

# BEYOND THE LAW: AGRIBUSINESS AND THE SYSTEMIC ABUSE OF ANIMALS RAISED FOR FOOD OR FOOD PRODUCTION

By  
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*Animals raised for food or food production in the United States are, in large part, excluded from legal protection against cruelty. This article describes the minimal state and federal laws relating to such animals and documents numerous recent amendments to state anticruelty statutes that have placed the definition of cruelty to farm animals in the hands of the farming community. Mr. Wolfson argues that these amendments contradict the historical purpose of anticruelty statutes originally enacted to protect farm animals. The article also contrasts this regressive legal development with progressive European legislation. Finally, Mr. Wolfson outlines a path for reform.*

## I. INTRODUCTION<sup>1</sup>

Since the early nineteenth century, Western society has enacted laws to protect animals from cruelty. While such laws were originally intended to protect animals such as cows, sheep, and horses, they have generally evolved to cover all domestic animals, including dogs and cats. In recent years, however, a large number of U.S. states have amended their anticruelty laws. Today, the majority of U.S. states prohibit, at least in part, the application of their anticruelty statutes to farm animals.

Specifically, twenty-eight states have enacted laws that create a legal realm whereby certain acts, no matter how cruel, are outside the reach of anticruelty statutes as long as the acts are deemed "accepted," "common," "customary," or "normal" farming practices. These statutes have given the farming community the power to define cruelty to animals in their care. Similarly, certain states' anticruelty statutes also exclude poultry, which represent an estimated ninety-five percent of the more than seven billion farm animals slaughtered annually.

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Seventeen states in the last ten years have amended their statutes to exempt "accepted," "common," "customary," or "normal" farming practices; in the last year alone, Idaho, Iowa, Michigan and Wyoming joined this trend, moving the states that exempt such farming practices from the minority to the majority. Such amendments indicate that current methods of farming encompass practices that might have been considered illegal prior to the amendments. Consequently, it was necessary to amend the anticruelty statutes to allow such practices to continue. Given that there is also no federal law applicable to the treatment of animals raised for food or food production while on the farm, such animals within these states now have no legal protection from institutionalized cruelty.

This article will examine both federal and state protection of animals raised for food or food production. Part II demonstrates how these animals receive absolutely no federal protection while on the farm and extremely limited federal protection during transport and slaughter. It will also discuss the sole source of legal protection for such animals on the farm: state anticruelty statutes, which themselves offer questionable protection. Part III briefly discusses "accepted," "common," "customary," or "normal" farming practices.<sup>2</sup> Part IV documents how the amendments to anticruelty laws mentioned above place animals raised for food or food production beyond the law's reach in the majority of states.

Part V offers evidence that the law in the United States fails to protect from cruel treatment animals raised for food or food production by comparison with legal developments in Western Europe. Not only are many customary farming practices in this country cruel, but many Western European countries have recognized the cruelty in such practices and are attempting to remedy the situation. Furthermore, even if present customary farming practices are not perceived as cruel, statutory exemptions create a regime whereby cruel farming practices can be developed without fear of sanction. The contrast is stark: the United States alters the law to allow cruel farming practices while Western European countries are banning cruel farming practices. Part VI concludes with an outline for reform.

The main purpose of this article is not remedial, but rather to present the realities of the current system. Although many people may have the impression that laws prevent domestic animals—the vast majority of which are animals raised for food or food production—from being treated in a cruel manner, the reality is that more such animals are now being abused than ever before in the history of the United States.

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<sup>2</sup> For the purpose of brevity, the term "customary farming practices" will be used hereinafter to refer to "accepted," "common," "customary," and "normal" farming practices.

## II. LEGAL PROTECTION FOR ANIMALS RAISED FOR FOOD OR FOOD PRODUCTION

*The worst sin towards our fellow creatures is not to hate them, but to be indifferent to them. That's the essence of inhumanity.<sup>3</sup>*

Although animals lack legal standing, they are protected in small part by both state and federal statutes.<sup>4</sup> In terms of animals raised for food or food production, three separate areas of activity are in need of protection: the treatment of the animal while being reared, the transport of the animal to the slaughterhouse or stockyard, and the slaughter itself.

### A. Federal Protection

One of the most important pieces of federal legislation in recent years relating to animals is the Animal Welfare Act, which generally applies to animals used in research, exhibitions, and commercial breeders of dogs and cats sold for research and the pet trade.<sup>5</sup> In 1985, the Improved Standards for Laboratory Animals Act amended the Animal Welfare Act.<sup>6</sup> Among other things, the amendment required the establishment of institutional animal care and use committees, and the provision by the United States Department of Agriculture (USDA) of additional standards for the care of animals used in research.<sup>7</sup> However, the Animal Welfare Act does not apply to animals raised for food or food production, and consequently, is irrelevant to the issue at hand.<sup>8</sup>

By contrast, the Twenty-Eight Hour Law of 1877 does apply to animals raised for food or food production.<sup>9</sup> This law, which was repealed

<sup>3</sup> George Bernard Shaw, *The Devil's Disciple*, in THE EXTENDED CIRCLE: A COMMON-PLACE BOOK OF ANIMAL RIGHTS 325 (Jon Wynne-Tyson ed., 1985) [hereinafter THE EXTENDED CIRCLE].

<sup>4</sup> For an argument towards extending such standing to animals, see Laurence Tribe, *Ways Not To Think About Plastic Trees*, 83 YALE LJ. 1315, 1341 (1974).

At a minimum we must begin to extricate our nature-regarding impulses from the conceptually oppressive sphere of human want satisfaction, by encouraging the elaboration of perceived obligations to plant and animal life... in terms that do not falsify such perceptions from the very beginning by insistent reference to human interests.... And legislation might be enacted to permit the bringing of claims directly on behalf of natural objects without imposing the requirement that such claims be couched in terms of interference with human use.

For a related proposal suggesting the appointment of guardians or trustees for animals, see Christopher Stone, *Should Trees Have Standing? - Toward Legal Rights for Natural Objects*, 45 S. CAL. L. REV. 450, 458-59 (1972). Our legal system has recognized many entities other than individual human beings: churches, partnerships, corporations, and unions.

<sup>5</sup> 7 U.S.C. §§ 2131-2159 (1994).

<sup>6</sup> *Id.* § 2143.

<sup>7</sup> *Id.*

<sup>8</sup> Section 2132(g) of the Animal Welfare Act reads: "[T]he term 'animal' . . . excludes . . . farm animals, such as, but not limited to livestock or poultry used or intended for use as food or fiber, or livestock or poultry used or intended for improving animal nutrition, breeding, management, production, efficiency, or for improving the quality of food or fiber." "Animal" is similarly defined in the 1985 Amendment. 7 U.S.C. § 2132(g) (1983).

<sup>9</sup> 49 U.S.C. § 80502 (1995).

and reenacted in an amended form in 1994, provides that animals cannot be transported across state lines for more than twenty-eight 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.<sup>10</sup> The statute does not apply to animals transported in a vehicle or vessel in which the animals have food, water, space and an opportunity to rest. Furthermore, sheep may be confined for an additional eight consecutive hours when the twenty-eight hour period of confinement ends at night, and animals may be confined for thirty-six consecutive hours upon the request of the owner or the person having custody of the animals.<sup>11</sup>

While it is arguable whether twenty-eight hours is a humane time limit when compared with the fifteen hour time limit in Britain and the eight hour time limit for standard vehicles in the European Community, the law does not cover transport by air or water and transport within a state. Most notably, the law is rarely enforced by the Attorney General, and even if a conviction occurs, the maximum penalty is only \$500.<sup>12</sup> It is also questionable whether the law applies to transport by truck.<sup>13</sup>

Finally, the Humane Slaughter Act<sup>14</sup> requires that livestock slaughter "be carried out only by humane methods" to prevent "needless suffering".<sup>15</sup> Additionally, regulations enacted pursuant to the Humane Slaughter Act of 1978 forbid the dragging of conscious non-ambulatory animals.<sup>16</sup> However, these statutes apply only to slaughterhouses under Federal meat inspection, excludes chickens, and include an important exemption for ritual slaughter.<sup>17</sup> The statutes do not cover state-inspected and small custom-exempt slaughterhouses. Ultimately, it is difficult to ascertain the effectiveness of the statutes; there is insufficient enforcement and the slaughterhouses are off-limits to the general public.

In sum, no federal law regulates the first area of concern—how animals raised for food or food production are treated on the farm while being reared. Similarly, a limited, arguably inhumane, and largely unenforced federal law applies to the interstate transport of animals to sale or slaughter. The law applicable to actual slaughter is also problematic. It is therefore necessary to turn to the states in hope of further legal protection.

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<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> As this paper will discuss, most states have transportation laws of their own, but many have time limits which are the same as, or exceed, those provided for under this law. ANIMAL WELFARE INSTITUTE, ANIMALS AND THEIR LEGAL RIGHTS: A SUMMARY OF AMERICAN LAWS FROM 1641-1990 50 (1990) [hereinafter ANIMAL WELFARE INSTITUTE].

<sup>14</sup> 7 U.S.C. §§ 1901-1906 (1994).

<sup>15</sup> *Id.* § 1901.

<sup>16</sup> 9 C.F.R. § 313.2 (1993).

<sup>17</sup> Recent developments have significantly reduced the problems related to the "shackle and hoist" method of slaughter previously associated with ritual slaughter. Such developments are in large part due to the initiative of Temple Grandin and the application of her upright restraining system.

### B. State Protection

All states in the United States have anticruelty laws, and certain states have laws pertaining to the transport and slaughter of animals. Indeed, the first statutory protection for animals was created in the United States. In 1641, the Puritans of Massachusetts Bay Colony voted to print their first legal code, "The Body of Liberties", which included Liberty 92, forbidding cruelty to animals: "No man shall exercise any Tirranny or Crueltie towards any bruite Creature which are usuallie kept for man's use."<sup>18</sup>

Other than this early law, there was no specific legislation for approximately two hundred years, although it was possible to prosecute cruelties under the common law as "nuisances." As far as can be determined, the first anticruelty law in the United States was enacted in 1821 by the Maine Legislature.<sup>19</sup> The law was limited to horses and cattle, and protected these species from being "cruelly beat."<sup>20</sup> Maine was followed by New York in 1829 with a law applied to horses, ox, cattle and sheep belonging to another person; Massachusetts in 1835; and Connecticut and Wisconsin in 1838.<sup>21</sup>

Historically, since the first agrarian societies domesticated animals for human use, domestic animals have been viewed as personal property to be disposed of as the owner wished. Only when animals gained economic value did the law prohibit the interference with such animals by someone other than the owner.<sup>22</sup> For example, destruction of livestock became a crime. Dogs, however, were so "undeserving of societal concern that not only did the criminal system not protect dogs, but special statutes were passed to preclude a dog owner from seeking recourse for harm to the animal."<sup>23</sup> Ironically, the situation today is somewhat reversed; dogs and cats are granted some legal protection, but many state anticruelty statutes have been amended to prevent cruelty charges being brought for customary methods of food production.

