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1-1-1995

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Recommended Citation

David Favre, Time for a Sharper Legal Focus, 1 Animal L. 1 (1995).

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ARTICLES

TIME FOR A SHARPER LEGAL FOCUS

By
DAVID FAVRE*

I have a modest personal tie to a prior group of students at Northwestern School of Law of Lewis and Clark College in that the editorial Board of their Environmental Law Review accepted and published my first law review article back in 1979, which coincidentally was on an animal issue.¹ I am pleased to now be invited, almost a generation later, by another group of Lewis and Clark students, to participate in the initiation of a new student journal, *Animal Law*.

I am also proud to be a part of the Animal Legal Defense Fund (ALDF).² This organization has sought to encourage the students at Lewis and Clark in their publication endeavor and is providing full financial support so that their enterprise may get started, but in the best of the tradition of American law journals, have left the development of the contents of this Law Review entirely in the control of the students. ALDF Vice President Richard Katz has served as the contact between ALDF and the student editors as this process of establishment has occurred over the past two years.

In the tradition of the prior students at Lewis and Clark, a substantial number of present students have focused upon what will be a cutting area of scholarship for the next generation of law students—animal related legal issues. In the 1970's the new area of jurisprudence was environmental law. In the 1990's there is a growing interest in animal issues. What is our ethical duty toward them? How ought we think about them? How should we act toward them? When should the legal system control the conduct of humans toward ani-

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¹ David Favre, *Wildlife Rights: The Ever-Widening Circle*, 9 ENVTL. L. 241 (1979).

² ALDF is a nationwide network of attorneys dedicated to improving the legal status of animals.

mals? While animals have long had a small place within our jurisprudence in the areas of cruelty laws and wildlife access, and more recently within the area of endangered species, new and broader issues are on the horizon. Within this volume of Animal Law, some of the issues addressed include: animal patenting, bear baiting, animal rights vs. freedom of religion, pet theft, and the U.S. Navy's dolphin research.

To focus on animal issues is not to suggest that human issues have been solved or are not important. But it is time to widen the scope of our societal vision and concern. Perhaps by reaching out beyond humankind, we will be more aware of the need for universal human rights at the same time. To argue for the recognition of the interests of animals can only be done in a context that presumes and promotes the recognition of the interests of the human animal.

The fledgling environmental movement of more than a generation ago faced vested economic interest and a public unaware of the concepts or rules of ecology. Likewise, those seeking to bring animal issues to the forefront must deal with significant economic interests and a public whose understanding of animals may be limited to experiences with the family pets and visits to the local zoo. Even though animals have been part of the world of humans from the beginning of recorded time, we still have ambiguous feelings about them. Should we idolize them, eat them, shoot them for sport, wear them as displays of wealth, admire them for grace and speed, or co-exist with them in a shared habitat? The legal system is equally ambiguous. The infliction of pain is usually illegal only if it is cruel, but how is cruelty to be judged?³ The same act of cutting a live animal with a knife may be illegal if done by the kid down the street, but legal if done in a college laboratory.

The present uncertainty within our society, and hence our legal system, about how to think about animals can be seen with several examples: the wolf "control program," the recently adopted referendum in Oregon dealing with the use of dogs while hunting bears, and the protection of nursing animals under the Marine Mammal Protection Act.

During the winter of 1994-95, the national nightly news shows displayed scenes of a wolf caught in a snare trap and an inept attempt to kill it by a state official who fired five times at the wolf's head. Under pressure from an outraged public, the Governor-elect of Alaska promised to stop it immediately upon taking office. Yet this infliction of pain and suffering is endemic in a country that allows trapping and predator control programs. What was unique was that someone recorded an event usually seen only by the killers of the animals. The activity captured on video was the natural result of a fully debated and adopted state program whereby the State of Alaska was actively killing wolves in order to assure the hunters of the state that there would

³ See DAVID FAVRE & MURRAY LORING, ANIMAL LAW 123-30 (1983).

be sufficient caribou to kill during the next hunting season. The new governor stopped the program in February of 1995.⁴

While the State of Alaska sought to kill the wolves of Alaska, our federal government was spending considerable time and money obtaining and reintroducing a handful of wolves into the Yellowstone National Park and the Bitterroot Mountains. This was being done as part of the wolf recovery program under the federal Endangered Species Act.⁵ A prime motivation for the reintroduction was to allow a primary predator to perform its functions for the herd animals of the area, the reverse of the position taken in Alaska.

