

FOXES IN THE HEN HOUSE

Animals, Agribusiness and the Law: A Modern American Fable

by

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The juxtaposition could not have been more telling. In the left column of the May 21, 2002 World Briefing section of The New York Times was a short story entitled, "Germany: Equal Rights For Animals." The German lower house of Parliament, the Times declared, "has voted overwhelmingly to amend the Constitution to protect animals." If approved by the upper house, the amendment would include animals in a clause obliging the state to respect and protect their dignity. In the opposite column on the same page was a picture of a bald chicken next to the headline, "Building A Better Chicken." The story described how scientists are developing a new breed of "featherless chicken" to allow farmers to produce birds faster and cut down on the processing of their bodies. The hope was that such chickens would grow faster, "save farmers money because less ventilation will be needed, be less fatty and will not have to be plucked after being killed."¹ Intentional or not, the presentation of these stories says much about our current legal treatment of farmed animals as compared to other animals.

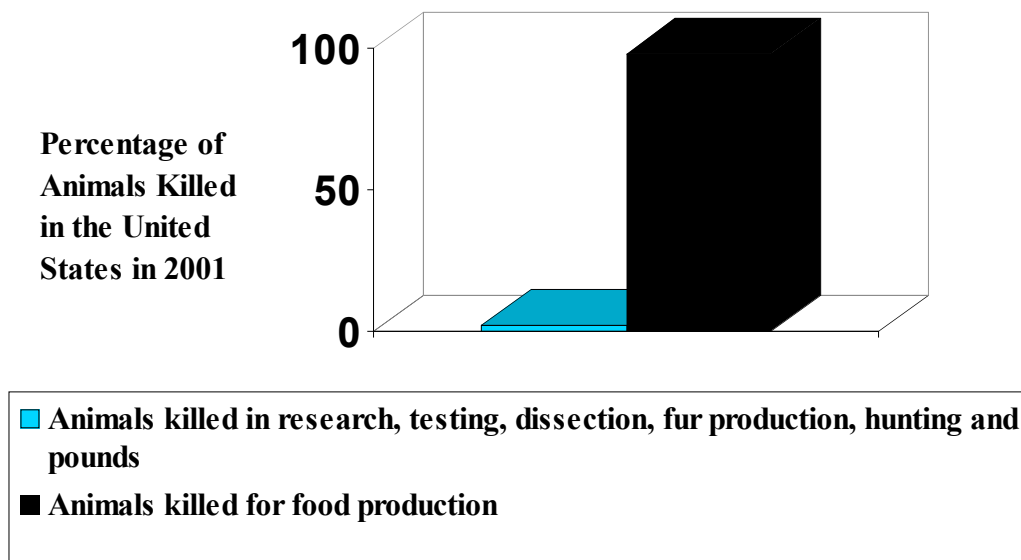
There can be no doubt that change is in the air in relation to the legal status of animals. The philosophical debate is growing, and there is increased acceptance of the idea that the law must recognize that animals have intellectual, emotional and physical attributes which entitle them to certain basic rights beyond protection from egregious cruelty. In the most scholarly annals of the law, there is serious discussion over whether animals should continue to be legally classified as property, whether animals should have legal standing to enforce the federal Animal Welfare Act, and even whether it is possible for a chimpanzee to appear in court on her own behalf or receive constitutional protection. Underlying this debate is a presumption that the law currently provides some basic legal protection for animals, even if there is skepticism about its effectiveness or enforcement. In fact, in the United States, this presumption is to a large extent false.

Legal scholarship has failed to recognize that only a tiny percentage of animals with whom humans interact are *not* raised for food, and that the legal status of farmed animals is dramatically different from that of other animals. While non-farmed animals do have certain protections, albeit inadequate and poorly enforced, upon which future legal developments can be based, it is not unfair to say that, as a practical matter, farmed animals have no legal protection at all. As far as the law is concerned, they simply do not exist. One reason for this reality is the obvious fact that people do not like to think about how farmed animals are raised and killed.

¹ N.Y. Times, May 21, 2002, at A6.

This natural reluctance has been used by the farmed animal industry to perform an extraordinary legal sleight of hand – it has made farmed animals disappear from the law.

It is almost impossible to effectively describe the number of farmed animals. Approximately 9.5 billion animals die annually in food production in the United States. This compares with some 218 million killed by hunters and trappers, in animal shelters, in biomedical research, product testing, dissection and fur farms, *combined*. Approximately 23 million chickens and some 268,000 pigs are slaughtered every 24 hours in the United States. That's 266 chickens per second, 24 hours a day, 365 days a year. From a statistician's point of view, since farmed animals represent 98% of all animals (even including companion animals and animals in zoos and circuses) with whom humans interact in the United States, all animals are farmed animals; the number who are not is statistically insignificant.²



² In 2002, the United States Department of Agriculture's National Agricultural Statistics Service reported that approximately 8.9 billion animals were slaughtered for food in the United States: 36.6 million cattle and calves; 98 million pigs; 3.3 million sheep and lambs; 8.4 billion "broiler" chickens; 160 million laying hens and breeding chickens; 268 million turkeys and 24.5 million ducks. In addition, an uncounted, but, at a minimum, 600 million, farmed animals die annually in process before being slaughtered, e.g., approximately 210 million male chicks are killed at birth every year since they are of no use to the egg industry. These numbers do not include farmed fish. Although exact numbers are difficult to ascertain, it is believed that the number of animals killed in research in the United States ranges from 20-60 million per year, and an additional 6 million animals per year are killed in teaching and education. Furthermore, approximately 8-10 million animals per year are killed for fur, 135 million animals per year are killed in hunting and 5-7 million animals per year in pounds. See, Introduction to Animal Rights, Your Child or the Dog?, Gary L. Francione, Temple University Press (2000); "Body Count: The Death Toll in America's War on Wildlife," April 2000, The Fund for Animals (<http://fund.org/library/documentviewer.asp?ID=85&leude=documents>).

Certainly, making this many animals disappear from the law is an enormous task. It has been accomplished, in significant part, through the efforts of the industry which owns these animals to obtain complete control, in one way or another, over the law which governs it. While this is not an unusual effort on the part of industry generally, the farmed animal industry's efforts have been exceptionally successful. The industry has devised a legally unique way to accomplish its purpose: it has persuaded legislatures to amend criminal statutes that purport to protect farmed animals from cruelty so that it cannot be prosecuted for any farming practice that the industry itself determines is acceptable, with no limit whatsoever on the pain caused by such practices. As a result, in most of the United States, prosecutors, judges and juries no longer have the power to determine whether or not farmed animals are treated in an acceptable manner. The industry alone defines the criminality of its own conduct.

The purpose of this chapter is to educate the reader as to the realities of farmed animal law. It will demonstrate how farmed animals receive no effective legal protection in the United States and detail how the law has been altered to transfer the power to determine whether or not a farming practice is illegally cruel from the court to the farmed animal industry. In addition, this chapter will briefly discuss customary farming practices and describe how many of such practices are not only outside the reach of courts in the United States, but cruel, as determined by an English court and European legislatures.

While the discussion of legal rights of animals is of undoubted importance, any discussion must take place with a clear understanding of a legal reality whereby nearly every animal in the United States has no real legal protection whatsoever, even though there is an assumption that such protection actually exists. There is a desperate need to focus on that simple fact – to look at where our feet are actually planted. The overwhelming majority of animals in the United States not only need viable legal rights, they need the most basic legal protection.