The laws passed in the late 1800's are the core of today's legislation. It has been argued that many courts and authors were uncomfortable with criminal laws being based solely on the welfare of animals.<sup>24</sup> Consequently, anticruelty laws were justified on the ground that witnessing acts of cruelty dulled individuals' humanitarian feelings.<sup>25</sup> As such, these laws were intended primarily to protect humanity and society, rather than the animals themselves. Thus, the legal duty to animals has been perceived as

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<sup>18</sup> ANIMAL WELFARE INSTITUTE, *supra* note 13, at 1.

<sup>19</sup> David Favre & Vivien Tsang, *The Development of Anti-Cruelty Laws During the 1800's*, 1 DET. C.L. REV. 1, 8 (1993).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 9; ANIMAL WELFARE INSTITUTE, *supra* note 13, at 2-3.

<sup>22</sup> DAVID FAVRE & MURRAY LORING, *ANIMAL LAW* 122 (1983).

<sup>23</sup> *Id.* See also Charles Friend, *Animal Cruelty Laws: The Case for Reform*, 8 U. RICH. L. REV. 201 (1974).

<sup>24</sup> FAVRE & LORING, *supra* note 22, at 122.

<sup>25</sup> *Id.*; see Richard F. McCarthy & Richard E. Bennett, *Statutory Protection for Farm Animals*, 3 PACE ENVT'L L. REV. 229, 235 (1986).

somewhat indirect, based on "the proposition that we have no duty directly to animals; rather, animals are a sort of medium through which we may either succeed or fail to discharge those direct duties we owe to non-animals, either ourselves, other human beings, or, as on some views, God."<sup>26</sup> Interestingly, French law adopted this philosophy so literally that animal cruelty was only a crime when the cruel act occurred in public so as to affect human observers.<sup>27</sup>

Such views are still prevalent in the interpretation of today's anticruelty laws. "These [anticruelty] statutes are 'directed against acts which may be thought to have a tendency to dull humanitarian feelings and to corrupt the morals of those who observe or have knowledge of those acts.'"<sup>28</sup> Indeed, a hundred years earlier, the Massachusetts Supreme Judicial Court stated that such statutes defined an offense not against the "rights of animals that are in a sense protected by it. The offense is against public morals, which the commission of cruel and barbarous acts tend to corrupt."<sup>29</sup>

With the exception of the limited federal laws that apply to transport and slaughter previously discussed, the sole protection from unnecessary suffering and cruel treatment for animals raised for food or food production falls within state *criminal* statutes.<sup>30</sup> While every state has an anticruelty law that forbids cruelty to animals in general, they vary significantly in degree and coverage. A brief survey of such laws leads to the following generalities.

### 1. *On the Farm*

Nineteen states and the District of Columbia prohibit both depriving an animal of "necessary sustenance" and failing to provide "food, water and shelter."<sup>31</sup> Several states require the provision of "necessary sustenance" without further reference to food, water, shelter, and the application of this phrase varies from state to state.<sup>32</sup> "Approximately half the state statutes require shelter without qualifying phrases, but most states

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<sup>26</sup> TOM REGAN, THE CASE FOR ANIMAL RIGHTS 150 (1983); see also Steven Wise, *Of Farm Animals and Justice*, 3 PACE ENVT'L L. REV. 191, 205 (1986).

<sup>27</sup> Wise, *supra* note 26, at 205.

<sup>28</sup> Knox v. Massachusetts SPCA, 425 N.E.2d 393, 396 (Mass. 1981) (citing Commonwealth v. Higgins, 277 Mass. 191, 194 (1931)).

<sup>29</sup> Commonwealth v. Turner, 14 N.E. 130, 131-132 (Mass. 1877).

<sup>30</sup> Attempts to invoke the civil process to protect livestock animals has been largely unsuccessful. Standing problems exist when individuals assert the rights of third parties, and those who have standing—the owners of the "property"—nearly always have no desire to participate and are usually inflicting the "injury". Additionally, even if a private citizen attempts to halt a practice and can avoid this problem, the matter may be dismissed upon the traditional equitable ground that the court will not enjoin a criminal act. See *Animal Legal Defense Fund v. Provimi Veal Corp.*, 626 F. Supp. 278 (D. Mass. 1986): "An ALDF victory in this action would have an unmistakable effect: to enforce by means of an injunction obtained in a private lawsuit, a criminal statute enforceable only by public prosecutors . . ." Wise, *supra* note 26, at 217-218.

<sup>31</sup> ANIMAL WELFARE INSTITUTE, *supra* note 13, at 7-10.

<sup>32</sup> *Id.*

require the failure to provide shelter to be proven to be intentional or cruel.<sup>33</sup> Finally, nearly half the states have laws which stipulate that cruelty to animals is an offense only if committed "willfully", "maliciously" or "cruelly."<sup>34</sup> As will be discussed below, many states mandate such requirements and then prohibit the application of the anticruelty statute to customary farming practices.

## 2. Transport

Federal law only applies to the interstate transport of animals, not the transport of animals within a state. The anticruelty laws or transportation laws of most states and the District of Columbia also require that transport of animals be conducted in a humane manner.<sup>35</sup> Nebraska and Nevada, however, specifically exempt animals raised for food or food production from their transportation laws, and some other states exempt them generally.<sup>36</sup> The laws that do exist are very brief. The following is a typical example of a transportation statute: "[I]f any person shall carry, or cause to be carried by hand or in or upon any vehicle or other conveyance, any creature in a cruel or inhumane manner, he shall be guilty of a misdemeanor."<sup>37</sup> Oregon has a specific provision whereby its anticruelty law does not apply to the "transport of livestock . . . or commercially grown poultry" unless there has been gross negligence.<sup>38</sup>

Furthermore, the fines for a breach of such transport laws are small: \$1000 in Connecticut (or \$100 for cruelty to poultry),<sup>39</sup> \$400 in South Carolina,<sup>40</sup> \$250 in New Jersey,<sup>41</sup> and \$150 in Washington.<sup>42</sup>

Similarly, the time limits for transporting animals without food, water, and rest are problematic. The shortest maximum time period an animal can be transported without food, water and rest is eighteen hours for trucks in Vermont,<sup>43</sup> with many states allowing twenty-eight hours for railroad and trucks.<sup>44</sup> States often allow thirty-six hours, if requested, for both railroad and trucks,<sup>45</sup> and Washington allows a total of two days for

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<sup>33</sup> *Id.* at 9.

<sup>34</sup> *Id.* at 7.

<sup>35</sup> *Id.* at 11.

<sup>36</sup> NEB. REV. STAT. § 28-1013(6) (Supp. 1994); NEV. REV. STAT. ANN. § 574.200(6) (Michie 1994).

<sup>37</sup> MISS. CODE ANN. § 97-41-5 (1972). ANIMAL WELFARE INSTITUTE, *supra* note 13, at 11.

<sup>38</sup> OR. REV. STAT. § 167.335 (1995).

<sup>39</sup> CONN. GEN. STAT. ANN. §§ 53-247, 53-249 (West Supp. 1994).

<sup>40</sup> S.C. CODE ANN. §§ 47-1-40, 47-1-50 (Law. Co-op. Supp. 1993).

<sup>41</sup> N.J. STAT. ANN. § 4:22-17 (West 1973).

<sup>42</sup> WASH. REV. CODE §§ 16.52.070, 16.52.080, 16.52.165 (1994).

<sup>43</sup> VT. STAT. ANN. tit. 13, § 382 (Supp. 1994).

<sup>44</sup> CONN. GEN. STAT. ANN. § 53-252 (West 1994); FLA. STAT. ANN. § 828.14 (West 1994); ILL. ANN. STAT. 510 ILCS 70/7 (Smith-Hurd 1993); MASS. ANN. LAWS. ch. 272 § 81 (Law. Co-op. Supp. 1994); R.I. GEN. LAWS § 4-1-17 (1987); VA. CODE ANN. § 3.1-796.69 (Michie 1994); VT. STAT. ANN. tit. 13, § 382 (Supp. 1994).

<sup>45</sup> CAL. FOOD AND AGRIC. CODE § 16908 (West 1986); ME. REV. STAT. ANN. tit. 7, § 3931 (1989); MICH. COMP. LAWS ANN. § 28.246 (West 1991); MINN. STAT. ANN. § 343.24 (Callaghan 1991); NEV. REV. STAT. ANN. § 705.090 (Michie 1993); N.Y. AGRIC. AND MKTS. LAW § 359 (Mc-

the transport of animals without food, water, or rest on the railroad. A breach of this law can result in a fine of up to \$1000.<sup>46</sup> The average fine for breach of state transportation laws is approximately \$500.

A limited number of states also have a separate law prohibiting the inhumane transportation of poultry.<sup>47</sup> In Pennsylvania, "it shall not be deemed cruel or inhumane to transport live poultry in crates so long as not more than fifteen pounds of live poultry are allocated to each cubic foot of space in the crate."<sup>48</sup> This is approximately four birds per cubic foot.

### 3. Slaughter

As described above, the limited protection of federal law in relation to slaughter necessitates that each state must pass its own humane slaughter law if all animals raised for food or food production are to be protected from inhumane treatment.<sup>49</sup> Presently, twenty-seven states have enacted humane slaughter laws.<sup>50</sup> Nine of these do not prohibit an inhumane method of stunning before slaughter (the manually operated sledgehammer),<sup>51</sup> and four have not even charged an official or department with the enforcement of the law.<sup>52</sup>

Moreover, fifteen states have designated the State Department of Agriculture or the Board of Agriculture to be in charge of enforcement.<sup>53</sup> It must be recognized that the primary purpose of such agencies is not animal well-being. Finally, the fines for breach of the law average about

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Kinney 1991); OHIO REV. CODE ANN. § 959.13 (Baldwin 1988); S.C. CODE ANN. § 47-1-90 (Law. Co-op. Supp. 1992).

<sup>46</sup> WASH. REV. CODE § 81.56.120 (1992).

<sup>47</sup> CONN. GEN. STAT. ANN. § 53-249 (West 1985); PA. STAT. ANN. tit. 18, § 5511(e) (Supp. 1994); R.I. GEN. LAWS § 4-1-7 (1987); VT. STAT. ANN. tit. 13 § 352(a)(10) (Supp. 1994); Wis. STAT. ANN. § 134:52 (West 1989).

<sup>48</sup> PA. STAT. ANN. tit. 18, § 5511(e) (Supp. 1995).

<sup>49</sup> ANIMAL WELFARE INSTITUTE, *supra* note 13, at 57.

