



EATING THAT IS NOT SELF-DEFEATING

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reviewing

Josh Milburn

Just Fodder: The Ethics of Feeding Animals
(McGill-Queen's University Press 2022)

MILBURN'S *JUST FODDER* IS ABOUT the ethics of feeding or not feeding nonhuman animals. The word “just” in the title refers both to the perception that this is a trivial area of inquiry from a philosophical perspective, and the response that these questions are not insignificant, engaging as they do questions of justice (pp. 4-5). Milburn is correct to appreciate that the topic can be viewed in both ways, as the following story illustrates.

I was interviewed last year by a law student who was writing a humorous piece for the “diversions” section of the school newspaper about how he was told he was not allowed to feed geese on the law school’s lawn. I had actually been following the city of Toronto’s nine-month-long *Animal Bylaw* review process, which was asking whether there should be a prohibition on feeding wildlife in the city, with a proposed exemption for songbirds fed using bird feeders. I sent the student information about this, referring him specifically to a list of issues the city had posted which tilted

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towards discouraging such feeding, namely, concerns about animals becoming dependent on people who feed them, losing their natural fear of humans, and reproducing at rates resulting in overpopulation (which would increase the likelihood of diseases and parasites and to the animals themselves becoming a “nuisance” – never good for any kind of wild animal), and about feeding attracting other undesired animals. The student wrote in his article that he “discussed this issue with Angela Fernandez who is well known at our school for her work on animal-related issues. Unfortunately, she was on the administration’s side and cited concerns” like the ones I had sent him. About the songbird exemption, he continued,

[g]eese are obviously birds so all I need to do is teach them to sing
Now, that is putting my legal education to good use. Sure, I need to figure out which notes a goose can hit, but those are minor details. I bet they would also look great in little choir uniforms.¹

I am happy for animal law at the University of Toronto² to be promoted in any ways, including light-hearted ones. Yet the experience reminded me of the point I developed in my book on *Pierson v. Post* that “solemn foolery” is so often used, especially in the law, in connection with nonhuman animals. An issue of this sort can easily swing both ways, from serious to silly and back again, like the more widely known backyard hen issue, which Milburn discusses in his book.³

Milburn notes that the backyard chicken issue is contentious (p. 39). Last year the city of Winnipeg voted to abandon its pilot program for backyard hens, and the city of Toronto is currently in the process of reviewing its urban hens program.⁴ There are a lot of issues relating to back-

¹ Kyle MacDonald, *Justice for Geese*, ULTRA VIRES (Mar. 1, 2023), <https://ultravires.ca/2022/03/justice-for-geese/>.

² <https://www.law.utoronto.ca/focus-area/animal-law>.

³ See ANGELA FERNANDEZ, *PIERSON V. POST, THE HUNT FOR THE FOX: LAW AND PROFESSIONALIZATION IN AMERICAN LEGAL CULTURE* ch. 2 (Cambridge University Press 2018) (giving examples of modern solemn foolery and historical examples of works of literature with legal themes expressly dealing with hunting themes).

⁴ See *City of Toronto Seeks Public Feedback on Backyard Hens Pilot Program* (Jan. 30, 2023), *City of Winnipeg Votes to Abandon Backyard Hen Program But Upholds Pitbull Ban* (Apr. 28, 2022), and *City of Toronto Reviewing Pilot Program on Urban Hens* (Feb. 11, 2022), in Brooks Animal Law Digest, <https://thebrooksinstitute.org/animal-law-digest>.

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yard hens, not the least of which relates to Avian Bird Flu, which you would think people would take seriously as we come out of a pandemic connected to zoonotic disease. Moreover, few veterinarians in Toronto (or other major cities) are qualified to treat farm animals, so regular care and care in distress situations – which, face it, will happen with coyotes and foxes living in the city’s ravines and parks – will be difficult or impossible to find for chickens. Consider also how predictable it is that people will tire of keeping a “hobby” animal like a chicken and, especially once they stop producing eggs after a year or two, be tempted to “dump” them. Chickens are not likely to be valued as highly as other companion animals in a family, and we are currently facing an epidemic of dumped dogs from the “pandemic puppy boom.”⁵ Already taxed local rescues do not need those animals on their overloaded plates. Also, while killing chickens for food is illegal in Toronto, it would be impossible to guarantee that some would not end up on that kind of plate, with attendant animal welfare and public health concerns around what would effectively become backyard slaughter. This all seems utterly inappropriate to permit in a city setting.⁶

