA inspection. USDA's relatively toothless animal handling regulations are extraordinarily out of step with the American public's growing expectation that regulators will ensure animals raised for food are not needlessly tortured.

In response to the abuses documented at Hallmark, Congress held multiple hearings on the issue, including one Energy & Commerce Oversight Subcommittee hearing where the president of Hallmark Meat Packing Plant had to be subpoenaed to attend to explain his company's actions. Additionally, Senator Diane Feinstein, with Senators Akaka, Stevens, and Boxer, have introduced S. 2770, which would establish meaningful civil penalties for those who abuse animals at slaughter facilities. S. 2770 addresses the existing problem that USDA may currently "suspend" a plant with serious violations for just a few hours, creating some appearance of enforcement rather than any meaningful consequence. The legislation also would apply new penalties to any violation of a ban on slaughtering downed animals or of the HMLSA. The tiered system triggers a fine based on a set percentage of the facility's gross income (e.g., the fine would be larger for larger-scale plants) for the first violation, a one-year shutdown for the second violation, and a permanent shutdown in the case of a third violation. The bill would also require USDA to finalize the pending rule to provide public disclosure of the names of establishments, such as groceries, restaurants, and schools, in receipt of recalled meat.

One striking result of this investigation is clear—once presented with evidence of criminal animal cruelty, the District Attorney, unlike the USDA, criminally charged two abusers. If the HSUS had not worked with the San Bernardino District Attorney's office to prosecute the individuals who routinely tortured downer cows at Hallmark, there is every reason to suspect that the USDA would not have detected the abuse. And as experience bears out, even if the agency did detect such abuse, it could only respond with a meager slap on the wrist of Hallmark's management, namely a paper write-up or a temporary shut-down. Neither of these outcomes would remove offending employees, ensure any consequences for those who violate the law, or send the message to others in the industry that there is a high price to pay for torturing animals. Although many may not be ready to eschew meat, eggs, and dairy entirely, Americans have nevertheless made it clear through their pocketbooks, elected officials, and ballot initiatives that they simply will not abide such a fundamental failure to prevent the most outrageous animal cruelty.

#### CONCLUSION

Public trends, while encouraging, must be codified into both state and federal laws to truly protect farm animals. As the Hallmark case demonstrates, the need for both state and federal action is pragmatic as well as principled. Unlike California's criminal justice system, the USDA can mete out no consequences to the individual abuser and, thus, neither deters abuse nor removes offenders from a position to repeat it. Perhaps most importantly, the USDA's current penalties do not make an example of those who torture animals. Congress should address this by granting the USDA the authority to punish those who torture farm animals. In the meantime, the USDA's complete lack of authority to target individual offenders for their

cruel acts can and should be supplemented by state law prosecutions. To facilitate this, most states will need legislation extending cruelty laws to farm animals; California's laws allowing for prosecution of the Hallmark employees are the exception rather than the rule.

In sum, there is a glaring need for a federal scheme that can truly ensure food safety and animal welfare. Likewise the states' unquestionable interest in protecting public health and welfare, and in deterring animal cruelty, demand that state laws are enacted to prohibit cruel practices. We can only hope that the lessons learned at the great expense of so many helpless and miserable animals at Hallmark need not be repeated before state legislatures and Congress take action to protect all farm animals from such torture and abuse.

# ANIMAL CRUELTY LAWS AND FACTORY FARMING

*Joseph Vining*\* †

## INTRODUCTION

“Should laws criminalizing animal abuse apply to animals raised for food?” The answer is yes, and yes especially because farm animals are generally now under the control of business corporations. State and federal criminal law have proved critical in modifying corporate policy and practice in other areas, a current example being worker safety. Criminal liability today would include criminal liability of the corporate entity itself, and would thus also introduce the most effective regulation of individual handling of farm animals—regulation by the corporation, which has methods and resources public agencies cannot match.

We have a background public policy of humane treatment of sentient creatures, with a long history and sufficiently broadly sourced in enacted law to be called quasi-constitutional. Both state and federal courts frequently refer to it as general public policy. The earliest criminal animal protection acts in Anglo-American law, in 1641 in Massachusetts and 1822 in England, were directed specifically at the suffering of farm animals. But while protection of animals from cruelty was developing in the United States during the nineteenth and twentieth centuries into a basic public value, farm animals, with few exceptions, were being moved outside legal protection—either through their exemption from the definition of animals protected, or through the exemption of cruel practices in farming from the definition of cruel practices. At the same time, individual and family farming was being replaced by large-scale corporate processing organized along industrial lines. The result of this combination is a crisis of suffering in the United States, a crisis in the way there are crises of mass human suffering around the world today.

## I. THE NECESSITY OF RESPONSE TO THIS CRUELTY THROUGH THE CRIMINAL LAW

The pressure for legal response is twofold. First, there is the claim of the suffering itself. We are centuries beyond the question whether farm animals’

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experience is suffering because they are not primates or human (whose suffering is not questioned) but lambs, hogs, chickens, or cattle. Despite difficulty in quantifying suffering (the degree of it) and difficulty in aggregating individual suffering (the amount of it), we do quantify and aggregate suffering. When we do, the degree and the amount of suffering of these animals—the numbers—are truly staggering. This suffering is seen against the background of laws that make the suffering of even a single animal at human hands sufficient to justify a felony conviction, and, startlingly, mandatory psychiatric treatment in some jurisdictions. Humane treatment of an animal has been a value in itself for a very long time. It does its own work in the individual mind and the legal mind, not unlike the value of human life, indifference to which is the very definition of criminality.

The second pressure comes directly from the pressure in the legal mind to make sense of things. Developments in one area of law always have ripple effects beyond it because the legal mind is a mind and not a mechanism, and animal law is no exception. As each part of animal law is affected by a widening sense of animals as having intrinsic worth, even individuality, the law's leaving virtually untouched this vast area of animal suffering at human hands is more and more anomalous.

An effective response can really only come from the criminal law, because the source of so much of the suffering is the industrial processes designed and controlled by business corporations. The point of introducing or reintroducing the criminal law would not be the effectiveness of criminal sanctions versus civil sanctions or administrative remedies. The point indeed would not be "deterrence," which brings with it its shadow of "overdeterrence." The point is the introduction of the governing public value into the picture, at all, and taking account of the reality that animals are suffering at the hands of individual actors who are not free to make their own decisions. Individuals processing farm animals are in some sense victims themselves, operating within and subject to the administrative structure of the modern corporation that has its own ethos and internal sanctions. This latter fact means that a response that does not address the corporation will not be effective. But it also means that there is the possibility of effective regulation by the corporation itself.

## II. CRAFTING A RESPONSE THROUGH CURRENT CRIMINAL LAW

The current criminal cruelty statutes can be used to prevent animal cruelty. The statutes are often written in ways that suggest something like a cost-benefit analysis before criminality is perceived or found. Within the same statute, reference may be made on the one hand to torture, torment, mutilation, or cruelty, as such; and on the other hand to "unnecessary" or "unjustified" injury, pain, or suffering. But there are very few absolute values in law, not even the value of human life. What is protected by the absolute prohibition of torture, absolute in that there can be no justification or excuse for torture, may be such a value. But in general what a particular criminal law does is to require of those subject to it that they themselves

internalize and respond in good faith to the value it protects. Internalized, the value has not so much a causal or systematic and predictable effect, but a very human effect in the mind, and, it does not go too far to say, the heart. Internalized, its effect is as far from *in terrorem* as can be: the value is a call, a claim, a challenge. Other values also call and claim—again, it is not absolute. Realizing them all may not be possible. But what values do, including this one regarding animal suffering, is to fuel the imagination in the hope of realizing them all, in some way, at some time. And what any particular value also does, internalized, is to ground self-limitation when acting in a way that may injure the value. There is not a happy “justification” that allows untroubled sleep when the immediate decision tips one way rather than another. There is always an element of tragic choice that leaves one alert, gives one pause, and keeps the imagination going.