<sup>50</sup> ARIZ. REV. STAT. ANN. §§ 3-2016, 3-2017 (1995); CAL. FOOD & AGRIC. CODE § 19501 (West Supp. 1993); COLO. REV. STAT. § 35-33-203 (Supp. 92); CONN. GEN. STAT. ANN. § 22-272a (West 1985); FLA. STAT. ANN. § 828.22 (West 1994); GA. CODE ANN. § 26-2-110.1 (1982); HAW. REV. STAT. § 159-21 (1994); ILL. ANN. STAT. § 510 ILCS 75/1 (Smith-Hurd 1993); IND. CODE ANN. § 42-16-6 (Burns 1994); IOWA CODE ANN. § 189A.18 (West 1985); KAN. STAT. ANN. § 47-1401 (1993); MD. ANN. CODE art. 27 § 333B (1992); MASS. ANN. LAWS ch. 94, § 139D (Law. Co-op. 1985); MICH. COMP. LAWS ANN. § 12.484 (West 1989); MINN. STAT. ANN. § 31.591 (West 1980); N.H. REV. STAT. ANN. § 427:33 (1991); OHIO REV. CODE ANN. § 945.01 (Baldwin 1988); OKLA. STAT. ANN. tit. 2, § 6-183 (West 1993); OR. REV. STAT. § 603.065 (1988); PA. STAT. ANN. tit. 3, § 451.52 (Purdon Supp. 1994); R.I. GEN. LAWS §§ 4-17-3, 4-17-4 (1987); S.D. CODIFIED LAWS ANN. § 39-5-23.2 (1985); UTAH CODE ANN. § 4-32-7(8)(b) (Supp. 1994); VT. STAT. ANN. tit. 6, § 3131 (1988); WASH. REV. CODE ANN. § 16.50.120 (West 1992); W. VA. CODE § 19-2E-1 (1993); and WIS. STAT. ANN. § 95.80 (West 1990).

<sup>51</sup> States that allow the manually-operated sledgehammer method of stunning are: Arizona, California, New Hampshire, Ohio, Oklahoma, South Dakota, Utah, West Virginia, and Wisconsin. ANIMAL WELFARE INSTITUTE, *supra* note 13, at 61.

<sup>52</sup> Georgia, Kansas, Maryland and Ohio. *Id.*

<sup>53</sup> California, Colorado, Illinois, Iowa, Michigan, Minnesota, New Hampshire, Oklahoma, Oregon, Pennsylvania, Utah, Vermont, Washington, West Virginia and Wisconsin. *Id.*

\$500 with certain states limiting the fine to \$100<sup>54</sup> or not specifying a penalty.<sup>55</sup>

#### 4. Problems Related to the Enforcement of State Anticruelty Laws

While the above may seem to provide a limited degree of legal protection to animals raised for food or food production from unnecessary suffering and cruel treatment, any legal protection is curtailed by the following factors. First, it is important to note what is not protected as well as what is. "Provisions for adequate exercise, space, light, ventilation; and clean living conditions for confined animals are important but infrequent requirements of state anticruelty laws."<sup>56</sup> For example, light is a requirement in only the Washington<sup>57</sup> and Puerto Rico statutes.<sup>58</sup> Only Maine and Wisconsin refer to clean living conditions, and Maine exempts animals raised for food or food production from this section.<sup>59</sup> Furthermore, the statutes that do mention such rights are vaguely worded.

Second, the statutes are frequently drafted in exceedingly general terms with discretion left to the court to exclude certain animals, or they specifically exclude certain animals, such as fowl;<sup>60</sup> approximately seven billion broiler chickens and turkeys are killed every year in the United States. Third, many state statutes require that the prosecution demonstrate a mental state of the defendant that may be hard to prove.<sup>61</sup> Finally, most laws are not effectively enforced, and enforcement is largely directed at dogs, cats, and horses rather than animals raised for food or food production.<sup>62</sup>

With regard to this final point, "[t]he enforcement of these criminal statutes is typically left to a public prosecutorial agency, itself overwhelmed by human problems, or to an overburdened private Society for the Prevention of Cruelty to Animals (SPCA) or similar society, with no private enforcement right."<sup>63</sup> Few public prosecutorial agencies will view animal welfare as a high priority, and civil enforcement faces standing problems.<sup>64</sup> 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 proce-

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<sup>54</sup> Iowa, Michigan, Pennsylvania, Vermont, West Virginia, and Wisconsin all limit the fine for animal cruelty. *Id.*

<sup>55</sup> Georgia. *Id.*

<sup>56</sup> ANIMAL WELFARE INSTITUTE, *supra* note 13, at 10.

<sup>57</sup> WASH. REV. CODE ANN. § 16.52.070 (West 1994).

<sup>58</sup> P.R. LAWS ANN. tit. 5, § 1652 (1984).

<sup>59</sup> ME. REV. STAT. ANN. tit. 7, § 4011 (West 1989).

<sup>60</sup> States that specifically exclude poultry are Louisiana and South Carolina, *see Appendix*. *See also* Wise, *supra* note 26, at 206.

<sup>61</sup> DANIEL S. MORETTI, *ANIMAL RIGHTS AND THE LAW* 6-7 (1984).

<sup>62</sup> *Id.* at 6; Friend, *supra* note 23 at 215-220. While it is difficult to research such a topic as any case research will not reflect the number of guilty pleas, a search provides some insight. A Lexis search for cruelty to farm animals in all states since 1970 found only six cases.

<sup>63</sup> Wise, *supra* note 26, at 206.

<sup>64</sup> *See* Friend, *supra* note 23, at 215-218.

dure 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.<sup>65</sup>

Convictions are infrequent and generally limited to minimal fines. For example, Montana has a fine of \$500,<sup>66</sup> while New Jersey imposes a fine of \$250 for cruelty to animals.<sup>67</sup> With little enforcement and small penalties, many individuals can only view such laws as irrelevant.

It is also extremely difficult to ascertain what occurs on the average farm, because a farm is private property. 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 by a humane officer without a valid warrant will be suppressed.<sup>68</sup> For example, recent evidence concerning "downers" abuse (animals crippled before or during transportation and then dragged) only surfaced when a private individual, Becky Sandstedt, conducted eighteen months of hidden video-taping of handling abuses. The video-tapes were publicized by Farm Sanctuary, a humane society, and gained national attention when the tapes were played on the TV news show *Expose*.<sup>69</sup>

Most importantly, there is a significant trend within states to remove legal protection from animals raised for food or food production altogether; if a farming practice is viewed by the agriculture industry as "accepted," "common," "customary" or "normal," the anticruelty statute will not be applied. The limited protections outlined above, which with greater enforcement could be somewhat effective in providing protection to animals raised for food or food production from institutionalized cruelty, are of no use if the treatment of such animals is specifically exempted from the coverage of the state statute, and thus condoned.

This pattern of amendments leads to the question of what such customary farming practices are. If such practices are cruel and cause pain and unnecessary suffering, state legislators are limiting the application of anticruelty laws to allow cruelty to occur. Moreover, even if today's customary farming practices are determined not to be cruel, the legislation of such exemptions creates an arena whereby farming practices can be developed, without fear of sanction, regardless of how cruel they may be.

<sup>65</sup> County of Albany v. ASPCA, 447 N.Y.S.2d 662, 664, 112 Misc. 2d 829, 832 (1982).

<sup>66</sup> MONT. CODE ANN. § 45-8-211(2) (1993).

<sup>67</sup> N.J. STAT. ANN. § 4:22-26 (West Supp. 1994).

<sup>68</sup> See, e.g., State v. Osborn, 409 N.E.2d 1077 (Ohio 1980).

<sup>69</sup> *Downer Cows: Have Things Changed?*, BEEF, February 1993, at 28; see also Friend, *supra* note 23.

### III. "ACCEPTED," "COMMON," "CUSTOMARY" OR "NORMAL" FARMING PRACTICES

*The question is not, can they reason? Nor, can they talk? But can they suffer? Why should the law refuse its protection to any sensitive being? The time will come when humanity will extend its mantle over everything which breathes. . . .<sup>70</sup>*

#### A. On the Farm

Farming practices in the United States dictate the fate of the majority of animals that come into contact with humans. An estimated seven billion animals are killed annually in the United States for food,<sup>71</sup> as compared with 220 million from hunting (mostly birds and small animals), 5.4 million cats and dogs in pounds (although this number is somewhat disputed and may be higher), over twenty million through research and testing,<sup>72</sup> eighteen million by dissection in classrooms and 4.5 million for fur garments (of which two million are ranched and 2.5 million are trapped).<sup>73</sup> Approximately twenty million chickens and some ninety thousand cows and calves are slaughtered every twenty-four hours in the United States.<sup>74</sup> The great majority of animals used for food or food production are raised using intensive husbandry practices. When discussing the treatment of such a large number of animals, it is hard not to write either in a droning monotone or somewhat sensationalized, but a brief analysis of a few customary farming practices is necessary to understand what a simple legal exemption actually achieves in practice. It is not simply more than seven billion animals a year, but it is one, and one, and one, amounting to the large scale mistreatment of individual animals.<sup>75</sup>

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<sup>70</sup> Jeremy Bentham, *Principles of Morals and Legislation*, in THE EXTENDED CIRCLE, *supra* note 4, at 16.

<sup>71</sup> According to the statistics provided by the USDA for cattle, calves, sheep and lambs in 1994 and poultry in 1993, the number of animals killed included: 7 billion broilers and turkeys (this number does not include ducks, geese, and non-broiler chickens), 34.2 million adult cattle, 1.3 million calves, 4.9 million sheep and lambs, and 95.7 million pigs. See UNITED STATES DEPARTMENT OF AGRICULTURE, LIVESTOCK SLAUGHTER 1994 SUMMARY (1995); see also UNITED STATES DEPARTMENT OF AGRICULTURE, POULTRY PRODUCTION AND VALUE 1993 SUMMARY (1994). These numbers do not include animals raised for food production, e.g., for eggs and milk.

<sup>72</sup> According to the Animal Welfare Act Reports for 1993, 49,561 primates, 106,191 dogs, and 33,991 cats were killed for research. Additionally, it is estimated that over 392,000 guinea pigs, 318,000 hamsters, 427,000 rabbits, 365,000 farm animals, and 678,000 others, are killed annually, not including mice and rats which account for approximately 90% of the total. See ANIMAL AND PLANT HEALTH INS. Svc., U.S. DEP'T OF AGRIC., ANIMAL WELFARE ENFORCEMENT, REPORT OF THE SECRETARY OF AGRICULTURE TO THE PRESIDENT OF THE SENATE AND THE SPEAKER OF THE HOUSE OF REPRESENTATIVES, 41-35-022 (1993).

<sup>73</sup> Telephone Interview with Merritt Clifton, Editor, *Animal People* (1995).

