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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.