

GIVING SLAUGHTERHOUSES GLASS WALLS: A NEW DIRECTION IN FOOD LABELING AND ANIMAL WELFARE

By
Zak Franklin*

Modern industrial animal agriculture and consumer purchasing patterns do not match consumers' moral preferences regarding animal welfare. Current production methods inflict a great deal of harm on animals despite widespread consumer preference for meat, dairy, and eggs that come from humanely treated animals. Judging by the premium pricing and market shares of food products with moral or special labels (e.g., 'cage-free,' 'free range,' and 'organic'), many consumers are willing to pay more for less harmful products, but they are unable to determine which products match this preference. The labels placed on animal products, and the insufficient government oversight of these labels, are significant factors in consumer ignorance because producers are allowed to use misleading labels and thwart consumers from aligning their preferences with their purchases. Producers are allowed to label their goods as friendly to animals or the environment without taking action to conform to those claims. Meanwhile, producers who do invest resources into more humane or environmentally-conscious production methods are competing with companies that do not make similar expenditures. Those companies can sell their products at a lower price without sacrificing profits, which prices-out producers who do invest resources. This Article proposes a new labeling regime in which animal products feature labels that adequately inform consumers of agricultural practices so that consumers can match their purchases with their moral preferences. In this proposed scheme, animal products would contain a label that concisely and objectively informs consumers what practices went into the making of that item. Such a scheme would enable consumers who wish to pay more for humane or environmentally-friendly products to do so, while rewarding those companies who actually do engage in better production methods. While the legal literature discussing food labeling and animal welfare is growing, most of the literature proposes legal definitions of terms like 'humane,' expansion of consumer protection law, or labeling systems in which third-parties provide grading or ranking systems for producers of animal products. This Article rejects those proposals as inadequate to sufficiently inform consumers and instead suggests providing consumers with a list of select practices producers engage in.

* © Zak Franklin 2015. Zak Franklin received his J.D. from the University of California, Berkeley, School of Law in 2014. He is a *summa cum laude* graduate of the University of Colorado, holding a B.A. in political science.

| | | |
|------|---|-----|
| I. | INTRODUCTION | 286 |
| A. | <i>The Current Animal Agriculture Production Regime</i> | 288 |
| B. | <i>Market Failure: Consumer Demand and Industry Deception</i> | 294 |
| 1. | <i>The Industrial Animal Agriculture Industry's Efforts to Mislead Consumers</i> | 295 |
| 2. | <i>The Introduction of Informative Food Labels Can Make Substantial Improvements in Consumer Awareness and Animal Welfare</i> | 302 |
| II. | THE CURRENT LEGAL LANDSCAPE | 304 |
| III. | SHORTCOMINGS OF CONTEMPORARY FOOD LABELS AND THE INADEQUACY OF OTHER PROPOSALS IN THE LEGAL LITERATURE | 307 |
| A. | <i>Labels Use Terms that Lack Meaningful Legal Definitions</i> | 307 |
| B. | <i>Most Consumers Lack Adequate Resources to Choose between Competing Labels</i> | 311 |
| IV. | FULL DISCLOSURE OF THE HARMFUL PRACTICES TAKEN AND NOT TAKEN BY PRODUCERS IS THE BEST APPROACH | 313 |
| A. | <i>Adequate Labels to Empower Consumers and Realize Meaningful Improvements in Animal Welfare</i> | 314 |
| 1. | <i>Participation in This Labeling System Should Be Mandatory</i> | 315 |
| 2. | <i>The Disclosed Practices Should Be Comprehensive with Respect to the Practices Most Important to the Animals' Quality of Life</i> | 316 |
| 3. | <i>The Labels Should Be Easily Understood by the Average Consumer</i> | 317 |
| 4. | <i>Independent Enforcement Mechanisms Should Be Included</i> | 317 |
| B. | <i>Challenges and Solutions</i> | 319 |
| 1. | <i>Overcoming the Animal Agriculture Industrial Complex</i> | 320 |
| 2. | <i>Industry Innovation and Reconfiguration Should Not Be Allowed to Thwart the Proposal's Purpose</i> | 323 |
| 3. | <i>Industry Lobbyists Should Not Be Allowed to Unduly Influence the Development of Labels</i> | 323 |
| 4. | <i>Industry Defenses Are Unconvincing: Cruel Practices Are Not in Consumers' or Animals' Best Interests</i> | 324 |
| 5. | <i>Educational Measures Should Be Implemented to Reduce Consumer Confusion</i> | 327 |
| V. | CONCLUSION | 327 |

I. INTRODUCTION

Modern industrial agriculture has many harmful effects on animals, the environment, and humans.¹ Industrial agriculturists further

¹ See generally Leo Horrigan et al., *How Sustainable Agriculture Can Address the Environmental and Health Harms of Industrial Agriculture*, 110 ENVTL. HEALTH PERSP. 445, 454 (2002) (noting that the maintenance of artificially low prices for factory-farm

propagate these harms by misleading consumers into believing that the animals whose flesh, eggs, and dairy show up in supermarkets and restaurants are well-treated during their lives.² One way animal product producers manage to deceive consumers is by labeling products with language that evokes a false perception of animal welfare, like ‘humane’ and ‘cage-free.’³ In response to this practice, some animal welfare advocates and legal scholars propose refinements to the current food labeling systems.⁴ This Article rejects those proposals and outlines a new labeling system. In contrast, the labeling scheme suggested by this Article—‘full disclosure labeling’—is akin to nutrition labeling, but rather than informing consumers about the nutritional value of a package’s contents, these proposed labels would inform consumers about animal welfare and environmental effects. Specifically, full disclosure labels would require the placement of a relatively comprehensive list of easily understood and common industrial agriculture practices on end-product food packaging. An accompanying notation would inform consumers whether or not the producer of that product engages in each particular practice at the facility that makes the product. This new scheme would better inform consumers so they can conform their purchasing practices to their individual preferences.⁵ Because many consumers prefer animal products from well-treated animals—and are willing to pay a higher price for those products—this

products ensures continued harmful effects on animal welfare, the environment, and human health).

² See Stephen Wells, *Greenwashing or Real Progress for Animals?*, HUFFINGTON POST BLOG, http://www.huffingtonpost.com/stephen-wells/greenwashing-or-real-prog_b_3503137.html [<http://perma.cc/GJ3Z-2B59>] (Aug. 28, 2013, 5:12 AM) (accessed Feb. 21, 2015) (discussing Tyson Foods’ history of “greenwashing,”—i.e. engaging in “false advertising that claims a product is more humane or environmentally friendly than it actually is,”—and calling for the Federal Trade Commission to enforce consumer protection laws to prevent companies like Tyson from misleading consumers).

³ See ANIMAL WELFARE INST., LABEL CONFUSION: HOW “HUMANE” AND “SUSTAINABLE” CLAIMS ON MEAT PACKAGES DECEIVE CONSUMERS 1, 3 (2014) (available at <https://awionline.org/sites/default/files/products/AWI-FA-FoodLabelReport-05072014.pdf> [<http://perma.cc/7AQ7-H48G>] (accessed Mar. 5, 2015)) (stating that the current USDA label approval process allows producers to have inconsistent, nontransparent, misleading, and deceptive labeling, and that inconsistent definitions of labeling claims leads to consumer confusion regarding perceived versus actual purchases).

⁴ See, e.g., Delcianna J. Winders, *Combining Reflexive Law and False Advertising Law to Standardize “Cruelty-Free” Labeling of Cosmetics*, 81 N.Y.U. L. REV. 454, 486 (2006) (advocating a third-party certification system to correct misleading “cruelty-free” claims on products); ANIMAL WELFARE INST., *supra* note 3, at 6 (proposing that the USDA approve labeling claims only after third-party certification); ANIMAL WELFARE APPROVED, FOOD LABELS EXPOSED: A DEFINITIVE GUIDE TO COMMON FOOD LABEL TERMS AND CLAIMS (2014) (available at <http://animalwelfareapproved.org/wp-content/uploads/2014/09/AWA-Food-Labels-Exposed-v10-ONLINE.pdf> [<http://perma.cc/3QAA-LSTQ>] (accessed Feb. 21, 2015)) (providing a guide for the consumer to understand animal-product labels and advocating for an independent third-party audit of labeling terms and claims).

⁵ Morten Raun Mørkbak & Jonas Nordström, *The Impact of Information on Consumer Preferences for Different Animal Food Production Methods*, 32 J. CONSUMER POL’Y 313, 327–28 (2009).

will incentivize producers to implement more humane animal husbandry practices.⁶

While there is limited data on exactly how such comprehensive disclosure of animal welfare conditions would affect consumer behavior, the effect of similar labels on consumer purchases illustrates the opportunity for comprehensive animal welfare labels to shape consumer behavior.⁷ For example, the more consumers know about egg-laying hens' living conditions, the more likely they are to buy cage-free eggs.⁸ Likewise, in a survey of United States (U.S.) consumers, approximately half of respondents reported that they would buy a different brand or product if they discover one product comes from animals who unnecessarily suffered.⁹ This preference for products from humanely treated animals also leads consumers to express a willingness to pay more for products they perceive to come from more humane sources.¹⁰

A. *The Current Animal Agriculture Production Regime*

Cruelty to animals is not the only harmful consequence of the contemporary animal agriculture system.¹¹ The assembly-line model also has harmful effects on workers, the environment, and public health—effects that would be lessened or alleviated if the Concentrated Animal Feeding Operations (CAFO) model was replaced by a more traditional agricultural system.¹²

⁶ See JAYSON L. LUSK, WORLD SOC'Y FOR THE PROTECTION OF ANIMALS, MARKET POTENTIAL FOR CAGE-FREE EGGS 2 (n.d.) (available at http://choosecagefree.org/sites/default/files/pdfs/CFreportday2_4%209.pdf [<http://perma.cc/NTP4-QCES>] (accessed Feb. 21, 2015)) (stating that the increase in consumers knowledgeable about the conditions of egg-laying hens is “projected to increase the market share of cage-free eggs by 20.3% and profitability by 4.7%”).

⁷ See L. Elbakidze & R. M. Nayga Jr., *The Effects of Information on Willingness to Pay for Animal Welfare in Dairy Production: Application of Nonhypothetical Valuation Mechanisms*, 95 J. DAIRY SCI. 1099, 1106 (2012) (noting that although there is not substantial evidence of consumers' willingness to pay more to cover additional costs for higher animal welfare production in the context of dairy products, there is enough evidence to suggest that further research is needed on market potential for humane animal care-labeled products).

⁸ LUSK, *supra* note 6, at 2.

⁹ *Id.*

¹⁰ See Mørkbak & Nordström, *supra* note 5, at 326 (finding that there is a relationship between information about food production and consumer preferences, and showing that there is a willingness to pay for both chicken reared outdoors and campylobacter-free chicken).

¹¹ See Horrigan et al., *supra* note 1, at 445 (positing the industrial agricultural system is contributing to environmental and human health problems).

¹² Cf. *Impacts of Industrial Agriculture*, GRACE COMMUNICATIONS FOUND., <http://www.sustainabletable.org/869/impacts-of-industrial-agriculture> [<http://perma.cc/TVT3-2LG6>] (updated 2015) (accessed Feb. 19, 2015) (outlining environmental, public health, labor, and economic threats posed by CAFOs, and suggesting a non-industrial agriculture alternative would avoid these harms).

In the U.S., the food production industry raises and slaughters approximately 11 billion animals each year.¹³ The vast majority of those animals, as well as those who die prior to slaughter, spend their lives in CAFOs, more commonly known as “factory farms.”¹⁴ While there is some variation amongst CAFOs, they all engage in animal management practices designed to maximize human profit by cramming as many animals into their facilities as they can most profitably make fit.¹⁵ The result is an assembly-line mentality that disregards animal interests and treats each animal as an industrial input rather than a sentient individual.¹⁶ The specific practices engaged in by producers vary, but there are many practices that are common for each product.¹⁷ What follows is a non-exhaustive list of common industrial farm practices organized by species.¹⁸

Chickens who are raised to be eaten—broiler chickens—are usually confined by the tens of thousands in artificially lit grower houses where the birds live amongst their excrement¹⁹ and are prevented from engaging in regular social behaviors.²⁰ This causes many birds to endure stress.²¹ The facilities typically provide birds with approximately 130 square inches of space per bird, which is less than the space needed for a chicken to stretch or flap its wings.²² CAFOs often

¹³ HUMANE SOC'Y OF THE U.S., AN HSUS REPORT: THE WELFARE OF ANIMALS IN THE MEAT, EGG, AND DAIRY INDUSTRIES 1 (n.d.) (available at http://www.humanesociety.org/assets/pdfs/farm/welfare_overview.pdf [<http://perma.cc/HEG9-LKLC>] (accessed Feb. 18, 2015)).

¹⁴ *Factory Farms, A WELL-FED WORLD*, <http://awfw.org/factory-farms/> [<http://perma.cc/SV2D-XQUU>] (accessed Feb. 21, 2015).

¹⁵ Holly Cheever, *Concentrated Animal Feeding Operations: The Bigger Picture*, 5 ALB. L. ENVTL. OUTLOOK 43, 45 (2000).

¹⁶ See *id.* (stating that large, highly concentrated agricultural operations aim to increase profit margins at the expense of animal welfare, and that they view animals as “maximal numbers of ‘units’” to be placed in a minimal amount of space).

¹⁷ See generally *Livestock Production Practices*, U.S. DEPT OF AGRIC. ECON. RESEARCH SERV., <http://www.ers.usda.gov/topics/farm-practices-management/crop-livestock-practices/livestock-production-practices.aspx> [<http://perma.cc/BHQ5-JRJ7>] (updated June 7, 2012) (accessed Mar. 2, 2015) (noting the common use of certain livestock production practices “as operators respond to changes in technologies, regulations and economic conditions”).

¹⁸ See HUMANE SOC'Y OF THE U.S., *supra* note 13, at 1–4 (reporting on customary agricultural practices for birds, pigs, cattle, and aquatic species).

¹⁹ HUMANE SOC'Y OF THE U.S., *supra* note 13, at 1; *Birds on Factory Farms*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspc.org/fight-cruelty/farm-animal-cruelty/birds-factory-farms> [<http://perma.cc/7M2V-DUZ7>] (accessed Feb. 22, 2015).

²⁰ *Factory Farming*, LAST CHANCE FOR ANIMALS, <http://www.lcanimal.org/index.php/campaigns/other-issues/factory-farming> [<http://perma.cc/USJ7-8FYA>] (accessed Feb. 22, 2015).

²¹ *Id.*

²² *Chickens on the Factory Farm*, MASS. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.mspca.org/programs/animal-protection-legislation/animal-welfare/farm-animal-welfare/factory-farming/chicken/chickens-on-the-factory-farm.html> [<http://perma.cc/WN67-EQXB>] (accessed Feb. 17, 2015); see *Meat Chickens*, ANIMAL WELFARE INST., <https://awionline.org/content/meat-chickens> [<https://perma.cc/7QSR->

do not clear the chickens' waste from their living spaces during their lifetimes.²³ The ammonia from the chickens' excrement makes the air quality very poor²⁴ and often causes painful skin and respiratory conditions as well as pulmonary congestion, swelling, hemorrhage, and blindness.²⁵ Birds' beaks and toes are cut off without any form of pain reduction.²⁶ Hormones and steroids are administered to increase birds' rate of growth to the point that they are on the "verge of structural collapse,"²⁷ in chronic pain, and unable to move around.²⁸ Each year approximately 139 million birds die on farms prior to being sent to slaughter.²⁹

Rather than herding or otherwise moving birds onto transports on their own, workers hastily catch the birds, often causing dislocated and broken hips and wings, as well as internal hemorrhaging.³⁰ The birds are transported to slaughter in crates stacked upon one another in trucks³¹ with no food or water and minimal protection from extreme temperatures.³² Many chickens die from hypothermia in transit.³³ The emotional stress on the chickens during transport is severe, making this a fatal procedure for many birds.³⁴ In preparation for slaughter, chickens are strung upside down by their legs before having their heads dipped into an electrified pool of water in an attempt at paralyzation.³⁵ Whether the birds are paralyzed or not (attempted paralyza-

5XRA] (accessed Feb. 22, 2015) (stating that "[t]he birds would need 138 square inches to spread just one wing"); Karen Davis, *Chickens' Lives: Facing the Unappetizing Facts*, N. AM. VEGETARIAN SOC'Y, https://www.navs-online.org/animal_issues/chickens/chickens_lives.php [<https://perma.cc/JYH7-75QZ>] (accessed Feb. 22, 2015) (noting that a hen needs 290 square inches to flap her wings).

²³ COMPASSION IN WORLD FARMING, *THE LIFE OF: BROILER CHICKENS 3* (updated Jan. 2013) (available at <http://www.ciwf.org.uk/media/5235306/The-life-of-Broiler-chickens.pdf> [<http://perma.cc/KZV5-3BAK>] (accessed Feb. 22, 2015)).

²⁴ *Chickens on the Factory Farm*, *supra* note 22.

²⁵ *Id.*

²⁶ *Factory Farming*, *supra* note 20.

²⁷ HUMANE SOC'Y OF THE U.S., *THE DIRTY SIX 2* (2006) (available at <http://www.humanesociety.org/assets/pdfs/farm/DirtySixBrochure.pdf> [<http://perma.cc/PXF2-XM6D>] (accessed Feb. 22, 2015)).

²⁸ HUMANE SOC'Y OF THE U.S., *supra* note 13, at 1.

²⁹ Harish, *Is Vegan Outreach Right About How Many Animals Suffer to Death?*, COUNTING ANIMALS, <http://www.countinganimals.com/is-vegan-outreach-right-about-how-many-animals-suffer-to-death/> [<http://perma.cc/G624-P3BQ>] (Oct. 24, 2011) (accessed Feb. 21, 2015).

³⁰ *Chickens on the Factory Farm*, *supra* note 22.