<sup>74</sup> *What Humans Owe To Animals*, The Economist, August 19, 1995, at 11; see also *supra*, note 71.

<sup>75</sup> The examples of farm practices in the following portion of the text were obtained from the following sources: J.R. GILLESPIE, MODERN LIVESTOCK AND POULTRY PRODUCTION (2d ed. 1983); B.P. SMITH, LARGE ANIMAL INTERNAL MEDICINE (1990); ANIMAL WELFARE INSTITUTE, *supra* note 13; ANIMAL WELFARE INSTITUTE, FACTORY FARMING: THE EXPERIMENT THAT FAILED

For example, pigs are castrated and have their tails removed without anesthetic. Moreover, gestating (pregnant) sows and farrowing (birthing) sows are housed in stalls where they are unable to turn around. Such intensive farming practices result in health problems, including lameness or high death rates, which are aggravated by uncontrolled genetic selection for production traits such as rapid growth. Genetic problems are increasing; some pigs are so excitable that quiet humane handling at the slaughter plant is very difficult.

Agribusiness subjects cattle of all ages to inhumane practices. For example, day-old baby calves are transported from the dairy farm before they are able to walk, resulting in calves being thrown, dragged, or trampled. This practice is becoming increasingly accepted at dairies in some parts of the country. Furthermore, cattle farmers often drag downed, crippled cows and will sell cows for slaughter when they are physically unfit to travel. Some communities consider this an accepted practice, but most good producers condemn the abuse of downers. Most downer cows are emaciated or in poor physical condition before they leave the farm. Veal calves are housed in stalls where they are unable to turn around. The calves are fed a liquid diet that does not allow the normal function of the calf's rumen. In addition, cattle are dehorned, castrated and hot-iron branded without anesthetic.

Poultry are also victims of cruel husbandry practices, such as the removal of chicken's beaks. Additionally, the starvation of laying hens to make them enter the next laying cycle is a common practice. This is termed "forced moulting." Egg layers are housed without access to a nest box in a manner that does not allow the birds a full range of motion. Another common practice is the disposal of male chicks or live unhatched eggs by suffocation. Agribusiness does not restrict its cruel practices to chickens. For example, geese are force-fed for the *foie gras* trade by pump-feeding food down the birds' throats.

#### B. Transport and Slaughter

Transportation and slaughter also cause suffering to animals raised for food or food production. The following is a brief list of examples: horses are transported in double-decker cattle trucks with a ceiling so low that they injure their heads and backs; animals are transported on long journeys without water or rest stops; animals are bred in a manner that produces genetic factors which increase death losses; conscious animals are shackled and hoisted by one back leg prior to ritual slaughter. Finally, genetic selection of animals for rapid weight gain and other traits results in very excitable pigs and cattle who are extremely difficult to move in a quiet manner at the slaughter plant. Animals will sometimes refuse to

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(1987); J. MASON & P. SINGER, ANIMAL FACTORIES (1990); J.B. MASON, INTENSIVE HUSBANDRY SYSTEMS, ANIMAL FOOD PRODUCTS AND HUMAN HEALTH (1991); J. Mench & A. Van Tienhoven, *Farm Animal Welfare*, AMERICAN SCIENTIST, Nov./Dec. 1986, at 598; Grandin, *supra* note 127; and agricultural journals such as BEEF, NATIONAL HOG FARMER, and FEEDSTUFFS.

move quietly through state of the art facilities that work well for normal animals. This results in pile-ups and abuses by frustrated handlers.<sup>76</sup>

#### IV. STATE ANTICRUELTY STATUTES THAT EXCLUDE "ACCEPTED," "COMMON," "CUSTOMARY" OR "NORMAL" FARMING PRACTICES

As of today, twenty-eight states' anticruelty statutes specifically exempt all or some customary farming practices, such as those described in the preceding section.<sup>77</sup> In some cases, the transport of animals raised for food is also exempted.<sup>78</sup> Additionally, the Texas anticruelty statute contains a bizarre provision whereby it is a crime to kill, injure, or administer poison "to an animal, other than cattle, horses, sheep, swine, or goats, belonging to another without legal authority or the owner's effective consent."<sup>79</sup>

Twenty-two of the twenty-eight states referred to above prohibit the application of their anticruelty statutes to all customary farming practices.<sup>80</sup> Moreover, of the twenty-eight states, seventeen amended their statutes in the last ten years to place agribusiness beyond the statutes' reach,<sup>81</sup> and fourteen of these seventeen amended their statutes in the last seven years.<sup>82</sup> In the last year alone, Idaho, Iowa, Michigan, and Wyoming enacted amendments to their anticruelty statutes to exclude animals raised for food or food production from their statute's reach.<sup>83</sup> Clearly, a definite trend exists.<sup>84</sup>

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<sup>76</sup> *Id.*

<sup>77</sup> See Appendix.

<sup>78</sup> It is arguable that the definition of "accepted," "common," "customary" or "normal" farming practices would include "accepted," "common," "customary" or "normal" methods of transportation of animals raised for food or food production.

<sup>79</sup> TEX. PENAL CODE ANN. § 42.09(5) (West 1996). New Mexico has also enacted an illegal confinement statute whereby it is a criminal offense to intentionally separate an offspring of a livestock animal from its mother, "provided that, when milk cows, which are actually used to furnish milk for household or dairy purposes, have calves, that are unbranded, such young animals may be separated from their mother and enclosed." N.M. STAT. ANN. § 30-18-5(C) (Michie 1995).

<sup>80</sup> Those states are: Arizona, Colorado, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Michigan, Missouri, Montana, Nebraska, Nevada, Oregon, Pennsylvania, South Carolina, South Dakota, Tennessee, Utah, Washington, West Virginia, and Wyoming.

<sup>81</sup> Those states are: Colorado, Idaho, Indiana, Iowa, Maine, Michigan, Montana, Nebraska, Nevada, Oregon, South Carolina, South Dakota, Tennessee, Utah, Vermont, West Virginia, and Wyoming.

<sup>82</sup> Those states are: Colorado, Idaho, Iowa, Michigan, Montana, Nebraska, Nevada, South Carolina, South Dakota, Tennessee, Utah, Vermont, W. Virginia, and Wyoming.

<sup>83</sup> IDAHO CODE § 25-3514(5)(9) (Supp. 1994); IOWA CODE § 717.2 (Supp. 1994); MICH. STAT. ANN. § 28.245(2) (Callaghan Supp. 1994); Wyo. STAT. § 6-3-203(I)(v) (Supp. 1995).

<sup>84</sup> This article will refer to amendments that "exempt" or "exclude" animals raised for food. It is worth noting, as a legal matter, that some of the statutes listed above are unclear as to whether they simply exempt or exclude such animals or, in the alternative, provide an affirmative defence for a defendant who can prove that the alleged cruel act is in fact an "accepted," "common," "customary" or "normal" farming practice. The practical consequence, however, is the same: the farming practice will not be successfully prosecuted under the relevant anti-cruelty statute.

Following are several examples of state law exemptions for farming practices: "nothing shall affect the accepted animal husbandry practices utilized by any person in the care of livestock animals,"<sup>85</sup> "nothing in this act affects normal good husbandry practices utilized by any person in the production of food,"<sup>86</sup> exemption for "commonly accepted agricultural and livestock practices on livestock,"<sup>87</sup> and the act does not "prohibit or interfere with established methods of animal husbandry including the raising, handling, feeding, housing, and transporting, of livestock or farm animals."<sup>88</sup>

Perhaps the most notable examples of these exemptions are the amendments recently enacted in Idaho and Iowa. The Idaho amendment provides that the anticruelty statute shall not be construed to interfere with normal or accepted practices of animal husbandry<sup>89</sup> and includes an additional section that states:

any other . . . activities normally or commonly considered acceptable . . . [are exempted] . . . all activities described in this section are not construed to be cruel nor shall they be defined as cruelty to animals, nor shall any person engaged in the practices, procedures, or activities be charged with cruelty to animals.<sup>90</sup>

Similarly, Iowa recently amended its anticruelty statute. The new statutory provisions provide a graphic example of how such amendments strip away pre-existing legal protection from animals raised for food or food production. Prior to the 1994 amendment, Iowa had two general anticruelty sections within a chapter entitled "Injury to Animals."<sup>91</sup> The 1994 amendment created two new chapters: "Injury to Livestock" and "Injury to Animals Other than Livestock."<sup>92</sup> Thus, on first impression, the amendment appears to provide a greater degree of protection to livestock than existed prior to its enactment. Such a conclusion is incorrect.

Specifically, the chapter entitled "Injury to Livestock" contains several subsections, the second of which applies only to livestock owned by another person. By contrast, the third subsection applies to all livestock, but only if the livestock is provided with care inconsistent with "customary animal husbandry," or if livestock is injured or destroyed "by any means which causes pain or suffering in a manner inconsistent with customary animal husbandry practices."<sup>93</sup> While the third subsection does provide that livestock must not be deprived of "necessary sustenance," the chapter defines "sustenance" as "food, water, or a nutritional formulation customarily used in the production of livestock."<sup>94</sup>

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<sup>85</sup> COLO. REV. STAT. § 18-9-201.5 (1991).

<sup>86</sup> ILL. ANN. STAT. 410 ILCS 70/13 (Smith-Hurd 1993).

<sup>87</sup> MONT. CODE ANN. § 45-8-211(4)(a) (1993).

<sup>88</sup> NEV. REV. STAT. ANN. § 574.200.6 (Michie 1994).

<sup>89</sup> IDAHO CODE § 25-3514(5) (Supp. 1995).

<sup>90</sup> *Id.* § 25-3514(9) (1995).

<sup>91</sup> IOWA CODE §§ 717.1, 717.2 (1993).

<sup>92</sup> IOWA CODE §§ 717, 717(B) (Supp. 1995).

<sup>93</sup> *Id.* § 717.2(1)(a),(c) (Supp. 1995).

<sup>94</sup> *Id.* §§ 717.2(1)(b), 717.1(6) (Supp. 1995).