Yet many people are enchanted with the idea of backyard chickens. *New Yorker* writer Susan Orlean, for example, includes many delightful chicken stories in her 2021 book *On Animals*,⁷ where she explains in her chapter “The It Bird,” the role that Martha Stewart played in popularizing the hobby.⁸ Orlean tells how Stewart “showcased her flock of rare-bred chickens and their pretty pastel-colored eggs” in her first book, how they were often featured in her magazine, and how she even “introduced a beautiful paint collection, which was based on egg colors from her flock.”⁹ In her inimitable style, Orlean goes into the history of the trend, connecting it to “the postfeminist reclamation of other farmwife domestic arts – knitting, canning, quilting. Keeping chickens was a do-it-yourself hobby at a moment when doing things for yourself was newly appreciated as a dec-

⁵ *It’s Never OK’: Pets being abandoned in Rouge park at alarming rate, park staff warn*, CBC NEWS (Mar. 1, 2023).

⁶ See Scott Tinney, *8 Reasons Why Keeping Urban Hens is a Bad Idea*, ANIMAL JUSTICE (Mar. 1, 2023).

⁷ SUSAN ORLEAN, *ON ANIMALS* (Avid Reader 2021).

⁸ “The It Bird” was first published in *The New Yorker* September 28, 2009.

⁹ ORLEAN, *ON ANIMALS*, at 20-21.

laration of self-sufficiency.”¹⁰ Orlean includes a story later in the book about choosing which of her seven chickens she would take to the taping of *The Martha Stewart Show*, and her selection of Tookie, who, much to her relief, attacked neither Stewart nor the other chickens during filming of the episode.¹¹ There is also a contribution on the problems with roosters (for example, inadvertently getting a chicken you thought was a hen, which apparently happens a lot “because it’s very hard to tell the sex of a chicken until it’s fairly mature”) – not the crowing, which she herself finds “charming, and others (perhaps a majority) find not so charming,” but, in her case, a chicken named Laura, who turned out to be a very aggressive rooster.¹² Offering him for adoption on her online chicken group Orlean said was pointless as “surplus roosters [were] being offered there almost every single day.”¹³ “The world,” it turns out, “is filled with redundant roosters.”¹⁴

In an industry setting, male chicks are routinely disposed of in astonishingly cruel and inhumane ways, specifically, being ground-up alive or smothered in garbage bags. Both of these practices, standard in the egg industry, can be seen in the twelve-minute video by Mercy for Animals, *From Farm to Fridge*.¹⁵ For those who understand that getting eggs from factory-farm-raised animals involves untold misery for chickens, the backyard urban hen holds out the promise of “a protein source that didn’t involve killing anything.”¹⁶ This idea that one can have the animal product without getting “blood on one’s hands” – a phrase Milburn uses a lot (for example, p. 181) – plays out for him in the dilemma every vegan who owns a cat faces: cat food. Because (generally speaking) cats are carnivores and need the nutrients that are in meat, one of the solutions Milburn proposes for feeding them is to keep a backyard chicken, who has the status of a com-

¹⁰ *Id.* at 26.

¹¹ See “Chicken TV” and “Broadcast Chicken,” *id.* at 210-12.

¹² See “Crow,” *id.* at 214. Orlean later calls him a “sociopath.” See “Spring Chickens,” *id.* at 227.

¹³ *Id.* at 215.

¹⁴ *Id.* at 214.

¹⁵ Mercy for Animals, *From Farm to Fridge: The Truth Behind Meat Production*, at 2:22-3:1 (Mar. 1, 2023), <https://www.youtube.com/watch?v=THIODWTqx5E>.

¹⁶ ORLEAN, ON ANIMALS, at 25.