Life, bodily integrity, sexual dignity, privacy, worker safety, environmental health, competitive markets, informed markets, animal welfare: the ways we describe what a criminal law is “about” range across the legal landscape. They have in common that they describe what a decision maker—minute to minute, day to day—cannot be indifferent to while deciding what to do. Externalizing a concern of criminal law as what guides others but not oneself, ignoring it or calculating only the consequences to oneself of others’ actions guided by it, *is* the crime. In analysis that is the “thing of the mind,” the *mens rea*, without which there is no true crime—civil liability perhaps, imposed to affect calculations and possibly insurable as a predictable risk, but not criminal liability.

The fact that criminal liability is not about “rules” or “rule breaking” is nicely illustrated by the definition of murder often encountered in statutes, which includes causing death “under circumstances manifesting extreme indifference to the value of human life.” There is no rule there to be broken or disobeyed. A lawyer’s advice with respect to it can only be “do not be indifferent to the value,” respect its importance; and if you are not indifferent, if you really are trying to protect it, the law responding to a terrible situation in which you are involved will move from criminal to civil to regulatory and even away from any particular focus on you. The same will be true when the law of animal cruelty protects farm animals.

### III. THE CORPORATE CONTEXT IN CRIMINALIZING CRUELTY TO FARM ANIMALS

While farm animals were coming under the ownership or control of business corporations, there were two further developments that pointed to application of the criminal cruelty laws as the only effective response to the present situation. They were linked.

One development was an increasing focus in the 1980s and 1990s on the criminal liability of organizations as such. It may not be generally recognized how far modern criminal law is from analogies that have been made between corporate criminal responsibility and corporate civil responsibility in contract and tort through respondeat superior. Today the corporate person

is seen to be directly responsible to the criminal law. Its liability is not strict; its mens rea is not vicarious or “attributed” from an individual employee’s mens rea, but is its own, frequently different from any individual’s and often described as a form of criminal negligence or indifference. Recognizing this, new criminal remedies tailored to the corporate defendant emerged from the debates over the legislative reform of criminal sentencing that was being undertaken during the same period.

The other development was an increasing emphasis in the economic literature and in business schools on pure profit-maximization as the criterion for guiding and judging decisions made on behalf of business corporations, whether for the long or the short term. This criterion has been debated among lawyers for decades and was in fact rejected in drafting the American Law Institute’s *Principles of Corporate Governance*. But it has been picked up by a large part of the corporate bar, if not yet in any clear way by courts. Embodied in an individual human being, pure profit-maximization would be a sign of pathology. Embodied in a business corporation it has been presented as contributing to efficiency and fairness in business practice and financial markets. It differs from a “primarily profit” orientation in its mathematical rigor and in excluding explicitly the relevance of substantive values in corporate decision making, their allowable effect being solely in the form of quantifiable costs imposed from outside that might enter into corporate risk-management calculations. And the effort to redefine the legal term “business” in this way for business corporations is a true source of the degree of suffering of farm animals today.

The new criminal remedies for corporations I note above were in part a response to the vulnerability of remedies that depended on fines. In pure profit-maximization corporations would do no more than enter fines into these risk-management calculations, discounted by probabilities drawn from the theory of games. The new sanctions were based explicitly on corporate culpability and culminated in supervised compliance programs, removal of recalcitrant individuals from positions of responsibility in a corporate hierarchy, and ultimately judicial supervision of corporate management in a new form of “corporate probation.” Their clear purpose is to ensure that values protected by the criminal law, whatever they might be and however described, are in fact entering as such into corporate decision making.

#### CONCLUSION

The deepening recognition of the sentience and suffering of farm animals has simply not yet led to turning and facing the consequences of animals’ ownership and processing as agricultural commodities by modern business corporations. We could not imagine the absolute control of human beings by people in organizations who thought it their duty to take no substantive value into account in what they did to them. Put the developments of the last several decades together—a shift of farm animals to the control of business corporations, professional thought that increasingly sees business corporations as value free except as the criminal law applies to them, and a

law of corporate criminality that is beginning to develop both substantive analysis and remedies appropriate to organizations—and the reintroduction of criminal cruelty laws into agriculture does not seem an extraordinary response but the most natural one. Indeed, the maintenance and continuing evolution of the new corporate criminal sanctions would not be absolutely essential. The criminality of cruelty to farm animals would itself have sufficient effect to warrant reintroduction. Criminalizing cruelty to farm animals would change what good faith decision making on behalf of a corporation would be, most especially in the design and internal administration of processes and practices. At the same time, it would delegitimize individuals' orders and actions within the corporation that contribute to suffering. Following this, the specificity and flexibility of the modern corporation's monitoring and reporting systems would make their special contribution to success in this area as in others. Far from being a last resort, criminalizing cruelty to farm animals should be the first step in confronting this crisis of suffering we as a society have allowed to happen.

# **“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**

*Angela J. Geiman*\* †

## INTRODUCTION

Since the beginning of history, people have used farm animals to assist with their work and to provide a source of food. These agricultural pursuits were not questioned; rather, they were a widely-accepted way of life. In fact, many people still say that the very purpose of livestock on this Earth is to provide these resources for mankind. As for the proper way to treat our livestock, we commonly hear farmers and livestock producers make comments like, “If we take care of the animals, they will take care of us,” and, “We treat our animals well because that’s just good business.”

Though times and methods have changed, our need for the resources provided to us by farm animals has not. Today individual families rarely raise their own livestock to harvest on the farm or at the local butcher shop. The majority of animals are raised in larger scale operations, and the task of harvesting them has been assumed by the meatpacking industry. This change has been driven not only by economics, but also by the fact that urbanization has encroached on previously rural lands. People do not want, or have the space, to grow their own food.

The purpose of this commentary is to respond to the question, “Should laws criminalizing animal abuse apply to animals raised for food?” The simple answer to the question is “yes,” but the reality is not simple. It requires analyzing both the science of raising livestock and the current legal framework, which we must understand before discussing what to require and how to implement those requirements. Continued improvements in the livestock and meatpacking industries and the rising expectations of consumers add to the complexity of the issue.

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## I. THE SCIENCE OF CARING FOR ANIMALS

The average consumer is likely unaware of the sophistication of the livestock production and meatpacking industries. When these industries are publicized, it is, all too often, not in a good light. We see photos of swine or poultry in buildings described as crowded or dirty by those who do not understand animal science. Unfortunately, we also sometimes see situations that are inexcusable—as repulsive to the industry as to those observing through the media.

Livestock production is a science. Thousands of students every year graduate with degrees in animal science (or animal husbandry, as it used to be called). For those who are unaware of this field of study, the definition of “animal husbandry” from the *Saunders Comprehensive Veterinary Dictionary*, is instructive:

The methods employed in keeping domestic animals in such a way as to avoid their abuse but so as to provide food, fiber, entertainment and company at levels described as love, companionship, physical guidance, protection, shepherding. In many instances the overriding constraint is that the maintenance system must be cost-effective so as to provide an occupation for the owner. In other circumstances the rewards are less tangible and come within the ambit of emotional gratification or psychological dependence. In more pragmatic terms the discipline includes nutrition, genetics and breeding, housing, handling facilities and techniques, hygiene, sanitation, health maintenance and disease prevention, marketing, preparation for contests, physical and psychological training, culling, management in times of drought or other civil disaster, use of animal experiments and codes of practice for the management and transport of various classes of animals.