Federal Law

In the case of farmed animals, federal law is essentially irrelevant. The Animal Welfare Act, which is the primary piece of federal legislation relating to animal protection and which sets certain basic standards for their care, simply exempts farmed animals, thereby making something of a mockery of its title.³ No other federal law applies to the *raising* of farmed

³ 7 U.S.C. §§ 2132(g) (2001).

animals, and, consequently, the United States Department of Agriculture has no statutory authority to promulgate regulations relating to the welfare of farmed animals on farms.

As a result, the Humane Slaughter Act is the primary federal legislation affecting farmed animals. It requires that livestock slaughter "be carried out only by humane methods" to prevent "needless suffering." Astoundingly, the statute exempts poultry, the result of which is that over 95% of all farmed animals (approximately 8.5 billion slaughtered per year) have no federal legal protection from inhumane slaughter.⁴ Even given its limited applicability, the Humane Slaughter Act would constitute a significant imposition on industry except for a lack of penalties and enforcement. There are no fines or penalties available for violation of the statute; the only sanction, rarely used, is that the slaughter line can be stopped at the discretion of a USDA employee. There also can be little doubt that the Act is not being effectively enforced. As Senator Robert Byrd (D-WV) recently stated on the floor of the Senate:

The law clearly requires that these poor creatures be stunned and rendered insensitive to pain before this process [i.e., by which they are cut, skinned and scalded] begins. Federal law is being ignored. Animal cruelty abounds. It is sickening. It is infuriating. Barbaric treatment of helpless, defenseless creatures must not be tolerated even if these animals are being raised for food – and even more so, more so.⁵

In 2002, Congress determined that the lack of enforcement was so problematic that it passed a resolution entitled, "Enforcement of the Humane Slaughter Act of 1958," whereby it stated that "it is the sense of the Congress that the Secretary of Agriculture should fully enforce [the Act]" and that "it is the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods, as provided in [the Act]."⁶ This be may one of the few occasions where Congress has felt the need to effectively re-enact an existing statute, though it did not increase the likelihood of compliance by enacting fines or other penalties for violations. The whole affair brings to mind Robin Williams' comment on the ability of the British police to impact criminal

⁴ 7 U.S.C. §§ 1901-1906 (2001); 9 C.F.R. § 301.2(qq).

⁵ 147 Cong. Rec. S7310 (daily. ed. July 9, 2001) (statement of Sen. Byrd). Subsequent to Senator Byrd's speech, Congress authorized some additional funding for increased enforcement of the Humane Slaughter Act.

⁶ Farm Security and Rural Investment Act of 2001 § 10305.

behavior without carrying guns – "Stop! Or I'll say 'Stop' again!"

Finally, there is also a little known statute entitled the Twenty-Eight Hour Law, enacted in 1877, which provides that animals cannot be transported across state lines for more than 28 hours by a "rail carrier, express carrier, or common carrier (except by air or water)" without being unloaded for at least five hours of rest, watering, and feeding.⁷ While on an initial reading the statute appears to be an attempt to limit farmed animal abuse, the United States Department of Agriculture has determined that the statute and its regulations were "written to apply only to transport by a railcar ... [and that] the Twenty-Eight Hour Law does not apply to transport by trucks."⁸ Of course, trucks are today's overwhelmingly preferred method of farmed animal transport. The law is rarely, if ever, enforced, and even if a conviction occurs, the maximum penalty is only \$500.

Given this ineffective federal legal protection, and the fact that no federal statute governs the treatment of farmed animals on the "farm," the only hope for legal protection is at the state level. In this context, the only significant protection for farmed animals are criminal anti-cruelty statutes which are intended to prohibit "unjustifiable" and/or "unnecessary" suffering to animals; in fact, many of such statutes were originally enacted to protect farmed animals. Thus, the question is simple: do state criminal anti-cruelty statutes protect farmed animals from cruelty? The answer is no. Most importantly, while these laws have never worked well to protect farmed animals, there is a fast growing trend to ensure that farmed animals are, as a practical matter, removed from the reach of these statutes entirely.

State Criminal Anti-Cruelty Statutes

State anti-cruelty statutes are criminal statutes that apply generally to all animals and not simply farmed animals.⁹ Thus, they are usually worded in very broad and largely undefined terms, and do not require specific affirmative acts, such as adequate exercise, space, light, ventilation, and clean living conditions. For many reasons, there are substantial problems inherent in the effective governance of an industry's conduct by means of a very general criminal

⁷ 49 U.S.C. § 80502 (2001).

⁸ 60 F.R. 48362, 48365.

⁹ Various categories of animals are often excluded from such statutes, e.g., animals who are hunted or used in research.

statute, rather than a regulatory statute.

Contrary to regulatory schemes generally set up by legislatures to govern industry conduct, criminal anti-cruelty statutes which govern the farming industry's treatment of animals do not provide for the promulgation of specific regulations to govern animal welfare, and the farming industry is not subject to any sort of regulatory enforcement of farmed animal welfare standards, does not undergo any inspections to determine whether farmed animals are being afforded appropriate treatment, and is not answerable to any governmental administrative agency (federal or state) on the subject of farmed animal welfare. In addition, the burden of proof on the prosecution is very high, i.e., beyond a reasonable doubt.

Moreover, unlike regulatory statutes, criminal anti-cruelty statutes also necessarily require that the prosecution demonstrate a mental state on the part of the defendant that may be hard to prove. Thus, a recent New Jersey conviction of an egg producer was vacated on appeal because the evidence failed to show that the company, which had been found guilty of cruelty for having discarded two sick, but living, hens in a garbage bin containing dead hens, had "knowingly" done so since, "keeping in mind someone is dealing with an awful lot of these chickens . . . I can perhaps see how it could have been overlooked" that the chickens were alive when they were discarded. The court went on:

It's hard for this Court to determine whether there was an attempt at vertebrae dislocation [i.e., euthanization of the chickens by wringing their necks] which was unsuccessful or whether in fact perhaps vertebrae dislocation was negligently done or attempted in this case or whether the employee in this case believed the chickens were even already dead and neglected to do it at all. And even if that was the case, I suppose it raises a doubt as to whether there was knowledge there necessary to establish beyond a reasonable doubt that there was cruelty.¹⁰

While regulatory schemes are generally enforced by governmental agencies with experience in the particular area, the enforcement of anti-cruelty statutes, like other criminal statutes, is left primarily to the police and public prosecutors, who have substantial other obligations to which they may assign a higher priority. While, in some states, limited

¹⁰ State of New Jersey v ISE Farms, Inc. (Sup. Ct. Warren Co., March 8, 2001 (John F. Kingfield, J.)) (unreported decision on the record).

enforcement powers are also granted to private Societies for the Prevention of Cruelty to Animals, such Societies generally receive no public funding and do not view farmed animal welfare as within their purview. To the extent that there is enforcement of these laws, it is largely directed at dogs, cats and horses, rather than farmed animals. A New York court eloquently summarized this situation:

The reluctance or inability on the part of the defendant ASPCA as set forth above, raises serious questions, vis-a-vis the effectiveness of our present procedure for dealing with allegations of cruelty to farm animals on the large scale. However, refinement or amendment of this procedure is in the province of the legislature rather than this court It's ironic that the only voices unheard in this entire proceeding are those of innocent, defenseless animals.¹¹

Consequently, convictions are infrequent and generally limited to minimal fines; for example, Alabama, Delaware and Maine have a maximum fine of \$1000, and Oklahoma and Rhode Island have a maximum fine of \$500, for general cruelty to animals.¹² And while a great deal of attention has been placed on recently enhanced anti-cruelty statutes that have felony penalties, little has been written about the fact that only six of the 33 felony statutes enacted to date apply to farmed animals.¹³

Even if the police and prosecutors were eager to enforce criminal anti-cruelty statutes, it is virtually impossible for enforcement agents to ascertain what occurs on the average farm because a farm is private property. Without any regulatory inspection powers, police and law enforcement officers associated with SPCAs and humane societies must demonstrate probable cause to obtain a warrant to search private property for evidence of abuse. Unless the agency is informed by someone "on the inside," it is extremely difficult for information to be discovered, and evidence obtained without a valid warrant will be suppressed. In certain states the obstacles are even greater; for example, in Tennessee, the anti-cruelty statute specifically

¹¹ County of Albany v. American Soc. for Prevention of Cruelty to Animals, 112 Misc. 2d 829 (Sup. Ct. Albany Co. 1982).

