

ANIMAL ETHICS AND THE LAW

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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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† Suggested citation: Bernard Rollin, Commentary, *Animal Ethics and the Law*, 106 MICH. L. REV. FIRST IMPRESSIONS 143 (2008), <http://www.michiganlawreview.org/firstimpressions/vol106/rollin.pdf>.

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.