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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.