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panion animal (which apparently they are very lovely at being) and a multispecies family member.¹⁷ Feed the chicken their own eggshells (something I remember my grandmother doing with the backyard hens who lived in her suburban garden in England), along with other vegetable and grain matter, and feed the eggs to the cat (pp. 38-41). He has some other suggestions for cat food, including scavenging (“freeganism” dumpster diving or utilizing roadkill). He admits that it is difficult to see how these ideas can be scaled up as viable political solutions, or even, one might add, how they can be used as a sustainable individual solution given how much work they would involve. It is curious, however, that his discussion does not canvass *any* of the public health and other concerns around backyard hen-keeping, including the utterly predictable and foreseeable animal welfare concerns.

Milburn writes:

When I first started talking about the problem of carnivory in the mid 2010s, I was met with incredulous stares, frustration, and (literal) laughter when I proposed that we should be feeding plant-based diets to carnivores or making pet food out of insects and cultivated meat (p. 49).

There are problems with both of the later suggestions. Essentially, we do not know that insects or other “low ranking” marine animals like oysters, scallops, mussels, sponges, and jellyfish are not sentient, and cultivated meat, even if it can be made without using foetal bovine serum, is not yet commercially available in most places (see pp. 41-47). Singapore has recently approved a serum-free cultivated meat for sale, which would obviate the need to use the blood of fetuses extracted from cows during the slaughter process.¹⁸ Milburn canvasses the idea that consenting humans could donate cells to make cultivated meat, which would not be cannibalism if it were fed to cats (p. 43).

One can appreciate here the very real risk of derision. In a podcast talking about his book Milburn makes the very good point that “literal

¹⁷ TOVE DANOVICH, *UNDER THE HENFLUENCE: INSIDE THE WORLD OF BACKYARD CHICKENS AND THE PEOPLE WHO LOVE THEM* (Agate Surrey 2023).

¹⁸ See “*Good Meat*” *Receives Approval to Sell Cultivated Meat in Singapore*, Brooks Animal Law Digest (Jan. 18, 2023), <https://thebrooksinstitute.org/animal-law-digest>.

laughter” seems out of place when in his proposals about cat food he is “trying to remove the abject suffering of millions of animals who are killed for pet food, or, at least, whose killing contributes to pet food.”¹⁹ Yet that seriousness does not insulate it from mockery, or at least being faced with incredulity, especially if someone is hearing it for the first time. I encounter this all the time when I tell people I feed my dog vegan pet food, and I explain that dogs are omnivores like us.

Milburn’s discussion of the carnivory problem has an air of someone trying desperately to come up with a perfect solution, which frustratingly evades him. This tone and result persists in other chapters of the book, including Chapter Five, which takes on the challenge of the “burger vegan,” which, if you are not familiar with it, consists of the charge that vegans are increasing the problem of the number of small animals being killed in plant agricultural production by eating a large amount of plant-based food and they should actually eat some animals to save those small animals.²⁰ I would have thought that one could just point out, as Milburn does, that “intensively raised animals are themselves fed the products of arable agriculture” which also kills those small animals and so continuing to eat factory farmed animals is no solution to this problem (p. 112). Yet in order to present a more devastating defeat of the “burger vegan,” Milburn presses on to propose the use of large-scale vertical hydroponic farms, which could be designed to exclude agricultural “pests.” The “burger vegan” sounds like they are espousing the garden-variety objection I think all vegans hear from time to time, namely, that you should not bother because there is no way to be truly consistent and if you do persist you are being a hypocrite. In my experience this is usually coming from a person who does not want to do anything about their food choices and is feeling defensive about that; they are not really raising an objection that they believe in or care about. Yet Milburn devotes a lot of energy to the issue, which feels like it has been passionately debated in a pub over beer with carnist interlocu-

¹⁹ Josh Milburn on *Just Fodder: The Ethics of Feeding Animals Part 1*, Thought About Food (Aug. 17, 2022) (podcast).

²⁰ Milburn says that this person can also be referred to as a “new omnivore.”

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tors, probably annoyingly pointing out that the beer is not vegan, into the wee hours of the morning.²¹

Drawing on work by Lori Guren, Milburn acknowledges that being a perfect vegan is impossible (pp. 113, 129).²² As one of the characters in the hilarious yet terrifyingly near-real futuristic novel *The Venomous Lump-sucker* puts it, “You know what they say – ‘the only way to be truly vegan is to die.’”²³ And in a footnote, Milburn rules out “voluntary human extinction” (p. 194 n. 3) as a solution to the problem that we humans need food (p. 110). I find it difficult to take seriously the idea that because you cannot do something perfectly, you should not do anything at all. Yet, I can see why it enters into the discussion, as it is a position (an objection?) that one does bump into moving around out there in the overwhelmingly non-vegan world, and that people seem to use a lot to justify not changing any of their habits relating to animals and the environment.