¹² Ala. Code § 13A-11-14 (2001); Del. Code Ann. tit. 11, § 1325 (2001); Me. Rev. Stat. Ann. tit. 7, §4016 (2001); Okla. Stat. tit. 21, § 1625 (2001); R.I. Gen. Laws § 4-1-2 (2001).

¹³ California, Delaware, Florida, New Hampshire, Oklahoma and Rhode Island.

states that although the SPCA is statutorily authorized to investigate animal abuse, it cannot do so in the case of farmed animals. Instead, law enforcement investigations relating to farmed animals, and entries onto farms, can only be conducted following an examination by "the county agricultural extension agent of such county, a graduate of an accredited college of veterinary medicine specializing in livestock practice or a graduate from an accredited college of agriculture with a specialty in livestock."¹⁴ A small animal veterinarian does not make the cut.

In the rare case when evidence of cruelty is nevertheless found, it does not mean that a conviction will be secured. Recently, an Idaho sheriff declined to pursue charges against a local dairy farmer in spite of a report by the Idaho Dairy Bureau that the dairy did not provide "reasonable care or sustenance to crippled or sick animals" and subjected cows to "needless suffering and inflicted unnecessary cruelty by dragging, lifting and burying live animals." The sheriff opined that farmed animal cruelty cases cannot be prosecuted unless there are "a substantial number of witnesses." Since the lack of witnesses meant there was no actual proof that the dairy's owner was involved in or ordered the abuse, according to the sheriff, the evidence was insufficient to support a criminal prosecution.¹⁵ This is particularly troubling given that the modern factory farm generally has an incredibly large number of animals managed by a remarkably small number of people, e.g., 200,000 chickens may be monitored by only two people.¹⁶

Criminal anti-cruelty statutes are also generally worded in ways that leave the court extraordinary discretion. By including in the definition of "cruelty" the otherwise undefined requirement that the conduct must be unjustifiable or unnecessary, the law may invite the conclusion that a practice, though capable of causing great suffering, is not legally cruel if it

¹⁴ Tenn. Code. Ann. § 39-14-211 (2001).

¹⁵ Jennifer Sandman, "Dairy Investigation Reports Animal Cruelty ... Officials Decide Not to Pursue Criminal Charges Against Dairy Owner," *The Times News*, Twins Fall, Idaho, January 30, 2003.

¹⁶ See *State of New Jersey v. ISE Farms, Inc.*, supra note 10. See also, *Dominion: The Power of Man, The Suffering of Animals, The Call to Mercy*, Matthew Scully, St. Martin's Press (2002). "Standing outside a factory farm, the first question that comes to mind is not a moral but a practical one. Where is everybody? Where are the owners, the farmers, the livestock managers, the extra hands, anybody? I have been driving around the North Carolina countryside on a Thursday afternoon in January 2001, pulling in at random to six hog farms, and have yet to find a single farmer or any other living soul. It is as if one of those vengeful hurricanes that pound the Carolinas has been spotted, and I am the only one who didn't get the word. Who runs these places? Why aren't they here? Who's looking after the animals?"

is related, in any way, to food production. As one court stated:

It must have come to the attention of many that the treatment of "animals" to be used for food while in transit to a stockyard or to a market is sometimes not short of cruel and, in some instances, torturable. Hogs have the nose perforated and a ring placed in it; ears of calves are similarly treated; chickens are crowded into freight cars; codfish is taken out of the waters and thrown into barrels of ice and sold on the market as "live cod"; eels have been known to squirm in the frying pan; and snails, lobsters and crabs are thrown into boiling water . . . still no one has raised a voice in protest. These practices have been tolerated on the theory, I assume, that, in the cases where these living dull and cold-blooded organisms are for food consumption, the pain, if any, would be classed as "justifiable" and necessary.¹⁷

Similarly, in *Lock v Falkenstine*, the Oklahoma Appellate Court determined that the statute's use of the general word, "animal," afforded it substantial discretion. As a result, the court determined that the legislature, in precluding cruelty to animals, did not intend to include "fowl" within that proscription, noting, *inter alia*, that fowl were referred to separately in Genesis 2.19 ("And out of the ground the Lord God formed every beast of the field and every fowl of the air"), and stating:

Though we respect those courts that have held that various kinds of fowl fall within that category [i.e., "animals"], and likewise agree that the science of Biology holds them to be such; however, we are charged with the duty of concluding whether the man of "ordinary intelligence" would consider a rooster an animal. Surely, we would not expect a man of ordinary intelligence to fathom the law on the same footing as a learned Judge, or be as well versed in genetics as a student of biology. We feel that the Statute is not explicit, nor is it certain. And that persons of ordinary intelligence would have difficulty understanding what it attempts to prohibit.¹⁸

The Rise of the "Customary Farming Exemption"

While, for all of these reasons, it is hard to argue that state criminal anti-cruelty statutes present a significant obstacle for the farmed animal industry in its pursuit of any practice that is economically expedient, the industry has, nevertheless, decided that these statutes are an

¹⁷ People ex. rel. Freel v. Downs, 136 N.Y.S. 444, 445 (N.Y. Magis. Ct. 1911).

¹⁸ Lock v Falkenstine, 1963 OK CR 32, 380 P2d 238 (Ok. Ct. Crim. App. 1963).

unacceptable risk. In a rapidly growing trend, as farming practices have become more and more industrialized and possibly less and less acceptable to the average person, the farmed animal industry has persuaded the *majority* of state legislatures to actually amend their criminal anti-cruelty statutes to simply exempt all "accepted," "common," "customary," or "normal" farming practices.¹⁹ Since 1990, 14 states have joined the growing majority of jurisdictions that have enacted such amendments. It is hard to imagine any reason for this aggressive legislative agenda on the part of industry other than a fear on its part that it is using farming methods that might be considered illegal under prior criminal law. Farmed animals within these states do not have even the illusion of legal protection from institutionalized cruelty.

The overwhelming majority of such states simply prohibit the application of the criminal anti-cruelty statute to all customary farming practices. What is considered a customary practice? Most often there is no statutory definition, although Pennsylvania has provided the remarkably broad definition of "normal activities, practices and procedures that farmers adopt, use or engage in year after year in the production and preparation for market of poultry and livestock."²⁰ A practice will be considered customary if a majority, or perhaps even a significant minority, of the animal industry follows it. In Wisconsin, for example, the statute specifies with respect to shelter requirements that such requirements merely be customary within the county.²¹ Tennessee (which already limits cruelty investigations as described in the preceding section, and which also exempts customary farming practices) provides that a customary farming practice is whatever a "college of agriculture *or* veterinary medicine" says it is.²²

¹⁹ The following states have exempted all customary farming practices: Arizona; Colorado; Connecticut; Idaho; Illinois; Indiana; Iowa; Kansas; Maryland; Michigan; Missouri; Montana; Nebraska; Nevada; New Mexico; North Carolina; Oregon; Pennsylvania; South Carolina; South Dakota; Tennessee; Texas; Utah; Washington; West Virginia; and Wyoming. In addition, South Carolina exempts fowl; Louisiana exempts fowl and the herding of domestic animals; New Jersey creates a legal presumption that certain practices to be specified by the Department of Agriculture are exempt, but such practices have never been specified; Ohio exempts farmed animals from requirements for wholesome exercise, a change of air and shelter prior to slaughter; Vermont exempts farmed animals from its Animal Welfare Act and the provision in its anti-cruelty statute that makes it illegal to tie, tether or restrain an animal in an inhumane or detrimental manner; Virginia exempts the dehorning of cattle; and Wisconsin requires farmed animals to be only provided with shelter requirements that are customary in the county.