Concern for animal welfare originated with animal scientists. Efficient and successful animal production depends on the proper treatment of animals, and academics and industry experts alike continue to study and make improvements in welfare conditions. On the other hand, many people who support the “animal rights movement” actually oppose most forms of animal husbandry. And some simply do not want to see animals used as food.

If critics have the impression that the livestock and meatpacking industries fight reform of humane treatment laws, it may be because the radical reforms that are sometimes sought have the potential for economic ruin for this industry and the typical American consumer. Ninety-seven percent of Americans are not vegetarians and ninety-nine percent of Americans are not vegans. Demand for products derived from livestock remains strong. Livestock producers and the meatpacking industry continue to produce such products, and they must be able to do so in a way that is economically sustainable.

A vocal few would have us believe that these industries do not want to be regulated in this area. In reality, the industries are already highly regulated, and they must work to improve or exceed existing regulations to meet increasing consumer expectations.

## II. CURRENT LEGAL FRAMEWORK

All fifty states have laws prohibiting unnecessary or unjustifiable cruelty to animals. These laws are primarily criminal statutes and are enforced through prosecution by local authorities. Thirty states have excluded accepted animal husbandry practices from the application of their animal protection laws.

At the federal level, the Twenty-Eight Hour Law and the Animal Welfare Act (“AWA”) provide protection for certain classes of livestock. The Twenty-Eight Hour Law requires that animals not be transported for more than twenty-eight hours without being unloaded for at least five hours of rest, watering, and feeding. The AWA is quite limited and applies to those farm animals that are being used for research, testing, and teaching. Most livestock, therefore, are not protected by any federal laws as long as they are on the farm, but they generally are protected as soon as they reach a harvest facility.

Federally inspected harvest facilities, highly regulated on many fronts, must comply with the Humane Methods of Slaughter Act (“HMSA”). The HMSA requires that animals be “rendered insensible to pain” prior to harvest. The USDA enforces the HMSA, and USDA inspectors have the ability to suspend inspection at those facilities where violations are found. This means that a federal inspection seal, which is necessary for interstate shipment of meat and meat products, may not be granted to products being manufactured, effectively halting commercial shipments. There is no doubt that this regulatory framework has been successful in improving the conditions for animals in harvest facilities.

In addition to complying with applicable laws, the livestock and meat industries are under increasing pressure not only to meet, but also to exceed, consumer expectations with respect to animal welfare. These expectations rise as knowledge of industry practices grows, allowing consumers to make more prescriptive choices about food purchases. In an increasingly competitive world market for animal protein products, industry players are committed to continued improvements in animal welfare practices based on both experience and research. Accordingly, a large amount of self-regulation occurs today, which effectively elevates actual standards and practices far above what is required under state or federal mandates.

## III. INDUSTRY SELF-REGULATION

Self-regulation and work to meet customer expectations has helped develop processes that improve the welfare conditions of all animals—from the farm, through the transportation process, and to the plant. Animal welfare audits, for example, are a common practice as part of the industry’s service to customers who purchase products and distribute them to consumers, either through retail sales or foodservice outlets. Objective measurements, which may include the percentage of animals that do not vocalize and the percentage of animals that do not slip or fall during han-

ding, have been put into place as the result of such audits. It is a competitive advantage for individual companies to not only comply with, but actually exceed these objective standards. There is no doubt that the increasing standards will continue to drive innovations to improve the treatment of animals.

Despite this high level of self-policing, however, there will still be bad actors—and proven situations of animal abuse should be vigorously punished. While today's laws and regulations are probably already sufficient to deal with egregious actions, a change in the current legal framework may be warranted because sometimes legislative change is required to force improvement upon those who will not adopt willingly.

#### IV. THE NEW JERSEY APPROACH AND WHY IT COULD WORK

When considering possible changes to the current legal framework, New Jersey's movement to a regulatory approach is interesting and worthy of further examination. New Jersey originally passed legislation in 1996 directing its Department of Agriculture to issue standards to ensure the humane care of domestic livestock. The regulations, which the Department of Agriculture proposed and adopted several years later, are based on objective criteria to assess the health and welfare of the animals. Production practices that are not specifically prohibited are permitted so long as they are "routine husbandry practices" taught at veterinary schools, land grant colleges, or agricultural extension agencies. Thus individual producers cannot, themselves, justify any practice that they wish as "humane." The definition is left in the hands of academic and industry experts.

The New Jersey regulators diligently reviewed scientific texts and research on production practices from governments and academic institutions. They balanced preservation of the agricultural business in the state with the protection of livestock from abuse. Yet their actions have been challenged by a group of plaintiffs that includes many familiar animal rights groups. In *New Jersey Society for Prevention of Cruelty to Animals v. New Jersey Department of Agriculture*, the plaintiffs asserted that the "regulations authorize industry practices that are not humane."

Increased regulation at the state level is, indeed, an enhancement of the overall system. Additional regulations could provide helpful guidelines on acceptable practices and could be amended as new methods and technologies are developed. If the New Jersey regulatory approach were adopted by other states and given an adequate framework of enforcement, improvements to animal welfare would likely continue and perhaps accelerate. Such a system would be similar to the European system, which has been highly regarded as successful by animal welfare proponents and has resulted in many improvements to production practices in European countries.

That said, it is important not to lose sight of the economic reality associated with making improvements to important animal welfare practices. Some of the practices adopted in European countries are proving to be economically infeasible and unrealistic in a competitive world market; and,

consequently, some European producers appear likely to be forced out of business by the high cost of complying with regulations that go far beyond widely recognized production practices. The New Jersey Department of Agriculture recognized the economic realities of animal agriculture. It adopted standards that will protect animals from inhumane treatment while also helping to sustain agriculture. Other states that wish to adopt animal welfare regulations would be well advised to do the same.

#### CONCLUSION

Governments at the federal and state levels, as well as the industry should focus on reform in areas where the benefit of increased animal welfare is greater than the burden placed on the industry. Production practices being used today are sound, scientific practices that have been developed, evaluated, and approved by experts. Room for improvement certainly exists, but the solution should not force economically unsound practices. If some consumers are willing to pay more for certain production practices, then those consumers should seek out sources for those specific products. The anti-meat agenda that reformists continue to advocate must not be blindly accepted as the driver for reform. Rather the entire supply chain must remain rational and objective as we consider ongoing and continuous improvements to the system.

The livestock and meatpacking industries take their responsibility for the welfare of animals very seriously. How well the industries treat animals affects their bottom line, and hundreds of thousands of jobs are dependent on the industries' economic success. Consumers depend on the industries to find efficient and responsible ways to meet demand for animal-derived products. But, most importantly, the industries care about and will continue to work to improve the treatment of the animals that they raise and harvest because it is the right thing to do.