The centerpiece chapter of Milburn’s book is about garden birds and whether it is acceptable to feed them (Chapter 4), and the image of a small sweet bird on a plate eating some bird seed graces the cover of *Just Fodder*. Milburn clearly feels pulled between following the injunction of Tom Reagan to leave wild animals alone (p. 148) and allowing himself the pleasure of interacting with a subset of animals whom Sue Donaldson and Will Kymlicka have classified as “liminal” (those who live with us but not as companion animals), and whom Milburn views as friendly “neighbours” (as opposed to other liminal animals such as rats and squirrels, who one probably would not want to hurt but also would not want to go out of one’s way to attract). Query into which category the law school geese land – my student saw them as the former (I’d like to share my sandwich crusts with them) and the university as the latter (do not feed them; more will come!). Racoons provide a similarly controversial example, especially in Toronto – where the racoon in a garbage can is an iconic image – as some people want to feed them but city leaders and those who have had to

²¹ See PETA, *Which beers are suitable for vegans?*, <https://www.peta.org/about-peta/faq/which-beers-are-suitable-for-vegans/>.

²² The work cited is L. Gruen and Robert C. Jones, *Veganism as an Aspiration* in BOB FISCHER AND BEN BRADLEY EDS., *THE ETHICAL COMPLEXITIES OF EATING MEAT* (Oxford University Press 2015) 153-71.

²³ NED BEAUMAN, *VENOMOUS LUMPSUCKER* 128 (Sceptre Books 2022).

clean up a lot of tipped green bins see them as a nuisance.²⁴ I argued that something like the same conflict was at play in *Pierson v Post*, where Post, the original hunter of the fox, saw the animal as an object of valuable recreational pursuit (to chase with his friends and dogs), and Pierson saw the fox as a pest and a threat to his agricultural family's interests (as both a stealer of chickens and an attractant to English-style fox hunting on their land) and therefore killed the fox on sight in an "unsportsmanlike way" (i.e., knowing that Post was already in pursuit).²⁵ These can be powerful, serious conflicts. As I wrote in my book, "no one who has read E.P. Tompson's classic *Whigs and Hunters* can doubt the tremendous social significance that can readily attach to hunted deer, hunting dogs, stolen horses, and poached rabbits."²⁶ Yet, at the same time, they are ripe for being made fun of, as the dissenting judge did in the *Pierson* case.²⁷ A case in point is the former mayor of Toronto John Tory referring mockingly, yet seriously, to the city's "war on racoons" and the role to be played by new green bins with racoon-resistant lids. Yet war is literally an utterly serious way of understanding how we treat nonhuman animals.²⁸

Milburn uses the idea of "hospitality" to distinguish between unwelcome liminal animals and those, like the sweet songbirds, whom we might extend a benefit to on occasion and be hospitable towards. That decision, he says, "cannot and should not bind us to a duty to provide for animals indefinitely" (p. 91). Cats, yet again, pose a problem here as one cannot put out birdseed and attract birds and then let one's cat prey on them. Milburn explains that "actively extending hospitality to both predator and prey concurrently" would be a failure "in our duties of hospitality to" the prey animal (p. 101).

The argument is really about whether *I* can put out some bird seed or some other food for liminal or wild animals, perhaps only from time to time; not what happens if *many* people start to do this and create problems

²⁴ See Paola Loriggio, Toronto wages war on Raccoon Nation, but experts say they're here to stay, Global News, globalnews.ca/news/1976391/toronto-wages-war-on-raccoon-nation-but-experts-say-the-animal-is-here-to-stay/ (May 3, 2015).

²⁵ See FERNANDEZ, *PIERSON V. POST*, at 54-59.

²⁶ *Id.* at 60.

²⁷ See *id.* at 45-51.

²⁸ See, e.g., DINESH WADIWAL, *THE WAR AGAINST ANIMALS* (Brill 2015).

