



# The Regulation of Animal Welfare in Food Production

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## The Regulation of Animal Welfare In Food Production

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Submitted to Professor Peter B. Hutt

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*Abstract: This paper surveys the various ways in which we choose to regulate, or could choose to regulate, the treatment of animals in food production. "Regulation" is broadly defined to encompass any systematic initiatives, public or private, that aim to affect the treatment of farmed animals. After offering a brief survey of the husbandry practices common in modern agriculture, and presenting evidence that our current system is too dependant on free-market principles, this paper goes on to consider several methods of regulating this sector: the regulation of advertising, the regulation of product labeling, the enactment of general welfare standards, and specific-practice legislation. For each of these categories, both current and potential regulatory initiatives are considered, and some analysis of the costs and benefits of each alternative approach is offered. I conclude that an absence of consumer deception regarding the treatment of the animals used to produce their food products should provide a baseline standard for regulation, although possibilities for regulation moving significantly beyond this baseline are considered.*

*Whenever people say “We mustn’t be sentimental,” you can take it they are about to do something cruel. And if they add “We must be realistic,” they mean they are going to make money out of it.*

*~Brigid Brophy*

By and large, modern American farmed animals live very rough lives.<sup>1</sup> The widespread industrialization of the agricultural sector over the last half-century<sup>2</sup> may have provided us with food that is cheaper,<sup>3</sup> more plentiful,<sup>4</sup> more appetizing,<sup>5</sup> and perhaps more nutritious,<sup>6</sup> but it has done so at great cost to the animals that constitute the “units of production” in the industry.

Some people consider this a triviality: since these animals are not human,<sup>7</sup> their suffering is thought beneath our concern.<sup>8</sup> Most persons, however, recognize that animals can indeed suffer,<sup>9</sup> and that such suffering

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<sup>1</sup>See generally Haas, Samantha J., *How We MisTreat the Animals we Eat* (2001) (Food & Drug Law Electronic Book, [http://www.law.harvard.edu/faculty/hutt/book\\_index.html](http://www.law.harvard.edu/faculty/hutt/book_index.html)).

<sup>2</sup>See ERIK MARCUS, MEAT MARKET: ANIMALS, ETHICS, AND MONEY 7-9 (2005). For example, “[b]etween 1905 and 1980, the number of U.S. farms with dairy cows fell 92 percent, from 3.65 million to 278,000,” even as output increased dramatically. *Id.* at 9. Similar consolidation occurred in virtually every sector of animal agriculture. *Id.* at 8-9.

<sup>3</sup>Between 1950 and 2000, the Consumer Price Index rose from 24.1 to 172.2, which implies an increase in the general price level of approximately 614% over that period. See <ftp://ftp.bls.gov/pub/special.requests/cpi/cpi.txt>. Over roughly the same period, milk prices rose by about 350%, while the price of eggs or chicken meat has not even doubled. Markus, *supra* note 2, at 7.

<sup>4</sup>For example, the total pounds of red meat (beef, veal, pork, lamb and mutton) slaughtered annually in the U.S. has grown steadily from 37,323 million in 1973 to 43,208 million in 1997. See <http://usda.mannlib.cornell.edu/usda/usda.html>.

<sup>5</sup>As the agricultural sciences have progressed since the mid-20<sup>th</sup> century, the consistency and quality of meat products have improved significantly. See, e.g., <http://agbu.une.edu.au/~aaabg/absfull.html> (noting advances in agricultural sciences driving improvements in meat quality).

<sup>6</sup>Increased availability of cheap meat and dairy products does provide a ready source of nutrition for consumers. See, e.g., [http://www.pueblo.gsa.gov/cic\\_text/food/food-pyramid/main.htm](http://www.pueblo.gsa.gov/cic_text/food/food-pyramid/main.htm) (USDA food pyramid recommending 2-3 servings of dairy and 2-3 servings of meat or other proteins every day). Note, however, that the increased availability of cheap meats may actually be making us healthier: there is considerable evidence that the average American diet is far too focused on meat products. See e.g. <http://www.planetark.com/dailynewsstory.cfm/newsid/26079/story.htm> (noting research by American Institute for Cancer Research concluding that more than 70% of Americans include too much meat and fat in the diets and too few vegetables).

<sup>7</sup>This is a rather artificial divide, of course: animals may in fact not be human, but all humans are indeed animals. For convenience, I will use the term animals to mean only non-human animals.

<sup>8</sup>This thinking can be traced back at least to Aristotle, who argued that animals were lesser beings since they lacked a human “rational soul.” See GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 37 (1995).

<sup>9</sup>As the philosopher Peter Singer argues:

should be prevented to whatever extent possible, at least where this can be done without sacrificing important human goals.<sup>10</sup> And whatever one's personal views are on the matter, this sentiment has been codified in animal anti-cruelty laws in all 50 states<sup>11</sup> (along with the rest of the developed world).<sup>12</sup> Thus, we have made the societal judgment that unduly cruel behavior towards animals is simply unacceptable, one's personal opinions on the matter notwithstanding.<sup>13</sup>

Of course, if there *is* something wrong with unnecessary cruelty to animals, then something is *very* wrong indeed.<sup>14</sup> It is hard for many people to grasp the sheer enormity of modern animal agriculture: while there

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Nearly all the external signs that lead us to infer pain in other humans can be seen in other species, especially the species most closely related to us—the species of mammals and birds. The behavioral signs include writhing, facial contortions, moaning, yelping or other forms of calling, attempts to avoid the source of the pain, appearance of fear at the prospect of its repetition, and so on. In addition, we know that these animals have nervous systems very like ours, which respond physiologically like ours do when the animal is in circumstances in which we would feel pain: an initial rise of blood pressure, dilated pupils, perspiration, an increased pulse rate, and, if the stimulus continues, a fall in blood pressure. Although human beings have a more developed cerebral cortex than other animals, this part of the brain is concerned with thinking functions rather than with basic impulses, emotions, and feelings. These impulses, emotions, and feelings are located in the diencephalon, which is well developed in many other species of animals, especially mammals and birds.

Peter Singer, *Do Animals Feel Pain?* (available at <http://articles.animalconcerns.org/ar-voices/archive/pain.html>). In claiming that animals “suffer,” I simply mean that they feel pain, not that they experience any sort of existential angst regarding their situations.

<sup>10</sup>Survey results by the Opinion Research Corporation of Princeton, New Jersey, indicate that 93% of US adults agreed that farm animal pain and suffering should be reduced as much as possible even though the animals are going to be slaughtered anyway. In addition, 90% of adult Americans “disapprove of current methods of raising food animals in spaces so confining that sows and calves can't even turn around and that laying hens are unable to stretch their wings,” and “91% think the US Department of Agriculture should be involved in protecting farm animals from cruelty.” See *AWI Quarterly* Fall 1995, Volume 44, Number 4 (available at <http://www.awionline.org/farm/issues.htm>).

<sup>11</sup>See, e.g., 272 M.G.L. § 77 (prohibiting the infliction of “unnecessary cruelty” upon animals in Massachusetts); see also *infra* note 176 and accompanying text.

<sup>12</sup>See generally Paige M. Tomaselli, *International Comparative Animal Cruelty Laws*, Mich. St. U.-Detroit Coll. L. (2003) (available at <http://www.animallaw.info/articles/ddusicacl.htm>) (noting protections offered by statutes like the “European Convention for the Protection of Animals for Farming Purposes,” the “European Convention for the Protection of Animals During International Transport,” and the “European Convention for the Protection of Animals for Slaughter”).

<sup>13</sup>But see *infra* note 180 and accompanying text (noting that 30 U.S. states explicitly exclude farmed animals from their anti-cruelty statutes). In many U.S. states, although an individual cannot legally subject a pig or cow to an “unnecessary” level of cruelty, a farmer legally can.

<sup>14</sup>Indeed, if one becomes convinced that our treatment of animals is truly unacceptably cruel, it is obviously such an *enormous* problem that even continuing to interact normally in society may become difficult. Nobel laureate J.M. Coetzee expresses this sentiment:

Seven o'clock, the sun just rising, and he and his mother are on the way to the airport.

“I'm sorry about Norma”, he says. “She has been under a lot of strain. I don't think she is in a position to sympathize. Perhaps one could say the same for me. It's been such a short visit, and I haven't had time to make sense of why you have become so intense about this animal business.”

She watches the wipers wagging back and forth. “A better explanation,” she says, “is that I have not told you why, or dare not tell you. When I think of the words, they seem so outrageous that they are best spoken into a pillow or into a hole in the ground, like King Midas.”

“I don't follow. What is it you can't say?”

are an estimated 60 million dogs living in households across the United States, well over *nine billion* animals are now being run through America's slaughterhouses *every year*.<sup>15</sup> Let that number sink in for a minute. If we aim to protect our animals from undue suffering, which our laws suggest we do,<sup>16</sup> surely we make a mockery of our principles if we remove farm animals from our calculation. And if we are not preventing the mistreatment of these creatures, any successes in discouraging the abuse of other animals must be regarded as mere triviality against an annual backdrop of *nine billion* failures.

This paper is not principally concerned with how cruelly farmed animals are treated, however, or with justifying the assertion that such cruel treatment is improper.<sup>17</sup> Instead, it is concerned with critically examining the various ways in which farm animals' treatment is currently regulated (or could be regulated). Obviously if one believes that animal's screams are only akin to the squeaks of "broken machinery,"<sup>18</sup> then a complete absence of regulation is probably preferable. Moving beyond that point, however, we can ask: if the need for some regulation of agricultural animal welfare is accepted, what type of system should be created? Should we incorporate our welfare laws into our administrative state, issuing substantive standards for humane treatment, or should we leave the decisions in the hands of private actors, trusting our market

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"It's that I no longer know where I am. I seem to move around perfectly easily among people, to have perfectly normal relations with them. Is it possible, I ask myself, that all of them are participants in a crime of stupefying proportions? Am I fantasizing it all? I must be mad! Yet every day I see the evidences. The very people I suspect produce the evidence, exhibit it, offer it to me. Corpses. Fragments of corpses that they have bought for money.

"It's as if I were to visit friends, and to make some polite remark about the lamp in their living room, and they were to say, 'Yes, it's nice, isn't it? Polish-Jewish skin it's made of, we find that's best, the skins of young Polish-Jewish virgins.' And then I go to the bathroom and the soap wrapper says 'Treblinka-100% human stearate.' Am I dreaming, I say to myself? What kind of house is this?

"Yet I'm not dreaming. I look into your eyes, into Norma's, into the children's, and I see only kindness, human-kindness. Calm down, I tell myself, you are making a mountain out of a molehill. This is life. Everyone else comes to terms with it, why can't you? *Why can't you?*"

J.M. COETZEE, *THE LIVES OF ANIMALS* 68-69 (Any Gutmann, ed., Princeton University Press 2001) (1999).

<sup>15</sup>See Marcus, *supra* note 2, at 5.

<sup>16</sup>See *supra* note 11 and accompanying text.

<sup>17</sup>Indeed, throughout this paper I refer to "cruel" or "inhumane" farm practices not under any pretense that these are objective assessments, nor even to signify my own moral conclusions, but solely for convenience: the phrase "practices considered to be 'cruel' or 'inhumane' by some segments of the population," though perhaps more objectively accurate, is far too clumsy for continual iteration.

<sup>18</sup>Descartes, believing animals to be incapable of suffering, is reported to have compared their cries during vivisection experiments to the noises exuded by "broken machinery." See Francione, *supra* note 8, at 38.

system to provide the correct answers? Once the debate becomes centered around these types of inquiries, the analysis becomes much more nuanced, and the type of regulation we might ultimately prefer will depend on our answers to a host of further questions, such as: how many resources do we want to devote to this goal?, how much are we willing to sacrifice to achieve our goals?, do we trust the government or private parties to better police and enforce our goals?, and, by the way, what are our goals exactly?<sup>19</sup> And, given that we are discussing a change in the current legal structure, what regulatory methods could most credibly gain the political support necessary for implementation?

Before attempting to analyze the various regulatory treatments of welfare protections, Part I first offers a brief glimpse of the conditions under which many animals live in modern agriculture. There is simply no way to comprehend the various proposed solutions without having at least some knowledge of the perceived problem. Next, Part I offers evidence to suggest that there is genuine public concern over these practices, despite the fact that they remain the prevailing market standards. Having staked out the extent of consumer concern, Part II turns to the heart of my analysis, which is an examination of the potential solutions to these concerns. To provide a baseline from which to compare the various regulatory models considered, Part II first discusses the current regulatory environment, which is more or less an absence of regulation.<sup>20</sup> Part II then discuss each of the major regulatory models in use today, and offer suggestions for how these programs could be tailored to better achieve their main objectives. Welfare regulations can be classes in various ways,

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<sup>19</sup>The ultimate goals of various advocates for farm-animal-welfare reforms differ markedly. Some are concerned simply with human health (or environmental) risks, most prominently the threat of Bovine Spongiform Encephalopathy (BSE or “Mad Cow Disease”). See <http://www.fda.gov/oc/opacom/hottopics/bse.html>. Others seek to protect animals in order to cultivate and preserve a sense of compassion among the human population. See, e.g., MATTHEW SCULLY, DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY (St. Martin’s Press) (2002) (arguing for radically increased protection for animals based on traditional Catholic principles of mercy and compassion). Some advocates seek to end the “abuse” of animals, while maintaining our traditional uses of them; still others want to eliminate the property status of animals and end their “exploitation” by humans altogether. See, e.g., TOM REGAN, THE CASE FOR ANIMAL RIGHTS (University of California Press) (1985).

<sup>20</sup>Animal agriculture is regulated, but almost solely with human health in mind. From the standpoint of animal welfare, it is a nearly unregulated field. See *infra* notes 81-83 and accompanying text.

whether by source (consumer, industry, or state) or by method (prohibitions against fraud vs. substantive prohibitions). Each of these regulatory models offers its own unique costs and benefits, and the solution that proves best for ultimate adoption will obviously depends on how society weighs the values inherent in these various costs and benefits. Finally, Part III offers concluding remarks.

## **PART I: Our Farms and Our Food**

Many people give little thought to the way their food is treated before slaughter. People are vocal in their concern for the *safety* of the food supply,<sup>21</sup> but by and large don't seem too anxious about the *humaneness* of the food supply. Some no doubt take this to mean that the humaneness of the food supply is simply not a significant public concern, and ought therefore not be something that worries regulators. More likely, however, it is not that people do not *care* about the humaneness of the food supply – it is simply that many of them have never stopped to think about it. Once the realities behind our modern food supply, however, many people become deeply concerned.<sup>22</sup>

### **Life on the Modern Farm**

Before an examination of the potential methods for regulating farm practices is possible, it is essential to

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<sup>21</sup>See “Statement of Bernard A. Schwetz, D.V.M., Ph.D., Acting Principal Deputy Commissioner, Food and Drug Administration, before the Committee on Governmental Affairs, Subcommittee on Oversight of Government Management, Restructuring, and the District of Columbia” (Oct. 10, 2001) (available at <http://www.fda.gov/ola/2001/foodsafety1010.html>).

<sup>22</sup>It is not uncommon for consumers to express outright shock when they first encounter the details of modern animal farming. Anecdotally, many animal rights supporters I have encountered have claimed that their own choices were motivated by initially encounters with the details of the animal agriculture industry. See also <http://www.vegfamily.com/why-vegan/> (containing scores of testimonials of vegans explaining their rationales for ceasing to eat animal products, the majority of whom relate their first encounters with the realities of modern agriculture as their turning points). Obviously, this point cannot be pushed too far: a great many people who know the details of modern farming express no discomfort with the situation.

understand the characteristics that describe life on the typical modern farm. Detailed presentations of these conditions abound,<sup>23</sup> so here I offer only sketch enough to give some sense of reality to the uninformed.

Chickens are thought by some to be the most cruelly mistreated animals in modern agriculture.<sup>24</sup> Two types of chickens are raised: “broilers” and “layers.”<sup>25</sup> “Broiler” chicken are raised and sold for their meat, while “layer” chicken are kept mainly for their eggs.<sup>26</sup> Due to their popularity with consumers, over eight *billion* chickens are now slaughtered every year in the United States, making them by far the most consumed animals in this country.<sup>27</sup> Broiler chickens are raised in cramped conditions,<sup>28</sup> and are slaughtered at only seven weeks of age.<sup>29</sup> In addition, neither federal nor typically state law regulates the slaughter of chickens in any way.<sup>30</sup>

Layers have it even worse: the overwhelming majority of laying chickens spend almost their entire lives in “battery cages” - cages so small and crowded that the birds are unable even to stretch their wings freely.<sup>31</sup> Their beaks are seared off so they don’t peck each other to death, a chicken’s natural defensive response to such an unnaturally overcrowded condition.<sup>32</sup> When their “production” falls (egg-laying declines), they are commonly subject to “forced-molting”: a period of starvation for one to two weeks designed to shock their bodies into molting and thereby increasing egg yield.<sup>33</sup> As they are of no use to the layer industry, male

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<sup>23</sup> See, e.g., Marcus, *supra* note 2, at 15-48.