²⁰ Pa. Stat. Ann. Tit 18, § 5511(c)(q) (2001).

²¹ Wis. Stat. Ann. § 951.14 (2001).

²² Tenn. Code Ann. § 39-14-202 (e)(1) (2001).

North Carolina has a bizarre provision which exempts all "lawful activities conducted for . . . purposes of production of livestock or poultry" even though no other North Carolina statute forbids any farming practice on the basis of cruelty.²³ In the absence of any legal authority specifying what is or is not a "lawful activity," the circularity of the statute makes it impossible to understand whether the statute exempts everything or nothing. Georgia's criminal anti-cruelty statute creates similar confusion. The anti-cruelty statute does not apply to "conduct otherwise permitted under the laws of this state . . . including . . . animal husbandry . . . nor . . . limit in any way the authority or duty of the Department of Agriculture."²⁴ It is unclear what the consequences of this provision are given that Georgia's statutes do not provide any other guidelines as to farmed animal welfare.

Certain states exempt only specific practices instead of all customary farming practices. This results in some surreal legal admissions. For example, Ohio exempts farmed animals from requirements for "wholesome exercise and a change of air" and Vermont exempts farmed animals from the section in its criminal anti-cruelty statute that deems it illegal to "tie, tether and restrain" an animal in a manner that is "inhumane or detrimental to its welfare."²⁵ One cannot help but assume that, in Ohio, farmed animals are denied wholesome exercise and a change of air, and, in Vermont, farmed animals are tied, tethered or restrained in a manner that is inhumane or detrimental to their welfare. In California, if we step outside of the criminal anti-cruelty statutes for a moment, there is the provision that live vertebrate animals in public elementary and high schools cannot, as part of a scientific experiment or for any other purpose, be experimentally medicated or drugged in a manner as to cause painful reactions or injury; these provisions, however, "are not intended to prohibit or constrain vocational instruction in the normal practices of animal husbandry."²⁶ And, in 2001, in an eyebrow raising move, the legislature of Maine felt the need to exempt "normal and accepted practices of animal husbandry" from the bestiality provision of its criminal anti-cruelty statute; apparently, the

²³ N.C. Gen. Stat. § 14-360(c)(2)(2A) (2001).

²⁴ Ga. Code. Ann. § 16-12-4 (2001).

²⁵ Ohio Rev. Code Ann. § 959.13(A)(4) (2001); Vt. Stat. Ann. Tit 13 § 352(3) (2001).

²⁶ Cal. Educ. Code § 51540 (2001).

farming community felt somewhat insecure about prosecutorial discretion in connection with a provision which prohibits the sexual stimulation of an animal by "any part of the person's body or an object."²⁷

In an interesting twist, New Jersey amended its criminal anti-cruelty statute in 1995 to provide that the "raising, keeping, care, treatment, marketing and sale of domestic livestock" is legally presumed to not be cruel if farmed animals are kept in accordance with "humane" standards to be developed and adopted by the "State Board of Agriculture and the Department of Agriculture in consultation with the New Jersey Agricultural Experiment Station."²⁸ The legislature directed that the standards be promulgated within six months. Unlike all the other statutes described in this section, this statute, on its face, appears to promote humaneness, although whether by design or mistake is unknown; what is clear is that the New Jersey Department of Agriculture appears to be unable to produce a list of humane farming practices since, eight years later and in denial of the statutory mandate and repeated requests by animal protection advocates, no standards have appeared, although rumors suggest standards may surface in the near future. In the meantime, New Jersey prosecutors have no guidance as to what is or is not an appropriate farming practice.

The limited case law that has developed under these statutes reflects their extreme nature. In Pennsylvania, individuals accused of starving horses argued that the practice of denying nutrition to horses who were no longer wanted and were to be sold for meat was a "normal agricultural operation." The defendants elicited testimony from witnesses that it was normal "to neglect . . . horses for sale . . . for meat." Such horses, the defendants argued, are commonly denied veterinary care and sufficient nutrition, and are placed in so-called "killer pens." Witnesses also stated that "various practices in the farming industry . . . might be considered cruel except for the fact that they are practices within the industry." While the court did convict the defendants of cruelty, it decided to do so only because the defendants failed to establish sufficient testimony as to the pervasiveness of the practice, and no testimony "indicat[ed] that in fact they were in the business of raising horses to be sold for dog food or that they had formed the definite intention of sending the horses in question to 'killer pens' for that

²⁷ Me. Rev. Stat. Ann. Tit. 17, § 1031(I) (2001).

²⁸ N.J. Stat. Ann. § 4:22-16.1 (2001).

purpose."²⁹

The case highlights the ramifications of the exclusion of customary farming practices from criminal anti-cruelty statutes. If the defendants had successfully shown with additional testimony that the practice of starving horses was a normal business practice and that they were in that business, the criminal statute would not have applied to this act and the court could not have found the defendants criminally liable. The defendants' problem was not that they starved horses, but that they could not prove that enough people were doing the same thing. Clearly, if enough people do it, anything is possible under the new statutes.³⁰

Ultimately, the impact of all this legislative maneuvering is a devastation of the existing, albeit weak, legal protection for farmed animals. State legislatures have endowed the farmed animal industry with complete authority to define what is, and what is not, cruelty to the animals in their care. There is no legal limit to institutionalized cruel practices to farmed animals who live in states with customary farming exemptions, which constitute a growing majority of states; if a certain percentage of the farming community wants to institute a new practice of raising a farmed animal, that is the end of the matter, and the hands of the judge, prosecutor or local SPCA are tied. The customary farming exemptions are not only an example of a powerful industry evading a criminal law that applies to everyone else, they are a unique development in that they delegate criminal enforcement power to the industry itself. It is difficult to imagine another non-governmental group possessing such influence over a criminal legal definition; for example, a law that provided that chemical corporations have not polluted (and, consequently, violated criminal law) so long as they released pollutants in amounts "accepted" or viewed as "customary" by the chemical industry. In effect, state legislators have granted agribusiness a license to treat animals as it wishes.

Ironically, the current legal reality has allowed the industry to claim that it should not be accused of treating animals improperly since it is, in fact, in compliance with the law. For

²⁹ Commonwealth v. Barnes, 629 A.2d 123 (Penn 1993).