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for humans living closely together in a city setting. It is the latter perspective that would be important for the making of law and policy, although obviously if I cannot do it (for a moral reason) then others should not either. However, just because it is morally permissible for me as an individual, does not mean it is a good idea for a city to permit it or not regulate against it. There are very real questions about the enforceability of such regulation given finite resources. In Toronto, for example, the idea to prevent cats from roaming free given how many birds and other animals they kill (and also to protect them from other predators, traffic, etc.) was rejected because it seemed like it would be impossible to enforce.²⁹ Yet these issues are not purely private decisions. Milburn's analysis frustratingly does not go beyond the question of personal moral permissibility. Where is the idea that even though it might be morally permissible for me to do it, perhaps I should not do it or should not encourage others to do so, even indirectly, if, for example, I am an Instagram influencer, or, let's just say it, Martha Stewart.

Milburn does widen the lens in the last two chapters of the book dealing with nonhuman animals in the wild, wild-animal-on-wild-animal predation, and wild animal starvation. Chapter Six argues that predators who are rescued and rehabilitated in wildlife rehabilitation centres should not be allowed to go back to the wild where they will continue to hunt and hurt or kill. This leaves "metaphorical blood on the hands of rehabilitation staff" (p. 137). That would leave rehabilitation centres keeping all their carnivores permanently, and along with them the cat food problem. It seems extremely unlikely these centres would have the resources to keep these animals, let alone try to feed them a plant-based diet or use one of the other options involving backyard chickens, dumpster diving, etc.

In Chapter Seven, Milburn argues that we might have an obligation to feed wild animals, including predators, especially if they are animals like polar bears, who have suffered from human-created climate change (see pp. 173-77). Milburn writes: "given the reality of climate change and the consequent struggles that wild animals face in acquiring food, it is increasingly difficult to maintain that we are not entangled with them in morally

²⁹ See Toronto City Council Adopts Amendments to the Animal By-law (July 20, 2022) and Toronto City Councilors Consider Banning Allowing Cats to Roam at Large (July 6, 2022), in Brooks Animal Law Digest, <https://thebrooksinstitute.org/animal-law-digest>.

salient ways” (p. 139; see also p. 172). I agree with him that this is going to be a big problem that will need to be dealt with in the not-too-distant future, if not now. Again the problem will be what to feed them – polar bears and orcas, for example – especially those who have been formerly kept in captivity and cannot feed themselves.

Milburn quotes the Latin maxim *de minimis non curat lex*, “the law does not concern itself with trifles” (p. 152). Yet even as a purely moral matter his purportedly “practical solutions” (p. 155) have an air of what he concedes is “unsatisfyingness.”³⁰ The fact that they also touch on areas of legal regulation is never mentioned. For example, Chapter Three deals with the moral duty to feed one’s companion animal; and nothing is said about the fact that there is already, in many jurisdictions, a legal duty to do just that. In Ontario, for instance, one has a legal obligation to prevent such an animal from being in distress, which would be caused by not having access to food and water.³¹ Just because something is illegal does not make it immoral; and certainly, just because is legal does not make it moral, as so much legal harm to animals demonstrates. However, one would think that the legal duty would be worth mentioning even if it does not mean it will be obeyed or a breach of it can be, or realistically will be, prosecuted.³² What about those who feel they have a legal right to keep chickens, not just that it is morally permissible for them to do it? Orlean, for instance, refers to successful legal challenges to anti-chicken-keeping laws in dozens of U.S. cities, which is evidence that what we are talking about is, in at least some jurisdictions, viewed as a “legal right” rather than a “morally ok” situation.³³ Perhaps the pub night discussions should have included a lawyer or two.

³⁰ Josh Milburn on *Just Fodder*, Thought About Food (podcast) at 1 hour: 16 minutes.

³¹ See, e.g., *Provincial Animal Welfare Act, 2019*, S.O. 2019, c. 13, § 15 (2), (Canada) (“No owner or custodian of an animal shall permit the animal to be in distress); s. 1(1) (“distress means the state of being, (a) in need of proper care, water, food or shelter”).