<sup>24</sup> *Id.* at 22.

<sup>25</sup> The terms “broilers” and “layers” are designations adopted by industry. “Broilers” and “layers” are not different species, but they are very distinct creatures due to aggressively selective breeding. See U.S. Poultry and Egg Association (<http://www.poultryegg.org/>).

<sup>26</sup> See *id.* Layers are slaughtered for their meat after their useful laying life, but their meat is considered vastly inferior and as such is only used in pet foods, TV dinners, and other low-grade processed products. Marcus, *supra* note 2, at 21.

<sup>27</sup> 8.284 billion “broiler” chickens were slaughtered in the U.S. in the year 2000. See USDA Agricultural Statistics, 2003, at VIII-36 (table 8-53).

<sup>28</sup> The typical broiler house has less than 1 square foot of space for each chicken. Marcus, *supra* note 2, at 23.

<sup>29</sup> *Id.* at 22.

<sup>30</sup> See *infra* notes 178-86 and accompanying text.

<sup>31</sup> See Marcus, *supra* note 2, at 18.

<sup>32</sup> *Id.* at 16-18.

<sup>33</sup> *Id.* at 21.

chicks are all killed shortly after birth, by gassing (in the best case) or grinding or suffocation (in the more common cases).<sup>34</sup>

Pigs are thought by some to be second only to chickens in the level of mistreatment they endure, and over 120 million hogs are killed every year in US slaughterhouses.<sup>35</sup> Pigs are extraordinarily intelligent creatures: researchers have noted their personalities rival those of domesticated dogs.<sup>36</sup> Yet most spend their lives in steel pens inside large, dark warehouses.<sup>37</sup> Particularly disturbing are the commonly used “gestation crates,” in which sows are strapped for weeks to concrete floors so their piglets can nurse – a necessity created by their lack of both space and nesting material.<sup>38</sup>

Like chickens, modern cattle come in essentially two varieties: dairy cattle and beef cattle. Dairy cattle are routinely overworked: average cows produce about four times as much milk annually as they did only 25 years ago, a increase made possible through selective breeding and heavy hormone dosages.<sup>39</sup> This has not come without a price: nearly a third of modern dairy cows are estimated to suffer from crippling mastitis, an infection of the udders caused by overproduction of milk.<sup>40</sup> This, combined with their annual

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<sup>34</sup>*Id.* at 16.

<sup>35</sup>In 2002 the USDA estimates that 123,677,000 pigs were slaughtered in the United States. See [www.usda.gov/nass/pubs/stathigh/2003/tables/livestock.htm#hprcpt](http://www.usda.gov/nass/pubs/stathigh/2003/tables/livestock.htm#hprcpt).

<sup>36</sup>See “This Little Piggy has Depression,” Independent UK (February 16, 2005) (available at [http://www.sentientbeings.org/science\\_piggy.htm](http://www.sentientbeings.org/science_piggy.htm)).

<sup>37</sup>In describing the situation, Matthew Sculley notes that pigs seem to have disappeared from the landscape of North Carolina: There are so many factory farms around here that they are easy to miss. I doubt the average visitor just passing through even knows what they are, any more than the airline passenger descending into Raleigh knows that inside each one of those barrack-like structures scattered below are four or five hundred animals never let out. Exactly identical, differing only in the number of long, drab, concrete and metal buildings that make up each of the state’s thirty-four hundred or so hog farms, these places seem by design to repel any natural human interest or curiosity. . . . Ten million pigs, more than the state’s human population, and you can travel North Carolina end to end without seeing a single snout except through the grating of those triple-decker trucks constantly rumbling by.

Scully, *note* 19, at 247-8.

<sup>38</sup>See Marcus, *supra note* 2, at 27-30.

<sup>39</sup>See <http://www.goveg.com/feat/ns-welfare.html>.

<sup>40</sup>See “Heifer Mastitis: Why Parturition Udder Health Matters” (available at <http://www.usjersey.com/Reference/HeiferMastitis.pdf>). The article notes:

The high prevalence of mastitis in the heifer population was relatively unknown until a study conducted by Dr. Stephen Nickerson, at that time on the faculty at Louisiana State University, was published in 1995 in the *Journal of Dairy Science*.

impregnations,<sup>41</sup> is very hard on their systems: most dairy cows are “exhausted” and sent to slaughter far before their natural lifespan should be complete. In fact, dairy cows represent the majority of the “downed cows” at the slaughterhouses – their bodies are often simply so exhausted that they are unable to walk to their deaths.<sup>42</sup>

Beef cattle live reasonably well, at least compared to many other farm animals. Most are still raised outdoors, with ample room to graze.<sup>43</sup> Of course, their lives are still far from ideal: their horns are seared off, and they are branded and castrated without anesthesia.<sup>44</sup> In addition, they often spend the last portion of their lives in crowded feedlots, which is also where they commonly consume their notoriously unnatural diets.<sup>45</sup>

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Scientists from the LSU Hill Farm Research Station collected milk samples from 116 pregnant and unbred Jersey heifers from four herds. Nickerson detected bacterial infections in an overwhelming 97% of the heifers and 75% of the quarters sampled. Signs of clinical mastitis were found in 29% of the heifers and 15% of the quarters. Subsequent studies have produced similar findings regarding the incidence of heifer mastitis.

*Id. at 1.*

<sup>41</sup>Cows, like other mammals, must give birth in order to lactate. Most large dairy farms artificially inseminate their cows annually. See Marcus, *supra note 2*, at 35. The calves created by this process serve two purposes: females are generally kept by the farmers to replenish their dairy herds, while male calves are generally sold for veal production. Veal operations have been a focus of many animal rights activists since the movement first began gaining national attention in the 1970s. *Id. at 37*. Many perceive them as particularly barbaric: before being slaughtered at only 13 weeks of age, the calves are deliberately raised on an iron-deficient diet (to create the prized “pale” coloring in their meat), and are often raised in individual stalls (“veal crates”) so small and narrow they are unable even to turn around. See *generally id. at 37-8*.

<sup>42</sup>See <http://www.veganpeace.com/animal.cruelty/CowsCruelty.htm>. The treatment of downed cattle has created a significant degree of public concern, in significant part because of its perceived ties to the spread of mad cow disease. See <http://www.nodowners.org/index.successes.htm>. Perhaps in response to public pressure, perhaps out of its own humanitarian or health concerns, even the cattle industry seems now to recognize that common treatments of downed cows are problematic, although no industry-wide solutions have been adopted for their treatment. See <http://www.nodowners.org/index.successes.htm>. For public health reasons, the USDA banned their introduction into the food supply in late 2003. See “Downer Cows Banned As Food,” CBS News (Dec. 30, 2003) (available at <http://www.cbsnews.com/stories/2003/12/31/health/main590842.shtml>). In April 2005, the Bush administration indicated that it may seek to reverse this ban. See Randy Fabi, “Bush Administration May Ease ‘Downer Cattle’ Ban,” ABC News (April 15, 2005) (available at <http://abcnews.go.com/Health/wireStory?id=673756>).

<sup>43</sup>See Marcus, *supra note 2*, at 38-39. It is worth remembering that the freedom and space these cattle are raised with comes at a high expense for taxpayers: cattle grazers are the recipients of extraordinarily generous federal subsidies, including most prominently the rental of vast swaths of government land to grazers at far-below-market rates. See *id. at 39-40*.

<sup>44</sup>*Id. at 41-43*.

<sup>45</sup>In addition to the rampant use of hormone implants, feedlot cattle are fed high-protein diets consisting in part of the remnants of other farmed animals. See Michael Gregor, M.D., “USDA Misleading American Public about Beef Safety” (2003) (available at <http://www.organicconsumers.org/madcow/Greger122403.cfm>). This has led to fears of spreading Mad Cow disease. Although “both Canada and the United States banned the feeding of the muscles and bones of most animals to cows and sheep back in 1997, . . . blood is currently exempted from the Canadian and the U.S. feed bans. You can still feed calves cow’s blood collected at the slaughterhouse. In modern factory farming practice calves may be removed from their mothers immediately after birth, so the calves are fed milk replacer, which is often supplemented with protein rich cow serum.” *Id.*

Of course, a great variety of animals besides chicken, swine, and cattle are raised for food in the US: turkey is one of the most prominent examples.<sup>46</sup> And then there are smaller, specialty markets, one of which deserves special mention: *foie gras*. *Foie gras* – swollen goose liver – is a French delicacy that is simply impossible to create in a humane way. The birds’ livers must be swollen far beyond their natural size, which is only possible through aggressive force-feeding. This is generally accomplished by shoving a feed tube down the goose’s throat several times per day, and pumping in far more food than the goose would naturally eat (or can comfortably tolerate). This gorging (over a four week period) overwhelms the goose’s liver, which swells up 6 to 10 times its normal size before being “harvested” as *foie gras*.<sup>47</sup>

The reason this “delicacy” deserves special attention is not just due to the cruelty involved, which may not surpass that which many farm animals endure. What makes *foie gras* remarkable is how starkly it emphasizes the complete amorality of the agricultural market: animals can be forced to endure *any* suffering for *no* reason other than pure palette preference. In contrast to other commonly-cited-as-cruel practices such as veal production, there is *no* economic justification for the production of *foie gras*, other than the simple fact that some consumers are willing to pay a premium to eat it.<sup>48</sup>

Note that animals aren’t the only ones suffering on modern farms: workers in slaughterhouses are among the most exploited in the nation,<sup>49</sup> and entire communities must bear the burden of the environmental damage

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<sup>46</sup>264 million turkeys were raised in the US in 2004. See “Turkeys Raised,” National Agricultural Statistics Service, USDA (January 7, 2005) (available at <http://jan.mannlib.cornell.edu/reports/nassr/poultry/pth-bbt/tuky0105.txt>).

<sup>47</sup>See generally [http://www.hsus.org/farm\\_animals/factory\\_farms/foie\\_gras.html](http://www.hsus.org/farm_animals/factory_farms/foie_gras.html).

<sup>48</sup>The veal market is something of a natural byproduct of the dairy industry: cows must give birth in order to lactate, and a good number of the calves will be male. Since something must be done with these animals, veal is a natural side-market. (The other option would be to slaughter them just after birth, like baby male layer chickens). *Foie gras*, by contrast, is not a natural derivative of any other markets – it is an uncommonly cruel product specifically *made* for no purpose other than to satisfy consumer palettes.

<sup>49</sup>See “BLOOD, SWEAT, AND FEAR: Workers’ Rights in U.S. Meat and Poultry Plants,” Human Rights Watch (2004) (available at <http://www.hrw.org/reports/2005/usa0105/usa0105.pdf>). In this 2004 report criticizing the United States for violating international human rights standards in its slaughterhouses, Human Rights Watch concludes:

Employers put workers at predictable risk of serious physical injury even though the means to avoid such injury are known and feasible. They frustrate workers’ efforts to obtain compensation for workplace injuries when they occur. They crush

wrought by the industry, including severe groundwater pollution, water shortages, and air pollution.<sup>50</sup> Hence, modern animal agriculture threatens values beyond those held by the traditional animal rights community; environmental activists and human rights advocates are also becoming concerned about the effects of the industry. And these concerns are not confined to the ideological left: even as renowned a conservative as newly appointed Pope Benedict XVI has spoken out against some the excesses of modern animal agriculture.<sup>51</sup> Add in the fears of some in the medical field that widespread antibiotic use in animal feeds may be forcing a crisis of effectiveness in this important class of medications,<sup>52</sup> and one begins to suspect that we as a society may in fact be paying a *very* high price to obtain our “cheap” meat.<sup>53</sup>

Much has been written on how our farms devolved into this state over the past several decades; there is

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workers’ self-organizing efforts and rights of association. They exploit the perceived vulnerability of a predominantly immigrant labor force in many of their work sites.<sup>2</sup> These are not occasional lapses by employers paying insufficient attention to modern human resources management policies. These are systematic human rights violations embedded in meat and poultry industry employment. . . . Health and safety laws and regulations fail to address critical hazards in the meat and poultry industry. Laws and agencies that are supposed to protect workers’ freedom of association are instead manipulated by employers to frustrate worker organizing. Federal laws and policies on immigrant workers are a mass of contradictions and incentives to violate their rights. In sum, the United States is failing to meet its obligations under international human rights standards to protect the human rights of meat and poultry industry workers.

*Id.* at 1-2.

<sup>50</sup>A 1999 study by the Union of Concerned Scientists ranked “meat and poultry production” second only to automobile usage in terms of overall environmental damage caused. See Glen Martin, “Group’s Surprising Beef With Meat Industry,” San Francisco Chronicle (April 27, 1999) (available at <http://boston.earthsave.org/DrivingVsMeat.htm>). Note that all modern agricultural production is relatively resource-intensive: the same study ranked fruit, vegetable, and grain production third, just behind meat in terms of overall environmental damage, primarily “because their cultivation usually entails large quantities of pesticides, herbicides, artificial fertilizers and irrigation water.” *Id.*

<sup>51</sup>In 2004, Pope Benedict XVI (then Cardinal Joseph Ratzinger) noted that, while it was appropriate to use animals as food, it was important to remember that they are “companions in creation,” remarking: [W]e cannot just do whatever we want with them.... Certainly, a sort of industrial use of creatures, so that geese are fed in such a way as to produce as large a liver as possible, or hens live so packed together that they become just caricatures of birds, this degrading of living creatures to a commodity seems to me in fact to contradict the relationship of mutuality that comes across in the Bible.

Matthew Scully, *Factory Farm Meat Not on Menu for Feast of St. Francis*, DALLAS MORNING NEWS, October 4, 2004 (available at [http://www.matthewscully.com/factory\\_farm\\_meat.htm](http://www.matthewscully.com/factory_farm_meat.htm)).

<sup>52</sup>See, e.g., Ruth Zadoks and Linda Tokofsky-Garrison, D.V.M., “What about antibiotic resistance and dairying?” (2003) (available at <http://qmps.vet.cornell.edu/articles/antibiotic%20resistance.pdf>) (detailing risks of widespread routine administration of antibiotics in the dairy industry). See also “Groups ask FDA to keep some antibiotics out of animal feed,” Andrew Martin, Chicago Tribune (April 8, 2005) (describing coalition of public health and environmental groups petition to the FDA to ban seven classes of antibiotic drugs from routine use in farm animal food supply).

<sup>53</sup>Indeed, once one begins to understand the enormous real costs borne not only by animals, but also by workers, neighboring communities, the environment, and society as a whole, the industry’s persistent trumpeting that this is all so very necessary in order to ensure our continued supply of “cheap” meat begins to ring especially hollow.

no reason to retrace the history here.<sup>54</sup> This paper is more interested in trying to examine the various options for how we can get *out* of the situation in which we currently find ourselves. Furthermore, as noted in the introduction, I am not here interested in arguing against all human mistreatment of animals; I am only interested in considering the possibilities for reform in farmed animal agriculture, which appears as a particularly nefarious abuse of our raw power over other animal species. For example, consider the practice of vivisection: animal testing in the medical field is almost certainly inflicts more suffering on animals than do farmers.<sup>55</sup> Yet vivisection has at its root an unquestionable intention to improve human health and overall welfare, and its methods are tailored to achieve that end.<sup>56</sup> In marked contrast, the current abuses in animal agriculture only serve to reduce the price of meat products,<sup>57</sup> which unquestionably serves to make our society dramatically *less* healthy. While the industry would claim that inexpensive meat is an important source of sustenance for our society,<sup>58</sup> the clear medical consensus is that most persons in our society currently eat *far too many* meat and animal products,<sup>59</sup> so an increase in their prices would actually be a significant boon to public health.<sup>60</sup> Therefore, the inhumane practices allowed on modern farms serve no public purpose whatsoever, apart from allowing us to satisfy more cheaply our pure *aesthetic preferences* for the taste of animal products. If *any* cruelty against animals is wrong,<sup>61</sup> this *must* be wrong.<sup>62</sup>

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<sup>54</sup>Those interested in a short but engaging history are recommended Marcus, *supra* note 2, at 5-60.

<sup>55</sup>See PETER SINGER, ANIMAL LIBERATION (2001) (describing life for animals fated to vivisection laboratories). Note that vivisection only inflicts more suffering on a *per animal* basis; once the number of animals involved enters the consideration, the farming community could perhaps be accused of greater carnage.