# AN ARGUMENT FOR THE BASIC LEGAL RIGHTS OF FARMED ANIMALS

Steven M. Wise\* †

## INTRODUCTION

The most abused beings in the United States are those whom we raise and kill for food. The numbers of dead are staggering. Most are victims of the severe and almost entirely unregulated practices that Americans permit on their factory farms. According to the United States Department of Agriculture's National Agricultural Statistics Service, in 2007, a total of 10.4 billion land-based animals were killed by the American food industry. These included 9.4 billion broiler chickens, 450 million laying hens, 317 million turkeys, 121 million pigs, 39 million bovines, 28 million ducks, 10 million rabbits, and 4 million sheep and goats—fifty times the number killed in biomedical research, for sport, as pests, and for all other reasons combined, carrying a value of hundreds of billions of dollars a year. The degree to which animal enslavement is embedded in our society is difficult to calculate or fathom. In commenting on human slavery, slave historian David Brion Davis wrote in the *New York Times* that

[a]fter decades of research, historians are only now beginning to grasp the complex interdependencies of a society enmeshed in slavery. There were shifting interactions among West African enslavers, sellers and European buyers; European investors on the slaver trade, which ranged from small-town merchants to well-known figures like the philosophers John Locke and Voltaire; wealthy Virginian and Brazilian middlemen who purchased large numbers of Africans off the ship to sell to planters; New Englanders who shipped foodstuffs, timber, shoes and clothing as supplies for slaves in the South and the West Indies; and, finally, the European and American consumers of slave-produced sugar, rum, rice, cotton, tobacco, indigo (for dyes), hemp (for rope-making) and other goods.

Brutalized as they were, at least human slaves in the United States were not eaten.

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## I. LEGAL RIGHTS AND NONHUMAN ANIMALS

Twenty-three years ago, as officers of the California-based Animal Legal Defense Fund, Michigan State University Law Professor David Favre and I commenced work in earnest on a long-term attempt to solve some of the most desperate problems posed by the legal thinghood of every nonhuman animal. As legal things, nonhuman animals lack all legal rights and remain entirely the object of the rights held by us legal persons—that is, the beings with rights. We understood that, with the exception of those few nonhuman animals protected by such statutes as the American Endangered Species Act, it is extremely difficult to protect and advance the interests of rightless beings in the courts. All legal history bears this out, whether those rightless things have been black slaves, women, children, the insane, or nonhuman animals. Most legal protections for nonhuman animals remain indirect (mostly anti-cruelty statutes), enforceable only by public prosecutors. Even the Endangered Species Act requires a human plaintiff to have standing sufficient under Article III of the United States Constitution.

Our years of practicing animal law and our knowledge of legal history convinced Professor Favre and me that no meaningful percentage of nonhuman animals will ever be treated well or fairly until they attain some minimum degree of legal personhood—that is, until they achieve some minimum level of fundamental legal rights. All legal history bears that out, too. Precisely because whether one is classified as a legal thing or a legal person determines who dies and who lives, who may be enslaved and who may not, who does not count and who does count within our legal system, legal personhood is the most important individual issue that can come before a court.

The arguments for the fundamental legal rights of any being, human or nonhuman animal, are strongest when they are most firmly grounded on accepted legal principles. Therefore, in arguing for the fundamental rights of a nonhuman animal, I rely upon bedrock principles of Western law: liberty and equality. Liberty entitles one to be treated a certain way because of characteristics one may possess. Presently for humans, some irreducible degree of bodily liberty and bodily integrity are everywhere protected. If we trespass upon this deeply personal liberty, we commit the terrible wrong of treating a person as a thing. Equality means that likes should be treated alike and unalikes can be treated unlike.

## II. FUNDAMENTAL LIBERTIES APPLY NOT JUST TO HUMANS

“In giving freedom to the slave, we assure freedom to the free,” said Abraham Lincoln in his 1862 message to the United States Congress. After centuries of struggle, it is clear that humans may not be legally enslaved and they may not be legally tortured, no matter how beneficial their enslavement or torture might be to others. Today virtually no legal scholar or moral philosopher seriously contends that rational arguments support a claim that all and only human beings ought to possess fundamental liberties. Yet these

most fundamental liberties are denied to every nonhuman animal. This not only inflicts grave injustice upon its victims, but underlines the arbitrariness of claiming fundamental liberties only for human beings.

Dignity mandates fundamental liberties. Dignity is, significantly, a product of the capacity for autonomy and self-determination. Things are not autonomous. Persons are. Things do not self-determine. Persons do. This entitles them to fundamental liberties. Most moral and legal philosophers, and nearly every common law judge, recognize that a normal human possesses autonomy and self-determination if she has preferences and the ability to act to satisfy them, can cope with changed circumstances, can make choices—even ones she cannot evaluate well—or has desires and beliefs and can make appropriate inferences from them.

I call these basic autonomies “practical.” Practical autonomy is not just what most humans have, but is what most judges think is *sufficient* for basic liberties. Any being possesses practical autonomy and is entitled to personhood and basic liberties if she can desire, can intentionally act to try to fulfill her desire, and can possess a sense of self-sufficiency to allow her to understand, even dimly, that it is she who wants something and is trying to get it. Consciousness, though not necessarily self-consciousness, and sentience are implicit.

How do we know when nonhuman animals possess practical autonomy? The more their behavior resembles ours and the taxonomically closer we are, the more confident we can be that they do. Chimpanzees, for example, are quite close to us taxonomically and genetically. Further, chimpanzee behavior resembles that of humans. They are conscious, probably self-aware, possess some or all the elements of a theory of mind (i.e., they know what others see or know), understand symbols, use a sophisticated language or language-like communication system, deceive, pretend, imitate, and solve complex problems that require mental representation. We can therefore be highly confident they possess practical autonomy sufficient for basic liberty rights.

The animals most commonly used for food (pigs, sheep, goats, cows, chickens, turkeys, and ducks) may have all the cognitive characteristics of chimpanzees. They may have none. Or they may have some; or perhaps they possess some simpler consciousness, are able mentally to represent and act insightfully, use symbols, think, use a simple communication system, and have a primitive, but sufficient, sense of self. The stronger and more complex these abilities are, the more confident we can be that a being possesses practical autonomy. We do not know much about the cognitive abilities of farmed animals, because those who make billions of dollars exploiting them have never bothered to conduct significant research into what sorts of beings they are. A leading twenty-first century text on pig production, *Pig Production: Biological Principles and Applications*, states that, despite the fact that tens of millions are raised in horrendous factory farm conditions then brutally slaughtered, “[l]ittle is known about the behavioral needs of pigs.” Scattered academics have recently begun to investigate farm animals’ cognitive abilities, but there remains little research on the subject.

In light of what we know—and we do know some things—it may be appropriate to apply the precautionary principle that is often used in the field of environmental law. Depriving any being with practical autonomy of basic liberty rights—treating a being as a thing rather than as a person—is the most terrible injustice we can inflict. When there is doubt and serious damage is threatened, we should err on the cautious side where evidence of practical autonomy exists. More than a million animal species exist. Darwinian evolution postulates a natural continuum of mental abilities. In *Drawing the Line*, I demonstrate that we know that all four species of great apes and at least some cetaceans, for example, possess practical autonomy, and that African elephants and African Grey Parrots probably do, too—or at least come close.

We could deal with this problem in another way. Personhood and basic liberty rights might be given in proportion to the degree a farmed animal possesses practical autonomy. If you have it, you get full liberty rights. But if you don't, the degree to which you *approach* it might make you eligible to receive some proportional liberties. This idea of receiving proportional liberties accords with how judges often think. They may give *fewer* legal rights to humans who lack autonomy. But they do not make her a legal thing. A severely mentally limited human adult or child who lacks the mental wherewithal to participate in the political process may still move freely about. A court may give *narrower* legal rights to her. A severely mentally limited human adult or child might not have the right to move in the world at large, but may move freely within her home or within an institution. A court may give *parts* of a complex right. A profoundly retarded human might have a claim to bodily integrity, but lack the power to waive it and be unable to consent to a risky medical procedure or the withdrawal of life-saving medical treatment. Elementary justice demands that research on what sorts of beings farmed animals are begin in earnest.