³⁰ In the last two years, there have been at least two successful criminal state prosecutions for particularly heinous fatal beatings of pigs at farms or slaughterhouses. It appears that, in these cases, either the particular jurisdiction did not have a customary farming exemption, or no attempt was made to argue that the brutal beating of pigs was a customary farming practice. However, if brutally beating pigs were shown to be a common farming practice in a state with a customary farming practice exemption, the court would apparently have no choice but to acquit the defendant.

example, a letter issued by the Consumer Affairs Department of egg producer Foster Farms reassured a consumer troubled about animal welfare issues with the statement, "With regard to our poultry slaughtering practices, Foster Farms slaughters chickens and turkeys in accordance with all pertinent State and Federal Regulations."³¹ Inasmuch as there are no federal regulations governing the welfare of chickens and turkeys during slaughter, and 47 states do not have any slaughter regulations that relate to chickens and turkeys, its compliance is presumably not overly burdensome.³²

Similarly, according to the American Meat Institute, "Federal laws govern animal health and humane treatment of animals."³³ As noted, the only Federal laws governing the humane treatment of farmed animals apply solely during shipment (but not by trucks) and at the slaughterhouse (but not chickens). Still, the American Meat Institute states, "The government also plays a role in ensuring the humane treatment of animals. A federal animal welfare law passed in 1958 governs the U.S. meat industry and includes important rules that every meat plant must follow [I]f you are one of the millions of people who enjoy our products, you should know that the meat industry, together with the government and academic researchers, are constantly seeking new ways to enhance animal welfare."³⁴

The result of these obfuscations/legal deficiencies is not only a harsh reality for the animals themselves, but turns on its head one of the most fundamental purposes of the law – to set appropriate standards by which conduct may be judged. Supreme Court Justice Oliver Wendell Holmes described as "a commonplace of the law" the principle that, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."³⁵ Similarly, Justice Learned Hand, in determining whether a tugboat company had violated the law in failing to equip its

³¹ Letter on file with Authors.

³² Only California, Indiana and Utah have regulations which relate to the slaughter of poultry.

³³ MeatAMI.com, American Meat Institute (<http://www.meatami.com/Template.cfmSection=AnimalWelfare&NavMenuID=374>).

³⁴ Animal Welfare in the Meat Industry, January 2001, American Meat Institute (<http://www.meatami.com/Template.cfm?Section=BrochuresandOtherPublications&NavMenuID=375>).

³⁵ *Texas and Pacific Railway Company v. Behmeyer*, 189 U.S. 468, 470 (1903).

tugboats with radios, responded to the argument that other companies had similarly failed:

There are yet, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence Indeed, in most cases reasonable prudence is common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.³⁶

In the area of farmed animal law, which is predominantly criminal law, this is simply not the case. Courts are now irrelevant.

Customary Farming Practices

Regardless of one's opinion as to whether or not customary farming practices are, or are not, cruel, the farming industry's control over criminal statutes is by itself cause for concern. The law, as it currently stands, allows the industry to create horrifyingly cruel farming practices without limitation if it so chooses. These legal developments have occurred in a cultural realm within which there is little public debate about the appropriate treatment of farmed animals and no apparent widespread awareness on the part of the public of the conditions under which animals are raised and slaughtered. As *The Economist* has noted:

It is all very well to say that individuals must wrestle with their conscience (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.³⁷

It is also difficult to avoid the conclusion that, perhaps, the reason for all of the legal maneuvering described in this chapter is a fear on the part of industry that the methods by which farmed animals are raised and slaughtered may not be acceptable to a significant percentage of people.

In fact, farmed animals live out their short lives in a shadow world. The vast majority never experience sunshine, grass, trees, fresh air, unfettered movement, sex, or many

³⁶ T.J. Hooper, et. al. v. Same, 60 F.2d 737, 739 (1932).

³⁷ What Humans Owe To Animals, *The Economist*, August 19, 1995, at 12.

other things that make up most of what we think of as the ordinary pattern of life on earth. They are castrated without anesthesia, on occasion deliberately starved, live in conditions of extreme and unrelieved crowding and suffer physical deformities as a result of genetic manipulation. Is this system cruel? Opinions vary. One Missouri legislator, in support of a bill that would make it a felony to enter a livestock facility without authorization and photograph the animals with the intent to harm the enterprise, said, "The [animals] never had it so good."³⁸ On the other hand, an Illinois legislator, confronted with videotapes of chickens on a modern egg farm, exclaimed, "It's incredible – if you see this –the hens are put into these positions, and there's seven or eight of them in these cages. It's dreadful."³⁹ In even greater detail, Senator Byrd declared:

Our inhumane treatment of livestock is becoming widespread and more and more barbaric. Six hundred-pound hogs – they were pigs at one time – are raised in two foot wide metal cages called gestation crates, in which the poor beasts are unable to turn around or lie down in natural positions, and this way they live for months at a time. On profit-driven factory farms, veal calves are confined to dark wooden crates so small that they are prevented from lying down or scratching themselves. These creatures feel; they know pain. They suffer pain just as we humans suffer pain. Egg-laying hens are confined to battery cages. Unable to spread their wings, they are reduced to nothing more than egg-laying machines.⁴⁰

Intensive confinement systems such as those described by Senator Byrd have been instituted in every sector of the farmed animal industry. The three specific practices that have been the subject of particular scrutiny are the ones to which he refers: the "battery cage" for laying hens, the "gestation crate" for breeding pigs, and the "veal crate" for calves. Every year, in the United States, approximately 98% of egg-producing chickens live in battery cages, approximately two-thirds of breeding pigs (and over 90% of the 1.8 million breeding pigs kept by the ten top producers) are kept in gestation crates during pregnancy, and at least 40% of male dairy calves

³⁸ "Missouri House Oks Ban on Barn Photos," Washington Post, May 16, 2002 (<http://www.washingtonpost.com/wp-dyn/articles/A25338-2002 May 16.html>).

³⁹ A.Kovac, "Legislators Target Chicken Farms' Egg," Chicago Tribune, February 14, 2002 (<http://www.chicagotribune.com/news/local/chicago/chi-0202140022feb14.story>).

⁴⁰ Byrd, *supra* note 5.

raised for veal are reared in veal crates.⁴¹ These practices are only examples of what are perhaps some of the most egregious methods of intensive confinement of farmed animals. Other types of confinement systems are used throughout the industry, for example, for dairy cows, meat-producing broiler chickens, and pigs generally.

The rather odd term "battery cage" is derived from the process of stacking cages one on the other, as in a "battery" of guns. It is standard practice to put eight hens in a cage that is approximately 20" by 19", though some suppliers put more.⁴² The birds are unable to spread their wings. According to Dr. Joy Mench, of the Department of Animal Science at the University of California, Davis:

When there are eight birds in a cage this size, the bird barely has room to stand. And even then she's really compressed. There are a lot of birds pressing against her and turning around is really difficult. And a really important thing about this as well, probably one of the main reasons that crowded hens experience a lot of illness, is there's not enough space for all the birds to feed at the same time. If you're a low ranking bird – low on the peck order – you tend to get pushed to the back during feeding and you can't get enough food. So often the lowest ranking bird in that cage gets sick and dies.⁴³

In order to avoid the wounds that would be caused by the hens fighting, which, in these close conditions, is inevitable, their beaks are cut off. Dr. Mench states that the loss of the beak causes

⁴¹ Introduction to United Egg Producers Animal Husbandry Guidelines for U.S. Egg-Laying Flocks, 2002 Edition, United Egg Producers; Swine 2000, Part I: Reference of Swine Health and Management in the United States, 2000, National Animal Health Monitoring System, USDA, August 2001; John J. McGlone, Phd, "The Crate (stall, case, cage, box, etc.) – Its History and Efficacy," PhD, Pork Industry Institute, Texas Tech University (http://www.depts.ttu.edu/porkindustryinstitute/SowHousing_files/The%20Crate_files/frame.htm); L. Wilson, L. Terosky, C. Stull & W. R. Stricklin, "Effects of Individual Housing Design and Size on Behavior and Stress Indicators of Special-Fed Holstein Veal Calves," *Journal of Animal Sciences*, Savory; June, 1999; L. Wilson, C. Stull & R. Warner, "Welfare Concerns of Special-Fed Veal in the United States," *The Professional Animal Scientist* 10:53-58.