<sup>56</sup>There is some controversy over whether experimental vivisection actually provides useful results for humans. See, e.g., National Anti-Vivisection Society (<http://www.navs.org/>). Nevertheless, the medical community overwhelmingly supports it. See "Animal Research - the Scientific Consensus" (available at <http://www.simr.org.uk/pages/avmyths/consensus.html>).

<sup>57</sup>Modern agricultural methods obviously also serve to lower the prices of other animal products like dairy, egg, and leather.

<sup>58</sup>Farmers often claim they are doing so much good for our country that they actually deserve further government subsidization. For example, one North Carolina hog farmer argued in support of a bill to provide a billion-dollar annual subsidy to his industry by simply noting: "We eat cheaper than anywhere else in the world." Scully, *supra* note 19, at 257.

<sup>59</sup>See, e.g., "American Diet Too Heavy on Meat, Study Finds," July 19, 2004 (available at <http://www.planetark.com/dailynewsstory.cfm/newsid/26079/story.htm>) (noting research by American Institute for Cancer Research concluding that more than 70% of Americans include too much meat and fat in the diets and too few vegetables).

<sup>60</sup>It is perhaps the best supported idea in economics that increased prices for a good will, *ceteris paribus*, lower the quantity of the good that is consumed.

<sup>61</sup>Note that all 50 states agree that some gratuitous cruelty to animals is wrong. See *infra* note 176 and accompanying text.

<sup>62</sup>Whether the entire animal agriculture industry should be eliminated, or only its most gross abuses curbed, is a question that splits animal advocates, so I have chosen to state my case only in the strongest terms: eliminating particularly appalling practices of the industry, which would only have the effect of raising prices, not eliminating animal products from the marketplace

## Does Anyone Care?

If farmers found it more efficient to run their tractors at double the recommended speed and without oil, such that they wore out in half their advertised lives, there would probably be no grounds for objection. If a farmer can produce more than twice as much output using two tractors per decade instead of one, society is presumably better off letting him do so.<sup>63</sup> That is free-market logic at its most pure. But automatically applying to the same logic to animals should give pause; these are not pieces of steel, after all, but sentient creatures.

Nonetheless, this is essentially the approach taken in modern America. And it is not without its backers: some argue that where no human health concerns exist, governmental oversight (whether by FDA, USDA, or state agencies) is inappropriate.<sup>64</sup> If farmers wish to overcrowd their livestock, for example, and consumers wish to purchase the inexpensive meat products that result, perhaps societal interest is best served by allowing the transaction to take place unhindered.

But note that there are several problems with this analysis. The typical *laissez-faire* argument for free-markets depends crucially on two key assumptions: a well-informed consumer group,<sup>65</sup> and an absence of

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altogether. Many would argue that eliminating these products altogether would only go further towards improving human health. *See generally* <http://www.veganhealth.org/>. This idea is much more controversial, to say the least. *See, e.g.,* U.S. Dietary guidelines, <http://www.pueblo.gsa.gov/cic.text/food/food-pyramid/main.htm> (recommending 2-3 servings of dairy and 2-3 servings of meat or other proteins every day).

<sup>63</sup>This assumes, of course, that there are no externalities in the production or operation of tractors. An externality is: An economic side-effect. Externalities are costs or benefits arising from an economic activity that affect somebody other than the people engaged in the economic activity and are not reflected fully in PRICES. For instance, smoke pumped out by a factory may impose clean-up costs on nearby residents; bees kept to produce honey may pollinate plants belonging to a nearby farmer, thus boosting his crop. Because these costs and benefits do not form part of the calculations of the people deciding whether to go ahead with the economic activity they are a form of MARKET FAILURE, since the amount of the activity carried out if left to the free market will be an inefficient use of resources. If the externality is beneficial, the market will provide too little; if it is a cost, the market will supply too much.

Economist.com Economics A-Z (<http://www.economist.com/research/Economics/alphabetical.cfm?LETTER=E#EXTERNALITY>).

<sup>64</sup>The FDA itself clearly views its mission only as “protecting the public health.” *See* FDA Mission Statement (<http://www.fda.gov/opacom/morechoices/mission.html>).

<sup>65</sup>The Economist regards “information” as “[t]he oil that keeps the economy running smoothly,” and goes on to note: Economic EFFICIENCY is likely to be greatest when information is comprehensive, accurate and cheaply available. Many of the problems facing economies arise from people making decisions without all the information they need... ASYMMETRIC

externalities – meaning that the parties to the transaction, the buyers and the sellers, bear all the costs (and reap all the benefits) of the exchange.<sup>66</sup> In animal agriculture, neither of these assumptions seems plausible. Many consumers are abysmally ignorant regarding the treatment of farm animals in modern agriculture,<sup>67</sup> and most producers have every incentive to keep consumers in the dark.<sup>68</sup> Furthermore, even where some consumers know exactly what they are buying, the substantial externalities generated by the transaction could alone justify regulation. Market solutions cannot be trusted to improve social welfare where a host of (negative) externalities arise out of the transaction.<sup>69</sup> Besides the producer and the consumer, parties negatively affected by modern agricultural practices include other members of society who suffer psychic injury from what they perceive to be animal mistreatment,<sup>70</sup> along with farmers who may wish to raise animals using more humane methods, but whose profits are squeezed by less-humane producers.<sup>71</sup> And of course, the most obvious affected parties besides the producers and the consumers are the animals themselves.

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INFORMATION, when one party to a deal knows more than the other party, can be a serious source of inefficiency and MARKET FAILURE.

Economist.com Economics A-Z (<http://www.economist.com/research/Economics/alphabetic.cfm?LETTER=I>).

<sup>66</sup> See *supra* note 63.

<sup>67</sup> See *supra* note 22 and accompanying text.

<sup>68</sup> To the extent that many consumers are appalled by the scenes that occur on modern farms and slaughterhouses, producers have a strong incentive to keep these scenes away from consumer eyes. Some of these efforts have been shockingly aggressive: for example, proposed amidst the wave of anti-terrorism legislation that followed September 11, 2001, were a bill in Missouri making it a criminal offense “to photograph puppy mills or livestock operations” and a Texas bill making it felonious to “enter[] [any place where animals are lawfully stored] to take photographs or

a video recording with the intent to defame the facility or the facility’s owner.” See Bill Berkowitz, “Animal Factory-Farm Activists Under Fire” (2003) (available at <http://www.workingforchange.com/article.cfm?ItemID=15046>). A few niche producers take the opposite approach – actively encouraging public access to their facility in order to promote their own above-industry welfare standards. See, e.g., “The Country Hen” ([www.countryhen.com/newborn.php](http://www.countryhen.com/newborn.php)) (encouraging customers to make appointments for live tours of the farm).

<sup>69</sup> Negative externalities are external costs imposed on parties not involved in the exchange. Positive externalities are benefits reaped by parties not involved in the exchange. See <http://en.wikipedia.org/wiki/Externality>.

<sup>70</sup> The simple existence of a various animal rights groups, such as PETA or Vegan Outreach, offers convincing evidence that some people suffer deep psychic injury knowing what modern farmed animals endure. Of course, there are *many* things the very existence of which upsets people – including for example pornography and alcohol (both of which have been regulated in the past). Our society doesn’t currently regulate all of these things, nor should we. The existence of negative externalities in the form of psychic injury cannot alone be a sufficient ground for prohibiting an activity, at least not in our pluralistic society. Combined with other factors, however, like an absence of adequate information in the market, and tangible negative externalities to the environment, to workers, and to animals, this psychic injury serves as an additional factor weighing against the absence of regulation.

<sup>71</sup> As F.J. Faison, president of the agricultural giant “Carroll’s Foods,” observed: “Only the least-cost producer survives in agriculture.” Scully, *supra* note 19, at 256. This would not be a problem if more humane producers have some way to reliably differentiate their products from those of less-humane producers. *Some* regulatory method – at the very least the prevention of false and/or misleading advertising, is needed to accomplish this. In a wholly unregulated world, inhumane producers’ lower operating costs pose substantial difficulties for more humane producers.

Normally, non-human welfare<sup>72</sup> is excluded from our social moral calculus, but it seems safe to assume that farmed animals are probably made less well-off by being mistreated. They certainly can't be better off for it. Putting these factors together, it becomes clear that there is no *prima facie* justification for an absence of regulation in this area – and in fact, there are many very good reasons to believe that creating some sort of regulatory structure is necessary to improve overall social welfare.

In less abstract terms, we can simply ask whether consumers as a class seem to *care* about the level of farmed animals suffering that has become the norm in modern agriculture. And although data is somewhat sparse, what evidence exists seems to suggest that yes, they do care. Although many consumers remain in the dark regarding the treatment of farmed animals, the issue has been receiving increasing media attention in recent years.<sup>73</sup> At the same time, demand has sky-rocketed for various products that consumers perceive to be less-cruel, from “organic” beef to “free-range” chicken.<sup>74</sup>

It is obvious that this increased demand is not fueled entirely by concern for farm animals; many people perceive these products to be better for their own health,<sup>75</sup> or for the natural environment.<sup>76</sup> For many consumers, these are probably the preeminent concerns driving the purchase of “humane” food products. Nonetheless, animal welfare seems to have undoubtedly played some significant role in recent market changes; developments like the “Certified Humane” labeling now appearing in some grocers would be impossible

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<sup>72</sup>It is not uncontroversial that such a thing as “non-human welfare” exists. *See supra* note 18 and accompanying text. We have every reason to think that it does, however; animals show us as many indications as our fellow humans that they do, indeed, have preferences. *See supra* note 9; *see also* STEVEN M. WISE, *RATTLING THE CAGE* (2001) (arguing that animals demonstrate sufficient indication of preferences to have them taken into consideration under basic principles of the common law).

<sup>73</sup>*See, e.g.*, Michael Pollen, “The Unnatural Idea of Animal Rights,” *The New York Times Magazine* (November 10, 2002).

<sup>74</sup>“Nationwide, the market for organics is growing at 20 percent per year. It’s the fastest-growing food area,” says Corinne Alexander, professor of agricultural economics at Purdue University. Kay Hagan, “Supply and Demand,” *Purdue Agriculture Magazine* (Fall 2004) (available at <http://www.agriculture.purdue.edu/agricultures/fall2004/supply.htm>). *See infra* notes 138-51 and accompanying text for descriptions and discussion of organic and free range products.

<sup>75</sup>In one recent study, rats fed organic foods demonstrated measurably better health, “in that they slept better, had stronger immune systems and were less obese.” David Adam, “Organic rats in rude good health,” *The Guardian* (February 19, 2005).

<sup>76</sup>*See supra* note 50 and accompanying text.

without consumer concern for farmed animal treatment, as it offers no apparent health or environmental benefits over more traditional “organic” labeling.<sup>77</sup>

In addition, there is good reason to believe that the demand for humane food products, burgeoning though it is, may significantly under-represent the actual social demand for low-cruelty production. There is a unique characteristic to the humane foods market, which could be characterized as a sort of market failure: a large number of the consumers who are both knowledgeable and concerned about these issues don’t purchase niche “humane” fare like the “certified humane” foods or “organic” meats - rather they drop out of the market altogether by becoming vegetarian (or even vegan).<sup>78</sup> Thus, the substantial consumer concern for improved farm animal treatment is only minimally reflected in the demand for “humane” alternatives.<sup>79</sup> This makes the relative success of these markets all the more surprising, and should make us all the more confident that recent market shifts are only partial indicia of even greater social demand for more humane food products.

## **PART II: Surveying the Regulatory Field**

The first Part of this article discussed (briefly) some of the perceived problems in modern animal agriculture, and suggested that there are both theoretical and empirical reasons to think that these problems matter and deserve legal attention. In Part II, I focus on that legal attention: both the regulations and remedies that

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<sup>77</sup>See *infra* notes 159-66 and accompanying text.

<sup>78</sup>Vegetarians are persons who eat no meat; vegans eat no animal products whatsoever. See <http://en.wikipedia.org/wiki/Vegan>.

<sup>79</sup>The economist Tyler Cowen has challenged animal advocates to break this paradox, noting that privately subsidizing the humane treatment of animals (through paying high prices for more humane food products) is a very good way to improve overall animal welfare. If one simply buys no animal products, this has the effect of depressing the market price of animals, and therefore makes them less valuable and less likely to be well cared-for. Tyler Cowen, *Market Failure for the Treatment of Animals* 15-17 (forthcoming 2005).

currently exist, and possibilities for changes and reforms.

### ***Caveat Emptor: the Free Market Approach to Animal Welfare***

It is naïve to expect significant change in farm animal treatment without legal change.<sup>80</sup> The main reason is that there is currently embarrassingly little direct regulation of farmed animal welfare in commercial agriculture.<sup>81</sup> This may be surprising, since agriculture is a relatively tightly regulated industry. However, although both the Food and Drug Administration (FDA) and the United State Department of Agriculture (USDA) are involved in the regulation of the animal agriculture,<sup>82</sup> both agencies focus almost exclusively on human health; neither agency concerns itself directly with the welfare of the farm animals used by the industry.<sup>83</sup> Likewise, beef or dairy industry groups have no incentive to concern themselves with welfare of the animals under their guise, except insofar as it affects their bottom line. So, despite the machinations of a regulatory process, the treatment of farm animals is largely left to the dictates of the free market.

As we have seen, this is not a very comfortable place to be. Animal agriculture is a very competitive industry, and in general rigorous cost-cutting is the only means of economic survival.<sup>84</sup> Unfortunately, providing much consideration for the welfare of the animals themselves is not generally compatible with this goal. Certainly, farmers must try to keep animals *alive* (until they are ready for slaughter), but provisions for their well-being

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<sup>80</sup>Change could potentially be effected without *substantive regulatory reform* – stronger enforcement of existing regulations could do some good. This is itself would be a real change in the *actual* legal-regulatory environment, even if it were not accompanied by changes in *any* laws or regulations.

<sup>81</sup>Various statutes exist to regulate farmed animal welfare, but they are full of holes and exceedingly poorly enforced. *See infra* notes 176-193 and accompanying text.

<sup>82</sup>*See* <http://www.cfsan.fda.gov/~lrd/foodadd.html> (describing FDA’s food production regulations); [http://www.usda.gov/wps/portal/!ut/p/\\_s.7\\_0\\_A/7\\_0\\_1OB?navid=ANIMAL\\_PRODUCTION&parentnav=AGRICULTURE&navtype=RT](http://www.usda.gov/wps/portal/!ut/p/_s.7_0_A/7_0_1OB?navid=ANIMAL_PRODUCTION&parentnav=AGRICULTURE&navtype=RT) (describing USDA’s “Animal Production” programs).

<sup>83</sup>The USDA does have authority to enforce some statutes protecting animal welfare, most importantly the Humane Slaughter Act. *See* 7 U.S.C. §§ 1901 *et seq.* This authority is routinely underutilized. *See infra* notes 189-90 and accompanying text.

<sup>84</sup>The recent growth in the market for relatively humane food products may be ameliorating this trend. *See supra* note 74.

beyond this minimum threshold are only drains on profit. There is evidence that many farmers would prefer to provide more humane care for their animals (especially in smaller operations where the farmer is in contact with the animals on a regular basis), but there are powerful economic forces pushing away from this goal.<sup>85</sup> And these farmers are a dying breed, anyway.<sup>86</sup>

### Consumer Protections

It has been argued that, in the free market, “[n]o economic principles call for the protection of farm animals from abuse.”<sup>87</sup> Perhaps this was once true, but in a very real sense it is no more. Consumers have shown clear willingness to pay hefty premiums to get their hands on agricultural products that are advertised as being more humane. And, following the “economic principles” of supply and demand, industry has responded: “free range” chicken is sold in groceries across the country,<sup>88</sup> “Certified Humane” labels are appearing (for a price) on many meat and dairy products,<sup>89</sup> and national natural foods retailer Whole Foods Markets has just created a new set of more stringent animal welfare standards for all their suppliers.<sup>90</sup>

Of course, left to its own devices, the agricultural industry has every incentive to *advertise* the humane treatment of their products, yet little incentive to actually *provide* it.<sup>91</sup> Advertising humane treatment creates money; providing humane treatment costs money. Since few consumers actually visit these farms,

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<sup>85</sup> See *supra* note 71 and accompanying text.

<sup>86</sup> See *supra* note 2 and accompanying text.

<sup>87</sup> Haas, *supra* note 1, at 8.

<sup>88</sup> See *infra* notes 147-9 and accompanying text.

<sup>89</sup> See *infra* notes 159-66 and accompanying text.

<sup>90</sup> See *infra* note 172 and accompanying text.