### III. EQUALITY RIGHTS AND NONHUMAN RIGHTS

Finally, recall that liberty is not the only ground for the allocation of basic legal rights and that equality demands that likes be treated alike. Equality rights depend upon how one rightless being compares to another being with rights. An animal might be entitled to basic equality rights, even if she is not entitled to liberties, because she is similar to another with basic liberty rights. Equality rights require a comparison. Since like beings should be treated alike, something can only be equal to something or someone else. The strongest argument for equality rights of a farmed animal is simple: even very young or severely cognitively-impaired humans possess the basic right to bodily integrity, though they lack autonomy. Presently, such nonhuman animals as chimpanzees possess very complex minds, yet lack all rights, as they are things. This offends equality. To the degree that the animals we raise and kill for food also possess complex minds, the refusal to recognize their basic rights also offends the principle of equality. Only care-

ful scientific investigations will answer the questions of what kinds of minds the various farmed animals possess.

There is only one reason not to determine what rights farmed animals are due and recognize them. That is the reason that once justified human slavery: powerful economic interests are arrayed against it. This is a practical reason why beings who ought to have liberty or equality rights do not, but it in no way justifies it. I leave the last words on that subject to David Brion Davis:

Considering that slavery had been globally accepted for millennia, it is encouraging that people were able to make such a major shift in their moral view, especially when a cause like abolition conflicted with strong economic interests. We can still learn from history the invaluable lesson that an enormously powerful and profitable evil can be overcome.

# ONE BAD DAY: THOUGHTS ON THE DIFFERENCE BETWEEN ANIMAL RIGHTS AND ANIMAL WELFARE

*Neil D. Hamilton*\* †

## INTRODUCTION

The lawsuit pitting the New Jersey Society for the Prevention of Cruelty to Animals against the New Jersey Department of Agriculture brings into sharp focus the issue of animal rights versus animal welfare that has been dividing animal activists, farmers, and society for decades. On one side are proponents of animal rights—a set of rights articulated by humans but granted to animals to govern how we treat them. For many believers this includes the right not to be owned and certainly not to be eaten. On the other side are proponents of animal welfare—also a set of human derived standards governing how we care for animals under our control. Animal welfare concerns are reflected in laws prohibiting cruelty and criminalizing certain abusive behavior. The debate as illustrated in the New Jersey litigation involves conflicting perspectives on what duties (or rights) we owe animals and on who should decide, using what standards. The contours of the debate have evolved, as reflected in the emergence of “Animal Law” in American legal education. Modern livestock production has also changed significantly, with an increase in confinement production. With these changes, the fundamental legal issues remain divisive, emotional, and elusive of clear resolution.

## I. LEGALIZING THE DEBATE BETWEEN ANIMAL RIGHTS AND ANIMAL WELFARE

The New Jersey case is unique, perhaps even significant, because it involves a focused legal challenge rather than an intellectual debate or noisy rally about whether to serve meat in the cafeteria. As a legalized issue the case could be—and most likely will be if the lower court decision is a guide—decided on narrow legal grounds of statutory interpretation and judicial deference to agency rulemaking. Even a narrow legal ruling will be welcomed by the winning side, but it will not resolve the underlying debate of animal rights versus animal welfare. The court will unlikely resolve that

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question—the divide between those who endorse traditional livestock husbandry practices and those who allege many of them are inhumane and cruel. Perhaps it is a resolution impossible to achieve in a courtroom, rule-making procedure, or legislative debate—at least not without significant changes in society’s relation to food and without extending human-based legal “rights” to animals raised for our purposes.

When stripped of the gloss of litigation and public relations, the debate isn’t just about animal welfare; if it were, the “carefully reviewed” decision by the New Jersey Department of Agriculture would resolve the matter. The real debate, at least for those who view it from the perspective of animal welfare, is more complicated. For example, some of those supporting the New Jersey action, such as Farm Sanctuary, do not believe animals should be eaten or that livestock production—modern or otherwise—should exist. For them the debate is a proxy war pitting animal rights and vegetarianism against the continued production and consumption of meat by society—masked as concern for animal welfare and the rule of law. For others, such as the Center for Food Safety, the question is how to balance animal welfare concerns and the profitability of farms, or how strongly economic arguments should be weighed in debates over particular practices.

## II. THE VALIDITY OF FARM PRODUCTION PRACTICES

No doubt there are well-meaning opponents of New Jersey’s rules who believe the practices under scrutiny are in fact “inhumane.” Perhaps such opponents would eat the veal chop if they knew the calf was raised in a pen rather than a crate or would enjoy the hamburger more knowing the steer had been anesthetized before being castrated. More likely, however, the food choices of most consumers would not be altered by this knowledge. Moreover, the New Jersey debate is not just a proxy war, but a phony war, to boot, given the heated rhetoric of how the practices in question are employed only by factory farms. The reality is many of the practices, such as castrating young males, are used by small family farmers as well as “factory farms.”

Many production practices, such as dehorning, castration, and debeaking, are done for valid production and management reasons and are familiar to every child who grew up with livestock. Of course, notions of what makes a practice “valid” or justified depend on where in the food chain you are located—as is your view of what is inhumane. From a farmer’s perspective, or for the veterinarian community, the practices in question are not considered abusive and are not done to be cruel. But for non-farmers or consumers, practices like these sound painful and are easily portrayed as inhumane. Can you imagine doing them to a pet? Animal abuse and cruelty have well-developed bodies of state law prohibiting mistreatment of farm animals. But the case is not only about law but also about rights. Here the debate becomes more complicated because it cannot be denied that some farm practices cause temporary or transient pain to animals. As a young boy the squeals of pigs having rings clamped in their noses made me want to

hide. But were their squeals about being grabbed by a human or the ringing? The fear and squeal would be no different if the pig was being grabbed to administer anesthetic or pinch the ring. But the reality of why Dad ringed their noses was undeniable—to stop them from rooting under the fence into the growing corn, or worse yet for their safety, running on the nearby road.

Ringed pigs is not common on farms today but not because any court ruled it inhumane. Instead, most pigs are confined in buildings, no longer free to root the soil. One promising development in our food system and in livestock production—at least for eaters concerned about food quality and the care farm animals receive—is the growing movement to local food and sustainable farming. Organizing producers to market food labeled to inform eaters how it is raised is critical to providing consumers with the quality of food they desire. For years I have worked with Iowa farmers who supply pork for Niman Ranch. The meat is labeled as sustainably and humanely raised on farms certified to meet the Animal Welfare Institute standards of care. The pigs are raised outdoors and not fed animal byproducts or antibiotics. These farmers are committed to providing their pigs the best care possible. Paul Willis, founder of Niman Ranch Pork Company and prominent sustainable Iowa hog farmer, says “our pigs only have one bad day” rather than a lifetime of confinement. But Paul’s pigs still end their lives as pork serving the needs of mankind. *And* the baby males are castrated without anesthesia, not because Paul is cruel, but because alternatives would add unnecessary cost and stress to their production.