³¹ FED'N OF ANIMAL SCI. SOCIETIES, *GUIDE FOR THE CARE AND USE OF AGRICULTURAL ANIMALS IN RESEARCH AND TEACHING 57* (3d ed. 2010) (available at http://www.fass.org/docs/agguide3rd/Ag_Guide_3rd_ed.pdf [<http://perma.cc/VL2N-GGB6>] (accessed Feb. 17, 2015)).

³² *Chickens on the Factory Farm*, *supra* note 22.

³³ *Id.*

³⁴ A.J.F. Webster et al., *Thermal Stress on Chickens in Transit*, 34 *BRIT. POULTRY SCI.* 267, 267 (1993).

³⁵ Karen Davis, *The Need for Legislation and Elimination of Electrical Immobilization*, UNITED POULTRY CONCERNS, <http://www.upc-online.org/slaughter/report.html> [<http://perma.cc/2UDM-62CA>] (accessed Feb. 17, 2015).

tion often fails when birds lift their heads to avoid having them dipped underwater), their throats are slit open by a machine so they will bleed out.³⁶ When this process fails, areas other than the birds' throats are lacerated, leaving them to enter the scalding tank fully sentient.

Along with broiler chickens, hens born to produce eggs are also mistreated. Ninety-five percent of egg-laying hens are kept in small battery cages.³⁷ Shortly after birth, chicks are sorted by sex.³⁸ Male chicks, who offer no economic value to the egg industry, are destroyed—usually eviscerated by a wood-chipper or piled into a trash can to suffocate.³⁹ Like broiler chickens, egg-laying hens have their beaks 'trimmed,' a procedure in which the beaks of young chicks are seared off without anesthesia or analgesia.⁴⁰ "A typical U.S. egg farm contains thousands of cages."⁴¹ Each cage houses multiple birds, with each bird given approximately 59 square inches, which is slightly larger than the size of one-half of a sheet of 8 ½ by 11 inch paper.⁴² Hens that live in metal-barred cages with wire flooring are prevented from nesting.⁴³ Hens are also prevented from engaging in other normal social behaviors and often harm themselves, typically by "throwing themselves against the bars of their cages."⁴⁴ This self-harm is believed to be the result of "severe frustration."⁴⁵ Decreased bone strength and osteoporosis are widespread.⁴⁶ In order to generate more frequent egg production, hens are often intentionally starved for up to two-week periods.⁴⁷ Unable to withstand the constant egg laying, hens frequently suffer from uterine prolapse, a painful condition causing the uterus to be pushed out of the body.⁴⁸ Once hens are no longer

³⁶ *Id.*

³⁷ UNITED EGG PRODUCERS, ANIMAL HUSBANDRY GUIDELINES FOR U.S. EGG LAYING FLOCKS 2014 EDITION (2014) (available at <http://www.uepcertified.com/pdf/UEP-Animal-Welfare-Guidelines-2014.pdf> [<http://perma.cc/8KZW-NCHF>] (accessed Feb. 17, 2015)).

³⁸ *Hatchery Investigation*, MERCY FOR ANIMALS, <http://hatchery.mercyforanimals.org> [<http://perma.cc/9V7H-6QBS>] (accessed Feb. 17, 2015).

³⁹ COMPASSION OVER KILLING, A COK REPORT: ANIMAL SUFFERING IN THE EGG INDUSTRY 4 (available at <http://cok.net/wp-content/uploads/2013/03/COKLayerReport.pdf> [<http://perma.cc/7MJ7-4K8S>] (accessed Feb. 17, 2015)).

⁴⁰ *Id.* at 1.

⁴¹ *Id.*

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.* at 2.

⁴⁵ *Laying Hens*, MASS. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.mspca.org/programs/animal-protection-legislation/animal-welfare/farm-animal-welfare/factory-farming/chicken/eggs.html> [<http://perma.cc/S95N-AKFW>] (accessed Feb. 17, 2015).

⁴⁶ A.B. Webster, *Welfare Implications of Avian Osteoporosis*, 83 POULTRY SCI. 184, 184 (2004).

⁴⁷ COMPASSION OVER KILLING, *supra* note 39, at 4.

⁴⁸ ELISA AALTOLA, ANIMAL SUFFERING: PHILOSOPHY AND CULTURE 37 (2012).

profitable—usually after two years—the majority are “depopulated” and slain.⁴⁹

The lives of the more than 100 million pigs in America’s pork industry are similarly bleak.⁵⁰ Through forcible artificial insemination, sows (adult female pigs) are customarily kept in a near constant state of impregnation and nursing.⁵¹ Approximately 80%⁵² of sows are kept in gestation crates that leave the sows unable to turn around.⁵³ The tails of pigs raised for meat are cut off, or ‘docked’—usually with pliers—without any pain relief.⁵⁴ Males are castrated, also without any pain relief.⁵⁵ Pigs are often herded by electric prods that deliver a high voltage shock.⁵⁶ Prior to slaughter, pigs are hung upside down by their legs and their throats are slit.⁵⁷ While the Humane Slaughter Act requires that animals be rendered “insensible to pain” before being hung and killed,⁵⁸ U.S. Department of Agriculture (USDA) and U.S. General Accounting Office (GAO) studies have found that some of the animals are still conscious when they are slaughtered.⁵⁹

The more than 32 million cows slaughtered in the U.S. each year also live agonizing lives.⁶⁰ Most cows “raised for beef are castrated, dehorned, and branded” without any pain relief.⁶¹ When cattle are transported to the slaughterhouse, the trip often lasts well over a thousand

⁴⁹ See HUMANE SOC’Y OF THE U.S., *supra* note 13, at 2 (defining depopulation as the removal of hens from their cages, followed by slaughter or gassing to death).

⁵⁰ See *Farm Animal Statistics: Slaughter Totals*, HUMANE SOC’Y OF THE U.S., http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html [<http://perma.cc/NFG3-9PR2>] (updated Sept. 15, 2014) (accessed Feb. 17, 2015) (noting the total number of slaughtered pigs in 2013).

⁵¹ HUMANE SOC’Y OF THE U.S., *supra* note 13, at 2.

⁵² See NAT’L ANIMAL HEALTH MONITORING SYS., U.S. DEPT. OF AGRIC., SWINE 2006, PART I: REFERENCE OF SWINE HEALTH AND MANAGEMENT PRACTICES IN THE UNITED STATES, 2006 38 (2007) (available at http://www.aphis.usda.gov/animal_health/nahms/swine/downloads/swine2006/Swine2006_dr_PartI.pdf [<http://perma.cc/HY3Z-XCHR>] (accessed Feb. 17, 2015)) (noting that 79.7% of gestating pigs are kept in total confinement).

⁵³ John McGlone, *The Crate*, in PROCEEDINGS: SYMPOSIUM ON SWINE HOUSING AND WELL-BEING 35, 35 (Richard Reynnells ed., U.S. DEPT. AGRIC. 2002) (available at https://www.extension.purdue.edu/pork/sowhousing/swine_02.pdf [<http://perma.cc/3LXK-N6DP>] (accessed Feb. 17, 2015)).

⁵⁴ MELANIE JOY, WHY WE LOVE DOGS, EAT PIGS, AND WEAR COWS 42 (2010).

⁵⁵ *Pigs: Intelligent Animals Suffering in Farms and Slaughterhouses*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <http://www.peta.org/issues/animals-used-for-food/animals-used-food-factsheets/pigs-intelligent-animals-suffering-factory-farms-slaughterhouses/> [<http://perma.cc/Z8NY-8BCR>] (accessed Feb. 17, 2015).

⁵⁶ J.G. Gentry et al., *The Welfare of Growing-Finishing Pigs*, in THE WELFARE OF PIGS FROM BIRTH TO SLAUGHTER 133, 143 (Luigi Faucitano & Allan L. Schaefer eds., 2008).

⁵⁷ Joy, *supra* note 54, at 45.

⁵⁸ 7 U.S.C. § 1902(a) (2012).

⁵⁹ U.S. GEN. ACCOUNTING OFF., GAO-04-247, HUMANE METHODS OF SLAUGHTER ACT: USDA HAS ADDRESSED SOME PROBLEMS BUT STILL FACES ENFORCEMENT CHALLENGES 23 (2004).

⁶⁰ *Farm Animal Statistics: Slaughter Totals*, *supra* note 50.

⁶¹ HUMANE SOC’Y OF THE U.S., *supra* note 13, at 3.

miles.⁶² The cattle are typically packed into cramped trailers that provide little protection from weather.⁶³ While cattle should be stunned and rendered unconscious prior to death, the high volume of cows killed (250 per hour at a typical slaughterhouse) and imprecise methods make effective stunning difficult.⁶⁴ As a result, cows are sometimes conscious as they bleed out.⁶⁵

Over 9 million cows are currently used for dairy production in the U.S.⁶⁶ They are kept in an almost constant cycle of pregnancy and milk production,⁶⁷ and given hormones to increase yield.⁶⁸ Cows are so frequently milked that their resultant energy expenditure is comparable to a human being forced to jog for six hours every day.⁶⁹ While cows “naturally live more than 20 years[,]”⁷⁰ dairy cows are ‘spent’ after only two years of milking.⁷¹ Male calves, being of no other value to dairy farmers,⁷² typically become veal calves, tethered and confined in small crates, unable to stand up or move for sixteen to eighteen weeks before slaughter.⁷³

If these animals were analogous to inanimate manufacturing materials, the above practices would not be objectionable. However, the scientific consensus maintains that the animals⁷⁴ in these CAFOs (and fisheries) exhibit many of the same interests as humans, including a desire to be free from pain and to engage in various social activities.⁷⁵

⁶² *Cow Transport and Slaughter*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <http://www.peta.org/issues/animals-used-for-food/factory-farming/cows/cow-transport-slaughter/> [<http://perma.cc/VNQ3-P8AN>] (accessed Feb. 19, 2015).

⁶³ *Id.*

⁶⁴ *Factory Farming*, *supra* note 20.

⁶⁵ *Cow Transport and Slaughter*, *supra* note 62.

⁶⁶ HUMANE SOC’Y OF THE U.S., AN HSUS REPORT: THE WELFARE OF COWS IN THE DAIRY INDUSTRY 1 (n.d.) (available at <http://www.humanesociety.org/assets/pdfs/farm/hsus-the-welfare-of-cows-in-the-dairy-industry.pdf> [<http://perma.cc/8RY9-VSZ9>] (accessed Feb. 18, 2015)).

⁶⁷ *See* HUMANE SOC’Y OF THE U.S., *supra* note 13, at 3 (stating that dairy cows “endure annual cycles of artificial insemination [and] mechanized milking for 10 out of 12 months (including 7 months of their 9-month pregnancies)”).

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *See id.* (stating that cows “produce an average of 729 days of milk . . . before they are considered “spent”).

⁷² *Id.*

⁷³ HUMANE SOC’Y OF THE U.S., *supra* note 13, at 3.

⁷⁴ *E.g.*, U.S. ENVTL. PROT. AGENCY, EPA 821-R-03-010, PRODUCERS’ COMPLIANCE GUIDE FOR CAFOs: REVISED CLEAN WATER ACT REGULATIONS FOR CONCENTRATED ANIMAL FEEDING OPERATIONS (CAFOs) 11–16 (2003) (available at <http://www.epa.gov/rfa/documents/Compliance-CAFOs.pdf> [<http://perma.cc/Y4RJ-MYML>] (accessed Feb. 20, 2015)). Typical CAFO animals include chickens, cows, ducks, lambs, pigs, and turkeys.

⁷⁵ *See* NUFFIELD COUNCIL ON BIOETHICS, THE ETHICS OF RESEARCH INVOLVING ANIMALS 61, 64 (2005) (available at <http://nuffieldbioethics.org/wp-content/uploads/The-ethics-of-research-involving-animals-full-report.pdf> [<http://perma.cc/NE2S-8W9P>] (accessed Feb. 20, 2015)) (admitting that researchers can never know the experiential states of animals, but fair assumptions can be made about their experiences of pain

B. *Market Failure: Consumer Demand and Industry Deception*

Concerns for animal welfare greatly impact consumer spending on meat and dairy products,⁷⁶ but the degree to which the animals suffer in CAFOs is not entirely apparent to consumers.⁷⁷ In one Associated Press poll, two-thirds of Americans agreed with this statement: “An animal’s right to live free of suffering should be just as important as a person’s right to live free of suffering[.]”⁷⁸ Indeed, not many people would “keep a hen in a shoebox for her egg-laying life; but practically everyone will eat smartly packaged ‘farm fresh’ eggs from battery hens.”⁷⁹ Meanwhile, producers lead consumers to believe that animals live happy lives before slaughter—like the inhabitants of ‘Old McDonald’s Farm.’⁸⁰ These consumers “have a false sense of security that before death, these animals had some sort of life.”⁸¹ For example, while close to 95% of egg-laying hens are confined in small cages, most American consumers think that percentage is somewhere between 40% and 70%.⁸² This disconnect is not the result of a benign coincidence; rather, it is the product of a concerted effort by the factory farming industry to mislead consumers.⁸³ This effort creates a windfall to producers who can charge higher prices to consumers who are willing

based on their behavior); see also MARC BEKOFF, *ANIMALS MATTER: A BIOLOGIST EXPLAINS WHY WE SHOULD TREAT ANIMALS WITH COMPASSION AND RESPECT* 67–68 (2007) (“Fish show responses to painful stimuli that resemble those of other animals, including humans.”).

⁷⁶ *Study Reveals Concerns over Farm Animal Welfare Greatly Impact Consumer Purchasing*, FREE FROM HARM, <http://freefromharm.org/farm-animal-welfare/concerns-over-animal-welfare-drives-consumer-decisions-about-what-meat-and-dairy-products-they-buy/> (Apr. 20, 2010) (accessed Feb. 20, 2015) (site no longer available).

⁷⁷ See Kate Good, *How Undercover Investigations Are Changing Public Perception of the Meat Industry*, ONEGREENPLANET.ORG, <http://www.onegreenplanet.org/animal-sandnature/how-undercover-investigations-are-changing-public-perception-of-the-meat-industry/> [<http://perma.cc/C9WJ-4L7Q>] (Aug. 8, 2014) (accessed Feb. 27, 2015) (describing the successful Big-Ag efforts to conceal from the public the deplorable living conditions of factory farm animals via lobbying for the passage of “ag-gag” laws).

⁷⁸ Gary L. Francione, *Animals—Property or Persons?*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 108, 109 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

⁷⁹ David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 208, 217 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

⁸⁰ See Donna Mo, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 *UCLA L. REV.* 1313, 1321–22 (2005) (detailing the California Milk Advisory Board’s “Happy Cows” campaign, which depicted cows and calves grazing in “spacious, grassy pastures on beautiful, rolling hills”).

⁸¹ Shennie Patel, *Making the Change, One Conservative at a Time: A Review of Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy*, 9 *ANIMAL L.* 299, 308 (2003) (quoting interview with Matthew Scully, Special Assistant to the President of the U.S. and White House Senior Speech Writer (Jan. 28, 2003)).

⁸² LUSK, *supra* note 6, at 2.

⁸³ See *Misleading Labels*, FOOD & WATER WATCH, <http://www.foodandwaterwatch.org/food/consumer-labels/misleading-labels/> [<http://perma.cc/U76K-ATPU>] (accessed Feb. 27, 2015) (indicating the myriad ways in which consumers are misled by labels

to pay more for goods they mistakenly believe are produced humanely.⁸⁴ Economists refer to this type of problem as “market failure.”⁸⁵

1. *The Industrial Animal Agriculture Industry’s Efforts to Mislead Consumers*

In order to propagate consumer misconception, members of the CAFO industry orchestrate advertising and lobbying campaigns to veil what really happens at their facilities, thereby allowing the CAFO industry to entrench their practices.⁸⁶ These campaigns consist primarily of placing misleading labels on the end products and lobbying policymakers to pass favorable legislation.⁸⁷

Marketing strategies depicting humanely raised and slaughtered animals have managed to convince many consumers that the animals whose flesh, milk, or eggs they consume are treated humanely.⁸⁸ This marketing comes in both explicit claims like “Certified Humane,” “Cage-Free,” or “Free Range” on meat or eggs,⁸⁹ as well as implied claims like television commercials, restaurant logos, mascots, or packaging that depict animals in green pastures or that suggest they enjoy

stating “raised without added hormones,” “natural,” “naturally raised,” and “free range”).

⁸⁴ Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25, 26 (2004).

⁸⁵ *Market Failure Definition*, ECONGURU.COM, <http://glossary.econguru.com/economic-term/market+failure> [<http://perma.cc/QUK7-84D5>] (accessed Feb. 20, 2015) (defining ‘market failure’ as: “A condition in which a market does not efficiently allocate resources to achieve the greatest possible consumer satisfaction”); see also Winders, *supra* note 4, at 462 (“[T]here is no standard definition of ‘cruelty-free.’ This lack of a standard leads to consumer confusion, deception, and market failure.”).

⁸⁶ See Rachel Wechsler, *Blood on the Hands of the Federal Government: Affirmative Steps that Promote Animal Cruelty*, 4 J. ANIMAL L. & ETH. 183, 189–90 (2011) (“[L]arge agribusiness corporations and livestock sector associations aggressively lobby Congress to ensure that farm and animal legislation reflects CAFO interests.”).

⁸⁷ See *id.* (“The AFBF [American Farm Bureau Federation] has actively lobbied for federal policies that favor CAFOs and disadvantage small, family farms.”); see also Maxx Chatsko, *Truth Behind 5 Misleading Food Labels*, USA TODAY, <http://www.usatoday.com/story/money/personalfinance/2014/08/17/the-truth-behind-five-misleading-food-labels/14135379/> [<http://perma.cc/NL42-QXPX>] (Aug. 12, 2014) (accessed Mar. 10, 2015) (highlighting five particularly weak FDA-approved labels that allow agribusiness corporations to mislead consumers).

⁸⁸ See Matthew Cole, *From “Animal Machines” to “Happy Meat”? Foucault’s Ideas of Disciplinary and Pastoral Power Applied to ‘Animal-Centered’ Welfare Discourse*, 1 ANIMALS 83, 84 (2011) (arguing that the concept of “happy meat” is an attempt to “remoralize the exploitation of ‘farmed’ animals”).