<sup>91</sup> Animal activists have been angered by perceived industry efforts to imply that their products are somehow more humane than they actually are. For example, California’s “Happy Cows” advertising campaign provoked lawsuits from consumer groups who felt the series inaccurately implied that California’s dairy cows were better treated – happier – than those in other states. See *infra* notes 95-6 and accompanying text.

they can easily be duped.<sup>92</sup> This obviously directly injures consumers, both financially (since products advertised as humane generally sell at a substantial premium) and psychically (since these consumers are presumably paying this premium *because* they do not wish to support what they regard as inhumane farm practices).

In addition, misleading advertisements can cripple any competing producers who may be attempting to provide more humane care for their animals. Higher standards of care cost money, and if these expenses are not able to be recuperated through premium pricing at the retail level, they will not be economically feasible. If competitors are able to *advertise* (even implicitly) humane care without actually *providing* it, and consumers are generally unable (without significant expense) to determine whose claims are true and whose are false, then relatively-humane producers have no hope of financial feasibility.

All of this makes it critically important that some well-functioning regulatory mechanism be in place to prevent consumer fraud. These regulatory mechanisms are the focus of this section, which seeks to understand the range of consumer legal protections in this field, and how each fares as a method of improving the treatment of farmed animals.

There are several different characteristics by which these regulations could be categorized. Some intend to prevent false advertising; some promote fair labeling (arguably a subset of false advertising, but handled under different legal standards by different administrative agencies). Some are government programs, others industry programs with governmental backing, while others still have no government oversight at all. We will see that these characteristics play a determinative role in the effectiveness of these various regulatory mechanisms.

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<sup>92</sup>There is good evidence that many consumers are being misled by “free range” chicken and egg products, for example. See *infra* notes 156-8 and accompanying text.

## Regulation of Advertising

Product advertising is subject to a complex and overlapping regulatory structure. At the federal level, the Federal Trade Commission (FTC) works to ensure the accuracy of advertisements reaching consumers.<sup>93</sup> In all 50 states, consumer protection laws prohibit false advertising, and state attorneys general (or sometimes private citizens) are usually empowered to enjoin such ads.<sup>94</sup> Furthermore, general tort law may in some circumstances be able to provide relief to parties injured by deceptive advertising.

Despite this thick regulatory structure, however, false advertising law has only been applied to animal-care issues recently, and recently only rarely. This is no doubt because advertisements touting humane production methods are themselves very recent phenomena, as consumer demand for such products has only begun to blossom in recent years. As these markets continue to expand, however, challenges to marketing claims or implications of humane treatment are certain to multiply, and increase significantly in importance.

In one prominent case, the advocacy organization People for the Ethical Treatment of Animals (PETA) filed a lawsuit in late 2002 against the California Milk Advisory Board, alleging that the Board's "Happy Cows" dairy advertising campaign was deceptive and misleading under California state law, as the ads could lead reasonable consumers to believe that California's dairy cows were treated more humanely than others in the industry.<sup>95</sup> The claim was never heard on its merits, as the trial court and the California Court

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<sup>93</sup>See *Fed. Trade Commn. Act of 1914*, 15 U.S.C. §§ 45, 52, 55; see also *FTC Enforcement Policy State on Food Advert.*, 59 Fed. Reg. 28388-01, 28388 (1994) (available at [www.ftc.gov/bcp/policystmt/ad-food.htm](http://www.ftc.gov/bcp/policystmt/ad-food.htm)) (noting the shared, complementary roles of the FTC, FDA, and USDA in regulating manufacturer food claims); Wheeler-Lea Amendments of 1938, 52 Stat. 111, 114 (confirming authority of FTC to regulate food advertising); *National Commission on Egg Nutrition and Richard Weimer v. FTC*, 570 F.2d 157 (1977) (upholding FTC prohibition of egg-industry advertisements claiming egg products did not raise human blood-cholesterol levels).

<sup>94</sup>See *infra* notes 106-7 and accompanying text.

<sup>95</sup>See *People for the Ethical Treatment of Animals v. California Milk Advisory Board*, 125 Cal.App.4<sup>th</sup> 871 (2005). The slogan for the disputed advertising campaign is "Great cheese comes from happy cows. Happy cows come from California." *Id.*

of Appeals both found that sovereign immunity protected governmental agencies like the California Milk Advisory Board against actions under the state’s consumer protection laws.<sup>96</sup> Despite this setback, the readiness of activists to bring a false advertising claim in this case underscores their potential applicability to many misleading claims by animal farmers, the majority of whom will be unable to hide behind the cloak of sovereign immunity.

As noted, at the Federal level the advertising of food products, like all general advertising, is regulated by the FTC.<sup>97</sup> The FTC has broad authority to act against advertisements containing material representations or omissions of fact that are likely to mislead consumers behaving reasonably under the circumstances.<sup>98</sup> Presumably, this broad language authorizes the agency to tackle a variety of advertisements that animal advocates have alleged to be misleading, including California’s “Happy Cows” campaign discussed above. Like all federal agencies, however, the FTC faces a scarcity of resources, and pursuing false or misleading claims of humane treatment does not appear to be high on its priority list.<sup>99</sup> This may be a deliberate policy judgment,<sup>100</sup> but it could just as easily be reflective of the fact that producers have not historically made humane-treatment claims in their advertisements, and consumers therefore do not have an established history of being harmed by them. As these claims become more prominent, increased incidence of clear consumer confusion may prompt responsive actions by the agency.

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at 874 n. 1.

<sup>96</sup> *Id.* at 881-3.

<sup>97</sup> *See supra* note 93.

<sup>98</sup> *Id.*

<sup>99</sup> FTC’s own enforcement policies note their concerns with only two aspects of food advertisements: “nutrient content claims,” and “health claims.” *FTC Enforcement Policy State on Food Advert.*, 59 Fed. Reg. 28388-01, 28388 (1994) (available at [www.ftc.gov/bcp/policystmt/ad-food.htm](http://www.ftc.gov/bcp/policystmt/ad-food.htm)). Claims regarding solely the treatment of farmed animals obviously fall into neither of these categories.

<sup>100</sup> FTC is a politically accountable branch of the Federal government, and the agricultural lobby is very powerful in Washington – as evidenced by the long history of generous subsidies paid out to the industry. *See, e.g.*, Brian Reidl, *Agriculture Lobby Wins Big New Farm Bill* (April 9, 2002) (available at <http://www.heritage.org/Research/Agriculture/BG1534.cfm>).

Federal law also provides injured parties a self-help remedy in the form of the Lanham Trade-Mark Act of 1946.<sup>101</sup> The Lanham Act provides for civil actions “by any person who believes that he or she is or is likely to be damaged” against anyone using deceitful or misleading material in a product advertisement.<sup>102</sup> Although the statute provides for suit by “any person” believing herself damaged, courts have consistently interpreted this act to allow only for actions by economic competitors, not harmed consumers.<sup>103</sup> Thus, consumers or consumer groups who are misled by advertisements implying humane treatment lack remedy under the Lanham Act.

For producers hoping to distinguish their products as more humane, however, the Lanham Act may provide a powerful remedy. Not only does the Act allow for one producer to challenge any competitor’s advertisements that they suspect consumers find misleading, it allows them a wide variety of remedies if their claims are proven.<sup>104</sup> Furthermore, the Act explicitly waives sovereign immunity and allows suits against states and state agencies.<sup>105</sup> Thus, were a competitor to sue the California Milk Advisory Board for its “Happy Cows” ad campaign under the Lanham Act, for example, the suit would at least be allowed to go forward and be heard on its merits.

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<sup>101</sup> 15 U.S.C. § 1125.

<sup>102</sup> The Act states, in relevant part:

(1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which—

(A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person, or

(B) in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person’s goods, services, or commercial activities,

shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act.

15 U.S.C. § 1125(a)(1).

<sup>103</sup> See generally James S. Wrona, *False Advertising and Consumer Standing Under Section 43(a) of the Lanham Act: Broad Consumer Protection Legislation or Narrow Pro-Competitive Measure?*, 47 Rutgers L. Rev. 1085 (1994).

<sup>104</sup> Available remedies include injunctions, corrective advertising, damages for lost profits, recovery of the defendant’s profits, costs, and attorney’s fees. See Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 Animal Law 25, 39 (2004).

<sup>105</sup> 15 U.S.C. § 1125(a)(2):

As used in this subsection, the term “any person” includes any State, instrumentality of a State or employee of a State or instrumentality of a State acting in his or her official capacity. Any State, and any such instrumentality, officer, or employee, shall be subject to the provisions of this chapter in the same manner and to the same extent as any nongovernmental entity.

Most states have laws closely paralleling these two federal avenues of protection: all states have agencies empowered to police advertising within their state as the FTC does nationally, and states also have general consumer anti-fraud statutes that can be used to combat false or misleading advertising. State laws are as varied as the fifty states, obviously, but some general principles can be noted.

First, the substantive standards in most state consumer protection laws are in main identical to those enforced by the FTC: prohibitions against advertising that is false or misleading in any particular.<sup>106</sup> Nonetheless, like the FTC, state agencies enforcing their consumer protection statutes are generally extraordinarily pressed for resources, and their focus is clearly on preventing real economic damage to consumers. To the extent that these agencies view complaints against misleading humane-food advertisements either as trivial or as subterfuge for mere attempts to protect animal welfare (rather than prevent consumer harm), they are unlikely to expend much energy pursuing these claims. This can make these laws somewhat unsatisfactory to those whose ultimate goal *actually is* an improvement in animal welfare (rather than a pure prevention of consumer harm).

Many state consumer protection laws do, on the other hand, allow private suits not only by injured economic competitors, but also by consumers harmed by the advertisements. In this way they open the courts to far more litigants than the Federal Lanham Act.<sup>107</sup> In some cases, injunctive relief may be sought and awarded

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<sup>106</sup> See Dillard, *supra* note 104, at 39-42.

<sup>107</sup> *Id.*

even where economic damages have been trivial, whereas other states provide for statutory minimum damages when a consumer's harm falls below a threshold level.<sup>108</sup>

Of course, if all else fails consumers can always rely on common law tort or contract claims, though these may be difficult to sustain. Where an advertisement is false or misleading to a reasonable consumer, general principles of the common law should award economic damages to a consumer injured in reliance on the claims made in these advertisements.<sup>109</sup> *Although these damages are likely to be small on an individual basis, consumer class-actions could* theoretically make litigation economically feasible. Courts in many states are likely to find these claims of false advertising preempted by the state consumer protection statutes, however, and may therefore not be willing to hear arguments on these grounds. Since tort laws in most states are unlikely to offer any independent advantages to litigation under the consumer protection laws, most litigants will probably not find reliance on the common law to be an attractive alternative.

Lastly, many industry trade boards play at least some role in the regulation of advertising.<sup>110</sup> For example,

<sup>108</sup> See Jeff Sovern, *Protecting Privacy with Deceptive Trade Practices Legislation*, 69 Fordham L. Rev. 1305, 1350 (2001).

<sup>109</sup> See, e.g., KENNETH S. ABRAHAM, A CONCISE RESTATEMENT OF TORTS §551 (American Law Institute Publishers 2000):

(1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability as though he had represented the nonexistence of the matter . . . if he is under a duty to the other to exercise reasonable care to disclose the matter in question.

(2) One party . . . is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated,

...  
(b) matters known to him that he knows to be reasonably necessary to prevent his partial or ambiguous statement of the facts from being misleading; and

...  
(e) facts basic to the transaction, if he knows that the other is about to enter into it under a mistake as to them, and that the other, because of the relationship between them, the customs of the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

<sup>110</sup> Cf. *Glickman v. Wileman Bros.*, 521 U.S. 457 (1997) (rejecting challenge to USDA assessment of mandatory fees for generic fruit-advertising campaign, finding that the fees did not amount to compelled speech or association).

the National Advertising Division of the Better Business Bureau acts as a self-regulating body for the advertising industry, and hears complaints against false or misleading advertisements (so long as they are of national importance).<sup>111</sup> Like most federal and state agencies, however, these bodies are likely apt to view skeptically any complaints they suspect are motivated more by concern for improving animal welfare than for preventing losses to consumers.

One fundamental problem with using any advertising-oriented approach towards improving animal welfare is that it is unlikely on its own to actually do anything to better the treatment of animals. Foremost, they can only be employed against producers who attempt to suggest (improperly) some degree of humane treatment of their animals. A large number of producers are therefore simply unreachable through these measures, as they make no such claims. Secondly, these challenges seem far more likely to inspire a change in advertising methods than any actual change in treatment. Given the real costs associated with improving farm practices, it seems beyond implausible that any farm would choose altering their production practices over simply ending or amending a challenged advertising campaign. Such a change would only be imaginable if consumer sentiment ever shifted so far that inhumane farming practices were no longer tolerated in the market. If such a shift were to occur, however, false advertising laws would almost certainly cease to be a preferred method of pursuing further change, as hard substantive prohibitions against inhumane practices would likely be legislated.<sup>112</sup>

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<sup>111</sup> See Dillard, *supra* note 104, at 33.

<sup>112</sup> If more humane treatments were the norm, it would be irrational and inefficient to force producers to spend money actually *advertising* their humane practices to distinguish themselves from any competitors who might be falling below industry standards. It would make more sense to have, and presumably industry would push for and receive, meaningful substantive laws mandating treatment not below standard industry practices.

Of course, preventing misleading advertising could ultimately help initiate such a change in consumer sentiment. On the one hand, it is all but essential for consumers to be able to easily and meaningfully differentiate products based on their relative humaneness if the nascent humanely-produced food product market has any chance of survival and growth. These producers purport to provide more humane care for their animals, and thus some suffering is presumably directly eliminated. On the other hand, the stark contrast between those products advertising humane production methods and those which conspicuously make no such claims could itself begin to take root with consumers, ultimately inspiring more to choose products advertised as more humane.

A second complication with using prohibitions against false or misleading advertising as a regulatory vehicle for ensuring adequate protection of farm animals is that current laws probably only prevent actual affirmative fraud. In other words, absent any other regulations, farmers could subject their animals to any sort of mistreatment, and not only would they not be prevented from doing so, they probably would not even be required to disclose these facts in the market. The only thing they would be prevented from doing is implying that they treated their animals *better* than they actually did.<sup>113</sup>

*Animal Legal Defense Fund v. Provimi Veal Corp.*,<sup>114</sup> a 1986 case from Massachusetts, nicely represents the distinction between these two positions. The plaintiff in the case, Animal Legal Defense Fund (ALDF), argued that Provimi Veal had a responsibility to affirmatively disclose to consumers the way their veal calves

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<sup>113</sup>Bonita Meyersfeld characterizes this distinction between “positive” and “negative” disclosure requirements thusly: “positive” disclosure requirements only prohibit false statements or implications, whereas a significantly more powerful “negative” disclosure requirement would prohibit the withholding of any material information from consumers. Bonita Meyersfeld, *If Only They Could Speak* at 32-39 (*forthcoming*). Our current laws almost exclusively only contain “positive” requirements.

<sup>114</sup>626 F.Supp. 278 (D. Mass. 1986).

were treated in the production of their product. Even though Provimi made no claims implying that the calves' treatment was better than it actually was, ALDF argued that consumers had an affirmative right to know this negative information, just as they would have a right to know of any health risks of the product.<sup>115</sup> Deliberate nondisclosure of this information was itself deceptive, since it left consumers ignorant regarding an important characteristic of the product.

Although the ALDF's case was dismissed without being heard on its merits,<sup>116</sup> the questions raised by the plaintiffs still have important implications for the use of consumer protection statutes as a method of working towards animal welfare goals. Indeed, unless some affirmative disclosures are required,<sup>117</sup> all the advantages lie with those producers who choose not to employ more humane production methods. They have the ability to continue operating as they choose, and need not concern themselves with any regulatory strictures. On the other hand, producers who might try to utilize more humane production methods must undertake the active burden of establishing some differentiation of their own products. If consumers are thought to be largely ignorant of the standard methods of operation (whether or not such ignorance is in some sense "willful"), then more humane producers would bear the burden not only of advertising their own products as more humane, but also of establishing in each consumer's psyche the baseline treatment against which their products should be compared.<sup>118</sup> Thus, more humane producers would in effect be required to

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<sup>115</sup>ALDF also alleged that the product *did* have health risks (that consumers had a right to know), since the veal calves were given sub-clinical doses of antibiotics as a part of their routine diets, but this is an independent point. *See id.* at 279.

<sup>116</sup>*See id.* at 287. Without considering the merits of ALDF's 93A claim (the Massachusetts consumer-protection statute), the court concluded that ALDF's contention was improper because it was in reality a backhanded effort to enforce Massachusetts' criminal animal anti-cruelty statute, which contains no private right of action. *See id.* at 281.