### III. LITIGATION CANNOT RESOLVE THE DEBATE

Are Paul and his colleagues demon “factory farms,” or are they caring producers who should be supported and trusted by consumers? Litigation like the present case in New Jersey diverts citizens and animal activists (at least those really interested in improving conditions for livestock) from supporting farmers committed to taking the best care of their animals. If people oppose factory farms—and there are many legitimate concerns about social ills of industrialized production—there are more direct ways to confront them rather than arguing in court that their practices are inhumane. Pursuing environmental compliance, raising public awareness of health risks from air pollution, and assuring worker safety are all more direct avenues—as are market-based actions of not buying their products. Recent actions by major food retailers, such as McDonald’s decision to require egg suppliers to increase the spacing given hens and dairies refusing to purchase milk produced with rBST (recombinant bovine somatotropin) or artificial growth hormones, show how sensitive the market can be to consumer concerns. Animal welfare issues are part of the marketer-consumer context.

My arguments may be suspect for opponents of New Jersey’s livestock rules. As a farm boy, meat eater, former cattle owner, and agricultural law professor—whatever that is—am I tainted by complicity in a lifestyle of cruelty and animal neglect? Maybe so, but doubters should also know I founded the local Slow Food convivium in Des Moines to help eaters ex-

perience the joys of food, sell produce to restaurants from our market garden, own many pets, freely criticize industrial agriculture, and advise small livestock producers seeking markets to support their practices. Rather than reduce the debate to narrow legal definitions like “inhumane” that are freighted with our own ideas of morality and ethics, it might be more effective to put the debate about livestock care into a larger context of social relations.

Consider two examples that question whether our perceptions of cruel and inhumane are more imagined than real. First is circumcising baby boys—done for health or religious reasons—something I experienced 54 years ago. I do not remember the event, but no doubt I cried, bled, and felt some pain. I cannot say I would like to do it again today, but does that make my parent’s decision cruel or inhumane? Should we outlaw the practice or require it be done under anesthesia—and if so local or general? Which treatment would threaten a baby’s health more? Who should decide? The second illustration is for law students. Remember the first day of class with a professor that used the Socratic method? Some may have thrived, but if you were like me you were terrified—at least at first. But you got used to it, you survived, and if the reasoning behind Socratic method can be trusted, it made you a better student and lawyer. Was it inhumane or cruel? Is it a legitimate teaching method—herd health management so to speak—or should it be outlawed or challenged as illegal under Michigan’s anti-hazing law? Whose standards should prevail—professors’ or student-rights activists’?

#### CONCLUSION

When I started attending the Association of American Law Schools (AALS) meetings we created an Agricultural Law section. In the mid 1980’s when the farm financial crisis threatened the lives and livelihoods of thousands of farm families, the section was lucky to attract ten colleagues to discuss helping farmers save their farms. At the same time the Animal Law section emerged and the size of their sessions grew. Agricultural law still struggles to attract twenty colleagues to sessions. At the 2008 New York meeting, our themes were the environment and alternative energy and in 2007, farmer-worker issues. Animal law has had far healthier growth and today is taught at many schools. In academia the rights of animals are apparently more attractive than those of farmers, eaters, or workers. The New York session “Debating Animals as Legal Persons” was packed. But a statement in the program description puzzled me—“No quintessentially ‘human’ characteristic definitively sets humans apart from other animals.” This seed sprouts the New Jersey litigation and our debate.

Think about it for a moment. Do you agree: have you ever been confused you were something other than a human or have you mistaken an animal as a human (regardless of how your dog might answer)? Of course not—there is a human essence that defines us all. But is the statement true, legally, or can we make it true? This incident is paralleled by another New Jersey story—the tragic tale of the landscaper, a human you might note, se-

verely mauled by an employer's dog. Under New Jersey law he recovered damages for the injuries but the dog was impounded and sentenced to die as a vicious animal. What has since unfolded illustrates our mixed, perhaps even misguided, attitudes about animal rights. The November 20, 2007, *New York Times* headline says it all, "A Landscaper is Mauled, and an Outpouring of Sympathy Goes to the Dog." Yes, we are animals too and in a legal democracy we can choose who we like more. But do we need to deny our humanity to promote animal rights? Perhaps those who rally for the dog are just saying landscapers and humans deserve our one bad day too. Animal welfare or animal rights—good luck bridging the divide.

# ANIMAL ETHICS AND THE LAW

*Bernard Rollin*\* †

## INTRODUCTION

Everyone reading this Article is doubtless aware of the woeful lack of legal protection for farm animals in the United States. Not only do the laws fail to assure even a minimally decent life for the majority of these animals, they do not provide protection against the most egregious treatment. As both a philosopher who has helped articulate new emerging societal ethics for animals, and as one who has successfully developed laws embodying that ethic—notably the 1985 federal laws protecting laboratory animals—I will stress the direction we need to move in the future to enfranchise farm animals. I have seen ethics inform law and law potentiate ethics—for example, when preparing my testimony before Congress in 1982 in defense of the laws mandating control of pain and suffering in laboratory animals, I found in a literature search only two papers on pain control, a telling indicator of the failure of the research community to practice pain control. Today there are somewhere between 5,000 and 10,000 such papers, and the practice of pain control has correlatively increased exponentially, all as a result of a legislative mandate. I also believe in the power of articulated societal ethics in effecting change—I was partly instrumental in convincing Smithfield to abandon sow stalls by ethical discussion with some of its senior executives. I will thus discuss the ethical basis of future laws.

## I. SOCIETY'S VIEW TOWARDS ANIMAL MISTREATMENT

Anyone attending to cultural history over the last three decades would note a crescendo of societal concern about animal treatment across the Western world. During this period, laws and regulations constraining the use of animals in a variety of areas including biomedical research and agriculture have proliferated worldwide. In the United States, two pieces of landmark laboratory animal laws passed in 1985 despite vigorous and powerful opposition from the research community, who publicized the claim that such laws would threaten human health. In the European Union, increasingly stringent regulations pertaining to both toxicological testing and animal agriculture have been promulgated (for example, sow stalls must be abandoned within a decade and in vitro cosmetic testing must replace animal testing). In

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Sweden in 1988, the Parliament passed, virtually unopposed, a law eliminating confinement agriculture (colloquially known as “factory farming”). Recent years in the United States have witnessed numerous examples of federal bills floated in Congress pertaining to animal welfare in areas as diverse as protecting marine mammals from tuna nets to preventing duplication in research. In 2003, some 2,100 bills relevant to animal treatment were introduced in state legislatures. Perhaps most notable was a successful California law making shipping horses for slaughter, or knowingly selling a horse to someone who will ship the animal to slaughter, a felony. A similar bill is now being pursued in Congress.

Historically both the laws protecting animals and the societal ethic informing them were extremely minimalist. In essence, they forbade outrageous neglect and deliberate, willful, sadistic, deviant, extraordinary, or unnecessary cruelty not essential for “ministering to the necessities of man,” as one court put it. This ethic is rooted in the Bible and in the Middle Ages, when St. Thomas Aquinas taught that animals were not direct objects of moral concern, but nevertheless presciently forbade cruelty to them. Aquinas warned that those who were cruel to animals would inexorably “graduate” to people, an insight buttressed by decades of research. Beginning in roughly 1800, anti-cruelty laws were codified in the legal systems of most western societies.

## II. FACTORS THAT DEMAND A NEW FRAMEWORK

If the anti-cruelty ethic and laws sufficed for most of human history, the question naturally arises as to why the past three decades called forth a demand for a new ethic and new laws. In contract research I undertook for USDA, I identified five factors:

*Demographics have changed, with consequent changes in the paradigm for animals.* At the turn of the century, more than half the population was engaged in producing food for the rest. Today only some 1.5% of the U.S. public is engaged in production agriculture. One hundred years ago, if one were to ask a person in the street, urban or rural, to state the words that come into their mind when one said “animal,” the answer would doubtless have been “horse,” “cow,” “food,” “work,” etc. Today, however, the majority of the population would give the answer “dog,” “cat,” or “pet.” Repeated studies show that almost 100% of the pet-owning population views their animals as members of the family. And virtually no one views them as an income source. Divorce lawyers note that custody of the dog can be as thorny an issue as custody of the children!