⁸⁹ See Anders Kelto, *Farm Fresh? Natural? Eggs Not Always What They’re Cracked Up to Be*, THE SALT, <http://www.npr.org/blogs/thesalt/2014/12/23/370377902/farm-fresh-natural-eggs-not-always-what-they-re-cracked-up-to-be> [<http://perma.cc/9GD4-255U>] (Dec. 23, 2014) (accessed Mar. 5, 2015) (highlighting the disparities between the actual meaning of egg carton labels such as ‘farm-fresh’ and ‘cage-free’ and what consumers believe those labels mean); ANIMAL WELFARE INST., *supra* note 3, at 2 (noting the “USDA has never officially acknowledged any particular set of animal standards as representing supporting evidence for the use of welfare-related claims”).

being eaten.⁹⁰ Unsurprisingly, the animals seen in industry ads or labels are rarely images of real animals, or the actual facilities in which animals are raised or slaughtered. Likely unbeknownst to most consumers, most of these claims have little to no legal or substantive significance. For example, the claim “free range” on chicken meat means only that the birds must have *some* access to the outdoors, which could include a barn the size of an airplane hangar, packed with birds, that has a small outdoors area open for some window of time during the day.⁹¹ Similarly, in egg production there is no inspection system for

⁹⁰ See Ashlee Kieler, *Burger King Is Apparently Leaving Product Decisions Up To A Chicken Now*, CONSUMERIST, <http://consumerist.com/2015/03/16/burger-king-is-apparently-leaving-product-decisions-up-to-a-chicken-now/> [<http://perma.cc/J7KX-HCRP>] (Mar. 16, 2015) (accessed Apr. 21, 2015) (quoting a Burger King statement which explains the process by which Gloria, an actual living chicken, is deployed to decide whether individual restaurants would be selling chicken fries on any given day: “Each day when she arrives with her expert handler, she will ascend from her plush coop onto her custom decision-making stage and randomly choose [according to whether she first pecks at a dish labeled ‘yes’ or one labeled ‘no’] whether or not Chicken Fries will return to that Burger King restaurant. . . . Like it or not, Gloria has the final word. She can’t be bought, seduced or swayed. . . . [Gloria has always] aspired to take the spotlight. Her friends on the farm adored her for her charisma and wit. And now, she finally has the perfect stage to showcase her talents.”). The chicken fries in question consist of breaded, fried chicken meat. See also, e.g., *Recipes*, PIGGLY WIGGLY, <https://www.pigglywiggly.com/recipes> [<http://perma.cc/LQG9-A5V3>] (accessed Apr. 21, 2015) (juxtaposing the Piggly Wiggly grocery chain mascot—a grinning, grocer’s hat-wearing pig—with recipes calling for the consumption of pig); *Meet Dave!*, FAMOUS DAVE’S, <http://www.famousdaves.com/our-barbeque/meet-dave> [<http://perma.cc/5VLU-V9JZ>] (accessed Apr. 21, 2015) (images of Dave Anderson, founder of Famous Dave’s Bar-B-Que, wearing apparel branded with the chain’s logo—a pig clad in chef’s hat and apron, smacking its lips as it gleefully holds a skewered rack of ribs over a flame); *Pollo Feliz USA*, POLLO FELIZ, <http://www.pollofeliz.com/USA/> [<http://perma.cc/YG7R-QT2T>] (accessed Apr. 21, 2015) (logo of the Pollo Feliz grilled chicken restaurant: a smiling chicken giving customers a thumbs-up); *About The Laughing Cow*, THE LAUGHING COW, <http://thelaughingcow.com/about-us/> [<http://perma.cc/7JPH-F2QV>] (accessed Apr. 21, 2015) (describing the over 350 million wedges of cheese each year which bear the company’s logo, a joyous bovine); Burger King, *Chicken Fries Commercial*, YOUTUBE, https://youtu.be/gm_n76Dsl0c [<http://perma.cc/5XB6-EQ6D>] (Aug. 2, 2006) (accessed Apr. 22, 2015) (featuring a chicken aggressively proclaiming “maybe I do want to be a french fry”); Burger King, *Chicken Fries Commercial 2015 Coopid*, YOUTUBE, <https://youtu.be/j834g62Opq0> [<http://perma.cc/L2L4-8FHK>] (Mar. 27, 2015) (accessed Apr. 22, 2015) (chicken uses a Grinder/Tinder-style dating app, rejecting multiple actual birds before enthusiastically matching with a basket of chicken fries; a voice-over tells listeners “there is just no stopping true love—chicken fries are back at Burger King!”); Mo, *supra* note 80, at 1321 (demonstrating that advertisers depict dairy cows as being raised in “spacious, grassy pastures”).

⁹¹ See Kelto, *supra* note 89 (noting that “the vast majority of free-range birds in commercial egg facilities never actually go outside”); *Deciphering “Humane” Labels and Loopholes*, WOODSTOCK FARM ANIMAL SANCTUARY, <http://woodstocksanctuary.org/learn-3/the-humane-farming-myth/humane-free-range/> [<http://perma.cc/BL8W-7SV3>] (accessed Mar. 5, 2015) (noting that on many free-range farms “20,000 birds may be crammed inside a facility with a single exit the size of a cat door”).

many of the labels commonly found on eggs.⁹² The terms “Farm Fresh” and “All Natural” have no legal significance.⁹³

While this marketing might seem no more dubious than a food being meaninglessly advertised as “fresh”⁹⁴ or a customer service program described as “friendly,” assertions of humane treatment of animals are typically not only patently false,⁹⁵ but also conceal from consumers verifiable information that might cause consumers to choose different products.⁹⁶ Imagery and claims of humane treatment are likely misleading consumers into believing that the products they purchase come from animals who are treated well.⁹⁷ Examining the effectiveness of similar “puffery,” researchers presented consumers with a variety of commercials and surveyed consumer perception of the products advertised.⁹⁸ The researchers found that a significant percentage of survey respondents believed puffery claims to be literally

⁹² See *COK Co-Files Lawsuit against Federal Agencies for Failure to Regulate Deceptive Egg Labels*, COMPASSION OVER KILLING, <http://cok.net/camp/truth-in-egg-labeling/> [<http://perma.cc/8M76-V2VT>] (accessed Mar. 5, 2015) (noting federal agencies “have failed to take any action to regulate the often-misleading claims and deceptive imagery widely found on egg cartons”).

⁹³ See Kelto, *supra* note 89 (explaining that the terms “Farm Fresh” and “All Natural” have no real meaning in food labeling).

⁹⁴ See S.T. VanAirdale, *The Fresh Wars: How the Five-Letter Word Became a Fast-Food Mantra*, SLATE, http://www.slate.com/articles/business/food/2013/02/the_fresh_wars_in_fast_food_how_the_five_letter_word_came_to_dominat_e_ads.html [<http://perma.cc/K9FG-3TRJ>] (Feb. 11, 2013) (accessed Mar. 5, 2015) (describing the different uses of the word “fresh” in fast food marketing).

⁹⁵ See, e.g., Stephen Wells, *Tyson Foods Says They’ll Treat Animals Humanely—Can They Be Trusted?*, ALTERNET, <http://www.alternet.org/news-amp-politics/can-tyson-foods-be-trusted-treat-animals-humanely> [<http://perma.cc/YL2Q-JAWP>] (June 26, 2013) (accessed Mar. 5, 2015) (asserting that, despite Tyson’s claims that animals are humanely housed in “favorable” and “comfortable” environments, its “factory farms confine animals in some of the cruelest conditions in the industrial agriculture industry”).

⁹⁶ See, e.g., *id.* (describing Tyson’s misleading statements concerning the environments in which its animals are raised); Press Release, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, *Treat My Chicken Right: ASPCA Survey Shows Consumers Want More Humanely Raised Chicken, Feel It Leads to Safer Chicken Products* (Sept. 2, 2014) (available at <http://www.aspc.org/about-us/press-releases/treat-my-chicken-right-aspc-survey-shows-consumers-want-more-humanely> [<http://perma.cc/VVS4-8FGP>] (accessed Mar. 5, 2015)) (noting that “more than 75 percent of chicken consumers surveyed” wanted to see more “humanely-raised chicken options” in stores).

⁹⁷ See, e.g., Mark Sherman, *Activists Decry ‘Happy Cows’ Ads*, L.A. TIMES, <http://articles.latimes.com/2002/dec/13/business/fi-cows13> [<http://perma.cc/RF3A-EQQF>] (Dec. 13, 2002) (accessed Mar. 5, 2015) (noting that the California Milk Advisory Board credited its commercials depicting happy dairy cows in bucolic settings with creating more consumer demand for cheese produced in California).

⁹⁸ Herbert J. Rotfeld & Kim B. Rotzoll, *Puffery vs. Fact Claims—Really Different?*, 4 CURRENT ISSUES & RES. IN ADVERTISING 85, 88–90 (1981). Rotfeld and Rotzoll frame puffery classically: the sort of “exaggerations and inflated claims” that consumers are assumed to anticipate being present in advertisements—that a certain product is “great,” that another is “the very best,” and so forth. *Id.* at 85. The term’s common law use dates back to 1892. *Carlill v. Carbolic Smoke Ball Co.* [1893] 1 Q.B. 256.

true, and some respondents expected advertisers could prove the literal truth of these puffery claims.⁹⁹

In response to industry deception, consumer and animal advocates have attempted to use consumer protection law to pursue the interests of animals killed for food and consumers who want products from more humanely treated animals.¹⁰⁰ Unfortunately, similar to the difficulty plaintiffs have establishing standing when suing on behalf of animals,¹⁰¹ consumers have a very difficult time establishing standing to sue companies who engage in this kind of deceptive advertising.¹⁰²

Many advocates of animal interests invest a significant portion of their resources in combating intensive animal agriculture, but they face a disproportionate fight of David versus Goliath-like proportions.¹⁰³ To put this into perspective, consider that the total assets of the Humane Society of the U.S. (HSUS), the nation's largest animal welfare advocacy organization, comprise less than 0.002% of meat producer Cargill's annual revenue.¹⁰⁴ Due in large part to its financial advantage, the animal agriculture industry has amassed a tremendous

⁹⁹ Rotfeld & Rotzoll, *supra* note 98, at 87.

¹⁰⁰ Dillard, *supra* note 84, at 41–42.

¹⁰¹ Delcianna J. Winders, *Confronting Barriers to the Courtroom for Animal Advocates*, 13 ANIMAL L. 1, 6 (2006) (“While advocates for humans often take standing for granted, standing has posed a frequent and formidable obstacle for animal advocates. . . . [S]tanding, particularly the injury-in-fact prong of standing analysis, poses a normative question. Lovvorn elaborated on this notion, asserting that underlying the heightened scrutiny of standing in animal protection cases ‘is the idea that the courts don’t really think that the injury that we’re talking about is a real injury.’”). While it is not inherently impossible for animals to have standing for themselves, such a step is likely to require explicit statutory authorization for animal standing. *See Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1176, 1179 (9th Cir. 2004) (“It is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents. . . . [T]he question becomes whether Congress has passed a statute actually doing so. . . . ‘[I]f Congress and the President intended to take the extraordinary step of authorizing animals as well as people and legal entities to sue, they could, and should, have said so plainly.’ In the absence of any such statement in the ESA, the MMPA, or NEPA, or the APA, we conclude that the Cetaceans do not have statutory standing to sue.”).

¹⁰² Dillard, *supra* note 84, at 38.

¹⁰³ Nil Zacharias, *Who’s Pulling the Strings of the Vegan Propaganda Machine*, HUFFINGTON POST, http://www.huffingtonpost.com/nil-zacharias/veganism_b_1505493.html [<http://perma.cc/J7DL-PEBJ>] (May 15, 2012) (accessed Mar. 5, 2015).

¹⁰⁴ *See About Us: Overview*, HUMANE SOC’Y OF THE U.S., <http://www.humanesociety.org/about/overview/> [<http://perma.cc/QBV3-F66Z>] (Feb. 11, 2015) (accessed Mar. 5, 2015) (“The Humane Society of the United States is the nation’s largest and most effective animal protection organization.”); HUMANE SOC’Y OF THE U.S., 2013 ANNUAL REPORT 20 (2014) (available at <http://www.humanesociety.org/assets/pdfs/about/2013-annual-report.pdf> (accessed Mar. 5, 2015)) (reporting HSUS’s total assets as \$267.18 million); CARGILL, 2014 ANNUAL REPORT 1 (2014) (reporting \$134.9 billion in revenue during 2014).

amount of political influence¹⁰⁵ by developing one of the most powerful lobbying groups in the nation, The American Farm Bureau Federation (AFBF).¹⁰⁶ Due in part to the industry's lobbying muscle, animal agriculture is legally advantaged by more than just the barriers hampering consumer suits over misleading marketing claims;¹⁰⁷ the industry also enjoys benefits including exceptions from animal protection statutes,¹⁰⁸ federal subsidies and programs that promote consumption of animal products,¹⁰⁹ and laws that criminalize or deter whistleblowing.¹¹⁰

Approximately \$14 billion in taxpayer funds are spent on farm subsidies every year,¹¹¹ allowing producers to lower prices for some products.¹¹² The federal government's promotion of animal product consumption,¹¹³ "including generic advertising schemes and the National School Lunch Program," also increases demand.¹¹⁴

¹⁰⁵ Wechsler, *supra* note 86, at 184.

¹⁰⁶ *Id.* at 189.

¹⁰⁷ Dillard, *supra* note 84, at 37–38.

¹⁰⁸ Wechsler, *supra* note 86, at 198.

¹⁰⁹ *Id.* at 183–84.

¹¹⁰ See Ted Genoways, *Gagged by Big Ag*, MOTHER JONES, July–Aug. 2013 (available at <http://www.motherjones.com/environment/2013/06/ag-gag-laws-mowmar-farms> [<http://perma.cc/53SH-249Z>] (accessed Mar. 5, 2015)) (tracing the origins of ag-gag laws—meant to prohibit covert video or audio recording of animal agriculture facilities, in some cases even for internal whistleblowers—directly to the efforts of “meat industry lobbyists”).

¹¹¹ *EWG Farm Subsidies: USDA Subsidies for Farms in United States Totaled \$292,548,000,000 from 1995 through 2012*, ENVTL. WORKING GROUP, <http://farm.ewg.org/regionsummary.php> [<http://perma.cc/5C6E-EXJZ>] (accessed Feb. 20, 2015); David J. Lynch & Alan Bjerga, *Taxpayers Turn U.S. Farmers into Fat Cats with Subsidies*, BLOOMBERG BUS., <http://www.bloomberg.com/news/articles/2013-09-09/farmers-boost-revenue-sowing-subsidies-for-crop-insurance> [<http://perma.cc/9DM7-X8Z2>] (Sept. 9, 2013) (accessed Feb. 20, 2015).

¹¹² *Economics*, UCONN RUDD CENTER FOR FOOD POLICY & OBESITY, <http://www.uconnruddcenter.org/economics> [<http://perma.cc/HXA5-RXKU>] (accessed Feb. 20, 2015).

¹¹³ See 7 C.F.R. § 1260.169(a) (2014) (establishing a program to promote beef and beef products); 7 C.F.R. § 1230.60(a)(1) (2014) (establishing a program to promote pork and pork products); 7 C.F.R. § 1250.341(a) (2012) (establishing a program to promote “eggs, egg products, spent fowl, and products of spent fowl . . .”); 7 C.F.R. § 1280.101(f) (2014) (establishing a program to promote lamb).

¹¹⁴ Wechsler, *supra* note 86, at 184; see 7 C.F.R. § 1260.169(d) (requiring that no advertising that includes a brand name of beef be implemented without prior approval); 7 C.F.R. § 1230.60(d) (requiring that no advertising that includes a brand name of pork be implemented without prior approval); 7 C.F.R. § 1250.341(e) (requiring that advertisements make no mention of brand names of eggs); 7 C.F.R. § 210.10(i) (requiring that under the National School Lunch Program schools provide either a meat or meat alternative component; further, meat alternatives include animal products such as cheese and eggs); *Research and Promotion Programs*, U.S. DEPT OF AGRIC., <http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=templateN&navID=IndustryMarketingandPromotion&leftNav=IndustryMarketingandPromotion&page=FluidMilkProcessorCheckoffPrograms&description=Fluid+Milk+Processor+Promotion+Programs> [<http://perma.cc/DT8Q-QHYU>] (Feb. 3, 2015) (accessed Feb. 20, 2015) (“The Fluid Milk Processor Promotion Program, or Fluid Milk Checkoff Program develops and finances generic advertising . . .”).

Federal legislation supports the industry and targets those who advocate for animal interests.¹¹⁵ For example, the Animal Enterprise Terrorism Act (AETA),¹¹⁶ passed in 2006, makes it illegal for journalists, employees, or anyone else to engage in conduct “for the purpose of damaging or interfering with the operations of an animal enterprise[,]” including intentionally causing damage to any real or personal property.¹¹⁷ The AETA has a savings clause indicating the AETA should not prohibit any activity protected by the First Amendment,¹¹⁸ but one recent case shows the potential for the AETA to be used as a tool to harass and intimidate individuals for peaceful and otherwise lawful behavior.¹¹⁹ In *U.S. v. Buddenberg*, four activists were indicted under the AETA for alleged participation in “conduct including protesting [outside a researcher’s home], writing with chalk on the sidewalk, chanting, leafleting, and using the internet to ‘find information on biomedical researchers.’”¹²⁰ In the order dismissing the indictment for lack of specificity, the judge noted that the alleged activities could fall within the protection of the First Amendment.¹²¹ Additionally, several states have passed ‘ag-gag’ laws, which make it a crime to go under-

¹¹⁵ See Animal Enterprise Terrorism Act, 18 U.S.C. § 43 (2012) (describing the illegality of “interfering with the operations of an animal enterprise”); *EWG Farm Subsidies: Total Cost (see methodology) by Crop in the U.S.*, ENVTL. WORKING GROUP, <http://farm.ewg.org/cropinsurance.php> [<http://perma.cc/UV5C-V69B>] (accessed Feb. 20, 2015) (indicating that the U.S. government spends millions of dollars each year to subsidize farmers who produce corn, wheat, and soybeans); *Major Crops Grown in the United States*, U.S. ENVTL. PROTECTION AGENCY, <http://epa.gov/agriculture/ag101/cropmajor.html> [<http://perma.cc/NBC6-KA9E>] (accessed Feb. 20, 2015) (explaining that a large percentage of corn, wheat, and soybeans are used as livestock feed).