In the 1994 general election in Oregon, the voters adopted a referendum which makes the use of dogs wearing telemetry collars, when hunting bears and cougars, illegal.⁶ Bear hunting itself continues to be legal, subject to regulation by the state wildlife agency. Notice the mixed signals this vote of the public sends the legal system. Presumably, notions of fairness and sportsmanship moved the public to adopt the referendum. To be chased by a pack of dogs for perhaps an hour or more before death by gunshot, exhaustion, or dog bites presents many negative images. But the more fundamental issue remains: why is it ethical, and therefore legally acceptable, for a human to kill a bear for recreation pleasure—with or without dogs? The chase is cruel, but death is not? Is it an issue of fairness? Can hunting with high powered rifles ever be considered fair? What about the ultimate issue of the death of an intelligent being?

As a final example of this legal and ethical dichotomy, consider the provision of the Marine Mammal Protection Act that prohibits the killing of seal pups before they are weaned from their mother's milk.⁷ A dollop of humanness for the young, perhaps, but veal calves, who might nurse as long as seven months if left to their own choices, are often removed from their mothers within the first day after birth and either taken immediately to a slaughter house or raised in crates for 12-14 weeks before being taken to the slaughter house. Why is it lawful in one case and illegal in another? All these examples suggest there is much to discuss, much to understand.

The key to the future legal development of this area will be the increased knowledge science is providing us about the nature of non-

⁴ Governor Tony Knowles canceled the state's wolf program Friday, calling it cruel and ineptly run, DET. FREE PRESS, Feb. 4, 1995, at 4A. The article reported that the state had set out 1,735 snare traps and killed 134 wolves over a two year program. See generally, *Alaska Halts Wolf-killing* ANIMAL PEOPLE Jan./Feb. 1995, at 1.

⁵ *Gray Wolves Await Release In the Rockies*, N.Y. TIMES, January 14, 1995, Late Edition - at Final, Sec. 1, p. 9, Col. 4, National Desk. The Secretary of the Interior can proceed with recovery programs for endangered species under 16 U.S.C. § 1533 (f).

⁶ See *Wildlife Ballot Initiatives Pass In Two States*, 15 ANIMAL'S AGENDA 1, 36 (1995).

⁷ 16 U.S.C. § 1372 (b) "[I]t is unlawful to import into the United States any marine mammal if such mammal was . . . (2) nursing at the time or taking, or less than eight months old." This provision was enforced in *Animal Welfare Institute v. Kreps*, 561 F.2d 1002 (D.C. Cir. 1977).

human animals. As with the environmental movement of the 1960's and 70's, one of the catalysts for change will be new information generated by the world of science. Within the past generation of science there has been generated more information about animals than was known in all of prior history. One example to consider is that of chimpanzees. Through the field research of Jane Goodall and others, we now understand that they operate in a complex social structure.⁸ Others have shown their ability to communicate and that they have self-awareness.⁹ What should we do with this information? Is their pain and suffering at the hands of humans of no ethical, and therefore no legal consequence? Should the law protect the ethical beliefs of those humans who are offended by such action? Should the criminal law protect them from lives in cages? Or, perhaps, should they have legal rights of their own?

This new information should provide a shift in the context for judging what is appropriate and, therefore, lawful conduct. Historically, such judgments were made solely in the context of human interests. In the case of the cruelty laws, this certainly is the starting point.¹⁰ At some point, concern for the interests of animals to be free from pain also arose. However, it is the human interest that continues to provide the context for judging legality. It is not the infliction of pain and suffering that is illegal, it is the unnecessary or cruel infliction of pain and suffering that is illegal. The qualifying words are judged in the human context rather than that of the animals that experience the pain and anguish. Perhaps it is time to broaden those interests that compose the legal context.

I am certain that these and other compelling issues will receive considerable attention in the coming issues of this new law review. There is much to learn, to discuss, to propose and to ponder. The Animal Law Review will be a key forum for this discussion. I urge everyone to read it and participate in the debate.

⁸ JANE GOODALL, *THE CHIMPANZEES OF GOMBE* (1986).

⁹ *Id.* at 9-14.

¹⁰ See David Favre & Vivien Tsang, *The Development of the Anti-Cruelty Laws During the 1800's*, 1993 DET. C.L. REV. 1, at 4-11 (fn 49) and 30-31 (1993).