*We have lived through a long period of ethical soul-searching.* For almost fifty years, society has turned its “ethical searchlight” on humans that are traditionally ignored or oppressed by the consensus ethic—blacks, women, the handicapped, and other minorities. The same ethical imperative has focused attention on our treatment of the nonhuman world: the environment and animals. In fact, many leaders of the activist animal movement

have roots in earlier movements, such as civil rights, feminism, homosexual rights, children's rights, and labor.

*The media have discovered that "animals sell papers."* One cannot channel-surf across normal television service without being bombarded with animal stories, both real and fictional. (A *New York Times* reporter recently told me that more time on cable television in New York City is devoted to animals than to any other subject.) Recall, for example, the extensive media coverage a decade ago of some whales trapped in an ice floe and freed by a Russian icebreaker. It seems someone in the Kremlin realized that liberating the whales was a cheap way to win credit with U.S. public opinion.

*Strong and visible arguments have been advanced in favor of raising the status of animals by philosophers, scientists, and celebrities.*

*The mid-twentieth century met with precipitous change in animal use.* This is the most significant reason for the demand for a new ethic and new laws in anti-cruelty.

Traditionally society's major use for animals was agricultural—food, fiber, locomotion, and power. The key to agricultural success was good husbandry, which meant taking great pains to provide animals with the best possible environment one could find to meet their physical and psychological natures (which, following Aristotle, I call *telos*), and then augmenting their ability to survive and thrive by providing them with food during famine, protection from predation, water during drought, medical attention, help in birthing, and so on. Thus traditional agriculture was roughly a fair contract between humans and animals, with both sides benefiting from the relationship. Husbandry agriculture was about placing square pegs into square holes, round pegs into round holes, and creating as little friction as possible in doing so. Welfare was thus assured by the strongest of sanctions: self-interest. The anti-cruelty ethic needed only to deal with sadists and psychopaths unmoved by self-interest.

The rise of confinement agriculture—the application of industrial methods to animal production—broke this ancient contract. With technological "sanders"—hormones, vaccines, antibiotics, air handling systems, mechanization—we could force square pegs into round holes and place animals into environments where they suffered in ways irrelevant to productivity. If a nineteenth-century agriculturalist had tried to put 100,000 egg-laying hens in cages in a building, they all would have died of disease in a month; today, such systems dominate. At the same historical moment, animals began to be used on a large scale in research and testing, again causing new and unprecedented degrees of suffering.

The amount of suffering arising from these sources far outweighs suffering as a result of deliberate cruelty. Further, the anti-cruelty laws do not cover these new uses, and cannot generally fit anything like steel-jawed trapping, sow stalls, or toxicology, since these exemplify the aforementioned "ministering to human necessity," a concept reiterated in the 1985 case *Animal Legal Defense Fund v. The Department of Environment Conservation of the State of New York*, though some attorneys work valiantly to squeeze additional protection for animals out of them. Thus a demand is called forth for a new ethic.

## III. THE ROLE OF ANIMAL RIGHTS TALK

In Western societies, human ethics balances utilitarian considerations—greatest good for the greatest number—against concern for individuals by building “protective fences” around essential features of human nature; these fences are called rights. Rights are a moral/legal notion designed to save essential features of individuals’ human nature—e.g., the desire for free speech—from being stifled for the general welfare. The logic of this notion is being exported to animals—society wishes to assure that animals’ basic interests, flowing from their telos, are not lost. Society wants farm animals to live decent lives, and laboratory animals to have pain controlled.

Direct rights for animals are of course legally impossible, given the legal status of animals as property; to change this would require a constitutional amendment. Many legal scholars are working to elevate the legal status of animals, and I applaud it. Indeed, I argued for it in 1981 in my book *Animal Rights and Human Morality*. But the same functional goal can be accomplished by restricting the use of animal property. For example, the laboratory animal laws require pain and distress control, forbid repeated invasive uses, require exercise for dogs, etc. Further, some European laws have forbidden sow stalls.

This mechanism is the root of what I have called “animal rights as a mainstream phenomenon.” It also explains the proliferation of laws pertaining to animals as an effort to ensure their welfare in the face of historically unprecedented uses. Although some thinkers see no value in animal rights talk, I do, since that is how people *think*. For example, a *Parents* magazine survey conducted in 1990 found that 84% of the U.S. public believes animals have rights! I am thus very hopeful for the future of farm animal welfare, particularly with some 90 law schools having programs in animal law, attracting bright students who are animal advocates.

# THE ENVIRONMENTAL EFFECTS OF CRUELTY TO AGRICULTURAL ANIMALS

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## INTRODUCTION

Laws criminalizing animal abuse should apply to the agricultural industry. When we exempt the agricultural industry from these laws, factory farms increase production to unnaturally high levels. This increased production causes devastating environmental effects, such as climate change, water shortages, and the loss of topsoil. In light of these effects, the law needs to do much more to regulate the agricultural industry, and the first step should be to criminalize cruelty to agricultural animals. This would force the industry to slow down production to more natural levels that are much less harmful to the environment.

### I. FACTORY FARMS INCREASE PRODUCTION TO UNNATURALLY HIGH LEVELS

The agricultural industry has been incredibly successful at convincing legislatures and agencies to exempt farmers from regulation. These exemptions have an intuitive appeal because we envision a smalltime, sun-scorched farmer putting on his mud boots before sunrise to go milk the cows and check on his fields, just as numerous generations did before him. This type of farmer hardly seems like someone we need to regulate, so it is no wonder that society has chosen to exempt his activities. The problem, of course, is that the real beneficiaries of these exemptions are factory farms—the Wal-Marts of farming—that run animals through assembly lines in an ongoing effort to maximize production. Most smalltime farmers are already treating their animals well and therefore do not need an exemption from animal cruelty laws. For centuries before “free-range” became a marketing ploy, that was simply how it was done, and farmers took pride in caring for their animals.

Factory farms hire lobbyists and participate in agency rulemaking because they have by far the most to gain from an unregulated industry. Unlike smalltime farmers, factory farms often fail to treat their animals with even minimal amounts of care. They are notorious for cramming far too many

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animals into far too little space. Indeed, factory farms are often called confined animal feeding operations. In *The Emotional Lives of Animals*, Mark Bekoff notes that a friend of his in the industry describes the thought process as follows: “How many chickens can you get in a cage with Vaseline and a shoehorn?” To make matter worse, animals such as chickens are territorial: when you throw too many of them into the same small cage, they are likely to attack each other. Rather than provide birds with additional space, factory farms often debeak birds—an incredibly painful process that is done without the aid of any anesthetic. In this way, one cruel practice leads to another, and production continues to increase.

Regulation scares factory farms because their practices undoubtedly violate any definition of cruelty to animals. It is impossible to treat animals humanely in a business that refuses to consider the interests of animals. As Mark Bittman recently said in the *New York Times*, factory farms are only in the business of “[g]rowing meat” because “it’s hard to use the word ‘raising’ when applied to animals in factory farms.” Without an exemption from animal cruelty laws, factory farms might have to provide their animals with adequate space, medical care, and humane handling. If they have to treat animals as the sentient beings that they are, production will surely decrease—a result that factory farms are unwilling to accept.