⁴² Battery cages may also be 16" by 20" (which typically hold between 5-7 birds) or 24" by 20" (which typically hold between 8-10 birds). Donald Bell, "Egg Economics Update," University of California/Cooperative Extension, 1999 (<http://animalscience.ucdavis.edu/Avian/euu1299.html>); "Caged Laying Hen Well-Being: An Economic Perspective," Michigan State University, 2001 (<http://www.msu.edu/user/rahn/Publications/NCADCPaper.pdf>).

⁴³ D. Zwerdling, "McDonald's New Farm: the Fast Food Industry and Animal Rights: Cracking Down on Egg Suppliers," *American Radio Works* (<http://americanradioworks.org/features/mcdonalds/index.html>).

lifelong suffering to a hen, whose beak is her primary means of exploring her environment.⁴⁴

The "gestation crate" is used to confine pregnant pigs. Pigs kept for breeding are impregnated continuously until their "production" drops off and they are sent to slaughter. The average life span of a breeding pig is about three years, which is significantly longer than that of other pigs, who are generally slaughtered prior to maturity at four to six months.⁴⁵ The "crates" used to confine pregnant pigs are actually metal stalls, without any straw, lined up next to each other in large buildings with concrete floors. The pig can generally take no more than one step forward or back, and can never turn around. Shortly before giving birth, the pig is transferred to a different crate (the "farrowing crate"), which is similarly confining, where she gives birth and suckles her piglets until they are weaned at the age of approximately three weeks.⁴⁶ She is then impregnated again and transferred back to the gestation crate. Thus, in systems where the gestation crate is in use, the breeding pig spends the vast majority of her life intensively confined.⁴⁷

Finally, perhaps the most well known intensive confinement system is the veal crate. In this system, very young calves are confined in wooden stalls, which are, again, so small that the animal is unable to turn around. In order to maintain the whiteness of the flesh of the calves, thereby making it more marketable, the calves are often kept anemic through a diet deficient in iron.⁴⁸

Not only are such practices legal in the United States, but the current legal

⁴⁴ Id.

⁴⁵ Nutrition of Piglets and Sows, American Soybean Association Technical Bulletin, 1999 (http://www.asajapan.org/tech/animal_wiseman_e_52.html); Swine 2000: Reference of Swine Health and Management in the United States, 2000, National Animal Health and Monitoring System (USDA), August 2001 (<http://www.aphis.usda.gov/vs/ceah/cahm/Swine/Swine2000/finalswoodes1.pdf>).

⁴⁶ Highlights of NAHMS Swine 2000, Part I, August 2001 (<http://www.aphis.usda.gov/vs/ceah/cahm/Swine/Swine2000/swine1highlights.htm.pdf>).

⁴⁷ Nutrition of Piglets and Sows, American Soybean Association Technical Bulletin, 1999 (http://www.asajapan.org/tech/animal_wiseman_e_52.html); Swine 2000: Reference of Swine Health and Management in the United States, 2000, National Animal Health and Monitoring System (USDA), August 2001 (<http://www.aphis.usda.gov/vs/ceah/cahm/Swine/Swine2000/finalswoodes1.pdf>); John J. McGlone, PhD, "The Crate (stall, case, cage, box, etc.) – Its History and Efficacy," PhD, Pork Industry Institute, Texas Tech University (http://www.depts.ttu.edu/porkindustryinstitute/SowHousing_files/The%20Crate_files/frame.htm).

⁴⁸ L. Wilson, Carolyn Stull & R. Warner, "Welfare Concerns of Special-Fed Veal in the United States," *The Professional Animal Scientist* 10:53-58.

framework prohibits United States courts from independently determining whether or not such practices are objectively cruel. Instead, in states with customary farming exemptions (i.e., the majority of states), a prosecutor's and judge's only role is to determine whether such practice is customary, which they all most certainly are. In states where there are no customary farming exemptions, on the rare occasion that a customary farming practice comes before a court, the legal focus is generally on whether such practices are "justifiable" or whether the worker acted with the appropriate state of mind or whether the animal was really an animal.

In the United Kingdom, however, due to a remarkable set of circumstances, a court was afforded a unique opportunity to examine customary farming practices and determine, for the first time, this exact point: whether, in the court's reasonable judgment, such customary farming practices are cruel.

McLibel

In the widely publicized "McLibel" case, McDonald's brought an action for defamation against a number of English political activists who helped hand out a pamphlet (of which no more than 1000 or so copies had been distributed), which stated, among other things, that many customary farming practices were cruel and that McDonald's was responsible for such cruelty. The odds for McDonald's no doubt seemed favorable; the relatively impoverished defendants would defend themselves, and, most significantly, in the United Kingdom, in order to avail themselves of the absolute defense to defamation that their statements were true, the defendants bore the burden of proving such truth "on the balance of probabilities." This is in stark contrast to the law in the United States, in which the plaintiff in a libel action bears the burden of establishing that the statements were false. But, surprisingly, two of the activists, Helen Steel and Dave Morris, decided to defend themselves, and the parties embarked on the longest civil trial in English history.⁴⁹

At the outset, McDonald's argued the standard legal approach in the United States. The court, it stated, should decide whether or not a farming practice is cruel by looking at

⁴⁹ David J. Wolfson, *McLibel*, 5 *Animal L.* 21 (1999). On March 31, 1999, an appeal courts reversed the lower court and held in favor of Steel and Morris on several issues unrelated to animal cruelty. McDonald's had not appealed the findings of the lower court in relation to the animal cruelty discussed in this chapter. For a discussion of the extraordinary disadvantages faced by Steel and Morris in this case, including the fact that they represented themselves pro se, raised only \$48,000 over six years, an amount McDonald's spent on legal fees in just one week, lost the right to a jury trial and were denied access by McDonald's to any of its animal production or slaughter facilities in the United Kingdom, see David J. Wolfson, *McLibel*.

whether such farming practice is a typical farming practice, that is, the norm, and if it were, the court should conclude that such practice was "acceptable and not to be criticized as cruel." The court, however, clearly rejected this argument, stating that it "cannot accept this approach" because "to do so would be to hand the decision as to what is cruel to the food industry completely, moved as it must be by economic as well as animal welfare considerations."⁵⁰ This simple logical statement is an unequivocal rejection of the statutory reality in the majority of states in the United States.

McDonald's also asserted that the court should determine that a farming practice is cruel only when it contravenes governmental guidelines, recommendations or codes; any practice which complies with the existing law or guidelines should be determined not to be cruel. But the court recognized that a farming practice can be cruel, within the ordinary meaning of the word, even if it is legal. Consequently, according to the court, while laws and government regulations are useful measures of animal welfare, neither is determinative of what is, or is not, a cruel practice. Instead, the court stated it would use its own judgment to "decide whether a practice is deliberate and whether it causes sufficiently intensive suffering for a sufficient duration of time to be justly described as cruel."⁵¹

While the court held a number of customary farming practices to be cruel, for the purposes of this chapter, we will discuss only a few specific findings. Noting that "egg-laying hens . . . work for McDonald's" the court initially focused on the battery cage. While the court believed the evidence presented by Steel and Morris failed to demonstrate that a chicken spending her whole life without sunshine or fresh air was cruel, it held that the severe restriction of movement caused by the battery cage for a chicken's whole life, which in the United Kingdom provides one bird "three quarters of the area of a London telephone directory," was proven to be cruel.⁵² As the court poignantly stated:

[i]t seems to me that even the humble battery hen probably has some sentience, some power of perception by its senses, of virtually total deprivation of all normal activities save eating,

⁵⁰ Chief Justice Bell, Verdict Section 8, at 5, "The Rearing and Slaughtering of Animals" (http://www.mcspotlight.org/case/trial/verdict_jud2c.html).