¹¹⁶ 18 U.S.C. § 43.

¹¹⁷ *Id.* § 43(a)(1)–(a)(2)(A).

¹¹⁸ *Id.* § 43(e)(2).

¹¹⁹ See Ctr. for Constitutional Rights, *Rights Lawyers File Motion for Activists Indicted under Terror Law for Leafleting, Internet Research*, YUBANET.COM, http://yubanet.com/usa/Rights-Lawyers-File-Motion-for-Activists-Indicted-Under-Terror-Law-for-Leafleting-Internet-Research_printer.php [<http://perma.cc/Z5WD-5JM7>] (May 23, 2009) (accessed Mar. 13, 2015) (noting that activists were indicted for activities that are protected under the First Amendment).

¹²⁰ *Id.*; *United States v. Buddenberg*, No. CR-09-00263 RMW, 2009 WL 3485937, at *1 (N.D. Cal. Oct. 28, 2009).

¹²¹ *United States v. Buddenberg*, No. CR-09-00263 RMW, 2010 WL 2735547 at *6, 9–10 (N.D. Cal. July 12, 2010) (“In order for an indictment to fulfill its constitutional purposes, it must allege facts that sufficiently inform each defendant of what it is that he or she is alleged to have done that constitutes a crime. This is particularly important where the species of behavior in question spans a wide spectrum from criminal conduct to constitutionally protected political protest.”).

cover at farms and record images or audio of what happens there.¹²² These ag-gag laws will likely face First Amendment challenges.¹²³

The incestuous relationship between the industry and the agencies tasked with regulating food production further insulates the industry.¹²⁴ The USDA is charged with both regulating and promoting the industry.¹²⁵ This creates a conflict of interest, as adequate regulations would often raise production costs by requiring additional safeguards be implemented or decrease demand by publishing information that could make consumers less likely to purchase animal products.¹²⁶ Similarly, when abuses are identified, structural obstacles may prevent prosecution.¹²⁷ Prosecutors and city attorneys are often overworked and subject to political pressure.¹²⁸ For example, “[i]f a deputy city attorney or assistant district attorney wants to prosecute a farm for animal cruelty, he or she will certainly be outmaneuvered by his or her elected superior, the City Attorney or District Attorney, who depends on financial contributions from the agricultural industry.”¹²⁹ Because existing regulation is insufficient, consumers are misled and their preferences are ignored.¹³⁰

¹²² Dan Flynn, ‘Ag-Gag’ Bill Introduced in the Washington State Legislature, FOOD SAFETY NEWS, <http://www.foodsafetynews.com/2015/01/ag-gag-bill-introduced-in-washington-state-house-of-representatives/#.VPTMMLs5CW8> [<http://perma.cc/T599-HHUT>] (Jan. 13, 2015) (accessed Feb. 20, 2015).

¹²³ *Taking Ag Gag to Court*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/cases-campaigns/features/taking-ag-gag-to-court> [<http://perma.cc/WR89-5FA5>] (accessed Mar. 2, 2015).

¹²⁴ Mo, *supra* note 80, at 1315.

¹²⁵ See *Mission Statement*, U.S. DEP’T OF AGRIC., http://www.usda.gov/wps/portal/usda/usdahome?navid=MISSION_STATEMENT [<http://perma.cc/9LFK-FK44>] (updated Apr. 15, 2014) (accessed Mar. 13, 2015) (stating the USDA is charged with “expanding markets for agricultural products and support[ing] international economic development, further developing alternative markets for agricultural products and activities, providing financing needed to help expand job opportunities and improve housing, utilities and infrastructure in rural America” in addition to their regulatory role).

¹²⁶ See Mo, *supra* note 80, at 1325 (discussing how Flying F Farm, a truly free-range egg producer, must charge higher prices which means that “it loses consumers and suffers from competitive harm”); LUSK, *supra* note 6 (stating that in a study of meat consumption, “pork and poultry demand has been adversely affected by media attention about animal welfare”).

¹²⁷ See Mo, *supra* note 80, at 1320 (highlighting the two main reasons for prosecutors’ decisions to not prosecute animal cruelty cases as being political pressure and their reliance on contributions from the agricultural industry). Critically, state animal cruelty statutes actually prevent many normatively cruel animal husbandry practices from rising to the level of criminal animal abuse at all. *Fight Animal Cruelty Glossary*, AM. SOC’Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspc.org/fight-cruelty/farm-animal-cruelty/farm-animal-cruelty-glossary> [<http://perma.cc/PQ2G-PGZE>] (accessed Apr. 21, 2015) (“While every state has a cruelty law protecting companion animals, most states exclude either farm animals or certain common, yet cruel forms of farm animal husbandry.”).

¹²⁸ Mo, *supra* note 80, at 1320.

¹²⁹ *Id.*

¹³⁰ See *id.* at 1355 (explaining how inefficient regulation of the term “free range” or “free roaming” misleads consumers).

2. *Introduction of Informative Food Labels Can Make Substantial Improvements in Consumer Awareness and Animal Welfare*

Unless the public is made more aware of the animal cruelty, pollution, and human rights issues that plague factory farms, practices that cause these consequences are unlikely to be remedied.¹³¹ Because these issues are harmful to public health and the environment, the public should be made aware of what is happening inside these factories. While many advocates for animals would like to see a quick end to all exploitation of animals, this would require such a drastic change in our diets, clothing, cosmetics, and medicine that it is unlikely to occur anytime soon.¹³² Nonetheless, what humans can do in the immediate future is take meaningful steps to lessen the harm inflicted by industrial animal agriculture. There is a clear consensus that American consumers want animal products to come from more humane methods,¹³³ and social science literature suggests that food labeling can affect consumer behavior.¹³⁴ Researchers have found that introduction of food labels led more consumers to meet dietary guidelines for calories from fat, dietary fiber, and cholesterol.¹³⁵

This Article proposes that federally mandated disclosure of the harmful practices commonly utilized by industrial agriculture be placed on food packaging at the point of purchase, in a manner analogous to nutrition labeling.¹³⁶ In order to inform consumers effectively and allow them to conform their purchases with their moral preferences, there is a need for federal legislation including (1) mandatory disclosure of (2) a relatively comprehensive list of common industrial farming practices that signals which practices each producer employs, (3) articulated in a manner that most consumers can easily understand, and (4) backed by effective enforcement mechanisms. In other

¹³¹ See *What Is a Factory Farm?*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspca.org/fight-cruelty/farm-animal-cruelty/what-factory-farm> [<http://perma.cc/PHL8-LDCF>] (updated 2015) (accessed Mar. 2, 2015) (explaining that factory farms are facilities that, as part of their day to day operations, routinely mistreat animals, pollute the environment at large, and endanger human health).

¹³² See JAMES FIESER, *MORAL ISSUES THAT DIVIDE US AND APPLIED ETHICS: A SOURCEBOOK* (forthcoming) (portions available at <http://www.utm.edu/staff/jfieser/class/160/9-animals.htm> [<http://perma.cc/HRB8-EBAD>] (accessed Feb. 18, 2015)) (illustrating that animals and animal products are an integral part of day-to-day human life).

¹³³ See AM. HUMANE ASS'N, *HUMANE HEARTLAND FARM ANIMAL WELFARE SURVEY* (2013) (available at <http://www.americanhumane.org/assets/humane-assets/humane-heartland-farm-animals-survey-results.pdf> (accessed Mar. 2, 2015)) (noting 89% of survey participants "were very concerned about farm animal welfare").

¹³⁴ See Mørkbak & Nordström, *supra* note 5, at 326 (stating that food labeling can affect a consumer's willingness to pay for a product).

¹³⁵ Sung-Yong Kim et al., *The Effect of Food Label Use on Nutrient Intakes: An Endogenous Switching Regression Analysis*, 25 J. AGRIC. & RESOURCE ECON. 228, 229–30 (2000).

¹³⁶ See *infra* Part III.A (developing further the idea that there should be federally mandated disclosure of harmful animal agriculture practices in a way similar to nutrition labeling).

words, producers should be compelled to place a relatively comprehensive list of easily understood common industrial agriculture practices on end-product food packaging with an accompanying notation that informs consumers whether or not the producer of that product engages in the particular practice at the facility where the product was produced.

Table 1:

| What practices does this producer engage in? | |
|---|-----|
| Beak cut without anesthesia? | Yes |
| Less than 200 square cm per bird? | No |
| Use of non-therapeutic antibiotics? | Yes |
| Access to natural sunlight? | No |
| Natural flooring? | No |
| Transported without climate control? | Yes |

Table 2:

| The producer of this product engages in the following practices: |
|---|
| Beaks cut without anesthesia; use of non-therapeutic antibiotics; little-to-no access to the outdoors; metal flooring; transported without climate control. |

While the legal literature discussing food labeling and animal welfare is growing,¹³⁷ most of the literature proposes legal definitions of terms like 'humane,' expansion of consumer protection laws, or labeling systems in which third-parties provide grading or ranking systems for producers of animal products.¹³⁸ This Article rejects those proposals as inadequate to inform consumers, and instead suggests providing relevant information directly to consumers.

¹³⁷ See Ken Strutin, *Animal Rights in the Human Legal System*, LLRX.COM, <http://www.llrx.com/features/animalrights.htm> [<http://perma.cc/QG5U-B6ZP>] (Feb. 20, 2012) (accessed Feb. 18, 2015) (compiling many of the ways in which the legal community is engaging with animal welfare law).

¹³⁸ See *supra* note 4 and accompanying text (describing labeling refinements proposed by animal advocates and legal scholars); see also Linda Bren, *Animal Health and Consumer Protection*, FDA CONSUMER MAG., Jan.-Feb. 2006 (available at <http://www.fda.gov/AboutFDA/WhatWeDo/History/ProductRegulation/AnimalHealthandConsumerProtection/> [<http://perma.cc/L5S7-XVV7>] (accessed Feb. 19, 2015)) (exploring the evolution of animal welfare law in relation to consumer protection).

II. THE CURRENT LEGAL LANDSCAPE

While every state has passed anti-cruelty statutes protecting cats and dogs,¹³⁹ the cruel practices discussed in Part I are often legal and subsidized by federal tax dollars.¹⁴⁰ A significant federal law purporting to regulate how producers treat their animals, the Humane Methods of Slaughter Act,¹⁴¹ exempts poultry¹⁴² and is sparingly enforced by the U.S. Department of Agriculture (USDA).¹⁴³ Thus, while the Act's title is promising, the law itself—significantly influenced by industry lobbyists¹⁴⁴—is virtually irrelevant.¹⁴⁵ Some states, including California, have enacted legislation aimed at curbing some cruel animal agriculture practices,¹⁴⁶ but these laws are likely to fall short of ensuring that producers treat animals humanely.¹⁴⁷ And, utilizing their political influence, producers are attempting to prevent states

¹³⁹ See generally Elizabeth R. Rumley, *States' Animal Cruelty Statutes*, NAT'L AGRIC. LAW CENTER, <http://nationalaglawcenter.org/state-compilations/animal-cruelty/> [http://perma.cc/C9XD-856E] (accessed Jan. 25, 2015) (compiling the statutory text and date of possible expiration of each state's animal cruelty statutes in a clickable U.S. map).

¹⁴⁰ See Wechsler, *supra* note 86, at 183–84 (stating that the federal government often “take[s] affirmative steps that foster animal suffering, namely through subsidizing and promoting consumption of animal products”); *Fight Animal Cruelty Glossary*, *supra* note 128 (discussing farm animals and practices typically excluded from animal cruelty prohibitions).

¹⁴¹ Humane Methods of Slaughter Act of 1978, 7 U.S.C. §§ 1901–1907.

¹⁴² See *id.* § 1902(a) (pertaining only to “cattle, calves, horses, mules, sheep, swine, and other livestock”). The Humane Methods of Slaughter Act only regulates slaughter, and thus leaves unaddressed many of the animal husbandry issues outlined in Part I—even for those non-poultry, non-fish animals who are covered by the Act. See DAVID ROBINSON SIMON, *MEATONOMIC* § 47 (2014) (“HMSA applies only in the final instant of a farm animal's life. . . . Except for the largely irrelevant Twenty-Eight Hour Law, neither HMSA nor any other federal law protects farm animals from cruelty during their lives other than at the moment of their death.”).

¹⁴³ Wolfson & Sullivan, *supra* note 79, at 208.

¹⁴⁴ See Steve Johnson, *The Politics of Meat: A Look at the Meat Industry's Influence on Capitol Hill*, PBS FRONTLINE, <http://www.pbs.org/wgbh/pages/frontline/shows/meat/politics/> [http://perma.cc/6AWU-6LFA] (accessed Mar. 2, 2015) (highlighting the considerable influence the meat and poultry lobbies hold over congressional attempts to pass legislation governing meat and poultry industry practices).

¹⁴⁵ Wolfson & Sullivan, *supra* note 79, at 207–08.

¹⁴⁶ See *Legal Protections for Farm Animals*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <http://www.aspc.org/fight-cruelty/farm-animal-cruelty/legal-protections-farm-animals> [http://perma.cc/RU58-PEY2] (accessed Mar. 2, 2015) (illustrating that some states have passed legislation banning various practices deemed cruel to farm animals); see also CAL. HEALTH & SAFETY CODE §§ 25990–25994 (West 2015) (California's legislation to curb cruel practices).

¹⁴⁷ See Brad Miller, *Why California Proposition 2, Now in Effect, Is Not Protecting Farmed Animals*, ANIMALS 24-7, <http://www.animals24-7.org/2015/01/02/why-california-proposition-2-now-in-effect-is-not-protecting-farmed-animals/> [http://perma.cc/ZH9U-KJVT] (Jan. 2, 2015) (accessed Feb. 20, 2015) (making the argument that California's law, Proposition 2, is not being enforced and lacks strong enough language for it to have the intended impact).

from enacting statutes to regulate how animals used for food are treated.¹⁴⁸

The various labels currently found on food packaging range from federally mandated labels¹⁴⁹ to third-party certification programs¹⁵⁰ in which some food manufacturers choose to participate, to terms that have no agreed upon meaning and are nothing more than advertising fluff.¹⁵¹ The content of these labels includes nutritional information as well as health, environmental, and animal welfare claims.¹⁵²

The first of more than 200 consumer protection laws, Congress passed the Pure Food and Drugs Act of 1906 (PFDA).¹⁵³ At that time, the “PFDA had no affirmative labeling requirement; it only mandated that any label applied to food packaging accurately reflect the package’s” contents.¹⁵⁴ Labeling regulations continued to evolve with the Federal Food, Drug, and Cosmetic Act of 1938 (FDCA), which gave the Food and Drug Administration (FDA) authority to prohibit “the movement . . . of adulterated and misbranded food, drugs, devices, and cosmetics,”¹⁵⁵ and the Wheeler-Lea Act of 1938,¹⁵⁶ which gave the Federal Trade Commission (FTC) the authority to oversee advertising

¹⁴⁸ See Lauren Bernadett, *Proposed King Amendment Threatens Broad Spectrum of Food Issues*, FOOD SAFETY NEWS, <http://www.foodsafetynews.com/2013/11/proposed-king-amendment-threatens-broad-spectrum-of-food-issues/> [<http://perma.cc/YQ9P-K9GY>] (Nov. 19, 2013) (accessed Feb. 20, 2015) (demonstrating that a congressional representative, financially backed by industrial livestock producers, attempted to limit state regulations governing animal food production through federal legislation).

¹⁴⁹ See 21 C.F.R. § 101 (2014) (mandating nutrition and health labels).

¹⁵⁰ See, e.g., *Meat and Dairy Labels: A Brief Guide to Labels and Animal Welfare*, HUMANE SOC'Y OF THE U.S., http://www.humanesociety.org/issues/confinement_farm/facts/meat_dairy_labels.html [<http://perma.cc/L35Q-83C6>] (Dec. 18, 2012) (accessed Feb. 16, 2015) [hereinafter *Meat and Dairy Labels*] (listing several third-party labels for meat and dairy products).

¹⁵¹ See Rotfeld & Rotzoll, *supra* note 98, at 4 (differentiating “puffery claims” from other types of advertising claims).

¹⁵² See 21 C.F.R. § 101 (mandating nutrition and health labels); Megan S. Houston, *Ecolabel Programs and Green Consumerism: Preserving a Hybrid Approach to Environmental Regulation*, 7 BROOK. J. CORP. FIN. & COM. L. 225, 238–40 (2012) (discussing the USDA’s organic food label program as an environmental claim); *Meat and Dairy Labels*, *supra* note 150 (providing examples of several animal welfare claims).

¹⁵³ Federal Food and Drugs Act of 1906, Pub. L. No. 59-384, 34 Stat. 768 (repealed 1938); *Legislation*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/RegulatoryInformation/Legislation/> [<http://perma.cc/H2YV-RNSM>] (accessed Apr. 2, 2015); Tobias J. Gillett, *Lessons from Nutritional Labeling on the 20th Anniversary of the NLEA: Applying the History of Food Labeling to the Future of Household Chemical Labeling*, 37 WASH. U. J.L. & POL'Y 267, 273 (2011).

¹⁵⁴ Gillett, *supra* note 153, at 273.

¹⁵⁵ *Id.* at 275; Federal Food, Drug, and Cosmetic Act, Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified as amended at 21 U.S.C. §§ 301–399(f) (2012)).