## II. UNNATURALLY HIGH PRODUCTION LEVELS HAVE DEVASTATING EFFECTS ON THE ENVIRONMENT

While factory farms are keen on keeping production levels as high as possible, the rest of society would be much better off if we found ways to decrease production at these plants. Although increased production usually benefits the economy, it is problematic in an industry—such as factory farming—that externalizes many of its costs and contributes to numerous environmental problems that affect human health and welfare. The unnaturally high production rates of factory farms have devastating effects on the environment, including hastening climate change, creating water quality and quantity problems, and destroying topsoil.

Livestock on factory farms currently play an enormous role in the climate change crisis. A recent United Nations study found that livestock account for eighteen percent of all greenhouse gas emissions. In comparison, all of the cars, trucks, airplanes, and other modes of fossil-based transportation combined only account for thirteen percent of the world’s emissions. Much of the livestock pollution comes from methane—a greenhouse gas (emitted directly by cows and sheep) that is at least twenty times more potent than carbon dioxide. Just looking at methane alone, the 100 million or so cattle in the United States produce roughly the same amount of greenhouse gas emissions as an equal number of cars. Factory farms also create significant carbon dioxide emissions (as well as other air pollution) by shipping large quantities of feed and meat products back and forth across the country. In addition, factory farms are responsible for mass deforestation for pasture land and to grow feed for agricultural animals.

Deforestation is a major contributor to climate change because it releases the carbon dioxide that is stored in standing trees. While politicians debate over what to do to reduce car emissions, the agribusiness lobby has so far quelled any debate over increased regulation of their industry, even though regulating factory farms would go much further towards averting the climate change crisis.

Factory farms also pose a major threat to the most crucial natural resource of all—water. In recent years, many scientists have recognized that we are currently facing a severe shortage of usable water. The United Nations has deemed the situation a worldwide “water crisis,” and the western United States is one area that is quickly running out of water. Factory farms are contributing to this water crisis in numerous ways. To begin, their contribution to climate change also contributes to the water crisis, since warmer global temperatures lead to lower lake and river levels. In addition, factory farms feed their livestock vast quantities of corn, soy, alfalfa, and other crops that take enormous amounts of water to grow. In the United States, crop irrigation accounts for over eighty percent of the consumptive use of freshwater, and in many arid western states, the level increases to around ninety percent. Although some of those crops feed humans, a staggering amount (including between sixty and seventy percent of all corn and soybeans grown in the United States) feed livestock. When farmers only had a small amount of livestock—many of which could graze on grass—much of this feed was unnecessary. On factory farms, however, livestock are crammed into cement bunkers, where grazing on grass is impossible and where there are so many of them that they demand an enormous amount of feed (and all of the water needed to grow that feed). As with greenhouse gas emissions, these facts fail to enter the political debate, and politicians propose drastic measures—such as building pipelines to bring water from the Great Lakes to the southwest—rather than regulating factory farms.

Factory farms have similarly negative effects on water quality. Agriculture is the leading contributor to water quality impairment in the United States, and the meat industry is often the worst of the worst. Raising unnaturally high numbers of animals in confined areas creates a large quantity of waste that is often not treated properly before it enters our nation’s waterways. For instance, in *United States v. Sinskey*, a meat-packing plant’s decision to double the number of hogs it raised—and thereby create more waste than their wastewater treatment plant could handle—necessarily resulted in criminal violations of the Clean Water Act. *Sinskey* involved one of the rare instances where a factory farm was caught for its environmental violations. More frequently, the dumping of untreated—or improperly treated—waste goes undetected, to the detriment of our waterways and human health.

Factory farms are also destroying topsoil. As Tom Paulson recently reported in the *Seattle Post-Intelligencer*, the erosion of topsoil—at rates more than ten times the replacement rate—is “a global crisis” that threatens “the shallow skin of nutrient-rich matter that sustains most of our food and appears to play a critical role in supporting life on Earth.” According to Harvey

Blatt in *America's Environmental Report Card*, “a few inches of dirt is all that separates us from mass starvation.” Factory farms are thinning this precious layer of topsoil by demanding vast quantities of certain crops (like corn and soy) that can be used as feed for their livestock. To meet this demand, farmers often clear additional fields and use tilling techniques that erode topsoil. Millions of acres of land are farmed every year just to feed the livestock at factory farms, and, as a result, every year these fields are left with less topsoil.

### III. CRIMINALIZING CRUELTY TO AGRICULTURAL ANIMALS WILL HELP PROTECT THE ENVIRONMENT

Factory farming as we know it—and its devastating environmental effects—would not be possible if we were to criminalize cruelty to agricultural animals. That is why this multi-billion-dollar industry spends so many resources lobbying legislatures and agencies to leave their practices unregulated. As soon as government steps in and requires factory farms to treat their animals appropriately—for instance, by providing each animal with adequate space to roam—these farms will not be able to raise nearly as many animals. Production will thus decrease, which will mitigate the environmental damage wrought by factory farms. Fewer agricultural animals will necessarily translate to less methane and other greenhouse gas emissions, less water consumption and pollution, and less erosion of topsoil. These and other environmental benefits all flow directly from decreasing production on factory farms.

Critics of the idea of criminalizing cruelty to agricultural animals are sure to point out that decreased production will raise the cost of meat. For instance, free-range, grass-fed beef currently costs more than beef from factory farms. Of course, many consumers are willing to pay the extra money, especially since grass-fed beef is a more healthful choice (in part because it is often organic since grass grows quite well without fertilizers and pesticides, despite the beliefs of millions of lawn manicurists). Nevertheless, what about those who do not (or cannot) pay more for their meat? The answer in this case (and arguably with regard to organic, sustainably produced goods in general) is that any increase in price merely reflects the true cost of these products. Meat from factory farms is currently a highly subsidized product with an artificially low price. The billions of dollars in annual subsidies for corn, soy, and other crops that are used primarily as animal feed are essentially subsidies for factory farms because they decrease the cost of animal feed. The meat-packing industry (as well as the feed industry that supports it) also externalizes enormous environmental costs. Economists call these costs externalities because they are improperly excluded from an industry's assessment of its costs and the price it charges for its products. Companies like Tyson Foods and Cargill never pay for their contributions to the climate change, water, and topsoil crises. Nor do they pay for the pain they cause their animals by raising them in some of the most inhumane conditions imaginable. Economists call this situation a market failure. To

remedy this failure, the prices of meat products need to increase to reflect their true costs.

In addition to the direct environmental benefits that flow from criminalizing cruelty to agricultural animals, regulating factory farms in this way would also have more subtle environmental benefits. In particular, it would signal a move to a more ecologically sound view of the world. The current mistreatment of animals in factory farms is symbolic of the way humans interact with much of the natural world—namely, seeing everything as a resource for human use. This mindset is at the root of the destruction of wilderness areas and old growth forests, the extinction of countless species, the near depletion of much of the world's fisheries, the crises in climate change, water, and topsoil, and many other environmental catastrophes that will haunt future generations. If we can move beyond the idea that animals are nothing more than resources for human consumption—if we can force factory farms to treat animals humanely—then we will be moving in the right direction toward a more humble view of our place in the natural world, and our environment will benefit greatly.

#### CONCLUSION

Factory farms have devastating environmental effects, and we need to do much more to regulate this industry. The first step should be to criminalize cruelty to agricultural animals to slow down production and thereby decrease the environmental destruction wrought by factory farms. The animals will thank us, and it will create a much better future for humans as well.