⁵¹ Id. at 6.

⁵² Id. at 32.

drinking, some minimal movement, defecating and laying eggs, and that the one in three or four of them which suffer broken bones on harvesting for slaughter must feel some significant pain. I conclude that the battery system as described to me is cruel in respect of the almost total restraint of the birds and the incidence of broken bones when they are taken for slaughter.⁵³

In addition, in the context of chickens, the court held that calcium deficits in battery hens which result in osteopaenia (a leg problem leading to fractures), the severe space restrictions meat-producing broiler chickens suffer in their last few days, and the standard practice in the egg industry of gassing male chicks (who are of no use in the egg industry) upon birth by carbon dioxide, were cruel.⁵⁴ Discussing the suffocating of chicks, the court stated:

I bear in mind the danger of substituting one's own imagination of what it must be like to be gassed in this way. I bear in mind that a very young chick's awareness must be limited. But as chickens are living creatures we must assume that they can feel pain, distress and discomfort in some form although we do not know exactly how they feel it. In my view chicks . . . do suffer significantly, albeit for a short period, when gassed by CO² and when an alternative method of instantaneous killing is available . . . I find the practice cruel.⁵⁵

Finally, focusing on the gestation crate, the court concluded that while the defendants had not been able to prove that the lack of open air and sunshine was cruel, they had proven that the severe restriction of movement was. Thus, the court stated that "pigs are intelligent and sociable animals and I have no doubt that keeping pigs in dry sow stalls [gestation crates] for extended periods is cruel."⁵⁶

No court in the United States has had the opportunity to determine whether such customary farming practices are cruel within the ordinary meaning of the word, nor is one likely to have a similar opportunity under the current state of the law. It does not seem probable that McDonald's, or any other facet of agribusiness, will make the mistake of initiating a defamation suit in the United States against individuals who claim they are responsible for cruel farming

⁵³ Id. at 34.

⁵⁴ Id. at 13.

⁵⁵ Id. at 15-16.

⁵⁶ Id. at 38.

practices, particularly since, as stated above, Steel and Morris faced a number of legal disadvantages in the United Kingdom that they would not have faced in the United States. On the other hand, the one advantage Steel and Morris had was that the litigation took place in a cultural environment in which the subject of farmed animal welfare has received serious societal and legislative consideration. An analysis of European legislation only further highlights the deficiencies of the legal approach taken in the United States.

Europe

Recent European concern over the intensive farming of animals began to arise shortly after the publication of a book by Ruth Harrison entitled *Animal Machines* in 1964. The book prompted the British government, in 1965, to appoint a committee "to examine the conditions in which livestock are kept under systems of intensive husbandry and to advise whether standards ought to be set in the interests of welfare, and if so what they should be."⁵⁷ This Committee, the Brambell Committee, set forth the "Five Freedoms" of movement:

In principal we disapprove of a degree of confinement of an animal which necessarily frustrates most of the major activities which make up its natural behavior An animal should at least have sufficient freedom of movement to be able without difficulty to turn around, groom itself, get up, lie down, stretch its limbs.⁵⁸

While none of these recommendations were given the force of law at that time, their effect was significant. Specifically, in 1987, the Parliament of the United Kingdom banned the veal crate and the anemic diet for veal calves.⁵⁹ This was followed by the Pig Husbandry Regulations enacted in 1991, which prohibited the gestation crate in the United Kingdom after 1999.⁶⁰

Certain other individual European countries also made significant strides in the area of farmed animal welfare at the same time as the United Kingdom. For example, in Switzerland, the Animal Protection Act banned all battery cages in 1991. The method of choice

⁵⁷ Steven Wise, *Of Farm Animals and Justice*, 3 Pace Entl. L. Rev. 191, 211 (1986).

⁵⁸ *Id.* at 212.

⁵⁹ Welfare of Calves Regulations No. 2021 (U.K. 1987).

⁶⁰ Welfare of Pig Regulations 1991; Paragraphs 6 and 7 of Schedule 6 to The Welfare of Farmed Animals (England) Regulations 2000.

in Switzerland is now the aviary, "conceived in accordance with the natural behavior of fowl and based on installations and equipment such as nest boxes and scratching areas, or perches that enable birds to follow patterns of behavior specific to their species."⁶¹ The Swiss Animal Protection Regulations of May 27, 1981 also provide that animals shall not be permanently tethered and that calves must receive sufficient iron in their feed.⁶² In Sweden, Parliament enacted laws that require cattle to be permitted to graze if over six months old, banned the gestation crate and required that cows and pigs have access to straw and litter in stalls and boxes. No drugs or hormones can be used on farmed animals, except to treat disease, and all slaughtering must be as humane as possible.⁶³

The impact of such reforms led, in turn, to legislation by the European Union, which has significant consequences given that it is comprised of such a large number of countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. In addition, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia are all being considered for membership.

In 1999, the European Union prohibited all battery egg production from 2012. The system will be replaced by free-range farming, or the housing of hens in large, barn-like aviaries, or by "enriched" cages with at least 116 square inches of space per chicken (compared with the 70 square inches currently required by law in the European Union and the 48 square inches customarily used in the United States), a nesting area, litter, a scratching pad to sharpen claws, and a perch.⁶⁴ Germany has required that such prohibition take effect by 2007 and, simultaneously, banned cages entirely from 2012.⁶⁵ The European Union has also prohibited the veal crate from 2007, and the gestation crate (other than in the first four weeks of pregnancy)

⁶¹ 1981 Swiss Ban on Battery Cages: A Success Story for Hens and Farmers, 44 *Anml. Welfare Inst. Q. No. 1* at 10; *Laying Hens; 12 Years of Experience with New Husbandry Systems in Switzerland*, Swiss Society for the Protection of Animals.

⁶² Council of Europe – Information Document; *Swiss Animal Protection Regulations*, May 27, 1991, at 6.

⁶³ *Swedish Animal Protection*, cited in Swedish Ministry of Agriculture Press Release (May 27, 1998).

⁶⁴ Article 5 of Council Directive 1997/74/EC of 19 July 1999.

⁶⁵ "One Giant Leap For Animal Welfare," Press Release, Bundesministerium für Verbraucherschutz, Ernährung und Landwirtschaft, 19 October 2001.

from 2013 and has enacted laws on slaughter which apply to all farmed animals including poultry.⁶⁶ In light of scientific evidence that boredom in pigs can lead them to harm themselves and each other, the European Union now requires pigs to be provided with "manipulable material," such as hay, to satisfy natural rooting behaviors.⁶⁷ There are also relatively strong laws which limit the time periods for the continuous transport of farmed animals as well as a significant movement within the European Union to limit such transportation time periods to a maximum of eight hours.⁶⁸

In another legal development, the Treaty of Rome, the founding document of the European Community, was recently amended to recognize that animals, including farmed animals, are sentient beings (it is unfortunate that the legal status of animals is such that it was considered necessary to pass a law declaring the truth of this thoroughly obvious statement and that its passage was regarded as such a profound event), and that all European Union legislation and member states must pay full regard to the welfare requirements of animals in the formulation and implementation of the community's policies on agriculture, research and transport.⁶⁹

Most fundamentally, from the viewpoint of a European farmed animal, a regulatory system has been initiated in Europe which prohibits a number of the most egregious intensive confinement farming practices.

Industry to the Rescue?