<sup>117</sup>In Meyersfeld's language, these would be termed "negative" disclosure obligations. *See supra note* 113.

<sup>118</sup>Obviously, this burden wouldn't fall solely on the shoulders of more humane producers – a plethora of activist groups are working stridently to inculcate such consumer awareness. *See, e.g.,* "People for the Ethical Treatment of Animals" ([www.peta.org](http://www.peta.org)); "Vegan Outreach" ([www.veganoutreach.com](http://www.veganoutreach.com)); "Farm Sanctuary" ([www.farmsanctuary.org](http://www.farmsanctuary.org)). But these groups may be less than enthusiast about promoting relatively more humane producers – there is a significant division in the activist community about the utility of such measures. Many seek outright abolition of the property status of animals (*see, e.g.,* Gary Francione, *supra note* 8), and consequently see humane producers and the like as threats: perhaps legitimizing and therefore reinforcing the farm animal system – making it last longer even if it becomes less cruel. Persons holding such a perspective will

bear twice the advertising load: first, defining and establishing their products and outlining their humane production methods, and second, in order to generate demand for their own (pricier) products, emphasizing the perceived cruelty associated with more traditional production methods. In addition, humane producers would also thereby subject themselves to a two-fold litigation risk: first a risk of liability for defamation from any traditional producers whose practices they criticized, and second the liability risk involved in making humane product claims (which consumers could allege were misleading). More traditional producers would face risk from neither of these sources. These extra advertising expenses and litigation risks would all work to necessitate an even larger price wedge between these humane products and their more traditional competition, which could needlessly hinder the development of these markets.

Yet to the extent that prohibitions against false advertising continue to constitute a primary method of pursuing the goal of more humane treatment for farmed animals, there is probably no more that can be done. A requirement forcing affirmative disclosure of inhumane farm practices may be imaginable, but would probably be unworkable in practice. If the requirement were created judicially, in response to suits like that brought in *Animal Legal Defense Fund v. Provimi Veal Corp.* for example, it is hard to conceive of any standard that could be articulated to meaningfully distinguish production practices that were so cruel that they needed to be disclosed to consumers as part of the producer's advertising. A standard forcing disclosure of practices considered cruel by the reasonable consumer, for example, is probably too vague to provide guidance to manufacturers. Well-advised farmers might feel compelled to list every aspect of their production processes, step by step, in order to avoid the risk of liability. And *whatever* standards were articulated by courts would constantly be pressed against the producers' free-speech rights to advertise their

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obviously be hesitant about helping relatively "humane" producers spread their message.

materials as they saw fit.<sup>119</sup>

Despite these hurdles, such a step would not be wholly unprecedented: the FDA often requires drug manufacturers to affirmatively list potential side effects of medications in their marketing materials.<sup>120</sup> Certainly, one can imagine the construction of a similar set of requirements forcing producers to disclose specific acts characterized as cruel by the agency. In doing so, the FDA would be on significantly firmer footing than a court, since they at least could lay out a comprehensive statutory scheme defining precisely what practices need and need not be disclosed in marketing campaigns. In this way, the system would at least become workable. But several problems would still remain.<sup>121</sup> First, the FDA's requirement that drug agencies list potential side effects in their advertisements is aimed squarely at protecting human health.<sup>122</sup> Prescription drugs are powerful products, and the agency reasonably fears that if drug companies are allowed to advertise their products without listing the side effects they will create unreasonable expectations in consumers' minds and potentially break down the doctor-patient relationship, ultimately threatening human health and well-being. Such a serious risk to human welfare constitutes a substantial interest of the government, and therefore a sufficient basis on which to place some curbs on drug companies' constitutional rights to free speech.<sup>123</sup> It is far from clear that protecting farm animal welfare also qualifies as a substantial government interest; if it were found not to, no such requirements could be imposed.<sup>124</sup>

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<sup>119</sup>First Amendment protection for commercial speech has been recognized since *Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976). This right extends only to speech that concerns lawful activity and is not misleading. *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 564 (1980). It is not wholly clear how an arguably misleading absence of speech would be protected under this standard.

<sup>120</sup>See *Statement by Janet Woodcock, M.D., Director, Center for Drug Evaluation and Research, U.S. Food and Drug Administration, Before the Senate Special Committee on Aging* (July 22, 2003) (available at <http://www.fda.gov/ola/2003/AdvertisingofPrescriptionDrugs0722.html>).

<sup>121</sup>I am of course ignoring the most significant problem: such FDA action is far beyond the realm of current political feasibility, and is of course not on the agency's agenda. But it is nonetheless instructive to consider how such a scheme might conceptually look.

<sup>122</sup>See generally Tamar V. Terzian, *Direct-to-Consumer Prescription Drug Advertising*, 25 AM. J. L. & MEDICINE 1 (1999).

<sup>123</sup>In order to regulate commercial speech, the government needs to show a "substantial government interest," that its regulations forward that interest, and that they do so in a manner that is no more restrictive than necessary. *Central Hudson Gas v. Public Service Comm'n*, 447 U.S. 557, 564 (1980).

<sup>124</sup>These regulations could be conceived of as protecting not farmed animal welfare, but the sanctity of market information

Furthermore, farm practices are continuously evolving, and these requirements would need to be updated regularly in order to remain meaningful. Given the current political stature of the farm lobby as compared to the animal rights lobby, one must be dubious of the likelihood of any such prohibitions retaining currency through continual revision, especially given the significant and sustained expenditure of resources that would be required to keep these standards up-to-date. If the animal rights community were not able to capture considerably more influence on capital hill, these standards would likely approach obsolescence relatively quickly; if the animal rights community were able to capture considerably more influence on capital hill, one suspects their agenda would not focus merely on regulating the *advertising* of animal food products.

Indeed, this last point underscores what may be the most significant drawback to any attempts to force advertisers to affirmatively disclose their inhumane farm practices in their advertising: it necessarily strips the power of action away from the injured private parties, and places it into the hands of an agency that might or might not share the private parties' priorities and convictions. One of the main attractions of most proposals to better farm animal treatment through the regulation of advertising is the fact that private parties remain empowered to take action against perceived lawbreakers. Moving to a system of required affirmative disclosures, which would require administrative guidance to be workable, would circumvent this power of private action, and leave enforcement of the regulations in the hands of a government agency. The lack of adequate enforcement is arguably a more severe current problem than the lack of adequate statutory power to act.<sup>125</sup> Moving the regulation of advertising also into wholly governmental hands therefore hardly seems advisable, at least at the present time.<sup>126</sup>

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– preventing misinformation among consumers. While this is a more traditional government interest, it is not clear that an elaborate scheme of required disclosures would satisfy the requirement that they be “no more restrictive than necessary” in forwarding this goal.

<sup>125</sup> See, e.g., *infra* notes 189-91 and accompanying text.

<sup>126</sup> If a private right of action were attached to a governmental regulatory program, this last drawback would obviously be nullified. FDA has not historically attached private rights-of-action to its regulatory schemas, however, and there is no reason to think they would act differently here.

Though they may be hard to ascertain given the above discussion, using advertising as a means to push for more humane treatment of farm animals does have some advantages and benefits. In contrast to strict substantive prohibitions, restrictions on false advertising involve an inherent respect for consumer sovereignty and personal choice, two notions deeply bound up in our legal system and our broader culture. Prohibitions against false advertising do not tell anyone how they can or cannot treat their farm animals, much less what they can or cannot eat. If someone wants to produce veal or *foie gras*, no one will stop them; neither will anyone stop a consumer from purchasing these products in restaurants or supermarkets. The only thing these laws require is that no one be misled about the products they are purchasing: consumers should not be led to believe their dairy products come from well-treated “happy cows,” when in fact they come from cows treated as bad as any in the country.<sup>127</sup> This view therefore comports to some extent with libertarian tendencies to let each follow his own path, without significant government intrusion into otherwise private-decisionmaking.<sup>128</sup> No significant expansion of the state’s reach into our personal lives is needed; the government, having slowly backed out of our bedrooms,<sup>129</sup> won’t stop to inspect our dinner table before being ushered out the door.

And animal advocates should *like* this fact, even if they would ultimately wish to see these cruel practices abolished. For, given current political sentiments, the prospect of near-term radical reform in our substantive laws appears vanishingly small. Yet existing consumer protection laws not only could promote positive change in consumer sentiment, they could do so with minimal political resistance. Indeed, it would be difficult for the agricultural industry to openly defend its right to run advertisements that *deceive* or *mislead* consumers. It is worth remembering that none of the lawsuits yet pursued in efforts to prevent producers from running misleading advertisements of humane treatment has been heard on its merits. Once litigants are able to

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<sup>127</sup> See *supra* note 95 and accompanying text.

<sup>128</sup> This factor is obviously a disadvantage rather than an advantage to those who view the improvement of farm animal treatment as an uncompromisable moral issue.

<sup>129</sup> See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (holding unconstitutional Texas anti-sodomy statute); *Griswold v. Connecticut*, 381 U.S. 479 (1965) (holding unconstitutional Connecticut statute prohibiting contraceptive use).

get around the procedural barriers and bring substantive claims – which can only be a matter of time as producer claims of humane treatment multiply in response to evolving consumer sentiment – significant progress may be achieved relatively rapidly, which could itself prompt further shifts in consumer sentiment and perhaps eventually more stringent substantive regulations, or at least more meaningful enforcement of existing substantive regulations.

### Regulation of Product Labeling

In some sense, the regulation of product labeling is a subset of the regulation of advertising; after all, product labels present cheap and convenient forums for producers to advertise their goods.<sup>130</sup> In this sense, most of not all of the same issues discussed above are relevant here. Yet product labeling has long been recognized as a unique form of advertising, and has long been subject to more stringent regulatory standards.<sup>131</sup> Perhaps because of these standards, consumers have developed heightened faith in the accuracy of product labels.<sup>132</sup>

Regulating the labeling of most food products is the statutory responsibility of the FDA,<sup>133</sup> the USDA regulates the labeling of meat products.<sup>134</sup> The two agencies operate under different standards. The FDA forbids any food labels that are “false or misleading in any particular,”<sup>135</sup> a standard it interprets very

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<sup>130</sup> See *United States v. 24 Bottles “Sterling Vinegar & Honey,” Etc.*, 338 F.2d 157 (2d. Cir. 1964) (“Advertising and labeling overlap; most labels advertise as well. They are not identical, however. . . . The distinguishing characteristic of a label is that, in some manner or another, it is presented to the customer in immediate connection with his view and his purchase of the product.”)

<sup>131</sup> See Federal Food, Drug, & Cosmetic Act, 21 U.S.C. § 343(a): “[a] food shall be deemed misbranded . . . [i]f its labeling is false or misleading in any particular.”

<sup>132</sup> According to independent consumer research conducted in the U.K., upwards of 89% of consumers have developed confidence that the laws protect them from misleading claims on product labels. See “*The Lie of the Label: A Report Calling for Honest Labelling* [sic],” (November 1997) (available at <http://www.co-op.co.uk:8080/ext.1/Development.nsf/0/b63c0daecc02aa7780256bec0031524b?OpenDocument&Click=>).

<sup>133</sup> See 21 U.S.C. § 343.

<sup>134</sup> See Meat Inspection Act, 21 U.S.C. §§ 601-23.

<sup>135</sup> See *supra* note 131.

stringently.<sup>136</sup> In contrast, the USDA simply requires actual pre-inspection of every label used on any meat products.<sup>137</sup>

Recent years have witnessed an explosion of food labels promoting various producer claims of more humane treatment for their animals. Walk into any grocery in America and one is likely to encounter “organic” milk and “free range” eggs, to name only a few examples. In some instances, regulators have stepped in to clarify what could otherwise be confusing producer claims, while in other instances industry groups have been left mostly to their own devices. The following paragraphs survey these various treatments, and offer some analysis of the regulatory responses to this humane food labeling.

The most comprehensive set of government food labeling requirements that touch on issues of animal welfare are those promulgated under the Organic Foods Production Act of 1990.<sup>138</sup> The Act set forth standards defining the production methods that must be utilized in order to label a food product as “organic.” These standards were put into effect on October 31, 2002, by the USDA’s National Organic Program.<sup>139</sup> Although the national organic standards are aimed principally at ensuring that foods labeled as “organic” are produced with minimal use of pesticides or various synthetic additives, they do have some (minor) provisions relating to animal welfare standards.<sup>140</sup> The standards require a producer of organic livestock to maintain “living conditions which accommodate the health and natural behavior of animals.”<sup>141</sup> Several specific requirements are set forth, prescribing that animals be provided with:

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<sup>136</sup> See, e.g., *United States v. 432 Cartons . . . Candy Lollipops*, 292 F.Supp. 839 (S.D.N.Y. 1968) (describing FDA action against “Liquor Flavored Lollipops” that were alleged to be misleadingly labeled as they contained no actual liquor).

<sup>137</sup> See 21 U.S.C. §§ 601-23.

<sup>138</sup> 7 U.S.C. §§ 6501 et seq.

<sup>139</sup> See <http://www.ams.usda.gov/nop/indexNet.htm> (website of the USDA National Organics Program).

<sup>140</sup> See 21 U.S.C. § 6509.

<sup>141</sup> National Organic Standards § 205.239(a).

(1)

Access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment;

(2)

Access to pasture for ruminants;

(3) Appropriate clean, dry bedding;

(4) Shelter designed to allow for:

i.

Natural maintenance, comfort behaviors, and opportunity to exercise;

ii.

Temperature level, ventilation and air circulations suitable to the species;

iii.

Reduction of potential for livestock injury.<sup>142</sup>

Temporary confinement of an animal is allowed under certain defined circumstances, such as in the event of inclement weather, risks to soil or water quality, or when the health and well being of the animal could otherwise be jeopardized.<sup>143</sup>

The USDA organic standard is not a concession to animal rights activists; the standards have been formulated

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<sup>143</sup>*Id.* at § 205.239(b).

only with human health and welfare in mind. The provisions quoted above are aimed at improving at improving the health and well-being of the animals only insofar as it is believed by some consumers that healthier animals make for healthier and superior food products. Nevertheless, it is clear that these standards supply animals with several basic provisions for more traditional lives, provisions otherwise lacking for many animals raised on modern US farms.

The standards promulgated by the USDA have brought significant clarity to an otherwise ambiguous term. Without federally prescribed standards, consumers would be left to guess what each individual producer had in mind when using the label “organic” on its food packaging. Producers’ claims would presumably be bound only by anti-fraud consumer protection statutes, and it is clear that there is a significant amount of deviation in what sorts of production processes could reasonably be considered “organic.” Without any method of distinguishing more rigorously-produced organic products from those that bore little deviation from conventional farm products, producers would have every incentive to *advertise* their products as organic, but would have little or no incentive to undertake many costly measures to actually reduce the level of chemical or synthetic ingredients in their products. *Some* deviation from standard practices would be necessary to prevent allegations of outright fraud, but the market would suffer substantially from a lack of any general consensus as to how much deviation was necessary. Consumers would likely lose faith in the label, and the pricing premium associated with organic products would likely therefore dissipate.<sup>144</sup>

In addition to clarifying the meaning of the “organic” label, the Organic Standards Board is required under

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<sup>144</sup>The premium prices associated with the “organic” label probably wouldn’t altogether disappear, especially as long as the FDA were acting to prevent cases of outright fraud. Some consumers would still likely respond to the label on the assumption that it had positive health benefits, even if trivial. For example, the FDA has long allowed producers to label their products as “natural” so long as they contain no artificial colors, flavors, or synthetic ingredients. PETER BARTON HUTT & RICHARD A. MERRILL, *FOOD AND DRUG LAW: CASES AND MATERIALS* 59 (2d Edition) (Foundation Press 1991), and the “natural” label is still widely used in product labeling.

the Organic Foods Production Act of 1990 to undertake certification and enforcement proceedings, to protect consumer confidence in the “USDA organic” label and to ensure that organic producers are meeting the established standards.<sup>145</sup> This verification process is critically important – consumers on their own have no way to know, even after purchasing these products, whether or not the claims made on the product packaging are truthful. Without government intervention, therefore, consumers would be reliant on the good-will and reputations of the manufacturers whose products they were purchasing. Producers might have some incentive to perform tests on each others’ products (to the extent possible)<sup>146</sup> in order to increase their own market share by discrediting their competitors, but such testing could be both expensive and time-consuming. If consumers had only their knowledge of a producer’s reputation on which to base their purchasing decisions, they would inevitably be drawn to the largest and most recognizable brands, which would place smaller regional and local producers at enormous disadvantage in the organic foods market. Given the enthusiasm for small producers and locally-produced product in much of the organic-foods market target demographic, a lack of credible enforcement and verification mechanisms would likely have provided a significant hindrance to the development of this market.