The remaining two sections enacted pursuant to the 1994 amendment are in the chapter entitled "Injury to Animals Other than Livestock." The definition of animal for the purposes of these two sections specifically excludes "livestock."<sup>95</sup> Thus, a total evaluation of the amendment reveals that "customary farming practices" are exempted from the reach of the anticruelty statute. Also, "livestock," comprising all "bovine, caprine, equine, ovine or porcine species or poultry," are no longer included within the definition of "animal" in the general section relating to cruelty to animals.<sup>96</sup>

Certain states exempt only specific practices instead of all customary farming practices. Maine exempts animals raised for food or food production from requirements of proper shelter, protection from the weather, and humanely clean conditions, as long as producers apply husbandry practices accepted county-wide.<sup>97</sup> Similarly, Wisconsin does not require such animals to be provided shelter other than as provided by normally accepted husbandry practices in each particular county.<sup>98</sup> Ohio exempts such animals from requirements for wholesome exercise and a change of air.<sup>99</sup> Virginia's anticruelty statute states that it shall not be construed to prohibit the dehorning of cattle.<sup>100</sup> Vermont exempts animals raised for food or food production from the section in its anticruelty statute that deems it illegal to "tie, tether and restrain" an animal in a manner that is inhumane or detrimental to its welfare.<sup>101</sup> Additionally, Louisiana and South Carolina exclude poultry from the protection of their anticruelty statutes, thus removing state legal protection for animals which represent at least ninety-five percent of the animals killed for food every year in the United States.<sup>102</sup>

The effect of this trend of amendments cannot be overemphasized. The trend indicates a nationwide perception that it was necessary to amend anticruelty statutes to avoid their possible application to animals raised for food or food production. Amendments specifically exempting customary husbandry practices indicate that, but for the exemption, such practices would be determined to be cruel. Exemptions for practices such as tethering, exercise, shelter, or clean conditions clearly demonstrate this attitude. Who decides what is considered a customary practice? Seemingly, the definition of an inhumane practice is determined by the average farmer. In Maine<sup>103</sup> and Wisconsin,<sup>104</sup> the county determines the customary practice, and Tennessee provides for determination by a "college of

<sup>95</sup> *Id.* § 717B.1(1)(a) (Supp. 1995).

<sup>96</sup> *Id.* §§ 717.1(2), 717B.1(1)(a) (Supp. 1995).

<sup>97</sup> ME. REV. STAT. ANN. tit. 7, § 4015 (West 1995).

<sup>98</sup> WIS. STAT. ANN. § 951.14 (West Supp. 1995).

<sup>99</sup> OHIO REV. CODE ANN. § 959.13 (A)(4) (Baldwin 1994).

<sup>100</sup> VA. CODE ANN. § 3.1-796.122(C) (Michie 1995).

<sup>101</sup> VT. STAT. ANN. tit. 13, § 352(a)(3) (Supp. 1995).

<sup>102</sup> According to the USDA's statistics, 114.6 million broiler chickens were slaughtered in South Carolina in 1992. *Supra* note 71.

<sup>103</sup> ME. REV. STAT. ANN. tit. 7, § 4011 (West 1989).

<sup>104</sup> WIS. STAT. ANN. § 951.14 (West Supp. 1995).

agriculture or veterinary medicine."<sup>105</sup> Legislatures have endowed the agribusiness community with complete authority to define what is, and is not, cruelty to the animals in their care. Particularly striking is the recently enacted Idaho statute, which not only states that the anticruelty statute shall not be construed as interfering with accepted practices of animal husbandry or any "other normally or commonly considered acceptable" practice, but also places enforcement power in the Department of Agriculture.<sup>106</sup>

Finally, the most remarkable aspect of the statutes is that seemingly *any* practice considered customary cannot be successfully prosecuted on the basis of cruelty. As Idaho's law states, normal or commonly accepted animal husbandry and other practices "shall not be construed to be cruel nor shall they be defined as cruelty to animals, nor shall any person engaged in these practices, procedures or activities be charged with cruelty."<sup>107</sup>

For example, in a recent Pennsylvania case, a defendant, accused of starving his horses, argued that the practice of denying nutrition to horses that were no longer wanted and were to be sold for meat was a "normal agricultural operation," not a criminal act.<sup>108</sup> The defendant elicited testimony from witnesses who stated it was a normal practice "to neglect . . . horses for sale . . . for meat."<sup>109</sup> Such horses, the defendant 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" — like the raising of veal calves and chickens.<sup>110</sup>

The court convicted the defendant of cruelty to animals. The defendant 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 purpose."<sup>111</sup>

This case highlights two essential issues related to the exclusion of customary farming practices from anticruelty statutes. First, if the defendant had successfully shown, with additional testimony, that the practice was a normal practice, the anticruelty statute would not have applied to the act of starving his horses, and the court would not have found him criminally liable. The defendant's problem was not that he starved his horses, but that he could not prove that enough people were doing the same thing. Clearly, if everyone does it, anything is possible under the new statutes. Second, if the defendant had proved he *intended* to be cruel

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<sup>105</sup> TENN. CODE ANN. § 39-14-202(e)(1) (1995).

<sup>106</sup> IDAHO CODE § 25-3501 (Supp. 1995).

<sup>107</sup> *Id.* § 25-3501, § 25-3514(5)(9) (Supp. 1995).

<sup>108</sup> Commonwealth v. Barnes, 629 A.2d 123 (Penn. 1993).

<sup>109</sup> *Id.* at 130.

<sup>110</sup> *Id.* at 132.

<sup>111</sup> *Id.*

for an economic reason, the court would have been less likely to convict him. In part, it was his lack of both intent and motive for profit that resulted in the criminal conviction.

Ultimately, many of the examples of customary farming practices described in the preceding section constitute cruelty to animals raised for food or food production, and state anticruelty laws that cover animals raised for food or food production are not applied to these practices. It is also clear that a large number of legislatures in the United States have created legal exemptions to allow such cruelty to continue. In effect, state legislatures have recognized that without amending anticruelty statutes, many of the practices described in the preceding sections could be criminal offenses.

Many European legislatures have also recognized that many of the customary farming practices described above are cruel. However, instead of altering the law so as to exempt the practices from legal protection and thus from criminal prosecution, many Western European countries have outlawed the same practices.

## V. THE SITUATION IN EUROPE

*If you have men who will exclude any of God's creatures from the shelter of compassion and pity, you will have men who will deal likewise with their fellow men.<sup>112</sup>*

### A. Origins of European Anticruelty Laws

In the Europe of the Middle Ages, man viewed himself as having God-given dominion over the world, although this was perceived as more of a feudal stewardship rather than one of natural domination.<sup>113</sup> In this world, animals and humans had an interactive relationship; the louse "existed to prompt humans to be clean, and the irksome horse-fly to stimulate man's ingenuity."<sup>114</sup> Animals were even the subject of legal trials in continental Europe. Examples can be found of a "sow being mutilated and hanged after it had killed a child, and leeches being excommunicated for killing fish in Lake Geneva."<sup>115</sup> As a legal commentator has stated, "by integrating animals within a human scheme of justice, these trials allowed the community to affirm a rational order and assign a role for animals within the hierarchy of creation."<sup>116</sup>

With the Enlightenment and the growth of town and commerce there arose what has been described as a "contractual notion of ethics: do as

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<sup>112</sup> St. Francis of Assisi, quoted in St. Bonaventura, the *Life*, in THE EXTENDED CIRCLE, *supra* note 4, at 6.

<sup>113</sup> *Man's Mirror (History of Animal Rights)*, The Economist, Nov. 16, 1991, at 22.

<sup>114</sup> *Id.* at 23.

<sup>115</sup> *Id.*

<sup>116</sup> Paul Schiff Berman, *Rats, Pigs and Statutes on Trial: The Creation of Cultural Narratives in the Prosecution of Animals and Inanimate Objects*, 69 N.Y.U. L. REV. 283, 291 (1994).

you would be done by."<sup>117</sup> The contract relationship did not extend to animals, but the notion of rationality began to enter into the animal-human relationship. Habits changed with the increase in household pets during the eighteenth century. Rousseau and Voltaire condemned man's treatment of animals as well as man's treatment of man. In 1824, the animal welfare movement came of age when William Wilberforce and Sir Thomas Fowell Buxton, two leaders of the movement to abolish the slave trade, both assisted in founding the Royal Society for the Prevention of Cruelty to Animals.<sup>118</sup> The first anticruelty law in Britain was passed in 1822 and condemned baiting and beating.<sup>119</sup>

Interestingly, early twentieth century English case law provides precedent for the proposition that cruel customary farming practices should be prohibited. In a 1913 case, *Waters v. Braithwaite*,<sup>120</sup> the respondent argued that the practice of neglecting to milk a cow for nineteen hours, causing distended udders and thereby demonstrating that the cow was a good milker, was not a cruel act because the practice was "customary" and performed for a commercial purpose. In reply, Justice Darling found the practice to be in violation of the Protection of Animals Act, stating that

[i]t was not denied that [the practice] caused great pain; no one alleged that it produced any benefit to the cow . . . [t]he only benefit there was might be that of the owner . . . If the custom of doing this did exist, it was time that it ceased, and people must find some other means of judging whether a cow was a good milker.<sup>121</sup>

### B. The Situation Today

Recent European concern over the conditions of intensive farming of animals began to arise shortly after the publication of a book by Ruth Harrison entitled *Animal Machines*, in 1964.<sup>122</sup> The book prompted the British government 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." 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.<sup>123</sup>

While none of these recommendations were given the force of law, their effect was significant.

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<sup>117</sup> *Man's Mirror (History of Animal Rights)*, *supra* note 113, at 24.

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*; see also Favre & Tsang, *supra* note 21.

<sup>120</sup> 30 T.L.R. 107, 108 (K.B. 1913).

<sup>121</sup> *Id.* at 108.

<sup>122</sup> Wise, *supra* note 26, at 211.

<sup>123</sup> *Id.* at 212.

Specifically, in 1987, the Parliament of the United Kingdom banned the veal crate and the anemic diet for veal calves. The Welfare of Calves Regulation 1987 Act reads:

No person shall keep, or knowingly cause or permit to be kept, a single calf in a pen or stall on any agricultural land unless the following requirements are complied with:

- (a) the width of the pen or stall is not less than the height of the calf at the withers;
- (b) the calf is free to turn round without difficulty;
- (c) the calf is fed a daily diet containing sufficient iron to maintain it in full health and vigor;
- (d) if the calf is more than 14 days old, it has access each day to food containing sufficient digestible fibre so as to not impair the development of its rumen.<sup>124</sup>

Similarly, the Pig Husbandry Law was enacted in 1991, making it illegal to rear sows in cramped stalls after 1999, when the law comes into effect.<sup>125</sup> The Welfare of Livestock Regulations of 1982 also prohibits short tail docking of sheep, hot branding of cattle, and tail docking of cattle and pigs, unless the pig is less than eight days old or the procedure is performed by a veterinary surgeon.<sup>126</sup> Additionally, England forbids the sale of day-old calves.<sup>127</sup>

In Western Europe, there has been further legal precedent for finding customary farming practices unacceptable. The German Animal Protection Act of 1972, revised in 1986, prohibits force feeding an animal except for health reasons.<sup>128</sup> Moreover, a West German appellate court "ruled that keeping laying hens in battery cages violated the German Animal Protection Act of 1972, as the practice failed to take the natural behavior of hens into account."<sup>129</sup> In 1979, the Frankfurt Court of Appeals ruled that the use of battery cages, as used in West Germany, constitutes cruelty within German Federal Law and was punishable under Section 17.2b of the German Animal Protection Act.<sup>130</sup>

Similarly, in Switzerland, the Animal Welfare Act, which became operative in July 1981, banned all battery cages by the end of 1991. The law requires housing systems for laying hens to provide sheltered, darkened

<sup>124</sup> Welfare of Calves Regulations No. 2021 (U.K. 1987), cited in ANIMAL WELFARE INSTITUTE, *supra* note 13, at 304.