Through a contrast of laws in the United States and Europe one gains a true appreciation of the extent to which legislatures in the United States have abdicated their responsibilities. The failure of the law in the United States in this area is demonstrated perhaps most clearly by recent efforts on the part of fast food restaurants, supermarkets, and even animal industry groups such as the United Egg Producers and the National Cattlemen's Beef

⁶⁶ Article 3(3) of Council Directive 91/629/EEC of 19 November 1991 (as amended by Council Directive 97/2/EC of 20 January 1997); Article 3 of Council Directive 91/630/EEC of 19 November 1991 (as amended by Council Directive 2001/88/EC of 23 October 2001); Council Directive 93/119/EC of 22 December 1993.

⁶⁷ "Pig toy tale 'anti-Europe Rubbish,'" January 29, 2003 (<http://www.cnn.com/2003/WORLD/europe/01/29/uk.pigs.play/index.html>).

⁶⁸ Council Directive 91/628/EEC (as amended by Council Directive 95/29/EEC) on the Protection of Animals During Transport.

⁶⁹ Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Nov. 10, 1997.

Association, to pressure suppliers to treat animals less inhumanely.⁷⁰ These entities, the first of which to act was, interestingly enough, McDonald's, shortly followed by Wendy's, Burger King and Safeway, have begun to develop standards, primarily in the area of slaughter and laying hens, that they will agree to impose on their suppliers.⁷¹ In the case of restaurants and supermarkets, they have indicated a desire to inspect the animal facilities to see that their standards are being followed, although the suppliers have not yet agreed to third party audit procedures.⁷² While the standards that have been imposed to date are minimal, and far below what is to be required in the European Union, in light of the practices currently in place they are certainly a step forward, and all of the practices that they seek to impact are customary farming practices.

Such developments have come from these entities in the absence of a widespread public outcry, although certain companies such as McDonald's and Wendy's had been targeted by the late Henry Spira, working with Peter Singer, and People for the Ethical Treatment of Animals ("PETA"). Only very recently, PETA initiated a global boycott against KFC alleging that KFC had failed to respond to two years of negotiations in relation to the inhumane care and slaughter of chickens. While it unclear whether KFC will be responsive to PETA's campaign, the willingness of retailers and industry groups to take on some responsibility for farmed animal welfare is an obvious acknowledgment on their part that the situation is sufficiently negative that they need to get out ahead of the bad news. It is to be hoped that these initiatives will spur the government, at both the state and federal level, to take a more active role. One obvious reason

⁷⁰ A number of the standards relating to egg-laying hens are the result of guidelines prepared by the United Egg Producers (UEP) based on recommendations of a scientific advisory committee commissioned in 1999. The UEP guidelines include, among other things, increased cage space per hen and standards relating to "forced molting" (starving hens) and beak cutting of chicks. "UEP Animal Care Certification Logo," Egg Industry, October 2002. See also R. Hegeman, "Cattlemen Work on Animal Care Rules," The Associated Press (December 25, 2002).

⁷¹ Burger King Corporation Announces Industry-Leading Food Animal Handling Guidelines and Audits, June 28, 2001 (<http://biz.yahoo.com/bio/010628/2244.html>); Zwerdling, *supra* note 43; Janet Adams, "PETA withdraws boycott of Safeway's," Contra Costa Times (<http://www.bayarea.com/mld/cctimes/3273959>).

⁷² The National Council of Chain Restaurants and the Food Marketing Institute are preparing voluntary supplier guidelines that would set uniform animal welfare standards (and include the UEP guidelines) and are also planning on, as a next step, an audit program with a third party verifier to enforce those standards. See A. Zuber, "News," Nation's Restaurant News, December 17, 2001 at 6. There are, however, some indications that industry trading groups, such as UEP, will try to maintain control over the audit process. See John Todd, "Record Crowds and Heated Discussions at UEP," Egg Industry, November 2002.

for the government to act is that these entities should not be the only ones with access to the animal facilities to determine whether their requirements are being met. It is inappropriate to rely on another (or in the case of the United Egg Producers or the National Cattlemen's Beef Association, the same) segment of the same industry to be the watchdog. Another reason that government action is needed is that certain suppliers will slip through the cracks because they do not do business with the companies that have agreed to impose the standards. Animals in the hands of those companies are no less deserving of humane treatment.

Most significantly, industry should not draft these standards. As noted, the standards are minimal and far weaker than those imposed in the European Union. They do not begin to compare to what has been required in particularly progressive European countries such as Germany, Sweden, Switzerland, and the United Kingdom. They are, nevertheless, being described as "humane" merely because they are better than what came before. Ultimately, standards set by industry will always run the risk of being the least that can be done in order to avoid public relations problems rather than what is necessary for the animal's well-being.

Nor can individual producers, by themselves, be expected to improve the conditions under which such animals are kept. Although measures which may be extremely deleterious to animals may shave only pennies from the cost of production, because of the economies of scale and the intensely competitive environment of the meat industry in the United States, producers who would prefer to treat their animals in a more ethical manner are severely constrained if they wish to compete. As a booklet recently published by the National Pork Board stated:

[I]n a technologically complex world in which a producer's choices are sharply limited, it is no longer appropriate to place the entire burden of ethical responsibility on the shoulders of individual farmers. Above all, consumers must not expect individual farmers to undertake practices that will make them uncompetitive in the marketplace. Livestock producers will do what is necessary to compete, or else they will not be livestock producers for very long.⁷³

Whatever the reason, there appears to be a substantial gap between the producer's view of an acceptable farming practice and what is considered acceptable by the public (once it

⁷³ "Swine Care Handbook," National Pork Board, 2002 (<http://www.porkboard.org.docs.swinecarehandbook.pdf>).

is informed). This was clearly demonstrated by the success of a recent ballot initiative in Florida. In November 2002, over 2.6 million Florida voters (55% of all votes cast) voted to amend the Florida constitution to ban the use of the gestation crate in the state.⁷⁴ The measure

⁷⁴ Animal Cruelty Amendment: 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.
- c. A person who violates this section shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 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.
- d. It is the intent of this section that implementing legislation is not required for enforcing any violations hereof.

was placed on the ballot after over 600,000 signatures were gathered, the vast majority of which were collected by unpaid volunteers. It seems clear that, at the citizen level, there is significant interest in the reform of laws that relate to the intensive confinement of farmed animals.

But while the Florida ballot initiative demonstrates growing support for such reform, state by state citizen ballot initiatives cannot be relied upon to resolve the deficiencies in the legal approach in the United States to farmed animal welfare or to reform an entire industry. Ballot initiatives must necessarily focus narrowly on one specific practice at a time, are expensive and time consuming to pursue, and are not even permitted in 26 states.

Fundamentally, the United States has historically placed the role of protecting farmed animals with the government and, in particular, the courts. The first known statute ever to punish individuals for cruelty to animals was enacted in the Massachusetts Bay Colony in 1641 in order to protect farmed animals.⁷⁵ If a decision is to be made to abandon this principled tradition and place farmed animals beyond the law, it needs to be made with a full awareness of all of the facts. Currently, there is still a basic belief on the part of the American public, and legal scholarship, that while all may not be right in the way we treat farmed animals, there are laws, albeit imperfect ones, that govern the industry. But, as has been demonstrated, this is simply not the case. The issue is not enforcement or effectiveness, it is jurisdiction.

Is our society really comfortable with removing judges, prosecutors and juries from any role in the determination of what is or is not acceptable treatment of nearly every domesticated animal? Are we sufficiently aware of and comfortable with customary farming practices to simply allow the farmed animal industry the power to do whatever it wants to animals? Should an industry be permitted to regulate itself? Is it right to proceed as if the law protects animals from cruelty when it does not?

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- e. 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.
 - f. This section shall take effect six years after approval by the electors.

⁷⁵ Animal Welfare Institute, *Animals and Their Legal Rights: A Summary of American Laws from 1641-1990*, 1 (1990).