Another piece of nomenclature that has begun to appear with increasing frequency on product labels in recent years is “free-range” (or sometimes its twin cousin, “free-roaming”).<sup>147</sup> Although these terms appear on a variety of meat products,<sup>148</sup> by far their most prominent usage has been on poultry, and particularly egg products. This is no doubt in part due growing awareness and increasing concern among many market

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<sup>145</sup>See 7 U.S.C. §§ 6511-6518.

<sup>146</sup>Even when practicable, such testing could only provide partial enforcement: competitors might readily be able to test products for pesticide residue, but one wonders how they could go about testing a product to see if the animal from whom it was produced was provided with appropriate space and bedding.

<sup>147</sup>See, e.g., “NAPA Free Range Beef” (<http://www.napafreerangebeef.com/>); “Mary’s Free Range Turkeys” (<http://www.marysturkeys.com/>).

<sup>148</sup>Under proposed USDA Regulations, “free range” beef is beef from cattle who have “never been confined to a feedlot, and “free range” pork is from pigs who “have continuous access to pasture for at least 80% of their production cycle.” See “United States Standards for Livestock and Meat Marketing Claims,” 67 Fed. Reg. 250, 79552, 79554 (December 30, 2002).

participants regarding the perceived cruelty of confining egg-laying hens to battery cages. In contrast to “organic” labeling, the “free-range” designation carries no obvious implicit or explicit health or environmental benefits; the designation seems to be claiming only an improvement in animal welfare. This makes its relative prominence in recent years particularly meaningful for those claiming that many consumers *do* care about the welfare of the animals that they eat (or whose eggs they eat): free-range eggs carry a very substantial market premium (often costing over twice as much as conventional eggs), and yet this submarket has grown dramatically within the last decade, and shows no signs of slowing pace.<sup>149</sup>

Yet, in marked contrast to the comprehensively defined standards that must be met in order for a producer to label its food as “organic,” the USDA has only the briefest of definitions for the terms “free range” or “free roaming”: “[p]roducers must demonstrate to the Agency that the poultry has been allowed access to the outside.”<sup>150</sup> In 2003, the agency considered slightly strengthening this definition to allow it on labels only for “[l]ivestock that have had continuous and unconfined access to pasture throughout their lifecycle,” but this change was never adopted.<sup>151</sup>

The standard the USDA requires producers to meet in order to label their products as “free-range” is not onerous. “Access to the outside” need mean nothing more than that a door is present on the barn in which they are confined, and since there is nothing in the requirements mandating continued or continual access,

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<sup>149</sup> See Lorraine Mitchell, U.S.-EU Food and Agriculture Comparisons (WRS-04-04), USDA Economic Research at 56-57 (noting growth trends in US market for free range eggs).

<sup>150</sup> Food Safety and Inspection Service Meat and Poultry Labeling Terms (revised August 2003) (available at <http://www.fsis.usda.gov/oa/pubs/lablterm.htm>).

<sup>151</sup> See “United States Standards for Livestock and Meat Marketing Claims,” 67 Fed. Reg. 250, 79552, 79554 (December 30, 2002). The proposed changes also included the following requirements:

Cattle – Shall never be confined to a feedlot.

Sheep – Shall never be confined to a feedlot.

Swine – Shall have continuous access to pasture for at least 80% of their production cycle.

\* FSIS requires product labels from red meat species with these claims also include the following further qualifying statement:  
“Free Range–Never Confined to Feedlot.”

See *id.*

the door need not even be open all the time. It is entirely possible that consumers could purchase “free range” poultry products that come from birds that have never actually been outdoors in their lives.

The USDA standard falls significantly below the meaning of “free range” in common parlance, even as captured in standard dictionary definitions. *The American Heritage Dictionary of the English Language (Fourth Edition)* defines free-range to mean “[o]f, relating to, or produced by animals, especially poultry, that range freely for food, rather than being confined in an enclosure.” The USDA definition does not mandate that animals be allowed to “range freely for food,” foraging around as farm animals are wont to do. In fact, most “free-range” poultry are trough-fed indoors on a traditional high-protein diet.<sup>152</sup>

Perhaps as significantly, in stark contrast to the USDA Organics program, the USDA has not established any comprehensive verification program of producers’ claims that their animals are “free-range” or “free-roaming.” This oversight is particularly crippling. Many other product labels can be verified relatively easily at the retail level (by consumer advocacy groups or the FDA itself, even if not by lone consumers). For

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<sup>152</sup>The USDA has established a set of “trade descriptions” for poultry products in order to “facilitate trade at the wholesale level. See U.S. Trade Descriptions for Poultry, AMS 71 *at 1* (August 2000). It provides several different “wholesale” categorizations for poultry, based on various production and feeding systems:

- (i) Traditional Production and Diet [Coded as 1] - Birds are raised in heated and air-cooled growing houses and fed a precisely formulated high protein diet.
  - (ii) Free-Range Production with Traditional Diet [2] - Birds are raised in heated and air-cooled growing houses with access to the outdoors and fed a traditional high protein diet. Because birds have access to the outdoors, diet and bio-security are not precisely controlled. Specific production requirements may need to be defined by buyer and seller.
  - (iii) Pastured/Pasture-Raised Production with Traditional Diet [3] - Birds are raised outdoors using movable enclosures located on grass and fed a traditional high-protein diet. Specific production requirements may need to be defined by buyer and seller.
  - (iv) Traditional Production with Organic and/or Antibiotic-Free Systems [4] - Birds are raised in heated and air-cooled growing houses and fed an organic diet (without hormones or non-organic additives) and/or raised without antibiotics (drugs that are intended to prevent or treat animal illnesses). Purchaser must specify system requirements under “Additional product options.”
  - (v) Free-Range Production with Organic and/or Antibiotic-Free Systems [5] - Birds are raised in heated and air-cooled growing houses with access to the outdoors and fed an organic diet (without hormones or non-organic additives) and/or raised without antibiotics (drugs that are intended to prevent or treat animal illnesses). Purchaser must specify system requirements under “Additional product options.”
  - (vi) Pastured Production with Organic and/or Antibiotic-Free Systems [6] - Birds are raised outdoors using movable enclosures located on grass and fed an organic diet (without hormones or non-organic additives) and/or raised without antibiotics (drugs that are intended to prevent or treat animal illnesses). Purchaser must specify system requirements under “Additional product options.”
- Id.* at 7-8.

example, the USDA allows food products to be labeled as “natural” when they meet the following criteria: “[a] product containing no artificial ingredient or added color and is only minimally processed (a process which does not fundamentally alter the raw product) may be labeled natural. The label must explain the use of the term natural (such as - no added colorings or artificial ingredients; minimally processed).”<sup>153</sup> Even if most consumers have no easy way to verify a manufacturer’s claim that a product is “natural,” laboratory tests could conceivably be performed by consumer groups or government agencies to test the accuracy of these claims. In contrast, since the “free-range” label doesn’t relate to *anything* about the food product itself, but rather only to the treatment given to the animals utilized in producing the food product, there are no post-hoc tests that can be performed to verify whether or not manufacturers are complying with even those minimal standards prescribed by USDA in claiming that their food products are “free-range.” There can be no substitute for simply going out and observing the animals on the farms.

Yet this is not the approach taken by the USDA. Instead, the agency generally “relies upon producer testimonials to support the accuracy of these claims.”<sup>154</sup> While the majority of producers would likely not attempt to commit outright fraud in labeling their products as free-range, this lack of routine verification of producer claims certainly encourages (and allows) producers to take as much license as possible in stretching the definition of “free range” far beyond expected limits. Observers have described scenes of “free-roaming” birds crammed together “wall to wall – 6,800 chickens with one rooster for every hundred hens. They never set foot outside.”<sup>155</sup>

All of this gives one reason to suspect that many consumers are being badly misled by terms like “free-

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<sup>153</sup>See *supra* note 144.

<sup>154</sup>Donovan, Michael E. Official U.S. Department of Agriculture/Food Safety and Inspection Service letter, April 11, 1996 (as quoted on <http://www.cok.net/lit/freerange.php>).

<sup>155</sup>Karen Davis, PhD., “Free Range Poultry and Eggs,” United Poultry Concerns, Inc., Feb. 11, 2004.

range” and “free-roaming.” “Companies want consumers to believe that products labeled ‘free-range’ or ‘free-roaming’ are derived from animals who spent their short lives outdoors, enjoying sunshine, fresh air, and the company of other animals.”<sup>156</sup> Shockingly, however, “the term ‘free-range’ doesn’t really tell you *anything* about the [animal’s]...quality of life.”<sup>157</sup> There is a cavernous disconnect between the images portrayed by marketers and descriptions by observers. In advertisements for “Happy Hen Organic Fertile Brown Eggs,” the producer claims the hens are raised “in a natural setting,” and are humanely housed in healthy, open-sided housing, for daily sunning — something Happy Hens really enjoy.” In reality, “[m]ore than 7,000 birds are housed in each ‘Happy Hen’ barn; the wall to wall birds are severely debeaked; and individual hens have no more than 11.5 square inches of space each.”<sup>158</sup> This is only slightly more space than hens receive in typical battery cages; it could hardly be considered a “natural setting.”

Indeed, if the label “free-range” fails to convey any meaningful information about the treatment of the animals from which food products are derived, what meaning does the term have at all? It carries no implications for human health or environmental preservation; the term either promises some improvement in animal welfare or it promises nothing at all. But if the term is all-but-meaningless – if “free-range” hens (or other free-range animals) don’t live better lives than their “traditional” compatriots – what justifies the massive price differentials between “free-range” and other animal products? And if there is no appreciable difference between the products, can the persistence of these price differentials mean anything other than that consumers are being misled on a broad scale? And if consumers are apparently being duped, why haven’t FDA or USDA taken any steps to remedy the situation?

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<sup>156</sup>“Free-Range Eggs and Meat: Conning Consumers?,” PETA Factsheet (available at [http://www.peta.org/mc/factsheet\\_display.asp?ID=96](http://www.peta.org/mc/factsheet_display.asp?ID=96)).

<sup>157</sup>Perl, Peter. The Truth About Turkeys, The Washington Post Magazine, November 5, 1995 (emphasis added).

<sup>158</sup>The Rougher They Look, The Better They Lay, Poultry Press, Vol. 2, No.4, 02.10.01.03-04. Note that this description was written *before* the USDA began strictly regulating the use of the term “organic.” It is possible, though far from certain, that eggs from hens housed in such conditions could no longer be labeled “organic,” *see supra* notes 139-143 and accompanying text, though the “free range” label could presumably still be used.

If the USDA's regulation of "organics" can be thought of as evidence of the successes possible with wholehearted governmental involvement in a labeling program, the "free-range" fiasco must represent the disaster that can result when regulators dabble in a field without enthusiastically pursuing the public interest. Consumers expect food product labels to be screened for accuracy by the FDA (or the USDA), which no doubt contributes to their heightened faith in the information they read on product labels as compared to other forms of product advertising. When these agencies let down their guard, and allow manufacturers to use terms based on definitions that do not accord with consumer expectations, and then fail to follow up to ensure that manufacturers are being scrupulous in their usage of even these loose definitions, widespread consumer confusion and misinformation becomes the extraordinarily likely result.

Of course, markets almost inevitably respond to demand. So when there is a significant demand for foodstuffs produced with more humane methods, and regulators fail to provide consumers with meaningful categories of such products, the expected result is for the private markets to move in (where possible) to help fill this void. Recent years have witnessed the growth of several wholly private labeling programs specifically designed to appeal to consumers seeking more humane food products.

One prominent set of standards are those put together by Humane Farm Animal Care under the "Certified Humane" label.<sup>159</sup> This organization was started through the joint efforts of the Humane Society of the United States and the American Society for the Prevention of Cruelty to Animals.<sup>160</sup> Humane Farm Animal Care has created a comprehensive set of animal welfare standards for many varieties of common farm animal products.<sup>161</sup> In contrast to USDA's paltry single sentence definition for "free-range" chicken, for example, a

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<sup>159</sup> See <http://www.certifiedhumane.com/>.

<sup>160</sup> See <http://www.certifiedhumane.com/story.html>.

<sup>161</sup> The organization has created detailed standards for the humane care and handling of beef cattle, broiler chickens, laying hens, dairy cows, pigs, sheep, and turkeys. It also has a general policy manual applicable to the raising of any animal species, and a specific set of detailed guidelines for the slaughter of cattle, pigs, and sheep. See

“certified humane” producer is required to satisfy the following criteria in order to label their egg products

“free-range”:

E 27: Outdoor area

The outdoor area in free-range systems must:

1.

Be designed and managed in ways that ensure that the land around the house does not become damaged, contaminated, or sodden;

2.

Consist of pasture covered by living vegetation, where possible. Chickens with access to range must have access to well-drained area for resting while outside the building.

E 28: Exits

a.

Hens kept in free-range systems must have sufficient exit areas appropriately distributed around the building to ensure that all hens have ready access to the range.

b.

Each exit area must allow the passage of more than one hen at a time.

E 29: Dust bathing area

a.

If the dust-bathing environment for free range hens is only provided outdoors, the hens must have access to this area for at least 4 hours every day.

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<http://www.certifiedhumane.com/documentation.asp>. The organization’s website further explains:

The standards were created by a team of Animal Scientists, and Veterinarians with expertise in farm animal issues. During creation of the standards, the team reviewed the latest research and consulted established standards, such as those in use by the Royal Society for the Prevention of Cruelty to Animals (RSPCA) in England, and other standards and guidelines recognized for the proper care of animals. Input was also obtained from producers.

See <http://www.certifiedhumane.com/faq.html>.

- b. Outdoor dust bathing environments must have a substrate suitable for the performance of dust-bathing behavior.

E 30: Vegetative cover for range area

In free-range systems, a cover of living vegetation should be maintained over the grazing area, with active management of damaged ground.

E 31: Size of range area

- a.

In systems where birds are primarily managed on range, the minimum space required is 2.5 acres for every thousand birds.

- b.

Land used for cropping (except grass or hay) is not regarded as acceptable vegetation and must be excluded from calculations for grazing space allowance.

- c.

The perimeter of the range should be within 400 yards of the house.

- d.

If rotational grazing is used, a minimum of 1/6 of the total range area should be available at any one time.

E 32: Parasite control

When there is a risk of build up of parasites or pathogens on the free-range land, rotational grazing or other disease control measures must be applied.

E 33: Overhead cover

Hens in free-range systems must have access to overhead cover to reduce regular fear reactions to overhead predators.

E 34: Shelter

a.

In areas where excessively cold temperatures or other adverse weather conditions that could lead to chilling of the hens are expected, a shelter must be accessible that:

1.

Is of sufficient size to accommodate all hens; and

2. Provides sufficient protection from wind, rain and snow.

b.

In areas where excessive heat may be a problem, a shaded area that has sufficient space so that the hens do not have to crowd together, risking further heat stress, must be accessible to the birds.<sup>162</sup>

These “free range” requirements constitute only a fraction of 29 full pages of standards applicable just to egg-laying hens in the Certified Humane program.<sup>163</sup>

In order for a producer to display the “Certified Humane” seal on her product label, she must first obtain certification from Humane Farm Animal Care.<sup>164</sup> This process is costly and time-consuming, and producers must consent to recurrent live check-ups to ensuring continuing compliance.<sup>165</sup> Funds to sustain the organization come from fees levied upon certified producers.<sup>166</sup> In exchange, producers receive the right to display the “Certified Humane” seal on their products – a seal that should allow them to obtain premium pricing in the market.

It is too early to offer a verdict on the long-term viability of the “Certified Humane” program, though there

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<sup>163</sup> See *id.*

<sup>164</sup> See <http://www.certifiedhumane.com/faq.html>.

<sup>165</sup> See *id.*

<sup>166</sup> See *id.*

are reasons to hope it succeeds. One significant advantage potentially created by private programs like this is their relative immunity from industry capture. The agricultural lobby carries a great deal of political weight, and any governmental regulations created to improve farm animal welfare are highly susceptible to industry influence, both during initial drafting and through later proposals for weakening amendments. Obviously, although some private institutions might be susceptible to industry influence, most are likely not, and certainly not those with long-established backgrounds in animal protection (like the United States Humane Society or the American Society for the Prevention of Cruelty to Animals). Consumers generally need not wade through the 200+ pages or so of regulations actually promulgated under the “Certified Humane” program in order to have great confidence that the standards were promulgated with uncompromising goals of animal welfare in mind. Many consumers, especially those savvy to the workings of the federal government, would not automatically place the same faith in any standards issued by regulators in Washington.