<sup>125</sup> *The Meat of the Matter*, THE ECONOMIST, Jan. 21, 1995, at 58.

<sup>126</sup> Glen H. Schmidt & Beverly A. Schmidt, *Animal Welfare Legislation in Northern Europe* 25 (1995) (unpublished article, on file with author).

<sup>127</sup> Temple Grandin, *Farm Animal Welfare during Handling, Transport and Slaughter*, 204 J. AM. VET. MED. ASS'N. 372, 373 (1994).

<sup>128</sup> Schmidt & Schmidt, *supra* note 126, at 34.

<sup>129</sup> Wise, *supra* note 26, at 212. This act has been replaced by the Animal Protection Act of 1986 which came into effect on January 1, 1987.

<sup>130</sup> *Id.* In 1979, the original claim raised in the district court was rejected only to be overturned at the appellate level. In 1985, the district court rejected another charge of cruelty. On the first occasion, the German government took the matter to the European Commission and are still awaiting the verdict. However, the Minister of Social Affairs in Hessen (where Frankfurt is situated) has banned the cages.

nesting boxes and perches or slatted grids for all hens and allows a minimum of eight hundred square centimeters per bird, thus effectively prohibiting the keeping of laying hens in cages. The method of choice 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."<sup>131</sup>

The Swiss Animal Protection Regulations of May 27, 1981 also provide that animals shall not be permanently tethered and "[s]talls, boxes and tethering systems shall be so designed that animals can lie-down, rest and rise to their feet in the way normal for their species."<sup>132</sup> Furthermore, calves must receive sufficient iron in their feed, pigs must be allowed ample rooting time with straw roughage or other suitable material, chickens' beaks shall not be clipped so as to prevent normal feeding, and chickens selected for killing shall not be piled on top of one another while still alive.<sup>133</sup> Moreover, animals shall not be transported unless they can be expected to withstand the journey without harm.<sup>134</sup> Additionally, producers in Denmark have to pay a rendering truck to remove downers, which are not allowed at the slaughter plant.<sup>135</sup>

Under European Community law, the European Convention For The Protection of Animals Kept For Farming Purposes "requires that animals be housed and provided with food, water, and care in a manner which is appropriate to their physiological and ethological needs, taking the species into consideration."<sup>136</sup> Article 4 places limits on the restriction of freedom of movement which causes the animal unnecessary suffering or injury, also taking each species into account.<sup>137</sup> The European Community banned imports of meat from animals raised with synthetic hormones, and it is considering action to ban the sale of a genetically engineered hormone, bovine somatotropin, that increases the output of milk in dairy cattle and hastens growth.<sup>138</sup>

On January 20, 1987, the European Parliament passed a report on animal welfare which would ban keeping veal calves in individual crates, phase out poultry battery cages within ten years, discontinue close con-

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<sup>131</sup> 1981 Swiss Ban on Battery Cages: A Success Story for Hens and Farmers, 44 ANML WELFARE INST. Q., No. 1, at 10 (1995). The information reported in the above publication is based on a report: *Laying Hens: 12 years of experience with new husbandry systems in Switzerland* (Swiss Society for the Protection of Animals) (on file with author).

<sup>132</sup> Council of Europe - Information Document, Swiss Animal Protection Regulations, May 27, 1981, art. 6. (on file with author); Wise, *supra* note 26, at 212.

<sup>133</sup> *Id.* art. 16, 20, 26.

<sup>134</sup> *Id.* art. 54.

<sup>135</sup> Grandin, *supra* note 127, at 372-373. In New Zealand, a downed animal cannot be sent to a slaughter plant until it is inspected on the farm by a veterinarian; in Australia, downed cattle that arrive at the slaughter plant at night are often euthanized and sent to rendering; and in Canada, large slaughter plants have stopped accepting downers.

<sup>136</sup> Wise, *supra* note 26, at 212.

<sup>137</sup> *Id.* at 212-213; ANIMAL WELFARE INSTITUTE, *supra* note 13, at 292.

<sup>138</sup> Steve Lohr, *Swedish Farm Animals Get a Bill of Rights*, N.Y. TIMES, Oct. 25, 1988, at A1, A8.

finement of pregnant sows, and ban routine tail-docking and castration of pigs. The European Commission responded to the concerns in the report with a number of proposals. These proposals would take the form of a regulation having direct effect and pre-empting national laws.<sup>139</sup> It seems likely that the veal crate will be banned within the European community. Sweden, Denmark, Austria, Ireland, Finland, Belgium, and the Netherlands are in favor of its abolition. Additionally, the Commission has condemned the use of individual veal crates. In a report, adopted on December 15, 1995, the Commission stated that calves suffered severe stress when they were confined in crates and recommended the provision of adequate nutrients such as iron and roughage. The Commission also recommended that the crates be abolished by 2008.<sup>140</sup> The Commission has also enacted rules stipulating hens in battery cages should have more space.<sup>141</sup>

Moreover, the Commission has recently enacted legislation, which comes into effect on January 1, 1997, enforcing an eight-hour maximum journey time for horses, cattle, pigs, sheep and goats being moved in standard haulage floats. Longer journeys can take place in vehicles with the following specifications: plenty of straw bedding, enough feed on board for the whole journey, direct access to the animals, forced ventilation if necessary, moveable partitions to create separate compartments inside the vehicle, equipment to connect to a water supply during stops, and pig carriers must carry enough water for the whole journey.<sup>142</sup>

If these requirements are met, the following journey times will apply: calves and lambs still on milk and unweaned piglets can travel for a maximum of nine hours, one hour minimum rest for water and feed if necessary, then a further nine hours before a twenty-four hours rest; pigs can travel twenty-four hours followed by twenty-four hours rest during which they must be unloaded, fed and provided water; adult cattle and sheep can travel for fourteen hours with one hour minimum rest for water and, if necessary, food, then fourteen hours further travel is allowed with a final twenty-four hours rest.<sup>143</sup> Animals cannot be transported by sea or rail for more than eight hours, unless the facilities on the ship conform with those detailed in the previous paragraph.<sup>144</sup> Finally, member states will be able to introduce an eight-hour maximum journey time when transport to a slaughterhouse is entirely within a member state.<sup>145</sup>

Sweden deserves special attention. On May 27, 1988, the Swedish parliament passed a new animal protection law with three basic tenets.

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<sup>139</sup> ANIMAL WELFARE INSTITUTE, *supra* note 13, at 286 (European Parliament Resolution on Animal Welfare Policy); Caroline Jackson, *Europe and Animal Welfare*, in ANIMAL WELFARE AND THE LAW 221-246 (1989).

<sup>140</sup> *The Reuter European Community Report*, December 19, 1995 (on file with author).

<sup>141</sup> Deborah Hargreaves, *Commission Struggles to Hold Ring on Animal Welfare in EU*, Financial Times, Jan. 12, 1994, at A3.

<sup>142</sup> Fordyce Maxwell, *Reservations Over Animal Transport Deal*, SCOTSMAN, June 23, 1995, at 26.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

First, the law granted domestic animals the right to a favorable environment where their natural behavior is protected. Second, protection for animals must improve, including protection from illness. Third, animal husbandry shall concentrate on keeping animals healthy and content.<sup>146</sup>

The law centered around the following regulations:

- All cattle are entitled to be put out to graze if over six months old.
- Poultry must be let out of battery cages.
- Sows may no longer to be tethered. They shall have sufficient room to move. Separate bedding, feeding and voiding places are to be provided. Breeding pigs should be given the opportunity to stay outdoors in the summer.
- Cows and pigs must have access to straw and litter in stalls and boxes.
- Livestock buildings must be fitted with windows that let in light.
- Technology must be adapted to the animals and not the reverse. As a result, it must be possible to test new technology from the animal safety and protection viewpoint before being put into practice.
- No drugs or hormones can be used on farm animals, except to treat disease.
- All slaughtering must be as humane as possible.
- In future, the government is empowered to forbid the use of genetic engineering and growth hormones which may mutate domestic animals.<sup>147</sup>

Most of the above requirements will be phased in over the next few years, although the implementation of the provisions making all chickens "free range" will be stretched over several years to lift some of the economic burden from farmers and provide time to build more spacious accommodation.<sup>148</sup>

In conclusion, a comparison shows that many common or normal farming practices in the United States are viewed as unacceptable in many European countries. While it is unclear as to what extent all these laws are effectively enforced and implemented, many customary but cruel agricultural practices are now illegal or about to become illegal. This is in contrast to the United States, where the law is altered so as to avoid its legal and moral consequence. Thus if, as Mahatma Gandhi stated, "[t]he greatness of a nation and its moral progress can be judged by the way its animals are treated," the United States is being left behind.<sup>149</sup>

## VI. TOWARDS AN ALTERNATIVE

*Until he extends the circle of his compassion to all living things, man will not himself find peace.*<sup>150</sup>

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<sup>146</sup> ANIMAL WELFARE INSTITUTE, *supra* note 13, at 305; Swedish Animal Protection, *cited in* Swedish Ministry of Agriculture Press Release (May 27, 1988).

<sup>147</sup> *Id.*

<sup>148</sup> Impetus for passage of the Swedish law is usually attributed to an author of children's books, Astrid Lindgren. In 1985, Lindgren began writing satires about farm animal care in Sweden which were widely circulated in newspapers. Lohr, *supra* note 138, at A1.

<sup>149</sup> *The Moral Basis of Vegetarianism*, in THE EXTENDED CIRCLE, *supra* note 4, at 91.

<sup>150</sup> Dr. Albert Schweitzer, *The Philosophy of Civilization*, in THE EXTENDED CIRCLE, *supra* note 4, at 316.