¹⁵⁶ Wheeler-Lea Act of 1938, Pub. L. No. 75-447, 52 Stat. 111, 114–15 (codified as amended at 15 U.S.C. §§ 41–58 (2012)) (amending § 5 of the existing Federal Trade Commission Act of 1914 to prohibit unfair methods of competition affecting consumers and allowing the Commission to bring suit to enjoin the dissemination of false advertising).

of all products regulated by the FDA other than prescription drugs.¹⁵⁷ However, the nutrition labeling most American consumers would recognize today only became mandatory in 1990 when Congress passed the Nutrition Labeling and Education Act (NLEA).¹⁵⁸

The NLEA grants the Secretary of the Department of Health and Human Services (HHS) authority to define specific terminology,¹⁵⁹ and requires the labeling of the serving size in “common household measure[s],” the number of servings, calories, and the sources of those calories.¹⁶⁰ The NLEA also requires manufacturers to list the amounts of several specific nutrients as well as any other information the Secretary determines will assist consumers.¹⁶¹ The NLEA preempts certain laws,¹⁶² however, states are permitted to add label information if it does not conflict with federal law or unduly burden interstate commerce, and if it is designed to address a particular need for information that is not met by the existing federal requirements.¹⁶³ Labels for packaged foods must contain an identification of the food,¹⁶⁴ the net quantity of the package’s contents,¹⁶⁵ a list of ingredients,¹⁶⁶ and the name and address of the manufacturer.¹⁶⁷ Label placement and font size are also regulated.¹⁶⁸ Additionally, “one of the central features of the current framework is to require nutrition information on labels when the manufacturer makes a nutritional claim or when vitamins, minerals or protein are added to the product.”¹⁶⁹ All other “nutrition labeling is optional.”¹⁷⁰

¹⁵⁷ See *Enforcement Policy Statement on Food Advertising*, FED. TRADE COMMISSION (May 13, 1994) (available at <https://www.ftc.gov/public-statements/1994/05/enforcement-policy-statement-food-advertising> [<http://perma.cc/RV55-V4AW>] (accessed Mar. 7, 2015)) (stating that the FTC and FDA “share jurisdiction over claims made by manufacturers of food products”).

¹⁵⁸ Nutrition Labeling and Education Act of 1990, Pub. L. No. 101-535, § 3(a), 104 Stat. 2353, 2358 (codified as amended in scattered sections of 21 U.S.C.); Eric F. Greenberg, *The Changing Food Label: The Nutrition Labeling and Education Act of 1990*, 3 LOY. CONSUMER L. REP. 10, 11–12 (1990); see also Christine L. Taylor & Virginia L. Wilkening, *How the Nutrition Food Label Was Developed, Part 1: The Nutrition Facts Panel*, 108 J. AM. DIETETIC ASS’N 437 (2008) (discussing some “guiding principles” of the design of the new food label).

¹⁵⁹ 21 U.S.C. § 343(r)(2).

¹⁶⁰ *Id.* § 343(q)(1).

¹⁶¹ *Id.*

¹⁶² *Id.* § 343-1(a).

¹⁶³ See Charles P. Mitchell, *State Regulation and Federal Preemption of Food Labeling*, 45 FOOD DRUG COSM. L.J. 123, 124–26 (1990) (explaining how states can adopt food labeling regulations).

¹⁶⁴ See 21 C.F.R. § 101.3(a) (listing requirements of a food’s “statement of identity”).

¹⁶⁵ See *id.* § 101.105(a) (requiring “declaration of the net quantity of contents”).

¹⁶⁶ See *id.* § 101.4(a) (requiring ingredients “be declared on the label”).

¹⁶⁷ See *id.* § 101.5 (requiring “name and place of business of manufacturer”).

¹⁶⁸ See *id.* §§ 101.2, 101.15 (requiring “prominence of required statements,” as well as specific size of type font).

¹⁶⁹ Greenberg, *supra* note 158, at 11; see also 21 C.F.R. § 101.9 (requiring listing of vitamins, minerals, and protein as a percentage of the recommended daily intake).

¹⁷⁰ Greenberg, *supra* note 158, at 11.

If a company chooses to put one or more affirmative health claims (e.g., Helps Lower Cholesterol) on their packaging, the NLEA imposes some additional regulations:

[H]ealth claims must be (1) truthful and not misleading, (2) limited to describing the value of ingestion or reduction 'of a dietary component, as a part of a total dietary pattern,' based on all publicly available scientific evidence, (3) consistent with generally recognized medical and nutritional principles for a total dietary pattern, (4) consistent with an FDA-accepted scientific summary and consumer health message summary, (5) accompanied by a reference to the applicable consumer health message summary which provides more complete information, and (6) accompanied by complete nutrition labeling.¹⁷¹

III. SHORTCOMINGS OF CONTEMPORARY FOOD LABELS AND THE INADEQUACY OF OTHER PROPOSALS IN THE LEGAL LITERATURE

In addition to federally mandated disclosures, there are private organizations that affix a seal of approval onto food packages.¹⁷² These third-party auditors set up their own standards for deciding which products may use their seal.¹⁷³ The companies these third-parties claim to regulate directly fund the efforts.¹⁷⁴ Many labels try to persuade consumers of the positive treatment of animals during the meat, dairy, or egg production process.¹⁷⁵ Several scholars have proposed legal changes to address the shortcomings of contemporary food labels.¹⁷⁶ Part III addresses some of the shortcomings of current labels, the inadequacy of the existing legal literature to suggest workable solutions to those problems, and why a system like that proposed in Part IV is better than both current labels and the alternatives proposed in the legal literature.

A. *Labels Use Terms that Lack Meaningful Legal Definitions*

Perhaps the biggest source of consumer confusion about animal welfare practices in industrial agriculture is producers' use of compassionate-sounding terms that have no legal definition. For example, 'humanely raised' appears on many different types of labels and has no

¹⁷¹ *Id.* at 12–13; see 104 Stat. 2353 (detailing the required nutrition information on labels).

¹⁷² RENÉE JOHNSON, CONG. RESEARCH SERV., RL31595, ORGANIC AGRICULTURE IN THE UNITED STATES: PROGRAM AND POLICY ISSUES 4 (2008) (available at <http://fas.org/sgp/crs/misc/RL31595.pdf> [<http://perma.cc/NSZ4-J2WQ>] (accessed Apr. 2, 2015)).

¹⁷³ *Id.*

¹⁷⁴ Rebecca Ruiz, *Smart Choices Foods: Dumb As They Look?*, FORBES, <http://www.forbes.com/2009/09/17/smart-choices-labels-lifestyle-health-foods.html> [<http://perma.cc/XT42-25AF>] (Sept. 17, 2009) (accessed Apr. 2, 2015).

¹⁷⁵ ANIMAL WELFARE APPROVED, *supra* note 4, at 3.

¹⁷⁶ MICHAEL L. MCKINNEY ET AL., ENVIRONMENTAL SCIENCE: SYSTEMS AND SOLUTIONS 187 (5th ed. 2013).

legal definition.¹⁷⁷ Any verification or certification process supporting such a claim—if there is one behind a particular label—would have to come from a third-party.¹⁷⁸ The definitions of ‘humane’ employed by the various private agencies that make such claims differ greatly, and many such definitions bear little resemblance to the word’s dictionary definition.¹⁷⁹ For example, under the “Certified Humane” labeling procedures, a farm may remove birds’ beaks or castrate cattle without painkillers and still be “Certified Humane.”¹⁸⁰ Similarly, the “Humanely Raised” label uses the guidelines of the “National Chicken Council—the trade group for the chicken industry.”¹⁸¹ These guidelines permit several practices that would not match the dictionary definition of the word ‘humane,’ including shackling of birds upside down, causing broken bones, bruising, and hemorrhaging.¹⁸²

Legislative definitions of what producers can call ‘humane’ are similarly misleading and oxymoronic, given what they endorse. For example, the Humane Methods of Slaughter Act (HMSA) provides minimal protections for certain livestock animals, but excludes poultry and animals used in ritual sacrifice entirely.¹⁸³ Likewise, labels claiming a “cruelty free” production process offer just as few assurances of compassionate practices as labels purporting to be humane.¹⁸⁴ No government agency defines the term ‘cruelty free,’ leaving each company to choose their own rationalization.¹⁸⁵

The suggestion that regulatory agencies enact substantively meaningful legal definitions of general terms like ‘humane’¹⁸⁶ or ‘cru-

¹⁷⁷ Alison Spiegel, *What Exactly Does ‘Humanely Raised’ Mean?*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/10/27/humanely-raised_n_6041402.html [http://perma.cc/5QCU-A63D] (Oct. 28, 2014) (accessed Apr. 2, 2015).

¹⁷⁸ Ruiz, *supra* note 174.

¹⁷⁹ *Decoding “Humane” Food Labels*, RED ROVER, <http://www.redrover.org/decoding-humane-food-labels> [http://perma.cc/58H2-9654] (accessed Apr. 2, 2015); *see also* WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1100 (Philip Babcock Gove ed., 1993) (defining humane to mean “marked by compassion, sympathy, or consideration for other human beings or animals”).

¹⁸⁰ *How to Read Meat and Dairy Labels*, HUMANE SOC’Y OF THE U.S., http://www.humanesociety.org/issues/confinement_farm/facts/meat_dairy_labels.html [http://perma.cc/8Z8Y-V779] (Dec. 18, 2012) (accessed Apr. 2, 2015).

¹⁸¹ Press Release, Humane Soc’y of the U.S., *Humanely Raised? Challenging Perdue’s Claims* (Nov. 29, 2010) (available at http://www.humanesociety.org/news/press_releases/2010/11/perdue_labels_112910.html [http://perma.cc/9L9G-34A5] (accessed Apr. 2, 2015)).

¹⁸² *Id.*; WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY, *supra* note 179, at 1100.

¹⁸³ 7 U.S.C. § 1902; Cynthia F. Hodges, *Detailed Discussion of the Humane Methods of Slaughter Act*, ANIMAL LEGAL & HIST. CENTER, <https://www.animallaw.info/article/detailed-discussion-humane-methods-slaughter-act> [http://perma.cc/5DVR-DCTV] (2010) (accessed Apr. 11, 2015).

¹⁸⁴ *Buyer Beware! Green Washed Cruelty-Free Labels*, HEARTS, <http://www.hearts.com/ecolife/certified-crueltyfree-food-labels> [http://perma.cc/7HNE-DCRQ] (accessed Apr. 2, 2015).

¹⁸⁵ *Id.*; *see also* Winders, *supra* note 4, at 463 (stating that the FDA and FTC have each declined to regulate “cruelty free” claims).

¹⁸⁶ ANIMAL WELFARE INST., *supra* note 3, at 2.

elty-free'¹⁸⁷—and that courts or other government bodies engage in review of these definitions—appears to be the most common proposal in the relevant legal scholarship.¹⁸⁸ Acknowledging that the accuracy of these labels is difficult to quantify or measure precisely, these proposals commonly advocate judicial or agency review that incorporates the social value of mitigating animal cruelty.¹⁸⁹ Some experts prefer the government agencies define terms and enforce accuracy, whereas others argue for a third-party certification process.¹⁹⁰ These proposals are a step in the right direction, but are ultimately misguided for several reasons. The reasons all relate to these general terms' inability to inform consumers adequately and induce producers to treat their animals more humanely. Undergirding all of these difficulties is the overwhelming influence of the animal agriculture industry on legislators and consumers.¹⁹¹

The first reason compassionate-sounding terms are inadequate signals is that it is difficult to determine what constitutes humane or compassionate conditions. The literature proposing better definitions of these terms typically falls short of proposing anything nearing a specific definition of the term they suggest be better defined.¹⁹² Indeed, the articles that propose specific definitions for animal welfare labels either draw a line that excludes all animal products¹⁹³ or make exceptions that would allow or ignore some very cruel practices,¹⁹⁴ somewhat similar to the misleading industry-financed third-party certification systems.¹⁹⁵

Second, if a producer is unwilling to pay the costs to make their production meet a given term, they could choose to label their product with an alternative term that invokes a similar perception in consum-

¹⁸⁷ Winders, *supra* note 4, at 486.

¹⁸⁸ See, e.g., Winders, *supra* note 4, at 486 (advocating a third-party certification system to correct misleading “cruelty-free” claims on products); ANIMAL WELFARE INST., *supra* note 3, at 6 (proposing that the USDA approve labeling claims only after third-party certification).

¹⁸⁹ See, e.g., Craig A. Wenner, *Judicial Review and the Humane Treatment of Animals*, 86 N.Y.U. L. REV. 1630, 1643 (2011) (contending “all permissible agency interpretations of [humane] must incorporate some consideration of social values regarding animal pain and suffering”).

¹⁹⁰ Winders, *supra* note 4, at 468, 485.

¹⁹¹ Stephanie Strom, *Has ‘Organic’ Been Oversized?*, N.Y. TIMES, <http://www.nytimes.com/2012/07/08/business/organic-food-purists-worry-about-big-companies-influence.html?pagewanted=all> [<http://perma.cc/4S6T-H7UL>] (July 7, 2012) (accessed Apr. 2, 2015).

¹⁹² See Wenner, *supra* note 189, at 1632–33 (suggesting a “baseline of minimizing the pain and suffering of animals,” but not stricter, specific standards).

¹⁹³ See, e.g., Carrie Griffin Basas, “V” *Is for Vegetarian: FDA-Mandated Vegetarian Food Labeling*, 2011 UTAH L. REV. 1275, 1279 (2011) (discussing labeling schemes that only affect meatless or animal-product-free food items).

¹⁹⁴ See Winders, *supra* note 4 (proposing certification standards that do not affect all steps in the supply chain of a product, leaving those unaffected steps open to continuance or ignoring cruel practices).

¹⁹⁵ See *supra* notes 172–174 and accompanying text (discussing the funding link between companies and third-party auditors).

ers. For example, if a regulator defines 'humane' in a way that would raise costs more than a corporation is willing to pay to obtain that label, the corporation could instead label their products 'compassionate.' Because these terms have no legal definition and consumers are given very little guidance in deciphering these terms, producers are likely to enter a race to the bottom and pay for labeling that will best serve the company's financial interests.¹⁹⁶ The ability of producers to evolve their labels in response to newly defined general terms would require legislators and courts to fight the same battle over and over again. A single federal program, along the lines of nutrition labeling,¹⁹⁷ would alleviate this problem by providing consumers with a single source for all the animal welfare information they need.

Third, the animal agriculture industry's pervasive influence over legislators¹⁹⁸ and disparate resources for pursuing litigation¹⁹⁹ makes legislators' frequent revisiting of the issue potentially fatal for such a regulatory program. As elected officials, legislators may not be in office long enough to warrant sustained effort on a policy or they may move on to other issues after a bill is defeated.²⁰⁰ Even when legislative efforts are successful, industry lawyers may stall and drag out enforcement litigation. This problem is likely to plague any regulatory program, but disclosure of objective information is more likely to communicate accurate information to consumers because there is less leeway to define specific practices than there is to define abstract conceptions like 'humane.'

Fourth, the regulation in the field might not be adequate to make these labeling programs meaningful, whether third-party or government-agency certification is the preferred method of implementation.

¹⁹⁶ ANIMAL WELFARE INST., *supra* note 3, at 2, 6.

¹⁹⁷ *Label Claims for Conventional Foods and Dietary Supplements*, U.S. FOOD & DRUG ADMIN., <http://www.fda.gov/Food/IngredientsPackagingLabeling/LabelingNutrition/ucm111447.htm> [<http://perma.cc/D6DV-JK3J>] (Dec. 2013) (accessed Feb. 17, 2015) ("Dietary guidance statements used on food labels must be truthful and non-misleading.").

¹⁹⁸ TRAVIS MADSEN ET AL., ENV'T AM. RESEARCH & POLICY CTR., *GROWING INFLUENCE: THE POLITICAL POWER OF AGRIBUSINESS AND THE FOULING OF AMERICA'S WATERWAYS* 5 (2011) (available at <http://www.frontiergroup.org/sites/default/files/reports/Growing-Influence.pdf> [<http://perma.cc/W26H-4EZ9>] (accessed Feb. 18, 2015)).

¹⁹⁹ See, e.g., Michelle Ma, *Anticipating and Reducing the Unfairness of Monsanto's Inadvertent Infringement Lawsuits: A Proposal to Import Copyright Law's Notice-and-Takedown Regime into the Seed Patent Context*, 100 CALIF. L. REV. 691, 700, 702 (2012) ("Monsanto Company owned 647 plant biotechnology patents as of 2005 and has brought numerous patent infringement lawsuits against farmers for impermissible use of Monsanto's genetically modified seeds, plants, genes, and methods for producing such technologies. Indeed, as of 2007, Monsanto had filed 112 lawsuits against farmers for breach of contract and patent infringement. . . . Monsanto investigates and pursues its patent infringement lawsuits vigorously.").

²⁰⁰ See Alison Peck, *Does Regulation Chill Democratic Deliberation? The Case of GMOs*, 46 CREIGHTON L. REV. 653, 698-700 (2013) (explaining that before Representative Dennis Kucinich lost his seat in 2012, he spent over ten years trying to pass legislation concerning genetically engineered food, which received varying levels of support, but ultimately never passed).

Corporations pay the third-party certifiers who purport to regulate them,²⁰¹ and members of the animal agriculture industry can influence government agencies charged with regulating the industry.²⁰² As this Article argues, placement of objective information about individual practices, rather than vague and broad terms, would better inform consumers.

Finally, even if consumers are able to discern which labeling terms are regulated and less humane than others, the practices that produce animal products on an industrial scale are inherently cruel, in part, because they treat animals as means for human ends, rather than ends in and of themselves. Allowing and adopting such misleading claims would entrench animal suffering and exploitation.

B. Most Consumers Lack Adequate Resources to Choose between Competing Labels

Many of the methods the various third-party certifying agencies employ are available online and elsewhere.²⁰³ However, consumers are unlikely to gain the knowledge necessary to make an informed decision that conforms to their preferences for two reasons. First, few consumers are able to distinguish between similar-sounding labels on their face or have the time to research what each label actually means.²⁰⁴ Second, few consumers have the animal, agriculture, or scientific acumen to decipher industry jargon or compare between different farming practices,²⁰⁵ even if they take the time to read each program's stan-

²⁰¹ See, e.g., Michael Moss & Andrew Martin, *Food Problems Elude Private Inspectors*, N.Y. TIMES, <http://www.nytimes.com/2009/03/06/business/06food.html?page-wanted=1> [<http://perma.cc/LKM7-MCTW>] (updated Mar. 7, 2009) (accessed Feb. 17, 2015) (“As in the Georgia peanut case, auditors are also usually paid by the food plants they inspect, which some experts said could deter them from cracking down. Yet food companies often point to an auditor’s certificate as a seal of approval.”).