³² See ALICE CRARY AND LORI GRUEN, *ANIMAL CRISIS: A NEW CRITICAL THEORY* 36 (Polity Press 2022) (referring to the practice of dairy farmers starving male calves or killing them because with low demand for veal – ironically, for animal welfare reasons – it costs too much to pay for them to be transported).

³³ See ORLEAN, ON ANIMALS at 28 (including Cleveland, Missoula, Ann Arbor, Madison, South Portland, and Maine).

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I do not know if Milburn likes to go to pubs to defend veganism against those who would attack it and want to see it fail against an ultimately unattainable standard of perfection. This is pure speculation on my part. I think a good case can be made that despite the purely philosophical approach to these problems, Milburn has succeeded in making animal ethics concrete, in the form of “what do I say or do as a vegan when” These are very real situations that regular people (including vegan lawyers) might find themselves in and about which they might appreciate some philosophical assistance. Such concrete problems, as well as possible solutions, are very deserving of the philosopher’s direct, unflinching gaze, even if one can see that the solutions provided are, appropriately enough, far from perfect.

The point is that the ethical evaluation of problems involving the feeding of animals should extend beyond the blood that *any individual person* might have on their hands, recognizing that we influence others (our children, other family members, neighbors, students, and readers of our work – assuming there are some!) with our actions, and that policy for larger populations of humans needs to be, and will be, made. A libertarian might not be inclined to think much beyond themselves and what they should or should not be permitted to do.³⁴ However, a libertarian perspective is not going to work well (if it ever did for those outside the global 1%) in a time of climate crisis when there is a very strong argument to be made that everything has to be approached as interconnected. Solutions for an “I,” who might somehow manage not to get blood on their own hands, are not really solutions unless they are (i) realistic and (ii) society-wide (or at least community-wide). There is a real risk that putting them forward (especially if they are not realistic) creates more harm than good.

First, consider vegans who have managed to get their personal animal cruelty footprint, what we might call their “hoof” or “paw” print, down to a much better level than those who continue to eat meat. Jo-Anne McArthur and Keith Wilson report that the number of animals consumed in the lifetime of an average person who eats animal products in a developed country

³⁴ See New Books Network (Aug. 31, 2022) (podcast), <https://newbooksnetwork.com/> (at 1 hour, 13 minutes Milburn describes a future work about Robert Nozick, not identifying as a libertarian but arguing that there should be libertarian and right-wing approaches to animal ethics).

is 7,000, a significant number.³⁵ Those vegans whose diet saves all or part of those 7,000 should not feel they are failing because they do not solve the cat food problem or save all small animals killed in agriculture, whose deaths at the present time cannot be avoided. Milburn discusses in podcast interviews that he is not intending to point fingers or “finger-wag”;³⁶ however, that effect does not rely on his intention. It must be said that vegans do not need to take on the burden of answering the questions asked by non-vegans.³⁷ However, vegans who do find themselves in such conversations and who want to respond to, say, an aggressive “burger vegan,” should not be encouraged to do so with weak and unrealistic proposals. Moreover, people who want to be ethically oriented (or who at least want to appear to be) are quick to latch onto approaches like “how to have a cow and eat her too,”³⁸ which will justify in their own minds continuing to be meat-eaters (there is a similar problem with cultivated meat). Such solutions can, however, inadvertently lead to increased levels of meat-eating in a population that would otherwise (for social and cultural background reasons) be willing to go (or at least try to be) plant-based (at least some of the time). In that sense, Milburn’s argument risks being seriously self-defeating.



³⁵ JO-ANNE MCARTHUR AND KEITH WILSON, *HIDDEN: ANIMALS IN THE ANTHROPOCENE* 268 (We Animals Media 2020).

³⁶ See, e.g., *Josh Milburn on Just Fodder*, Thought About Food (podcast).

³⁷ See generally CAROL J. ADAMS, *LIVING AMONG MEAT EATERS* 2d ed. (Bloomsbury 2022).

³⁸ New Books Network podcast, *supra* note 35, at approximately 1 hour, 12 minutes (using this phrase in relationship to another book which will put forward a non-vegan solution to human eating, JOSH MILLBURN, *FOOD JUSTICE AND ANIMALS: FEEDING THE WORLD RESPECTFULLY* (forthcoming with Oxford University Press in 2023)).