Of course, this lack of governmental oversight has its downside as well: namely, a lack of any centralized set of definitions to bring order to the marketplace. In the 1990s, a confusing web of more than three dozen different organic certifying standards existed, all competing for the consumer dollar.<sup>167</sup> The requirements for obtaining “organic” labeling differed significantly among these various certification programs, and consumers naturally were left perplexed, unable easily to sort through the myriad definitions (if they were even aware of the differences). And since the ‘degree of organic-ness’ of a food product is completely invisible to consumers, even after purchase, consumers had little ability to retaliate against producers whose organic products were inferior to competing products. This again created a situation ripe for exploitation: producers had every incentive to craft minimalist standards for an “organic” program in order to slap an attractive label on their product. In other words, producers had every incentive to *advertise* their foods as organic but little incentive

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<sup>167</sup> See, e.g., <http://www.cnn.com/HEALTH/indepth.food/organic/> (noting that “[t]he long-awaited [federal] rules” are “intended to end a patchwork of more than three dozen state and private sector organic certifying standards”).

to actually *provide* costly organic foods.

It is not difficult to imagine how a similar situation could arise with respect to private-label “humane foods” certifications, were the market to continue its rapid recent growth. Were numerous “humane” standards to begin competing against each other, consumers could have an extremely difficult time sorting through the various claims – especially as they began to emanate from sources less generally trusted than the Humane Society of the United States and the American Society for the Prevention of Cruelty to Animals. Once consumer confusion set in, even those consumer populations most interested in purchasing more humane food products might feel perplexed by a baffling array of product claims.

Something like this is of course happening already – as noted, many consumers currently interested in purchasing relatively humane food products pay significant premiums to purchase “free range” products, presumably in the belief that their extra dollars are buying substantially better lives for the animals from which their food products are derived. In addition, several years ago a consortium of egg producers created an “Animal Care Certified” label for their egg products.<sup>168</sup> In 2003, the Better Business Bureau ruled that this label implied to average consumers that the hens laying these eggs received some material higher standard of care than that practiced by the industry at large.<sup>169</sup> Since these birds received only marginally better care – their battery cages were slightly less crowded, but little else was changed – the Better Business Bureau concluded that these labels were inherently misleading and their use should be discontinued.<sup>170</sup> Despite this ruling, “Animal Care Certified” labels appear on grocery shelves to this day, and they still sell at premium prices relative to conventional products.<sup>171</sup> These sorts of confusions in the market make it significantly

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<sup>168</sup>For details on the “Animal Care Certified” labeling program, see [www.animalcarecertified.com](http://www.animalcarecertified.com).

<sup>169</sup>See *United Egg Producers, Inc., NAD Case Rpts. 636, 636 (Dec. 2003)*.

<sup>170</sup>*Id.*

<sup>171</sup>For example, many of Eggland’s Best Farms’ egg products carry the “Animal Care Certified” label. See <http://www.eggland.com/egglandsbest/index.html>.

more difficult for truly stringent (and costly) animal welfare standards like those embodied in the “Certified Humane” program to take root – and makes the continued existence of these more rigorous programs all the more impressive.

One other recent initiative deserves mention here: in late 2004, national health foods retailer Whole Foods Market announced plans to substantially strengthen the animal welfare standards required of all their suppliers.<sup>172</sup> While these standards are not technically a regulation of “labeling,” the Whole Foods initiative does have important implications for this discussion. Whole Foods is a private market participant that is creating its own set of animal welfare standards. Unlike most private systems (such as the “Certified Humane” program), Whole Foods will not be forced to have their standards compete directly against those of other (potentially misleading) claimants. They will simply allow products meeting their standards on their store shelves, and will not allow products failing to satisfy their standards. In this way they will successfully evade the problem plaguing most private humane-labeling systems: the ability of competitors to put comparable labels on products that are not comparably humane. It is conceivable that in the future Whole Foods Market itself might face competition from other grocery chains, claiming to have rigorous welfare standards of their own, and forcing consumers to attempt to evaluate the veracity of these various claims. When such a day comes there may be an indisputable need for stronger centralized welfare guidelines (probably in the form of substantive laws), but for today the idea of whole grocery chains competing based on their animal welfare standards is indeed remote.

More generally, welfare labeling – being merely a subset of advertising – raises many of the same policy

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<sup>172</sup>See [http://www.wholefoods.com/products/meat\\_aw-standards.html](http://www.wholefoods.com/products/meat_aw-standards.html) (detailing animal welfare standards required of Whole Foods’ suppliers).

considerations as does other welfare advertising. As the preceding discussion has illustrated, however, there are several unique considerations that come into play when dealing with the regulation of product labeling. Labels are inherently short on space, so lengthy definitions of advisatory catch-phrases are simply not feasible. Yet, if product labels are to have any meaning at all, consumers must be able to meaningfully differentiate between label claims. Troublingly, even though the market for humane foods is still in its formative stages, a number of confusing claims are already making meaningful differentiation difficult for consumers. This implies that regulatory bodies need to work vigilantly to protect against fraud here, whether by mandating the uses of certain terms or simply by being willing to respond with sanctions to any credible evidence that consumers are, in fact, being misled by product claims. Obviously, this is necessary for all advertisements, but the need for more active government involvement seems particularly acute here. Persistent price differentials that cannot be explained except with reference to claims made on product labels should themselves be taken as *prima facie* evidence that consumers are being misled, unless the claims carry some substantive, non-deceptive meaning that could reasonably justify such differentials.

Furthermore, as these claims are being policed, it is important that special recognition be given to the fact that these claims typically move beyond the realm of common sense for most (if not all) consumers. Claims like “Animal Care Certified” or “Free Range” are fundamentally different from many other traditional food product label claims – like “Heart Healthy”<sup>173</sup> or “High in Fiber,”<sup>174</sup> for example. Consumers may not be able to evaluate whether or not one of these claims is true – whether a serving of olive oil is indeed “heart healthy” – but they more or less know perfectly well what it means (and what consequences potentially follow from having good heart health as opposed to poor heart health). Consumers as a class lack any of

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<sup>173</sup> See, e.g., Jennifer Warner, “Olive Oil Cleared for Heart-Healthy Claim,” Nov. 1, 2004 (available at <http://my.webmd.com/content/article/96/103722.htm?src=rss.cbsnews>) (noting FDA’s decision to allow containers of olive oil to display a “Heart Healthy” claim on their labels).

<sup>174</sup> See generally “A Food Labeling Guide–Appendix B,” FDA Center for Food Safety and Applied Nutrition, 1994 (revised 1999) (available at <http://www.cfsan.fda.gov/~dms/flg-6b.html>).

this same intuition regarding claims such as “animal care certified” or “free range”; in fact, there is strong evidence that these terms (without further explication) are extraordinarily misleading to consumers. Many people are not only unable to evaluate the accuracy of these claims; they are unable even to discern their true meanings. This might justify applying a heightened standard of scrutiny to claims of humane treatment, perhaps requiring claims to be either clearly defined or nearly incapable of misinterpretation.<sup>175</sup>

### **Substantive Prohibitions**

Thus far, this paper has concentrated on what might be termed “market-based” regulations – those measures that attempt to improve the welfare of farmed animals not through coercion, but merely through improving the flow of information in the product markets (whether by providing accurate information or preventing the dissemination of inaccurate information). The analysis now turns to the stronger protections of statutory codes, those requirements saying that a producer *must do x* or *must not do y* in his interactions with animals. These substantive regulations are significantly more controversial: many people bristle at the idea of an intrusive state telling them what they may or may not do with their property. In contrast, although one may not agree with the resolution of any particular issue, it is hard to argue with the basic premise that consumers ought to be as well informed as possible regarding their purchases. On the other hand, animal advocates appreciate both the clear prohibitions and the strong moral statements that positive laws can

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<sup>175</sup>In *United States v. Article Consisting of 216 Cartoned Bottles . . . “Sudden Change,”* 409 F.2d 734 (2d. Cir. 1969), the court noted that FDA’s responsibility under the Food, Drug & Cosmetics Act was to protect “the ignorant, the unthinking, and the credulous” among the consumer class. Several other courts have echoed this sentiment. See Hutt & Merrill, *supra note* 144, at 57 n. 2. While this standard may be overly burdensome in many circumstances where the majority of consumers have a good understanding of the meaning of product label claims, it seems entirely appropriate here: where even the “reasonable” consumer is indeed “ignorant” regarding the fundamental nature of most welfare claims, no degree of consumer knowledge or expertise should be presumed.

potentially offer.

In the animal welfare field, substantive prohibitions can be broken down into two general classes: what I call generalized welfare standards, and specific-act legislation. Although the distinctions between these two types of legal protections are not precise, there are enough salient differences to make their separate analysis useful.

### Generalized Welfare Standards

An archetype of a generalized standard for animal welfare would be one of the many state anti-cruelty laws. These laws, enacted with considerable similarity in all 50 states, proscribe a wide variety of behaviors determined to be cruel or abusive.<sup>176</sup>

Although the language in almost all of the statutes could be interpreted to prohibit many of the practices common in modern agriculture, the statutes all either explicitly or implicitly exempt these practices. The

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<sup>176</sup>The Massachusetts animal anti-cruelty statute, 272 M.G.L. § 77, states:

Whoever overdrives, overloads, drives when overloaded, overworks, tortures, torments, deprives of necessary sustenance, cruelly beats, mutilates or kills an animal, or causes or procures an animal to be overdriven, overloaded, driven when overloaded, overworked, tortured, tormented, deprived of necessary sustenance, cruelly beaten, mutilated or killed; and whoever uses in a cruel or inhuman manner in a race, game, or contest, or in training therefor, as lure or bait a live animal, except an animal if used as lure or bait in fishing; and whoever, having the charge or custody of an animal, either as owner or otherwise, inflicts unnecessary cruelty upon it, or unnecessarily fails to provide it with proper food, drink, shelter, sanitary environment, or protection from the weather, and whoever, as owner, possessor, or person having the charge or custody of an animal, cruelly drives or works it when unfit for labor, or willfully abandons it, or carries it or causes it to be carried in or upon a vehicle, or otherwise, in an unnecessarily cruel or inhuman manner or in a way and manner which might endanger the animal carried thereon, or knowingly and willfully authorizes or permits it to be subjected to unnecessary torture, suffering or cruelty of any kind shall be punished by a fine of not more than one thousand dollars or by imprisonment for not more than one year, or both. The New York anti-cruelty-statute, Ch. 69 N.Y.C.L., Art. 26 § 353, states:

A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who wilfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a misdemeanor, punishable by imprisonment for not more than one year, or by a fine of not more than one thousand dollars, or by both.

Massachusetts anti-cruelty law, for example, applies to anyone who “torments, deprives of necessary sustenance, cruelly beats” or “inflicts unnecessary cruelty upon” any animal.<sup>177</sup> Anyone who has listened a dairy cow bellow for hours after her newborn calf is forcibly taken from her side will recognize a clear manifestation of “torment”; and what exactly is avian forced-molting, if not the “depriv[ation] of necessary sustenance”? Can anyone one watch a downed cow struggling to move as it sustains repeated kicks and blows with rods and not wonder what “cruelly beats” means, exactly? Or see physically ill geese jerk and squirm as feeding tubes are forced down their throats, bloating their stomachs with far more food than they can comfortably digest, and not wonder just what the infliction of “unnecessary” cruelty might look like?

Yet, although on its face the Massachusetts anti-cruelty law applies to farm animals, in reality none of these practices can even be effectively challenged under the statute. There are two principle reasons for this: first, courts in Massachusetts and across the country have consistently been willing to bend statutory text to its breaking point to avoid holding farmers liable for the way their animals are treated, as long as they are treated in general accordance with industry customs.<sup>178</sup> Whatever the farming community does thereby often ceases to be cruel, simply by virtue of the fact that the farming community is doing it.

Secondly, many state anti-cruelty statutes, being criminal in nature, have no citizen-suit enforcement provisions.<sup>179</sup> This leaves enforcement of these statutes solely in the hands of local district attorneys, who often have limited resources and dockets filled with far more politically salient crimes. Prosecution of local farmers, even when anti-cruelty statutes might arguably apply, is simply not a priority.

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<sup>177</sup> *Id.*

<sup>178</sup> See generally David J. Wolfson and Mariann Sullivan, *Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable*, in CASS R. SUNSTEIN AND MARTHA C. NUSSBAUM, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205 (Oxford University Press 2004).

<sup>179</sup> See, e.g., 272 M.G.L. § 84; *Quinn v. Aetna Life & Cas. Co.* 482 F.Supp. 22, 29 (E.D.N.Y. 1979).

A majority of US states take this one step further, simply explicitly exempting outright all “common,” “accepted,” “customary,” or “normal” farming practices.<sup>180</sup> In these states, no farm practices can constitute legal cruelty, no matter how clearly they meet the statutory requirements, nor how sympathetic the local prosecutor, as long as they are common practices within the agricultural industry. There is no check on how inhumane these practices can be; if farmers are willing to practice them, they are *ipso facto* legal.

Unfortunately, Federal laws provide most animals with no better protections against general cruelty. The main piece of general animal welfare legislation at the federal level is the Animal Welfare Act,<sup>181</sup> which purports to set standards for the humane care of all animals, but simply exempts farmed animals outright.<sup>182</sup> No other federal laws exist regulating the general care of farmed animals.

The Humane Slaughter Act<sup>183</sup> does regulate the *slaughter* of animals, purporting to offer them protection against “needless suffering” in the moments immediately prior to their deaths.<sup>184</sup> Curiously, however, USDA regulations implementing the Humane Slaughter Act explicitly exempt chickens from its coverage.<sup>185</sup> If the thought that any animals in slaughterhouses are not protected even against “needless” suffering is not ghastly enough, it is worth noting that chickens constitute over 95% of the farmed animals slaughtered for food every year in the United States.<sup>186</sup> Thus, the only general federal protection prohibition on farmed animal cruelty, which itself only applies in the final few moments of an animal’s life, offers no protection at all to the overwhelming majority of the farm animals killed in this country every year.

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<sup>180</sup>30 states have written “customary farming practice” exemptions into their animal anti-cruelty laws. See Wolfson, *supra* note 178, at 212 n. 20.

<sup>181</sup>7 U.S.C. §§ 2131-2156.

<sup>182</sup>See 7 U.S.C. § 2132(g) (“[t]he term “animal” . . . excludes horses not used for research purposes or other farm animals, such as, but not limited to livestock or poultry, used or intended for use as food or fiber, or . . . intended for improving animal nutrition, breeding, management or production efficiency, or for improving the quality of food or fiber”).

<sup>183</sup>7 U.S.C. §§ 1901-1907.

<sup>184</sup>7 U.S.C. § 1901.

<sup>185</sup>See Wolfson, *supra* note 178, at 208.

<sup>186</sup>*Id.*

In addition to its statutory narrowness, federal animal welfare law suffers from the same chronic dearth of enforcement that plagues state law. The USDA has a limited number of inspectors responsible for the 900+ slaughterhouses it is responsible for monitoring.<sup>187</sup> Remembering that these slaughterhouses cumulatively slaughter an average of more than 27 *million* animals every day of every year (or more than 19,000 animals every *minute*),<sup>188</sup> vigorous enforcement of the statute Humane Slaughter Act would probably be impossible, even if the USDA were interested in vigorously enforcing the law.<sup>189</sup> And all evidence suggests that USDA is not particularly interested in vigorous enforcement: even Congress has expressed irritation at the lack of respect paid to the statute by the agency. In 2002, Congress passed the “Enforcement of the Humane Slaughter Act of 1958” resolution, stating simply: “it is the sense of Congress that the Secretary of Agriculture should fully enforce [the Humane Slaughter Act].”<sup>190</sup>

There may be no practical way to force state and federal regulators to take the prosecution of farmed animal abuse seriously; the issue simply lacks sufficient political salience to demand attention in their busy schedules. For this reason, some animal activists have argued that Federal and State anti-cruelty statutes should be amended to allow private citizens to bring enforcement actions in court. (Obviously, many of these laws would need simultaneously to be amended to cover farm animals even nominally). Citizens (or advocacy groups) who were concerned about perceived abuses could then themselves take these claims to court, where they could be evaluated on their merits.<sup>191</sup> Since there exists a large pool of individuals dedicated to promoting

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<sup>187</sup>See Dena Jones, *Crimes Unseen: Can consumers rewrite the dark and brutal story of America's big slaughterhouses?* (Orion Magazine, July/August 2004) (available at [http://www.foodfund.org/news\\_articles/orion\\_1.html](http://www.foodfund.org/news_articles/orion_1.html)).