### A. The Cruel Reality

While the United States has a law in every state purporting to protect animals from cruelty, the amendments discussed above effectively withdraw such protection from the majority of domestic animals—animals raised for food or food production—in those states. Concurrently, federal legislation focuses on protecting farming interests. The recently enacted Animal Enterprise Protection Act of 1992 is designed to deter, prevent, and penalize crimes against farmers, ranchers, food processors, and agricultural researchers, with a penalty of imprisonment of up to a year.<sup>151</sup> The Attorney General and Secretary of Agriculture have the authority to "conduct a study on the extent and effects of domestic and international terrorism on enterprises using animals for food or fiber production, agriculture, research, or testing."<sup>152</sup>

The power of the farming industry in the United States must be recognized in order to fully understand the conflict that such a simple subject as the prevention of cruelty to animals raises and the difficulties facing any attempted reform. Even though less than two percent of the United States population is involved in producing the "raw materials" for the United States food supply, beef alone is a multi-billion dollar a year industry.<sup>153</sup>

Thus, farming is no longer a small family business. As Senator Metzenbaum recently declared while chairing a committee on diseases in the poultry industry, "[t]he poultry industry is dominated by a few giant corporations, all of whom produce the same product with the same problems. Twenty companies produce eighty percent of U.S. poultry. Four [of these] companies produce forty percent."<sup>154</sup> This monopolization is certainly not unique to the chicken industry. According to 1991 livestock and poultry production estimates, the top four companies controlled close to thirty-

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<sup>151</sup> The statute sanctions anyone who "intentionally causes physical disruption to the functioning of an animal enterprise by intentionally, stealing, damaging, or causing the loss of any property (including animals or records) . . . and thereby causes economic damage exceeding \$10,000 to that enterprise, or conspires to do so." 18 U.S.C. § 43 (1994). This federal legislation was supported by such groups as the National Livestock Producers Association, American Veal Association, National Board of Fur Farm Organizations, American Feed Industry Association, National Cattlemen's Association, National Broiler Council, National Turkey Federation and the Pacific Egg and Poultry Organizations. Similar legislation has also been enacted in a number of states. See, e.g., ALA. CODE § 13A-11-150 (1994) (enacted in 1993); ARK. CODE ANN. § 5-62-201 (Michie 1993) (enacted in 1991); FLA. STAT. ANN. § 828.40 (West 1994) (enacted in 1993); KY. REV. STAT. ANN. § 437.420 (Baldwin 1994) (enacted in 1990); OKLA. STAT. ANN. tit. 21, § 1680.1 (West Supp. 1996) (enacted in 1991).

<sup>152</sup> Pub. L. No. 102-346 § 3(a).

<sup>153</sup> Schmidt & Schmidt, *supra* note 126 at 52.

<sup>154</sup> *Poultry Safety: Consumers at Risk: Hearing on S.1924 Before the Senate Committee on Labor and Human Resources*, 102nd Cong., 1st Sess. 1 (1991) (statement of Senator Metzenbaum). For example, while North Carolina has 4200 poultry farmers, more than a fifth of those in the South who raise chickens and turkeys—accounting for 99% of all broilers and 90% of all turkeys—are grown by farmers under contracts with large poultry corporations. The companies provide the chickens, feed, and medication and the farmers provide the house and equipment. *Id.* at 320; Barry Yeoman, *Don't Count Your Chickens*, SOUTHERN EXPOSURE, Summer 1989, at 21-24.

three percent of the turkey market. In beef slaughter, the top four companies controlled sixty-nine percent of the market, and only twenty feedlots marketed over fifty percent of beef. In 1989, five egg production companies controlled almost twenty percent of the market.<sup>155</sup> These industry giants are extraordinarily powerful and efficient lobbyists, and they are primarily concerned with profit. This profit motive is often the cause of inadequate conditions for animals raised for food or food production.<sup>156</sup>

Consequently, at the heart of the subject of this article lies a simple conflict—the humane treatment of animals versus profit. Farming is a multi-billion dollar industry, fiercely protected by those who gain from it. Many farming practices that increase profits result in increased suffering of animals, and it is wrongly perceived that any attempt to treat animals better will result in reduced profits.

Economic pressures are particularly relevant because there is little personal incentive to treat animals raised for food or food production humanely. Unlike many activities, there is little cultural pressure to limit cruel practices in farming since very few people are aware of what occurs in intensive farming. This is true even though the products of intensive farming pervade our grocery stores and menus and are uncritically embraced:

In general we are ignorant of the abuse of living creatures that lies behind the food we eat. Our purchase is the culmination of a long process, of which all but the end product is delicately screened from our eyes, . . . There is no reason to associate [a neat plastic] package with a living, breathing, walking, suffering animal.<sup>157</sup>

As the *Economist* recently remarked:

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>158</sup>

Consumers do not wish to be reminded of the origins of their meat. Thus, meat always "com[es] cooked and reshaped, in a sesame bun or an exotically flavored sauce, as a turkey roll, or as chicken nuggets, in a

<sup>155</sup> William D. Heffernan & Douglas H. Constance, Concentration of Agricultural Markets, Department of Rural Sociology, University of Missouri. (May, 1991) (unpublished manuscript, on file with author).

<sup>156</sup> Agribusiness also effectively markets its products. For example, the National Livestock and Meat Board promotes the "Doctor Opinion Correction Campaign," with the aim of "improv[ing] physicians'" attitudes about pork. The campaign is aimed at "primary care physicians in group practices in metropolitan areas and with patient profiles that call for dietary counseling." Over one million dollars is projected to be spent on this campaign. A similar campaign is "Youth Initiative," designed "to provide accurate information about meat to America's young people." NAT'L HOG FARMER, Mar. 15, 1993, at 6.

<sup>157</sup> PETER SINGER, ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS 92-93 (1990).

<sup>158</sup> *What Humans Owe To Animals*, *supra* note 74, at 12.

crumb coating or a vacuum packet, with not a hint of blood in sight."<sup>159</sup> We disguise the source of the meat by labeling pig as pork, bacon, or sausage; cow as beef or hamburger; sheep as mutton; calves as veal; and deer as venison. Although meat exists as a living animal prior to the animal's death, our society clearly avoids this fact. In food production, animals are turned into "food-producing units," "protein harvesters," "converting machines," "crops," "grain-consuming animal units" (as defined by the USDA) and "biomachines."<sup>160</sup>

As a result of such economic and societal pressures, the majority of states in the United States have enacted laws mandating that prosecutors, humane-enforcement agencies, and the judiciary cannot examine farming practices for cruelty or animal abuse once the particular practice is demonstrated to be a customary practice of the United States farming community.

Cruel farming practices should not be excluded from criminal sanction simply because they are profitable. Lawmakers should not assume that customary farming practices are not cruel and do not cause unnecessary suffering. Neither should they allow such suffering simply because the practice is one accepted by the farming community. The delegation of power to the farming industry is breathtaking. It is difficult to imagine another non-governmental group possessing such influence over a criminal legal definition. In effect, state legislators have granted agribusiness a "legal license" to treat farm animals as they wish.

Thus, the laws governing cruelty to animals either fail to cover the vast majority of domestic animals in this country, are ineffectively enforced, or are painfully inadequate, such as the laws concerning transport time limits and space requirements. If effectively enforced and applied to the practices described in this article, state anticyrueity laws that do not exempt customary farming practices could be somewhat effective in preventing institutionalized cruelty to animals raised for food or food production. Unfortunately, the cruel practices described in this article exist in many states where customary farming practices are not exempted from anticyrueity statutes.<sup>161</sup>

The essential point of this article is to demonstrate the absence of a presumed presence of law. We must recognize that our elected representatives are creating a legally protected sphere whereby any act, if it is viewed as customary by the United States farming community, is determined not to be cruel. Thus, even if certain current farming practices are not interpreted as cruel, the enactment of such exemptions creates an arena whereby any future farming practice is possible, no matter how horrific, as long as the practice is a customary one.

The legislatures of the nineteenth century based their anticyrueity laws, in part, on the belief that cruelty to animals hardens the heart of mankind:

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<sup>159</sup> Nick Fiddes, *Meat: A Natural Symbol*, UTNE READER, Mar.-Apr. 1992.

<sup>160</sup> CAROL J. ADAMS, THE SEXUAL POLITICS OF MEAT 68 (1990).

<sup>161</sup> See Wise, *supra* note 26, at 207.

But legislatures err in believing that when they narrow the positive law that codifies this moral precept, as when they exclude farm animals or animals raised under factory-farming conditions from its reach, they modify the moral precept [itself].<sup>162</sup>

### B. The Future?

Since the early nineteenth century, the United States has possessed laws that, on their face, prohibited cruel farming practices. These laws were enacted, in part, because individuals had previously treated animals as they wished. As a result, animals were subject to horrible abuse. Many states recognized that, if left to its own devices, society would exploit animals without regard to moral or ethical considerations. Consequently, states enacted these early statutes to prohibit cruelty to animals such as sheep, pigs, cows, and horses. As time passed, other animals, such as cats and dogs, were brought within the protected sphere of the anticruelty statutes.

Initially, such laws were applied by some prosecutors to certain customary farming practices.<sup>163</sup> However, as time passed, courts and prosecutors became loathe to apply the statutes to common farming techniques. If a court had to determine whether a particular customary farming practice was cruel, it might simply "pass" on the question. 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.<sup>164</sup>

In the last thirty years, the process of rearing farm animals has drastically altered. As a result, the consequences of not applying the anticruelty statutes to such farming practices have magnified. Over seven billion farm animals are killed every year. The family farm has become a massive machine, abusing animals on a scale not previously imagined. Indeed, most of the abusive farming practices described in the preceding sections are modern developments. Concurrently, certain segments of the public

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<sup>162</sup> *Id.* at 209.

<sup>163</sup> For example, Henry Bergh, the man credited with the creation of the ASPCA and humane enforcement in New York, obtained a successful prosecution under the 1867 New York anti-cruelty statute for the method by which sheep and calves were transported to the "shambles" (slaughter houses). Similarly, the ASPCA's first series of cruelty enforcement cases dealt with concern about adulterated food for horses and cattle, as well as the transportation of cattle by the railroad. Favre & Tsang, *supra* note 21, at 14-20.

<sup>164</sup> People ex. rel. Freel v. Downs, 136 N.Y.S. 440, 445 (N.Y. Magis. Ct. 1911) (emphasis added).

have expressed an increased concern for animal welfare and "animal rights."

In recent years, many state legislatures were no longer content to rely on the courts and prosecutors to interpret anticruelty statutes to exempt cruel farming practices. This attitude was probably spurred by the notion that "animal rights" philosophies could gain sympathy among prosecutors and judges. It became conceivable that anticruelty statutes might be applied to modern intensive farming techniques, and thus impact the profit-making ability of farms. In response, seventeen state legislatures in the last ten years have amended their anticruelty statutes to exempt customary farming practices. In essence, they have handed the farming community the power to decide for itself what constitutes cruelty to animals.

The bizarre result of this trend is that farm animals have been placed in a legal time machine and transported to a time prior to the enactment of anticruelty statutes. Individuals can once again treat animals as they wish. By contrast, European legislatures have responded to modern farming practices by enacting new statutes which specifically prohibit certain cruel farming practices and mandate, at least in part, the proper treatment of farm animals. The contrast between the legal development of Europe and the United States is stark; Europe's statutory development is consistent with the history and the evolution of its anticruelty laws, whereas the United States legal development is one of regression.