²⁰² See *supra* Part I.B.1 (discussing how the animal agriculture industry uses lobbying campaigns to mislead legislators and consumers).

²⁰³ See *Certification Programs*, U.S. DEP’T OF AGRIC., <http://awic.nal.usda.gov/farm-animals/animal-welfare-audits-and-certification-programs/animal-welfare-audits-and-2> [<http://perma.cc/QH8A-ZVQL>] (updated Feb. 18, 2015) (accessed Feb. 19, 2015) (listing links to certifying agencies and their program guidelines).

²⁰⁴ See Sheila Rodriguez, *The Morally Informed Consumer: Examining Animal Welfare Claims on Egg Labels*, 30 TEMP. J. SCI. TECH. & ENVTL. L. 51, 74–76 (2011) (describing three different animal welfare labels on egg cartons and their differences and omissions).

²⁰⁵ See Hillary Sackett et al., *Consumer Perceptions of Sustainable Farming Practices: A Best-Worst Scenario*, Paper Presented at the Agricultural and Applied Economics Association’s 2011 AAEA and NAREA Joint Annual Meeting 18–20 (July 24–26, 2011) (available at http://ageconsearch.umn.edu/bitstream/103791/2/Best_Worst_Chapter.pdf [<http://perma.cc/8D9P-J2SE>] (accessed Feb. 19, 2015)) (illustrating consumer preference for a few, easily understood labels and characteristics of farm products); John Greig, *Editing Out Jargon and Creating Clarity in Agricultural Journalism*, INT’L FED’N OF AGRIC. JOURNALISTS, <http://www.ifaj.org/professional-development/professional-features/editing-out-jargon-and-creating-clarity-in-agricultural-journalism.html> [<http://perma.cc/6PAJ-Z3LN>] (accessed Apr. 22, 2015) (discussing how agricultural terminology suffers from opaque industry jargon).

dards. Thus, even if some labels are significantly better than others, many consumers may still unwittingly purchase cruel or misleading goods. For example, most consumers likely do not know the difference between ‘American Humane Certified’ and ‘Certified Humane.’ This lack of knowledge effectively undermines any value labels have as mechanisms to inform consumers of the relative compassion of the products.

Misinformation harms consumers by preventing them from conforming their purchasing behavior to their own moral preferences. On the other hand, it serves as a windfall to producers. Producers may market their goods as conforming to consumers’ moral preferences while charging a higher price for goods whose production costs are only marginally increased, if increased at all.²⁰⁶ Meanwhile, producers who might pay additional input costs in order to bring about relatively humane conditions risk being priced out of the market²⁰⁷ since their competitors may make an indistinguishable animal welfare or environmental claim without paying the higher input costs that such compassionate methods entail.

For example, labels claiming to contain eggs, meat, or dairy from ‘cage free’ or ‘free range’ animals may offer slightly more meaningful information. But these labels suffer from the same possibility of providing consumers with incomplete or false reassurance about the treatment of animals. The U.S. Department of Agriculture (USDA) requires that the labels of animals whose meat, dairy, or eggs is ‘free range’ have some access to the outside.²⁰⁸ However, ‘free range’ means that producers can pack animals in as high a density as they choose.²⁰⁹ Although producers must also submit affidavits to the USDA supporting their ‘free range’ label,²¹⁰ there is no requirement as to how often the

²⁰⁶ See ANIMAL WELFARE INST., *supra* note 3, at 7 (“The USDA is currently allowing producers to make claims that, to consumers, represent the equivalent message of an independent third-party certification. Producers who make animal welfare and/or environmental claims, but do not adhere to higher standards are not independently certified, are able to avoid both the cost of certification and better production, and still reap the benefits of certification by selling products at a premium price.”).

²⁰⁷ *Id.* at 6.

²⁰⁸ *Meat and Poultry Labeling Terms*, U.S. DEP’T OF AGRIC., <http://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/food-labeling/meat-and-poultry-labeling-terms/meat-and-poultry-labeling-terms> [<http://perma.cc/A7SF-CGGE>] (updated Oct. 24, 2014) (accessed Feb. 17, 2015).

²⁰⁹ See FARM SANCTUARY, THE TRUTH BEHIND “HUMANE” MEAT, MILK AND EGGS 2 (available at <http://www.farmsanctuary.org/wp-content/uploads/2012/03/Truth-Behind-Humane-FINAL-4-21-09.pdf> [<http://perma.cc/9F2C-RS2K>] (accessed Feb. 17, 2015)) (noting that “[b]irds are often packed together by the thousands” and that producers are not held to space regulations).

²¹⁰ *How to Read Meat and Dairy Labels*, *supra* note 180.

animals have access to the outside or on the quality of the land accessible.²¹¹ Painful procedures without anesthesia are also allowed.²¹²

Meanwhile, 'cage free' has minimal relevance to chickens raised for meat since they are rarely caged prior to transport.²¹³ However, for the chickens in egg production, a life cage free is a meaningful improvement, since "most egg-laying hens are kept in severely restrictive cages that prohibit most natural behavior[s] . . ." ²¹⁴ Nonetheless, as with 'free range,' thousands of animals may be housed inside the facilities.²¹⁵

Due to constraints on consumer education, consumers are unlikely to become, and remain, adequately informed on whether a particular term has a specific and regulated definition. Additionally, consumers may not know the substantive impact on animal welfare of the behavior conforming to that definition.

In sum, without providing consumers with meaningful signals of which product conforms to their preferences, there will be no market pressure inducing companies to treat their animals more humanely. Without this pressure, companies are unlikely to sacrifice profits for improvements in their animals' welfare.

IV. FULL DISCLOSURE OF THE HARMFUL PRACTICES TAKEN AND NOT TAKEN BY PRODUCERS IS THE BEST APPROACH

The pervasive disregard for animal welfare throughout the industrial food production system²¹⁶ harms consumers, animals, workers, the environment, and public health.²¹⁷ One way to lessen these harms is to better inform consumers of what occurs on factory farms. Then consumers can conform their purchasing behavior to their moral choices and incentivize producers to adjust practices.²¹⁸ This Article posits that a food labeling system that educates is the best way to provide consumers with this information. However, current labeling law mirrors the industrial animal agriculture industry's disregard for

²¹¹ *Id.* I say theoretically accessible because many animals might be unable to travel over, through, or around their companions to actually reach whatever space is accessible.

²¹² *Id.*

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ See *Cage-Free vs. Battery-Cage Eggs*, HUMANE SOC'Y OF THE U.S., http://www.humanesociety.org/issues/confinement_farm/facts/cage-free_vs_battery-cage.html [<http://perma.cc/2AA7-AULJ>] (updated Sept. 1, 2009) (accessed Feb. 17, 2015) (noting that most cage-free hens live in flocks of thousands).

²¹⁶ See *supra* Part I.A (describing the deplorable living conditions and painful procedures animals on factory-farms are subjected to).

²¹⁷ *Impacts of Industrial Agriculture*, *supra* note 12.

²¹⁸ See Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 *LAW & CONTEMP. PROBS.* 117, 136 (2007) (noting that changes in producer behavior will result from consumer preferences).

animal welfare.²¹⁹ Therefore, to bring about change through market mechanisms, there needs to be a better system of informing consumers. Accordingly, this Article proposes the placement of a comprehensive list of understandable, common industrial agriculture practices on end-product food packaging. This list would accompany a notation that informs consumers whether the producer engages in particular practices at its production facilities. This animal welfare labeling system is the equivalent of nutrition labels. The following section provides the details of this proposed labeling system, including what the label would entail, important elements of the label, and the logic behind the system. After the proposal, the Article identifies and addresses counter-arguments and shortcomings.

A. Adequate Labels to Empower Consumers and Realize Meaningful Improvements in Animal Welfare

The ideal labeling system informs consumers of all the material information necessary to conform their purchasing behavior to their preferences. While animal cruelty may not affect the physical qualities of the end product, consumers are not only concerned with a product's physical qualities—their perceptions also affect enjoyment and demand for products.²²⁰ Consumer demand affects production methods and amounts.²²¹ Modern industrial agriculture has dire consequences for animal welfare, the environment, personal health, public health, and labor.²²² Reduction of such harmful industrial production methods should lessen the toll of animal agriculture. Current labeling practices and suggestions are inadequate to bring about the changes consumers desire.²²³ The food labeling regime that would best align animal agricultural realities with consumer preferences has four basic elements: (1) mandatory disclosure of (2) a relatively comprehensive list of common industrial farming practices that signals which practices each producer employs, (3) articulated in a manner that most consumers can understand, and (4) backed by effective enforcement mechanisms. The following section discusses each of these four elements and elaborates on why each is needed.

²¹⁹ See *supra* Part I.B (discussing the impact of animal welfare concerns on consumer demand and satisfaction).

²²⁰ See Zarrel V. Lambert, *Price and Choice Behavior*, 9 J. MARKETING RES. 35, 35 (1972) (stating that consumer perceptions affect their preferences).

²²¹ Helen H. Jensen, *Consumer Issues and Demand*, 21 CHOICES, no. 3, at 165, 168, <http://www.choicesmagazine.org/2006-3/animal/2006-3-09.pdf> [<http://perma.cc/Y6NP-6WUR>] (2006) (accessed Mar. 1, 2015).

²²² *Impacts of Industrial Agriculture*, GRACE COMM. FOUND., <http://www.sustainabletable.org/869/impacts-of-industrial-agriculture> [<http://perma.cc/DL9M-49JE>] (accessed Feb. 19, 2015).

²²³ See *supra* Part I.B (discussing the impact of animal welfare concerns on consumer demand and satisfaction).

1. *Participation in This Labeling System Should Be Mandatory*

The first element of this proposal is to make disclosure mandatory for all large-scale producers of animal products. Third-party certification is not adequate to ensure that all producers engage in more humane methods.²²⁴ Short of industry-wide compliance, certification fails to signal to consumers which producers use more compassionate methods.²²⁵ In order for any market mechanism that relies on consumer choice to be effective, consumers must receive sufficient signals so they may conform their behavior to their preferences.²²⁶ If a large number of poorly-regulated labels continue to bombard consumers, then a system that relies on consumer decision-making will fail to reward suppliers who meet consumer preferences. Without mandatory participation, producers who choose to use the proposed label would be competing against labels that purport to utilize 'humane' treatment methods and consumers might have difficulty discerning which is actually more humane.

For example, imagine two pork producers, Producer A and Producer B. Producer A's facilities dock the tails of their pigs but otherwise treat their pigs quite well prior to killing them; providing the pigs with natural flooring, space to move around, and slaughtering the pigs on site, but where the other pigs cannot see their companions being slaughtered. Meanwhile, pigs at Producer B's facilities are treated much worse; not only do they dock the tails of their pigs, but they employ gestation crates, have no natural flooring, and transport their pigs many miles before slaughter. Producer A elects to use an optional labeling system, which means that consumers will see that Producer A's pigs undergo tail-docking. Meanwhile, Producer B does not opt into this labeling regime and instead markets their products as 'humane.' A typical consumer, likely unaware of the lack of legal or substantive meaning of 'humane,' might see that Producer A docks the tails of their pigs and, opposing such a practice, buy the meat from Producer B, whose process is labeled 'humane.' If this happens, it removes the incentive to engage in this labeling system and incentivizes producers to return to vague terms like 'humane.' This practice is likely, given the lower production costs of farming animals with disregard for their wel-

²²⁴ See *supra* Part III (explaining why third-party certification will not result in more transparent labeling of inhumane practices).

²²⁵ RACHEL MATHEWS, ANIMAL WELFARE INST. HUMANEWASHED: USDA PROCESS VERIFIED PROGRAM MISLEADS CONSUMERS ABOUT ANIMAL WELFARE MARKETING CLAIMS 2 (Mar. 2012) (available at <http://awionline.org/sites/default/files/uploads/documents/fahumanewashedreportonusdapvp.pdf> [<http://perma.cc/6AG8-7DD9>] (accessed Mar. 1, 2015)).

²²⁶ See RUSSELL TRONSTAD ET AL., CERTIFICATION AND LABELING CONSIDERATIONS FOR AGRICULTURAL PRODUCERS 37 (Nancy Bannister ed., 2005) (available at <http://cals.arizona.edu/arec/wemc/certification&labeling/certificationbookprint.pdf> [<http://perma.cc/ZC7M-37U6>] (accessed Apr. 14, 2015)) (discussing labels and their lack of credibility, which may undermine the market mechanism).

fare.²²⁷ There are multiple ways to try and ensure producer adherence, such as inspections by USDA agents and the use of video camera surveillance.²²⁸

2. *The Disclosed Practices Should Be Comprehensive with Respect to the Practices Most Important to the Animals' Quality of Life*

The second element is that these labels should include a relatively comprehensive list of industrial farming practices currently employed by industry members. While there is limited legal scholarship on the issue, there have been some efforts to disclose to consumers which practices given producers utilize. For example, the Animal Legal Defense Fund and Compassion Over Killing submitted a petition to the Food and Drug Administration (FDA) to force the label of eggs that come from caged hens to say "Eggs from Caged Hens."²²⁹ While such effort is admirable, such labeling of only a single practice is vulnerable to abuse.²³⁰ Consumers are ill-informed when labels fail to mention given producers' other practices that—in total or by themselves—might be more indicative of the overall treatment of animals. Instead, there should be a list of practices commonly used at facilities that produce the animal product on each package to inform consumers and better align consumer purchases with their moral preferences. This would incentivize producers to eliminate those cruel practices.

To gather a comprehensive list for each product, the proposal would create a special commission made up primarily of scientists who study animal behavior, animal welfare advocates, and individuals with animal agriculture knowledge. The commission could also consider other factors that affect animals and public health.²³¹

²²⁷ Nonetheless, an optional regime accompanied by consumer education would likely still be better than the status quo. *See supra* Part II (explaining the current lack of uniform standards for label claims).

²²⁸ *See supra* Part IV.A.4 (discussing the need for independent enforcement mechanisms).

²²⁹ Press Release, Lisa Franzetta, Animal Protection Groups Urge "Eggs from Caged Hens" Labeling, <http://aldf.org/article.php?id=1475> [<http://perma.cc/G6SD-ML98>] (Sep. 21, 2010) (accessed Feb. 20, 2015).

²³⁰ *See supra* note Part IV.A.1 (posing a hypothetical scenario with two producers that illustrates how producers could manipulate a system where only a single practice is labeled).

²³¹ Examples of factors to be considered include: confinement, air quality, antibiotic or steroid use, transportation time, distance, and conditions, the number of animals that die before slaughter, what happens to unwanted animals, amount of time between birth and slaughter, forced starvation, frequency of impregnation, how the animals are collected, as well as whether de-beaking, tail-docking, cutting off of toes, castration, or horn removal are employed and whether or not the animals are given pain relief for these procedures. *See generally supra* note 208 (providing background information on practices to be labeled).

3. *The Labels Should Be Easily Understood by the Average Consumer*

The third element of this proposal is to make the labels easy enough to understand so that consumers are not confused. Most consumers are unlikely to know enough about animals' interests or farming practices to understand a label that presents the consumer with too much complicated information.²³² Instead, labels should balance technical precision with easy-to-understand terms, avoiding industry jargon or measurements that would not be particularly meaningful to consumers. For example, "castration without pain relief" is easier to understand than "castration without analgesia." Similarly, for practices whose quantification might not be meaningful to most consumers, a standard could be set for that variable, with input from consumer and animal welfare advocates. The label should use terms standard across all products with that animal ingredient and those terms should have meaningful substantive definitions that are measureable and verifiable. Another plausible way to present important information would be binary notation of whether the producers use a given practice. For example, the label could place a checkmark, plus or minus sign, or yes or no next to a practice. If a ranking of each practice based on the pain or stress caused to the animals is plausible, it would also be preferable to rank the practices in descending order from least to most acceptable so consumers do not confuse very painful practices with less painful practices.

4. *Independent Enforcement Mechanisms Should Be Included*

The fourth and final element is that there should be effective enforcement mechanisms in place to ensure the assertions on a product's label are accurate. There are two foreseeable enforcement systems. The first would be a continuation of current food inspection methods with necessary adjustments to meet this proposal. The preferred enforcement mechanism would be the placement of video cameras in important areas of factory farms and large slaughterhouses. This method would provide for penalties against producers whose production practices do not align with the claims on their labels.

Placement of video cameras in animal agriculture facilities is not novel.²³³ Ministers in the United Kingdom (U.K.) are considering com-

²³² Citizen Petition from Consumers Union to Tom Vilsack, Sec'y, U.S. Dep't of Agric. (June 26, 2014) (available at <http://www.fsis.usda.gov/wps/wcm/connect/6122594c-93db-46db-beb6-dc250bc43b6d/Petition-Consumers-Union-062614.pdf?MOD=AJPERES> [<http://perma.cc/V6JL-LBRN>] (accessed Feb. 20, 2015)).

²³³ See James Meikle & Paul Lewis, *Secret Abattoir Video Shows 'Sickening' Abuse of Animals*, GUARDIAN, <http://www.theguardian.com/world/2010/oct/08/secret-abattoir-video-animal-abuse> [<http://perma.cc/BL3G-7VRQ>] (Oct. 8, 2010) (accessed Feb. 20, 2015) (showing that the British government required many slaughterhouses to install cameras over four years ago).

pulsory placement of video cameras in slaughterhouses.²³⁴ While some producers might resist such a system, approximately 48% of the red meat and 59% of poultry in the U.K. comes from slaughterhouses that voluntarily installed these cameras.²³⁵ Furthermore, a strong majority of British citizens support making video cameras mandatory in slaughterhouses.²³⁶ The release of an undercover video documenting abuses at British slaughterhouses prompted ministers to consider compulsory installation of video cameras.²³⁷ Given that undercover videos taken at animal production facilities here in the U.S. often cause popular uproar and financial harm to producers, there is reason to believe that significant support for such a system would exist in the U.S. as well.²³⁸

The additional footage could support the producers' claims that animals are treated humanely. Even if footage is only immediately available to producers and government regulators, animal welfare advocates might still gain access to this footage through Freedom of Information Act requests.²³⁹

While video camera monitoring of animal agriculture facilities is the ideal enforcement mechanism, more traditional methods, like regular inspections by USDA, Federal Trade Commission, and FDA personnel might also be sufficient with some relatively minor changes. Indeed, one strength of this proposed labeling system is that it is objective in nature. Information like whether or not birds are de-beaked or pigs are tail-docked would not require discretion on the part of inspectors. Furthermore, courts or supervisors who oversee inspections can verify the results of these claims.