<sup>188</sup>See *id.*

<sup>189</sup>Note, for example, that regulations promulgated under the Humane Slaughter Act forbid “[t]he dragging of disabled animals and other animals unable to move, while conscious.” 9 C.F.R. § 313.2(d)(2). Yet video footage of downed cattle being pushed by tractors or drug by chains at slaughterhouses is appallingly common. See, e.g., *Peaceable Kingdom: A Tribe of Heart Documentary* (Tribe of Heart 2004). Whether due to a lack of agency resolve or simply a lack of resources, these regulations are being ignored with impunity.

<sup>190</sup>See Farm Security and Rural Investment Act of 2002 §10305, as quoted in Wolfson, *supra* note 178.

<sup>191</sup>There is reason to believe many of these claims have at least a reasonable chance of success on the merits: in one of the only cases (globally) in which a court has actually been able to evaluate the anti-cruelty claims on behalf of farmed animals, an English court concluded that the customary farming practices of many McDonald’s suppliers were legally “cruel.” See generally David J. Wolfson, *McLibel*, 5 *Animal L.* 21 (1999).

animal welfare goals, this would presumably vastly improve the enforcement of and compliance with these laws.

It would also arguably open the system to incredible potential for abuse. Many of the same groups interested in promoting animal welfare goals are also interested in pushing the laws much further and doing away with animal agriculture (and animal ownership) altogether.<sup>192</sup> Were these groups able to sue farmers for violating amorphous standards like those prohibiting “torment” or “inflicting unnecessary cruelty,” farmers could reasonably fear an endless barrage of lawsuits challenging virtually all their practices. The concern would be that enforcement of the laws could escalate to simple harassment.

Such a fear is likely overblown. While an initial rash of such suits would very likely materialize, courts in every jurisdiction could quickly establish clearly the permissibility of most modern farm practices; the possibility that courts anywhere would shut down the industry is unimaginable. Once the basic contours of the statutes were defined by case law, the potential to use lawsuits merely to harass producers would diminish significantly; lawsuits challenging routine, relatively humane practices could be thrown out summarily. As long as the suits were clear losers, even the most impassioned animal rights groups would have no incentive to bring them.<sup>193</sup> The potential for abuse could never be eliminated – it always exists in every aspect of our legal system – but as long as appellate courts were able to define a clear set of practices that could not constitute abuse, there is no reason to expect the risk would be impermissibly large here.

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<sup>192</sup>Many animal rights organizations oppose *all* forms of human use and ownership of animals, including even pet ownership. See, e.g., <http://www.peta.org/about/faq-comp.asp> (stating PETA’s opposition to all forms of pet ownership other than the adoption of abandoned or abused animals from shelters).

<sup>193</sup>Consider the fact that now, rights groups could be bringing suits under state cruelty laws anyway, if harassing farmers with losing lawsuits were their only goals. These cases would currently be thrown out by the courts on the grounds that the state statutes have no citizen suit provisions; were citizen-suit provisions added, they could be thrown out on the grounds that they challenged practices already deemed legal.

If this potential for harassment is still deemed too great, however, a more effective approach might be writing more of our intended protections into specific-act legislation, which has the virtue of avoiding inherently fuzzy notions of “cruelty,” substituting instead hard and fast rules concerning a specific product or practice.

### Specific Act Legislation

If general welfare legislation is not doing enough to protect farm animals, and no easy remedies for its holes present themselves, specific act legislation may provide a potential solution. By specific act legislation, I am referring to well-defined substantive prohibitions on specific acts or practices. Rather than generalized standards forbidding things like “cruelty” and “torment,” these pieces of legislation spell out in specific detail what actions may or may not be taken with respect to various practices.<sup>194</sup> They lack the scope of generalized welfare standards, but compensate for this deficiency with their far greater precision.

At the federal level, the primary piece of specific legislation affecting the welfare of farmed animals is the Live-

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<sup>194</sup>Obviously, many single statutes contain both generalized welfare standards and specific act legislations. For example, the Massachusetts animal anti-cruelty statute both generally forbids “unnecessary cruelty” and specifically using a live animal “as lure or bait” (except in fishing). *See supra* note 176.

stock Transportation Act.<sup>195</sup> *This Act provides that no animals may be confined for transport “for more than 28 consecutive hours without unloading the*

The duration of permissible confinement is automatically extended to 36 hours if the owner “requests.”<sup>197</sup>

Until a 1994 amendment the law failed even to apply to transportation by trucks,<sup>198</sup> a glaring oversight considering nearly all animal transport in this country has been by truck since the development of the interstate highway system in the mid-20<sup>th</sup> century.<sup>199</sup>

The acts targeted by the Livestock Transportation Act are unquestionably inhumane; the plight of animals enduring arduous journeys in cramped, unsanitary railcars was what inspired Congress to make this the first federal law motivated (even in part) by a desire to limit the cruel treatment of animals.<sup>200</sup> That fact that the act still *allows* up to 36 consecutive hours of transport *without* unloading for “feeding, water, or rest”

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<sup>195</sup>40 U.S.C. § 80502. The statute provides:

(a) Confinement.—

(1) Except as provided in this section, a rail carrier, express carrier, or common carrier (except by air or water), a receiver, trustee, or lessee of one of those carriers, or an owner or master of a vessel transporting animals from a place in a State, the District of Columbia, or a territory or possession of the United States through or to a place in another State, the District of Columbia, or a territory or possession, may not confine animals in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest.

(2) Sheep may be confined for an additional 8 consecutive hours without being unloaded when the 28-hour period of confinement ends at night. Animals may be confined for—

(A) more than 28 hours when the animals cannot be unloaded because of accidental or unavoidable causes that could not have been anticipated or avoided when being careful; and

(B) 36 consecutive hours when the owner or person having custody of animals being transported requests, in writing and separate from a bill of lading or other rail form, that the 28-hour period be extended to 36 hours.

(3) Time spent in loading and unloading animals is not included as part of a period of confinement under this subsection.

(b) Unloading, Feeding, Watering, and Rest.— Animals being transported shall be unloaded in a humane way into pens equipped for feeding, water, and rest for at least 5 consecutive hours. The owner or person having custody of the animals shall feed and water the animals. When the animals are not fed and watered by the owner or person having custody, the rail carrier, express carrier, or common carrier (except by air or water), the receiver, trustee, or lessee of one of those carriers, or the owner or master of a vessel transporting the animals—

(1) shall feed and water the animals at the reasonable expense of the owner or person having custody, except that the owner or shipper may provide food;

(2) has a lien on the animals for providing food, care, and custody that may be collected at the destination in the same way that a transportation charge is collected; and

(3) is not liable for detaining the animals for a reasonable period to comply with subsection (a) of this section.

(c) Nonapplication.— This section does not apply when animals are transported in a vehicle or vessel in which the animals have food, water, space, and an opportunity for rest.

<sup>196</sup> *Id.* at (a)(1).

<sup>197</sup> *Id.* at (a)(2)(B).

<sup>198</sup> USDA had determined that the law was intended to apply “only to transport by railcar.” See 60 F.R. 48362, 48365 (September 19, 1995).

<sup>199</sup> See JORDAN CURNUTT, ANIMALS AND THE LAW: A SOURCEBOOK 194 (ABC-CLIO 2001).

<sup>200</sup> *Id.*

is itself telling; certainly many might argue a truly humane standard could be markedly more stringent. Penalties imposed in violation of the act are also not onerous: transgressors are fined between \$100 and \$500 for each violation.<sup>201</sup>

Despite these shortcomings, the law does at least contain a clear line that cannot (legally) be crossed, in contrast to the generalized standards prohibiting only indeterminate notions of “cruelty.” This is a significant advantage, for while prosecutors may be uninterested in fighting in court about what practices are or are not cruel or inhumane, they are generally committed to upholding the law, and where clear lines are drawn they can be difficult to ignore. Similarly, were citizen suits allowed in enforcing this law, there would be little room for non-meritous or harassing suits; the requirements of the law are too clear to allow much room for argument as to whether or not its terms have been met.<sup>202</sup>

In recent years, several US states have also passed specific act legislation designed to protect farmed animal welfare. In 2002, Florida voters passed a ballot initiative amending their state constitution to ban outright the use of gestation crates within the state, beginning in 2008.<sup>203</sup> Florida is not a significant source of

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<sup>201</sup> 49 U.S.C. § 80502(d).

<sup>202</sup> In fact, there has been no reported litigation under the Livestock Transportation Act in nearly fifty years. Curnutt, *supra* note 199, at 195.

<sup>203</sup> Florida State Const., Art. X, § 21. The provision reads:

Limiting cruel and inhumane confinement of pigs during pregnancy.—Inhumane treatment of animals is a concern of Florida citizens. To prevent cruelty to certain animals and as recommended by The Humane Society of the United States, the people of the State of Florida hereby limit the cruel and inhumane confinement of pigs during pregnancy as provided herein.

(a) It shall be unlawful for any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely.

(b) This section shall not apply:

(1) when a pig is undergoing an examination, test, treatment or operation carried out for veterinary purposes, provided the period during which the animal is confined or tethered is not longer than reasonably necessary.

(2) during the prebirthing period.

(c) For purposes of this section:

(1) enclosure means any cage, crate or other enclosure in which a pig is kept for all or the majority of any day, including what is commonly described as the gestation crate.

(2) farm means the land, buildings, support facilities, and other appurtenances used in the production of animals for food or fiber.

(3) person means any natural person, corporation and/or business entity.

(4) pig means any animal of the porcine species.

(5) turning around freely means turning around without having to touch any side of the pig’s enclosure.

(6) prebirthing period means the seven day period prior to a pig’s expected date of giving birth.

(d) A person who violates this section shall be guilty of a misdemeanor of the first degree, punishable as provided in s.

pork products: Farm Bureau representatives in Florida expected only one producer to be affected by the ban, and expected growth of the industry was very low (even before the ban was passed).<sup>204</sup> Nonetheless, the initiative represents a positive step: these practices are likely to first be eradicated in the areas least economically dependant on them, if they are eventually to be eliminated more broadly.<sup>205</sup> More recently, California signed into law a ban on the production or sale of *foie gras* within the state.<sup>206</sup> Like Florida, California's ban will affect only one producer, who will have until July 2012 to discontinue operations in California.<sup>207</sup> Nonetheless, California's leadership has prompted several other states to consider similar legislation, including Massachusetts, Illinois, Oregon, and New York.<sup>208</sup> Notably, the state of New York has the largest *foie gras* production facilities in the United States.<sup>209</sup> As more states move toward banning these practices, consumer awareness will inevitably grow and the pressure to end these practices nationwide will accelerate.

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775.082(4)(a), Florida Statutes (1999), as amended, or by a fine of not more than \$5000, or by both imprisonment and a fine, unless and until the legislature enacts more stringent penalties for violations hereof. On and after the effective date of this section, law enforcement officers in the state are authorized to enforce the provisions of this section in the same manner and authority as if a violation of this section constituted a violation of Section 828.13, Florida Statutes (1999). The confinement or tethering of each pig shall constitute a separate offense. The knowledge or acts of agents and employees of a person in regard to a pig owned, farmed or in the custody of a person, shall be held to be the knowledge or act of such person.

(e) It is the intent of this section that implementing legislation is not required for enforcing any violations hereof.

(f) If any portion of this section is held invalid for any reason, the remaining portion of this section, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.

(g) This section shall take effect six years after approval by the electors.

<sup>204</sup>See Allen Harper, "Florida's Ban on Gestation Crates" (Livestock Update 2002) (available at [http://www.ext.vt.edu/news/periodicals/livestock/aps-02\\_12/aps-175.html](http://www.ext.vt.edu/news/periodicals/livestock/aps-02_12/aps-175.html)).

<sup>205</sup>A nationwide ban of gestation crates is not wholly unimaginable; they have already been banned throughout the European Union (with the ban set to take effect in 2006). See [http://www.ari-online.org/pages/europe\\_5\\_sowstalls.html](http://www.ari-online.org/pages/europe_5_sowstalls.html). In addition, two Massachusetts legislators recently introduced a bill to end the use of gestation (and veal) crates within the state. See <http://www.zogby.com/Soundbites/ReadClips.dbm?ID=11047>.

<sup>206</sup>CA S.B. 1520. See <http://www.indybay.org/news/2004/09/1697078.php>.

<sup>207</sup>The lengthy lag time caused some animal rights supporters to oppose this measure altogether. See, e.g., Priscilla Feral, "Update on SB1520: The California Foie Gras Ban That Wasn't," August 16, 2004 (available at <http://www.friendsofanimals.org/news/2004/august/update-on-sb1520.html>) (expressing serious concern that the bill's provisions will eventually be amended or otherwise never actually go into effect, and especially noting that once the eight year delay was built into the statute, California's lone *foie gras* producer actually hired a lobbyist to work on *ensuring the bill's passage*).

<sup>208</sup>See <http://www.zogby.com/Soundbites/ReadClips.dbm?ID=11047>. In New York, Assemblymember John McEneny (D) and Sen. Frank Padavan (R) have sponsored a bipartisan bill to end the production of *foie gras* in the state. See NY A. 6212 & S. 2083; [http://www.hsus.org/legislation\\_laws/state\\_legislation/new\\_york/ny\\_s\\_2083\\_force\\_feeding.html](http://www.hsus.org/legislation_laws/state_legislation/new_york/ny_s_2083_force_feeding.html).

<sup>209</sup>See <http://www.zogby.com/Soundbites/ReadClips.dbm?ID=11047>.

As noted above, the enforcement of these articles of specific act legislation is generally much less problematic than the enforcement of generalized welfare standards. Particularly where outright product or production bans are enacted, enforcement is almost self-assured: no well-advised producer would deliberately set up operations in an area where her intended production methods were illegal, especially where legal alternatives exist. This advantage of easy enforcement must be weighed against the potential for these laws to stagnate: while a general prohibition against “unnecessary cruelty” (honestly applied) may be what society wants in all cases, specific bans prohibit one practice while offering no judgment on any others. As new farm practices are developed, perhaps even in response to the imposition of specific bans, it may become necessary to pass further laws to ensure the expected level of humane treatment. Sustaining the degree of political organization necessary to update these laws regularly may require more resources than the animal rights community can currently muster.<sup>210</sup>

### **Part III: Concluding Remarks**

The intent behind the preceding survey is to move the debate over farmed animal welfare beyond the question of whether something should be done to alleviate their plight. Even though there is no consensus answer to that question (far from it), there is a growing movement of activists and consumers convinced that the clear answer is “yes.” Yet little progress can be made without having any idea of what exactly needs to be changed in the near-term. What changes to our legal system need to be made to ensure greater protection for these creatures? Assuming there are many options available, which are the most desirable? The most feasible?

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<sup>210</sup>Note that the Florida process for amending the state constitution by ballot initiative was changed after the 2002 gestation crate amendment, *specifically because of the gestation crate amendment* (which the legislature thought silly). See Brian Carnell, “Moves to Limit Florida Initiatives in Wake of Gestation Crate Vote” (April 23, 2003) (available at <http://www.animalrights.net/archives/year/2003/000136.html>).

This paper raises more questions than it answers; it is meant primarily to present a survey of the field in order to motivate further discussion. Many questions are presented, and many are deliberately left unresolved. Some are altogether untouched, including questions regarding the degree of accommodation the laws should generally make for the variety of personal beliefs existing in a diverse society like ours. When some see animal agriculture as simple murder and other see it as an essential part of their cultural or even religious heritage and tradition, the law will inevitably be unable to provide answers that satisfy all.

I have suggested that an absence of deception should be a baseline standard; no one (openly) defends their right to commit fraud on the market. The provision of adequate, useful information to consumers must be considered a key component of any well-functioning market. I have demonstrated that our current regulatory structure in many ways falls short of even this modest goal. As the *Economist* has noted:

It is all very well to say that individuals must wrestle with their consciences – but only if their consciences are awake and informed. Industrial society, alas, hides animals' suffering. Few people would themselves keep a hen in a shoebox for her egg-laying life; but practically everyone will eat smartly packaged, "farm-fresh" eggs from battery hens.<sup>211</sup>

Nonetheless, there is no costless way to ensure all consumers are well-informed, and some attempts to do so would likely create significant problems of their own.

Substantive prohibitions make stronger statements, and may be the only satisfactory goals for those many who view the mistreatment of farm animals as a profound moral wrong. Of course, as long as we live in a pluralistic society, substantive prohibitions will remain both more politically challenging and inherently offensive to those whose values differ, and who perceive their fundamental and longstanding freedoms being infringed. Animal activists need to understand the difficulties they face in confronting these beliefs, and need to be cognizant of these differences as they search for the policies with the greatest likelihood of doing

the most good for the creatures whose cause they advocate.