If we are to honestly act as a society that condemns the unnecessary suffering of animals, our system of laws must be changed to resemble laws in Western Europe, where certain farming practices have been recognized for what they are: cruel. The current trend in the United States legal system implies we value profit and appetite over any pain felt by an animal. Consequently, animals raised for food or food production do not receive the legal protection from cruelty that other animals receive.

The United States should legislate proper farming practices. In doing so, the government can reclaim, from the farming community, the power to define what is cruelty to animals. Given the intense economic pressures from agribusiness in certain states, the legislation should be federal to prevent amendments to state anticruelty statutes that effectively negate the law's effect and result in uneven and inconsistent laws.

For example, the veal crate and the anemic diet for calves, as well as the confinement of sows in cramped stalls, should be specifically prohibited by statute, as in England and other European countries. Similarly, battery cages, force-feeding, beak-trimming, and the killing of chicks by suffocation should be abolished. Switzerland, Germany, and Sweden have already banned some, or all, of these practices. Moreover, as in Sweden, no drugs or hormones should be used on farm animals, except to treat disease that is not induced by stressful conditions. The transport of day-old calves should be banned, as in England. As one expert has suggested, at a minimum, calves should not be transported until they have a dry hair

coat, a dry umbilical cord, and are able to stand and walk without assistance.<sup>165</sup>

A governmental organization should be created to determine which customary farming practices should be prohibited. This organization should be comprised of farming representatives and experts whose primary concern is the health and welfare of the farm animal. Thus, this new body would differ from federal organizations that currently deal with farming issues—the USDA or the Food Safety and Inspection Service (FSIS)—whose concern is for the humans who eat the animals. This organization would also examine all new farming practices to ensure that such practices were humane.<sup>166</sup>

Specific animal welfare measures should be also be legislated requiring the provision of adequate fresh water, nutrition for full health and vigor, veterinary care, grazing, shelter, exercise, and housing in compatible social groups under as natural conditions as possible. The housing should not impair the animal's ability to rise, lie down, turn around, groom, and fully spread limbs or wings in any direction. Additionally, the law should mandate anesthetic use in all potentially painful procedures, as well as a ban on hot-iron branding.<sup>167</sup> Once again, Sweden's recent legislation provides a good statutory model.

As stated above, such legislation must be accompanied by effective enforcement and high fines, as is the case with other important criminal laws. A regulatory scheme should exist whereby farms would be periodically open to inspection by an enforcement agency so as to prevent abuse.<sup>168</sup> Likewise, the present transportation and humane slaughter laws should be properly enforced, and research should be conducted to determine a humane time limit for the transportation of animals raised for food or food production similar to the recent European Commission legislation.

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<sup>165</sup> Grandin, *supra* note 127, at 373.

<sup>166</sup> The Food Safety and Inspection Service (FSIS) presently conducts a somewhat similar procedure in relation to slaughter. Section 1904(a) of the Humane Methods of Slaughter Act of 1978 authorizes and directs the Secretary of Agriculture to "conduct, assist, and foster research, investigation, and experimentation to develop and determine methods of slaughter and the handling of livestock in connection with slaughter which are practicable with reference to the speed and scope of slaughtering operations and *humane* with reference to other existing methods and their current scientific knowledge." 7 U.S.C. § 1904(a) (1994) (emphasis added). Consequently, the FSIS must approve new technologies and procedures in federally inspected plants and determine whether such activities are humane. It is, however, unclear to what extent the FSIS actually incorporates humane considerations in its determination. See, e.g., FOOD SAFETY AND INSPECTION SERVICE, GUIDELINES FOR PREPARING AND SUBMITTING EXPERIMENTAL PROTOCOLS FOR IN-PLANT TRIALS OF NEW TECHNOLOGIES AND PROCEDURES, Directive 10,700.1 (April 11, 1995), which focuses on four areas of concern—product safety, worker safety, environmental safety and inspection procedures—but contains no guidelines expressly relating to humane treatment of animals.

<sup>167</sup> See also Position Statement On "Factory Farming" (Association of Veterinarians for Animal Rights) 1988.

<sup>168</sup> At present, it seems that there is no active state or federal involvement in the inspection of farms for cruelty to animals raised for food or food production, although certain industries have Industry Quality Assurance Programs whereby the industry regulates itself to assure the quality of the product, i.e., to avoid damaged meat.

Such a system is necessary given the failure of today's laws to control the cruel realities of intensive farming. The alternative is the present situation with all of its legal and societal inconsistencies. Today, the overwhelming majority of domestic animals have no real legal protection, yet most people believe that they do. Some animals are protected from cruelty and abuse in this country; others are not. The choice to move towards a more humane and legally consistent future will provide an invaluable postscript to the following observation made by Judge Arnold in 1888:

[L]aws, and the enforcement or observance of laws for the protection of dumb brutes from cruelty are, in my judgment, among the best evidences of the justice and benevolence of men.<sup>169</sup>

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<sup>169</sup> Stephens v. State, 3 So. 458 (Miss. 1888).

## APPENDIX

ARIZ. REV. STAT. ANN. § 13-2910.03 (1989). Exempts activities involving the use of animals in farming.

COLO. REV. STAT. § 18-9-201.5 (1991). The anticyrueity statute shall not affect accepted animal husbandry practices.

IDAHO CODE § 25-3514(5)(9) (Supp. 1994). The anticyrueity statute shall not be construed as interfering with normal or accepted practices of animal identification and animal husbandry and any other activities, practices or procedures normally or commonly considered acceptable.

ILL. ANN. STAT. 510 ILCS 70/13 (Smith-Hurd 1993). The Humane Care for Animals statute shall not affect normal good husbandry practices.

IND. CODE ANN. § 35-46-3-5 (Burns 1994). Exempts acceptable farm management practices.

IOWA CODE § 717.2 (Supp. 1994). "Livestock Neglect" applies if a person "(a) fails to provide livestock with care consistent with customary animal husbandry practices; (b) deprives livestock of necessary sustenance; (c) injures or destroys livestock by any means which causes pain or suffering in a manner inconsistent with customary animal husbandry practices." In § 717.1(6), "sustenance" is defined as "food, water, or a nutritional formulation customarily used in the production of livestock."

KAN. STAT. ANN. § 21-4310(2)(f) (1988). The anticyrueity statute shall not apply to normal or accepted practices of animal husbandry.

LA. REV. STAT. ANN. § 14:102.1(C)(D) (West 1996). The Louisiana anticyrueity statute states that it shall not apply to the "herding of domestic animals", and states for "the purposes of this Section, fowl shall not be defined as animal."

ME. REV. STAT. ANN. tit. 7, § 4011 (West 1989). The statute shall not apply to farm animals in relation to cruelty caused by a lack of "proper shelter, protection from the weather and humanely clean conditions" as long as the normally accepted husbandry practices in the county are applied.

M.D. CODE ANN. art. 27, § 59(c) (1991). Exempts customary and normal agricultural husbandry practices including dehorning, castration, docking tails and limit feeding. Also exempts human practices to which infliction of pain to an animal is purely incidental and unavoidable.

MICH. STAT. ANN. § 28.245(2) (Callaghan Supp. 1994). The anticyrueity statute does not prohibit the lawful use of an animal in relation to "farming or animal husbandry." Moreover, § 28.245(7) states: "this section does not prohibit the lawful killing of livestock or a customary animal husbandry or farming practice involving livestock."

MO. ANN. STAT. § 578.007(8) (Vernon Supp. 1992). The anticyrueity statute shall not apply to normal or accepted practices of animal husbandry.

MONT. CODE ANN. § 45-8-211(4)(a)(b) (1993). Exempts commonly accepted agricultural farming and livestock practices.

NEB. REV. STAT. § 28-1013(6) (Supp. 1994). Exempts "commonly accepted practices of animal husbandry with respect to farm animals including their transport from one location to another."

NEV. REV. STAT. ANN. § 574.200.(b) (Michie 1994). Exempts established methods of animal husbandry, including raising, handling, feeding, housing and transporting.

OHIO REV. CODE ANN. § 959.13 (A)(4) (Baldwin 1994). It is unlawful to "keep animals other than cattle, poultry or fowl, swine, sheep or goats in an enclosure without wholesome exercise and a change of air." Subsection (A)(2) states that prior to slaughter, farm animals are also exempted from the requirement for shelter.

OR. REV. STAT. §§ 167.320(2), 167.315(2) (1995). Exempts good animal husbandry practices from the crime of animal abuse. In § 167.310(2), "good animal husbandry" is defined according to accepted practices of animal husbandry. Similarly, in § 167.310(c), requirements of food, shelter, cleanliness, temperature, exercise and space provided for in the animal neglect statute do not apply to livestock and poultry.

PA. STAT. ANN. tit. 18, § 5511(c) (Supp. 1994). Exempts normal agricultural operations. Normal agricultural practices are defined as 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.

S.C. CODE ANN. § 47-1-40(c) (Law. Co-op. Supp. 1995). The anticruelty statute does not apply to accepted animal husbandry practices and also specifically excludes fowl.

S.D. CODIFIED LAWS ANN. § 40-1-33, 40-1-2.4 (1995). Exempts standard and accepted agricultural pursuits and procedures.

TENN. CODE ANN. § 39-14-202(e)(1) (1995). The anticruelty statute does not prohibit "usual and customary practices which are accepted by colleges of agriculture or veterinary medicine."

UTAH CODE ANN. § 76-9-301 (5)(b)(ii) (1995). Specifically states that animals within the cruelty statute do not include "animals kept or owned for agricultural purposes in accordance with accepted husbandry practices."

Vt. STAT. ANN. tit. 20, § 3901(4) (1995). The Animal Welfare Act does not include "horse, cattle, sheep, goats, swine, and domestic fowl."

Vt. STAT. ANN. tit. 13, § 352(a)(3) (Supp. 1995). The Animal Cruelty Law states that accepted agricultural methods are exempted from the section that deems it illegal to "tie, tether or restrain" an animal in a manner that is inhumane or detrimental to the animal's welfare.

VA. CODE ANN. § 3.1-796.122(C) (Michie 1995). Nothing in the anticruelty statute "shall be construed to prohibit the dehorning of cattle."

WASH. REV. CODE ANN. § 16.52.185 (West Supp. 1996). Excludes accepted husbandry practices used in commercial raising of livestock and poultry.

W. VA. CODE § 61-8-19(e) (1995). Excludes usual and accepted standards of livestock, poultry, and gaming fowl farm production and management.

Wis. STAT. ANN. § 951.14 (West Supp. 1995). Requires the provision of proper shelter for animals but states that nothing in the statute imposes shelter requirements or standards more stringent than normally accepted husbandry practices in the particular county where the animal or shelter is located.

Wyo. Stat. § 6-3-203(f)(v) (Supp. 1995). The anticruelty statute does not prohibit the use of commonly accepted agricultural and livestock practices on livestock.