²³⁴ James Meikle, *Slaughterhouses Could Be Forced to Fit CCTV to Prevent Animal Abuse*, GUARDIAN, <http://www.guardian.co.uk/world/2011/nov/08/slaughterhouses-cctv-prevent-abuse> [<http://perma.cc/D39B-CB28>] (Nov. 8, 2011) (accessed Feb. 20, 2015).

²³⁵ ANDREW RHODES, FOOD STANDARDS AGENCY OPEN BOARD, SUMMARY: CCTV FOR MONITORING ANIMAL WELFARE AT THE TIME OF SLAUGHTER 2 (Nov. 15, 2011) (available at <http://www.food.gov.uk/multimedia/pdfs/board/fsa111109.pdf>) [<http://perma.cc/2S2U-DY6J>] (accessed Feb. 20, 2015); see *The Food Standards Agency Backs CCTV Campaign*, ANIMAL AID, http://www.animalaid.org.uk/h/n/NEWS/news_slaughter/ALL/2274/ [<http://perma.cc/DUZ6-RZLV>] (Mar. 4, 2010) (accessed Mar. 1, 2015) (stating that abattoir surveillance by CCTV camera cannot be made mandatory).

²³⁶ *'Make CCTV Mandatory for Slaughterhouses!' Says the British Public*, ANIMAL AID, http://www.animalaid.org.uk/h/n/NEWS/news_slaughter/ALL/2786/ [<http://perma.cc/E3M2-CV9R>] (Nov. 28, 2012) (accessed Feb. 20, 2015).

²³⁷ See Meikle, *supra* note 234 (stating that due to the release of animal abuse footage, large customers of British abattoirs are requiring the installation of surveillance cameras in the stunning and killing areas).

²³⁸ Ciara Smyth, *The Power of Undercover Videos*, ANIMAL BLAWG, <http://animalblawg.wordpress.com/2011/11/29/the-power-of-undercover-videos/> [<http://perma.cc/CG3X-EAYG>] (Nov. 29, 2011) (accessed Feb. 20, 2015); see, e.g., Baylen Linnekin, *How Ag Gag Laws Suppress Free Speech and the Marketplace of Ideas*, REASON.COM, <http://reason.com/archives/2012/09/01/ag-gag-laws-suppress-free-speech-marketp> [<http://perma.cc/P9ZB-9UWK>] (Sept. 1, 2012) (accessed Feb. 20, 2015) (noting that after videos surfaced showing abuse of cattle at the Central Valley Meat slaughterhouse in Hanford, California, In-N-Out Burger, Costco, and McDonalds all ceased buying from Central Valley).

²³⁹ 5 U.S.C. § 552(a)(1)(A).

Consumer protection litigation would complement either system. It would be important to extend standing doctrine, so that parties other than industry competitors could pursue claims against producers whose production practices do not conform to their claims.²⁴⁰ However, even without this extension, litigation by one producer against another for misleading consumers is likely to be less costly and more beneficial for plaintiffs.²⁴¹ Rather than difficult factual disputes over whether or not a defendant producer's product matches the claims on its packaging, plaintiffs would only need to prove a violation of one of the objective and pre-defined labeling claims. For example, the plaintiff could prove that the defendant's eggs came from chickens whose conditions did not meet an objective claim like 'no de-beaking.' If standing doctrine does not extend to include animal advocacy or consumer protection organizations, those organizations should earmark funds to help producers pursue meritorious claims against other producers.

B. Challenges and Solutions

The political strength of producers²⁴² and their ability to innovate and influence²⁴³ are likely the biggest difficulties facing efforts to inform consumers of animal welfare abuses in industrial agriculture. Industry apologists may argue that common industrial farm practices are in the best interests of consumers.²⁴⁴ At the same time, many animal rights fundamentalists might argue that this labeling system condones animal exploitation and risks entrenching inherently cruel practices. There is also risk that new labels will overwhelm consumers. The remainder of this Article will discuss and rebut those arguments before concluding.

²⁴⁰ See *Mason v. Nature's Innovation, Inc.*, No. 12CV3019 BTM(DHB), 2013 WL 1969957, at *2 (S.D. Cal. May 13, 2013) (holding that consumers have difficulty obtaining standing against manufacturers that misrepresent products because a consumer must prove that they would buy the product again).

²⁴¹ See James Muehlberger & Jara Settle, *Move Over Caveat Emptor, Meet Caveat Venditor*, LAW360, <http://www.law360.com/articles/607493/move-over-caveat-emptor-meet-caveat-venditor> [<http://perma.cc/7ZMJ-DVES>] (Jan. 2, 2015) (accessed Feb. 21, 2015) (showing that plaintiffs are often favored in food misrepresentation lawsuits).

²⁴² Kelsea Kenzy Sutton, *The Beef with Big Meat: Meatpacking and Antitrust in America's Heartland*, 58 S.D. L. REV. 611, 629, 634 (2013) (quoting Bill Bullard, Chief Executive Officer, R-Calf USA).

²⁴³ Julie A. Caswell & Eliza M. Mojduszka, *Using Informational Labeling to Influence the Market for Quality in Food Products*, 78 AM. J. AGRIC. ECON. 1248, 1248-49 (1996).

²⁴⁴ See Fredrick, *Advantages of Industrial Agriculture*, BRIGHT HUB, <http://www.brighthub.com/environment/science-environmental/articles/73606.aspx> [<http://perma.cc/USB3-67LN>] (updated Nov. 13, 2013) (accessed Feb. 21, 2015) (explaining that industrial agriculture provides cheaper food, greater variety and availability of food, longer shelf life of food, fewer geographic limitations on food production, less dependence on human labor, and decreased time between production and market availability).

1. *Overcoming the Animal Agriculture Industrial Complex*

The animal agriculture industry has a great deal of political power.²⁴⁵ It wields this power to procure favorable legislation and conceal the realities of factory farming from consumers.²⁴⁶ Because of this political power, the industry is likely to actively oppose enactment of this labeling system if it perceives it to be bad for business. However, consumers prefer products from animals who receive humane treatment.²⁴⁷ It is plausible that producers could support a proposal that forces all producers to disclose harmful practices and eliminate the clandestine nature of the animal agriculture industry.²⁴⁸

If producers oppose this kind of labeling, animal welfare advocates will need to mobilize public support. While animal interest advocates are at a significant financial disadvantage compared to the agricultural lobby,²⁴⁹ these advocates are likely to have an initial advantage in public opinion.²⁵⁰ The recent political battle over California's Proposition 2, a 2008 ballot initiative to eliminate gestation crates, veal crates, and battery cages, might be instructive.²⁵¹ Opponents of the measure, including two of the biggest newspapers in the state,²⁵² ar-

²⁴⁵ See *supra* Part I.B.1 (explaining that the agriculture industry has tremendous political power).

²⁴⁶ See *supra* Part I.B.1 (explaining that marketing strategies depicting humanely raised animals are used to convince consumers).

²⁴⁷ See AM. HUMANE ASS'N, *supra* note 133 (finding that 74% of survey participants said they were willing to pay more for humanely-raised meat, dairy, and eggs).

²⁴⁸ Cf. RP Siegel, *Humane Society Undercover Investigators Shine a Bright Light on Unsustainable Farming Practices*, TRIPLE PUNDIT, <http://www.triplepundit.com/2012/11/undercover-investigators-shine-bright-light-unsustainable-farming-practices-2/> [<http://perma.cc/BND5-Y97S>] (Nov. 28, 2012) (accessed Feb. 21, 2015) (stating that concealment of industrial farming practices is an outmoded way of doing business).

²⁴⁹ See Ian T. Shearn, *Whose Side Is the American Farm Bureau on?*, NATION, <http://www.thenation.com/article/168913/q-whose-side-american-farm-bureau> [<http://perma.cc/G7VM-3X52>] (July 16, 2012) (accessed Feb. 21, 2015) (stating that industrial food producers have achieved a high level of political success because of their financial resources); INEQUALITY AND AMERICAN DEMOCRACY 66 (Lawrence R. Jacobs & Theda Skocpol eds., 2005).

²⁵⁰ Francione, *supra* note 78, at 109 (citing David Foster, *Animal Rights Activists Getting Message Across: New Poll Findings Show Americans More in Tune with "Radical" Views*, CHI. TRIB., Jan. 25, 1996, at C8); Jonathan R. Lovvorn & Nancy V. Perry, *California Proposition 2: A Watershed Moment for Animal Law*, 15 ANIMAL L. 149, 168-69 (2009).

²⁵¹ Cal. Sec'y of State, *Official Voter Information Guide: Proposition 2 Standards for Confining Animals*, CAL. GEN. ELECTION, <http://www.voterguide.sos.ca.gov/past/2008/general/title-sum/prop2-title-sum.htm> [<http://perma.cc/KB8D-E47C>] (accessed June 29, 2015).

²⁵² See *No on Prop. 2*, L.A. TIMES, <http://www.latimes.com/opinion/editorials/la-ed-2prop25-2008sep25-story.html> [<http://perma.cc/C27J-6XKT>] (Sept. 28, 2008) (accessed Feb. 21, 2015) (recommending voters reject Prop 2 because the measure would likely raise the cost of eggs within California and encourage consumers to buy cheaper eggs from unregulated farms in Mexico); *About Us*, L.A. TIMES, <http://www.latimes.com/about/la-about-us-storygallery.html> [<http://perma.cc/7S9S-ZX7L>] (accessed Feb. 21, 2015) (stating that the "Los Angeles Times is the largest metropolitan daily newspaper

gued that Proposition 2 would eliminate California egg production, jeopardize food safety and public health, and harm consumers by increasing prices.²⁵³ Yet, despite these arguments, opposition by opinion leaders, and approximately \$9 million spent to defeat the measure,²⁵⁴ Proposition 2 passed with over 63% of voters supporting the measure.²⁵⁵ If the animal agriculture industry chooses to fight a comprehensive mandatory labeling system, they are likely to make similar arguments. However, there is little reason to believe those arguments would be any more effective on a national scale than they were in several states, including California, Florida, Arizona, Oregon, and Colorado, when those states contemplated and eventually passed similar laws banning gestation crates.²⁵⁶

The success of Proposition 2 and similar proposals signals an advantage for animal welfare advocates with respect to the present labeling proposal. The laws passed in those states all ban one or more common farm practice.²⁵⁷ This proposal does not seek to ban any farm

in the country,” with “a combined print and online local weekly audience of 4.1 million”); *Why Proposition 2 Is a Bad Idea*, SF GATE, <http://www.sfgate.com/opinion/article/Why-Proposition-2-is-a-bad-idea-3268208.php> [<http://perma.cc/AW3E-PCES>] (Sept. 24, 2008) (accessed Feb. 21, 2015) (characterizing Prop 2 as overly concerned about the conditions of egg-laying hens without regard for the burdens imposed on egg producers); *About Us*, S.F. CHRONICLE, <http://www.hearst.com/newspapers/san-francisco-chronicle> [<http://perma.cc/6GGU-E3LE>] (accessed Feb. 21, 2015) (stating that the “San Francisco Chronicle is the largest newspaper in Northern California” and that SFGate is the Chronicle’s online component).

²⁵³ *Why Proposition 2 Is a Bad Idea*, *supra* note 252.

²⁵⁴ *Campaign Finance: No on Proposition 2*, CAL. SECRETARY OF ST. ALEX PADILLA, <http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1301370&session=2007> [<http://perma.cc/5JMX-LVH5>] (accessed Feb. 15, 2015).

²⁵⁵ CAL. SEC’Y OF STATE ALEX PADILLA, APPROVAL PERCENTAGES OF INITIATIVES VOTED INTO LAW (2014) (available at <https://www.sos.ca.gov/elections/ballot-measures/pdf/approval-percentages-initiatives.pdf> (accessed Feb. 21, 2015)); *California Results*, L.A. TIMES, <http://www.latimes.com/local/la-2008election-california-results-htmlstory.html?view=2&tab=0&fnum=0> [<http://perma.cc/8LLS-VML5>] (accessed Feb. 21, 2015).

²⁵⁶ See FLA. CONST. art. X, § 21 (prohibiting the confining or tethering of pregnant pigs in a manner that prevents the pig from turning around freely); ARIZ. REV. STAT. ANN. § 13-2910.07 (2015) (prohibiting the tethering or confining of pigs during pregnancy or any calf raised for veal in a manner that prevents the animal from lying down and fully extending all limbs or turning around freely); COLO. REV. STAT. ANN. § 35-50.5-102 (West 2015) (prohibiting the confinement of pregnant pigs or a calf raised for veal in a manner that prevents the animal from standing up, lying down, or turning around without touching the sides of its enclosure); OR. REV. STAT. § 600.150 (2014) (prohibiting the restrictive confinement of pregnant pigs); OR. REV. STAT. § 632.845 (2014) (prohibiting commercial farm owners and operators from confining egg-laying hens in an enclosure that fails to comply with USDA rules). See generally *Crammed into Gestation Crates: Life for America’s Breeding Pigs*, HUMANE SOC’Y OF THE U.S., http://www.humanesociety.org/issues/confinement_farm/facts/gestation_crates.html [<http://perma.cc/GQ8B-DY6Q>] (Feb. 19, 2014) (accessed Feb. 21, 2015) (noting that, as of February 2014, nine states “have passed laws to prohibit the use of gestation crates”).

²⁵⁷ FLA. CONST. art. X, § 21; ARIZ. REV. STAT. ANN. § 13-2910.07; CAL. HEALTH & SAFETY CODE § 25990 (West 2015); COLO. REV. STAT. § 35-50.5-102; OR. REV. STAT. § 600.150; OR. REV. STAT. § 632.845.

practices; instead it only requires that producers disclose their methods to consumers. Rejection of the proposal would leave producers in the unenviable position of trying to convince the public that the industry should not have to fully inform consumers.

Producers may support mandatory disclosures for two reasons: first, past difficulties winning popular support; second, a desire to avoid sending the message that they want to hide information from consumers. Perhaps producers will see industry-wide transparency and end the race-to-the-bottom that incentivizes producers to cut input costs and eliminate competition.²⁵⁸ For example, in a letter sent to its pork suppliers, Tyson encouraged producers to end the use of gestation crates.²⁵⁹ The letter stated, “We believe future sow housing should allow sows of all sizes to stand, turn around, lie down and stretch their legs.”²⁶⁰ Farmers, ranchers, slaughterhouse workers, and other members of the animal agriculture industry are not necessarily adverse to animal welfare concerns—some of them care deeply about their animals and would likely treat them more humanely if they could competitively afford to do so.²⁶¹ Therefore, many producers may welcome competition to strike the most profitable balance between low cost methods that entail high animal welfare costs and more expensive methods that provide for more humane treatment of animals.

The argument that producers might favor a labeling system that incentivizes more humane treatment of animals remains untested. However, another California political battle—the successful effort to ban shark fin soup from California restaurants—might be illustra-

²⁵⁸ See Paul Shapiro, *A Race to the Bottom for the Pork Industry?*, HUFFINGTON POST, http://www.huffingtonpost.com/paul-shapiro/a-race-to-the-bottom-for-_b_4732910.html [<http://perma.cc/4GKZ-QN2H>] (Feb. 6, 2014) (accessed Feb. 15, 2015) (explaining how greater transparency of pork industry practices has lead major producers to end the “race to the bottom”). See generally Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 LAW & CONTEMP. PROBS. 325, 328–29 (2007) (“When animal welfare competes with economics, economics usually wins; it can be cheaper for producers to accept losses due to disease and mortality than to prevent those losses.”); Darian M. Ibrahim, *A Return to Descartes: Property, Profit, and the Corporate Ownership of Animals*, 70 LAW & CONTEMP. PROBS. 95, 96–97 (2007) (noting that “vertical and horizontal integration has left a system of industrial agriculture controlled by a shrinking number of national agribusiness corporations, with family farmers all but phased out of operation”).

²⁵⁹ James Andrews, *Smithfield, Tyson Encouraging Transition Away from Gestation Crates*, FOOD SAFETY NEWS, <http://www.foodsafetynews.com/2014/01/smithfield-tyson-to-make-distance-from-gestation-crates/> [<http://perma.cc/45W4-XJ98>] (Jan. 10, 2014) (accessed Feb. 16, 2015).

²⁶⁰ *Id.*

²⁶¹ U.S. Farmers & Ranchers Alliance, *USFRA’s Point of View*, FOOD DIALOGUES, <http://www.fooddialogues.com/foodsource/animal-welfare> [<http://perma.cc/ZWL2-S4YU>] (accessed Feb. 19, 2015); see Stephanie Simon, *A Killing Floor Chronicle*, L.A. TIMES, <http://articles.latimes.com/2003/dec/08/nation/na-virgil8> [<http://perma.cc/8UKV-WYBU>] (Dec. 8, 2003) (accessed Feb. 19, 2015) (profiling a former worker at a Tyson chicken processing facility who went public with his experiences working on the killing floor).

tive.²⁶² In that campaign, many Chinese restaurateurs who were profiting from the sale of shark fin soup supported the ban because it gave them the political cover to stop offering a dish they found morally objectionable.²⁶³ Perhaps animal product producers will similarly support an initiative that will help make it profitable to engage in more humane treatment of animals.

2. *Industry Innovation and Reconfiguration Should Not Be Allowed to Thwart the Proposal's Purpose*

Once the list of practices that producers must disclose is available, producers could undermine the effectiveness of the labeling system. Producers could change to un-listed, but similarly cost-effective, practices that are still cruel to animals. Such innovation, if not properly checked, could reintroduce consumer confusion and further market failure.²⁶⁴ One way to avert this failure is to have courts, or other independent arbiters, focus on the public policy of ensuring consumers' access to substantive information so they may make purchasing decisions that conform to their preferences. Similarly, regulatory agencies should periodically revisit the list of practices requiring disclosure and add innovative but cruel practices to that list as required.

3. *Industry Lobbyists Should Not Be Allowed to Unduly Influence the Development of Labels*

In order to ensure the labels effectively inform consumers who choose to rely on them, the design of the labels and definitions of the

²⁶² See CAL. FISH & GAME CODE § 2021 (West 2013) (making it unlawful for “any person to possess, sell, offer for sale, trade, or distribute a shark fin” unless the person holds the proper license or permit); Juliet Eilperin, *California Adopts Shark Fin Ban*, WASH. POST, http://www.washingtonpost.com/national/health-science/california-adopts-shark-fin-ban/2011/09/06/gIQCgsD9J_story.html [<http://perma.cc/QR9A-XLDF>] (Sept. 7, 2011) (accessed Mar. 1, 2015) (noting that the California Senate passed the shark fin ban despite some Chinese-American state senators arguing that the ban is discriminatory because it singles out a popular Chinese dish).

²⁶³ See Paul Rogers, *Shark Fin Soup Ban Takes Effect Monday*, SAN JOSE MERCURY NEWS, http://www.mercurynews.com/ci_23567375/shark-fin-soup-ban-takes-effect-monday [<http://perma.cc/M4BX-VWNJ>] (July 1, 2013) (accessed Feb. 19, 2013) (quoting a Chinese-American restaurant owner stating that she removed shark fin soup from her menu voluntarily and that the bill will not cause her restaurant to lose money); Michael Conathan & Rebecca Friendly, *Landmark Shark Fin Bill Awaits Signature of California Governor Jerry Brown*, THINK PROGRESS, <http://thinkprogress.org/climate/2011/10/07/338880/landmark-shark-fin-bill-awaits-signature-of-california-governor-jerry-brown/> [<http://perma.cc/8BFK-LEWM>] (Oct. 7, 2011) (accessed Feb. 19, 2015) (referencing a study that found 70% of California's Chinese-American voters supported the bill); see also *Shark Fin FAQs: Interview*, SEA STEWARDS, <http://seastewards.org/shark-fin-faqs-interview/> [<http://perma.cc/5U5Q-73C4>] (Apr. 2, 2013) (accessed Feb. 20, 2015) (referencing a poll that indicated 78% of Chinese-Americans would support a ban on shark fins “once they learned the gravity of the situation”).

²⁶⁴ See *supra* notes 83–85 and accompanying text (explaining how CAFOs manipulate labels to mislead consumers and charge more for products consumers believe to be produced humanely).

terms used must be both meaningful to the average consumer and able to accurately reflect animal welfare conditions. If industry lobbyists are able to exert disparate influence over the design and definitions of the label, the accuracy and effectiveness of the label will likely diminish. The best way to insulate the labels from undue industry influence is to limit the number of representatives with industry affiliations who participate in the design of the label, the selection of practices that require disclosure, and the defining of those practices. Instead, the group impaneled to create the labels should consist primarily of scientists who study animal behavior, veterinarians, and animal husbandry specialists. These professionals must be willing to work without financial incentive to represent varying interests. If industry lobbyists are part of the consultation, their numbers should be limited to ensure that representatives with a financial interest do not comprise a significant contingent.

4. *Industry Defenses Are Unconvincing; Cruel Practices Are Not in Consumers' or Animals' Best Interests*

Animal product producers present two common defenses of inhumane practices that warrant brief consideration: (1) these practices are good for consumers²⁶⁵ and (2) these practices are good for the animals.²⁶⁶ The logic behind each argument is the same—that current practices cause less harm than avoiding them.²⁶⁷ What these arguments do not address is that the harms producers claim to avoid are only issues because of the conditions that factory-farmed animals live in.²⁶⁸ If producers provided animals with a less impoverished habitat, the greater evils that producers assert would not exist.²⁶⁹

²⁶⁵ Richard F. McCarthy & Richard E. Bennett, *Statutory Protection for Farm Animals*, 3 PACE ENVTL. L. REV. 226, 232 (1986).

²⁶⁶ *Id.* at 231, 239.

²⁶⁷ *Id.*; see Curt Zingula, *Appreciate 'Factory Farms'*, GAZETTE, <http://thegazette.com/2014/03/28/appreciate-factory-farms/> [<http://perma.cc/PNX8-CB54>] (Apr. 1, 2014) (accessed Feb. 20, 2015) (providing a farmer's view of why factory farming is beneficial and results in less harm).

²⁶⁸ See, e.g., PETER STEVENSON, COMPASSION IN WORLD FARMING TRUST, "FOR THEIR OWN GOOD": A STUDY OF FARM ANIMAL MUTILATIONS (1994) (available at http://www.ciwf.org.uk/includes/documents/cm_docs/2008/E1_for_their_own_good_1994.pdf [<http://perma.cc/2JS5-KHDX>] (accessed Feb. 20, 2015)) (noting that instead of addressing the causes of tail-biting in pigs, "the industry's solution is to tail-dock piglets on a routine basis" and suggesting that the "proper response to tail-biting is . . . to address the factors which encourage tail-biting" such as "diet, poor atmospheric environment . . . and poor housing").

²⁶⁹ See, e.g., *id.* (explaining that the problem of tail-biting "can be alleviated by providing a less impoverished environment," especially by providing the pigs with straw); see also G. van Putten, *An Investigation into Tail-Biting Among Fattening Pigs*, 125 BRIT. VETERINARY J. 511, 515–16 (1969) (outlining a study finding that unpleasant environmental conditions contributed to tail-biting among pigs); A. J. McKinnon et al., *Behaviour of Groups of Weaner Pigs in Three Different Housing Systems*, 145 BRIT. VETERINARY J. 367, 372 (1989) (discussing a study that found improved behavior when pigs were housed with straw flooring).

When industry apologists claim that an inhumane factory farming practice is better for consumers, they mean that the practice either allows for lower prices or reduces the likelihood of foodborne illness.²⁷⁰ One example of this type of practice is tail-docking dairy cattle. This practice involves the removal of up to two-thirds of a cow's tail using a sharp instrument without pain relief.²⁷¹ Industry apologists justify this practice with the claim that it prevents harmful bacteria getting into milk²⁷² and makes it easier for workers to milk cows.²⁷³ However, scientific studies that test the veracity of these claims have found that animal cleanliness does not vary with tail-docking and provides no benefit to the animal.²⁷⁴ A paper in the *Journal of the American Veterinary Medical Association* reviewed the literature on tail-docking of dairy cows and found no significant support for tail-docking to improve dairy worker comfort or safety.²⁷⁵ Tail-docking is now outlawed or re-

²⁷⁰ See, e.g., McCarthy & Bennett, *supra* note 265, at 232 (“Advocates of agricultural interests argue that it is ‘factory farming’ that has allowed the farmer to meet this very clear consumer demand for reasonably priced food of uniform quality and ample supply.”); Cassandra B. Tucker et al., *Tail Docking Dairy Cattle: Effects on Cow Cleanliness and Udder Health*, 84 J. DAIRY SCI. 84, 84 (2001) (“Producers cite a number of reasons for docking cows, including improved ease of milking, cow cleanliness, and udder health.”).

²⁷¹ HUMANE SOC’Y OF THE U.S., AN HSUS REPORT: WELFARE ISSUES WITH TAIL DOCKING OF COWS IN THE DAIRY INDUSTRY 1 (2012) (available at <http://www.humanesociety.org/assets/pdfs/farm/HSUS-Report-on-Tail-Docking-of-Dairy-Cows.pdf> [<http://perma.cc/CZC7-5FF3>] (accessed Feb. 20, 2015)).

²⁷² Dan Weary & Marina von Keyserlingk, *Tail Docking: Why Some Love It and Many More Do Not*, PROGRESSIVE DAIRYMAN, <http://www.progressivedairy.com/dairy-basics/cow-comfort/5079-tail-docking-why-some-love-it-and-many-more-do-not> [<http://perma.cc/J2GP-HQWM>] (accessed Mar. 1, 2015); see Marlene Halverson, *Tail Docking Dairy Cattle*, 51 ANIMAL WELFARE INST. Q., no. 4, <http://www.awionline.org/pubs/Quarterly/fall02/taildocking.htm> [<http://perma.cc/KR2M-U7SM>] (Fall 2002) (accessed Feb. 21, 2015) (stating that “it has been assumed that dirty tails can contaminate udders”); C.L. Stull et al., *Evaluation of the Scientific Justification for Tail Docking in Dairy Cattle*, 220 J. AM. VETERINARY MED. ASS’N 1298, 1301 (2002) (noting a “variety of benefits have been attributed to tail docking, including improved cow cleanliness, udder health, milk hygiene, and milk production”).

²⁷³ C.L. Stull et al., *supra* note 272, at 1298; see AM. VETERINARY MED. ASS’N, LITERATURE REVIEW ON THE WELFARE IMPLICATIONS OF TAIL DOCKING OF CATTLE 2 (2014) (available at https://www.avma.org/KB/Resources/LiteratureReviews/Documents/tail_docking_cattle_bgnd.pdf [<http://perma.cc/35J5-PXJ8>] (accessed Feb. 21, 2015)) (noting that tail-docking is purported to reduce the transmission of leptospirosis from dairy cows to milkers).

²⁷⁴ C. L. Stull et al., *supra* note 272, at 1302; AM. VETERINARY MED. ASS’N, *supra* note 273, at 4.

²⁷⁵ C. L. Stull et al., *supra* note 272, at 1302.

stricted in the European Union, California, Ohio, and Rhode Island.²⁷⁶ However, it is still used by many U.S. dairy producers.²⁷⁷

Similarly, when producers argue that current practices are needed in order to protect the animals, they fail to mention that the ‘need,’ when it exists, is a result of inhumane practices. For example, many producers claim that tail-docking of fattening pigs is necessary to prevent infection from ‘pig cannibalism.’²⁷⁸ The reasoning is that once the lower half of a pig’s tail is removed, the remaining portion is so sensitive—and irritation of the stump so painful—that a pig will quickly escape if another pig bites its tail.²⁷⁹ Pig cannibalism is a prominent issue factory farms face because the impoverished conditions frustrate the animals’ natural foraging and exploratory instincts.²⁸⁰ Fattening pigs are usually kept in intensely crowded pens with no natural lighting and metallic, slatted flooring.²⁸¹ Studies comparing factory farm-like conditions with more natural conditions demonstrate that the environment of the former may induce pig cannibalism.²⁸² In fact, when pigs are provided with an environment that includes bedding, more space per pig, a better diet, ventilation, and earthen or straw floors, pig cannibalism declines notably.²⁸³

Many current factory-farm practices, such as tail-docking dairy cows or fattening pigs, are not essential to animal product production

²⁷⁶ See Commission Directive 2001/93/EC, Amending Directive 91/630/EEC Laying Down Minimum Standards for the Protection of Pigs, 2001 O.J. (L 316) 36, 36–37 (allowing tail-docking of pigs “only when there is evidence that injuries . . . to other [pigs have] occurred”); CAL. PENAL CODE § 597n (West 2010) (prohibiting tail-docking for cows or horses); OHIO ADMIN. CODE § 901:12-6-02(A)(4) (2015) (West) (tail-docking only allowed “using elastrator castration bands in a manner that will result in the least amount of pain” until December 31, 2017, after which tail-docking is only permitted if “medically necessary”); R.I. GEN LAWS § 4-1-6.1 (2013) (prohibiting tail-docking on cows).

²⁷⁷ See AM. VETERINARY MED. ASS’N, *supra* note 273, at 1 (describing a 2008 survey of 113 North Central and North Eastern U.S. dairies which “found that tail docking was practiced on 82.3% of the dairies”).

²⁷⁸ Martin Hickman, *The Pain of Tail-Docking: A Fact of Life for Millions of Pigs*, INDEPENDENT, <http://www.independent.co.uk/news/uk/home-news/the-pain-of-taildocking-a-fact-of-life-for-millions-of-pigs-761687.html> [<http://perma.cc/ZRT5-2D8Y>] (Dec. 1, 2007) (accessed Feb. 15, 2015).

²⁷⁹ STEVENSON, COMPASSION IN WORLD FARMING TRUST, *supra* note 268.

²⁸⁰ *Id.*

²⁸¹ *Pigs and Management and Housing*, FOOD & AGRIC. ORG. OF THE U.N., http://www.fao.org/ag/againfo/themes/en/pigs/AP_management.html [<http://perma.cc/8WJD-V7RZ>] (updated Nov. 27, 2014) (accessed Feb. 20, 2015).

²⁸² See Lilia Thays Sonoda et al., *Schwanzbeißen beim Schwein – Ursachen und Management- strategien zur Reduktion der Verhaltensstörung. Eine Literatürübersicht* [Tail Biting in Pigs – Causes and Management Intervention Strategies to Reduce the Behavioural Disorder], 126 BERL MÜNCH TIERÄRZTL WOCHENSCHR 104, 104–09 (2013) (Ger.) (summarizing studies indicating “pigs in . . . enriched environments . . . [express] less ‘harmful social behavior’ and ‘aggressive behavior’” than pigs in traditional, non-enriched pens).

²⁸³ *Id.* at 108–09.

or the best practices for animal welfare.²⁸⁴ Producers should inform consumers of their practices so consumers can choose whether to purchase products that come from animals forced to endure the current, and arguably inhumane, agricultural practices.

5. *Educational Measures Should Be Implemented to Reduce Consumer Confusion*

The addition of comprehensive animal welfare labels to food packaging risks confusing consumers, as many terms and practices are unfamiliar and misconceived by a large portion of U.S. consumers.²⁸⁵ While some consumer confusion is expected, there is little reason to believe that consumers will struggle to comprehend the information on these animal welfare labels any more than they struggle to believe other labels affixed to food packaging.

V. CONCLUSION

Today, approximately 99% of farm animals in the U.S. are raised on factory farms.²⁸⁶ Their current living conditions are abhorrent²⁸⁷ and have significant negative effects on the environment, public health, and workers' rights.²⁸⁸ Although it is unlikely that human consumption of meat, egg, and dairy products will cease in the near future, consumers want products that come from animals treated more humanely than those on factory farms.²⁸⁹ However, these cruel and harmful practices persist because of the industry's ability to deceive consumers about the benevolent treatment of animals.²⁹⁰ Favorable legislation and regulatory indifference, largely brought about by the

²⁸⁴ See, e.g., AM. VETERINARY MED. ASS'N, WELFARE IMPLICATIONS OF TEETH CLIPPING, TAIL DOCKING AND PERMANENT IDENTIFICATION OF PIGLETS (2014) (available at https://www.avma.org/KB/Resources/LiteratureReviews/Documents/practices_piglets_bgnd.pdf [<http://perma.cc/N5MV-LFDJ>] (accessed Feb. 20, 2015)) (reviewing various procedures piglets undergo and the welfare implications).

²⁸⁵ See, e.g., Agata Blaszczak-Boxe, *What Does "Natural" Really Mean on Food Labels?*, CBS NEWS, <http://www.cbsnews.com/news/what-does-natural-really-mean-on-food-labels/> [<http://perma.cc/H6ET-R3WR>] (June 16, 2014) (accessed Feb. 20, 2015) (discussing survey data concerning consumer misconceptions of food labels).

²⁸⁶ *What Is a Factory Farm?*, *supra* note 131.

²⁸⁷ See *supra* Part I.A. (describing various living conditions of factory farm animals).

²⁸⁸ See DOUG GURIAN-SHERMAN, UNION OF CONCERNED SCIENTISTS, CAFOs UNCOVERED: THE UNTOLD COSTS OF CONFINED ANIMAL FEEDING OPERATIONS (2008) (available at http://www.ucsusa.org/sites/default/files/legacy/assets/documents/food_and_agriculture/cafos-uncovered.pdf [<http://perma.cc/S4NS-QL9R>] (accessed Feb. 19, 2015)) (discussing the "many hidden costs of CAFOs").

²⁸⁹ Cf. Francione, *supra* note 78 (arguing that humans claim to acknowledge animals' moral interests as significant, but ignore those interests whenever it is of human benefit, something he calls "moral schizophrenia").

²⁹⁰ See *supra* Part I.B.1 (discussing the deceptive marketing strategies of the animal agricultural industry).

disparate lobbying power of the industrial agriculture industry, allows producers to continue deceptive and cruel practices.²⁹¹

One way to realize more humane practices in animal agriculture is to adequately inform consumers of animal agriculture practices so they may harmonize their purchases and moral preferences. Food labeling is one effective way to do so. The current food-labeling system is inadequate because it either misinforms consumers by providing them with a false sense of moral security or fails to provide any animal treatment information.²⁹² Proposed labeling schemes, while often better than the current system, fail to inform consumers or reform producers' practices.²⁹³ Thus, the implementation of these proposals is unlikely to generate the kind of substantial changes that would benefit factory-farm animals.²⁹⁴ Instead, it is necessary for food labels to adequately inform consumers and incentivize producers to improve how they treat their animals. This Article proposes requiring a comprehensive list of understandable, common industrial agriculture practices on end-product food packaging. The packaging should include an accompanying notation that informs consumers of the practices producers engage in at the facilities where the products come from. To implement this system will likely bring about the change necessary to allow consumers to buy the products that best meet their moral preferences, while also encouraging farmers and producers to take positive strides towards bettering animals' lives on factory farms.

²⁹¹ See *supra* Part I.B.1 (describing the effects of a powerful agricultural lobby and strong political influence on advertising).

²⁹² See *supra* Part III (detailing inadequacies and falsities of current food-labeling schemes).

²⁹³ *Supra* Part III.

²⁹⁴ *Supra* Part III.