

ANIMAL RIGHTS WITHOUT CONTROVERSY

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I

INTRODUCTION

Many consumers would be willing to pay something to reduce the suffering of animals used as food. Unfortunately, they do not and cannot, because existing markets do not disclose the relevant treatment of animals, even though that treatment would trouble many consumers. Steps should be taken to promote disclosure so as to fortify market processes and to promote democratic discussion of the treatment of animals. In the context of animal welfare, a serious problem is that people's practices ensure outcomes that defy their existing moral commitments. A disclosure regime could improve animal welfare without making it necessary to resolve the most deeply contested questions in this domain.

II

OF THEORIES AND PRACTICES

To all appearances, disputes over animal rights produce an extraordinary amount of polarization and acrimony. Some people believe that those who defend animal rights are zealots, showing an inexplicable willingness to sacrifice important human interests for the sake of rats, pigs, and salmon. Judge Richard Posner, for example, refers to "the siren song of animal rights,"¹ while Richard Epstein complains that recognition of an "animal right to bodily integrity . . .

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1. Richard A. Posner, *Animal Rights: Legal, Philosophical, and Pragmatic Perspectives*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 51, 74 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004).

will not happen, and it should not happen.”² Others believe that those who ridicule animal rights are morally obtuse, replicating some of the cruelty and abuse of sexism, slavery, and even the Holocaust. Gary Francione, a prominent defender of animal rights, contends that animals should have “the right not to be treated as our property.”³

The intensity of certain conflicts over animal rights obscures an important fact: Almost everyone agrees that animal suffering matters, and that it is legitimate to take steps to reduce it. In a 1995 poll, for example, two-thirds of Americans agreed with the following statement: “An animal’s right to live free of suffering should be just as important as a person’s right to be free of suffering.”⁴ This statement of equivalence almost certainly does not adequately reflect people’s reflective judgments; but it is surely true that a social consensus supports the view that in deciding what to do, both private and public institutions should take animal suffering into account.⁵

Of course people disagree about how people should treat animals. But the tension between competing beliefs is less remarkable than the tension between widespread practices and widespread moral commitments. Every day of every year, people engage in practices that ensure extraordinary suffering for animals. If those practices were highly visible, they would change because many people already believe they are morally unacceptable. This point makes existing treatment of animals extremely unusual. A great deal of progress could be

2. Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 1, at 157.

3. Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, *supra* note 1, at 108.

4. David Foster, *Animal Rights Gain Support, Poll Shows*, THE SEATTLE TIMES, Dec. 3, 1995, at A4.

5. Studies have consistently shown this to be true. For instance, ninety-one percent of Americans believe that the U.S. Department of Agriculture should be involved in safeguarding humane treatment of animals. Amanda Tolles & Steve Dyott, *Consumers Seek to Curb Farm Animal Suffering*, 96 BUS. & SOC’Y REV. 19 (1996). A more recent study on New Jerseyans’ opinions on animal treatment found that the vast majority of consumers were opposed to several treatment practices common among producers: eighty-three percent of those polled felt that confining pregnant pigs and veal calves to stalls too small for them to turn around or stretch out should not be allowed; eighty-two percent were against cutting off the tails of cows or pigs without use of pain killers; eighty-one percent were against withholding food from chickens for up to fourteen days to increase egg production; seventy-eight percent were against transporting livestock that are emaciated or unable to stand up; and seventy-four percent were against feeding calves liquid diets with no fiber or iron. EAGLETON INSTITUTE OF POLITICS CENTER FOR PUBLIC INTEREST POLLING, NEW JERSEYANS’ OPINIONS ON HUMANE STANDARDS FOR TREATMENT OF LIVESTOCK 4 (2003) (performed on behalf of Farm Sanctuary), http://www.njfarmers.org/NJ_opinions.pdf. The study also asked how important it was to respondents that farm animals and livestock in New Jersey be treated humanely; sixty-five percent replied that it was very important and twenty-four percent somewhat important. *Id.* at 16. Similarly, surveys conducted in the European Union in 2005 found that over eighty-five percent of respondents believed that animals should be treated much better in production systems. FARM ANIMAL WELFARE COUNCIL, REPORT ON WELFARE LABELING 16 (2006), *available at* <http://www.fawc.org.uk/reports/welfarelabel-0606.pdf>. For a summary of studies of public opinion on animal welfare through 2001, see Harold Herzog, Andrew Rowan, & Daniel Kossow, *Social Attitudes and Animals*, in THE STATE OF ANIMALS: 2001 55, 65–66 (Deborah J. Salem & Andrew Rowan eds., 2001), *available at* http://www.hsus.org/press_and_publications/humane_bookshelf/the_state_of_the_animals_2001.html (last visited July 25, 2006).

made, not by challenging existing moral judgments, but by ensuring that they are actually respected.

Our central goal in this article is to suggest a simple way to bring current practices and moral judgments into closer alignment. In short, consumers should be informed of the treatment of animals used for food, so that they can make knowledgeable choices about what food to buy. Disclosure of animal treatment would make markets work better; it would also ensure more and better democratic discussion about the treatment of animals. Moreover, it would be possible to accomplish both of these goals without taking a stand on the issues that most sharply divide people. People might, in short, come to agreement on a relevant practice—one of disclosure—amidst uncertainty or disagreement about the most fundamental issues. As a result, they might well protect numerous animals from serious suffering. To understand these claims, it is necessary to back up a bit.

III

LAWS AND GAPS

In 1789, the year of the ratification of America's Bill of Rights, Jeremy Bentham argued:

The day *may* come, when the rest of the animal creation may acquire those rights which never could have been withholden from them but by the hand of tyranny. The French have already discovered that the blackness of the skin is no reason why a human being should be abandoned without redress to the caprice of a tormentor. . . . [A] full-grown horse or dog is beyond comparison a more rational, as well as a more conversable animal, than an infant of a day, or a week, or even month, old. But suppose the case were otherwise, what would it avail? [T]he question is not, Can they *reason*? [N]or, Can they *talk*? [B]ut, Can they *suffer*?⁶

In his time, Bentham's argument to this effect was exceptionally controversial. But the argument is no longer much contested. Consider, for example, the fact that every state of the union has long maintained anticruelty laws specifically designed to reduce the suffering of animals.⁷ Of course, the idea of "rights" can be understood in many different ways, and it is possible to understand the term in a way that would deny that animals can have them.⁸ But if the idea of rights is taken in pragmatic terms, to mean legal protection against harm, then many animals already do have rights, simply because they enjoy such protection. And if we take the term "rights" to entail a moral claim to such

6. See JEREMY BENTHAM, *THE PRINCIPLES OF MORALS AND LEGISLATION* 310–11 n.1 (Prometheus Books 1988) (1789).

7. See generally Pamela D. Frasch et al., *State Anti-Animal Cruelty Statutes: An Overview*, 5 *ANIMAL L.* 69 (1999) (reviewing anti-cruelty statutes and penalties in all fifty states and the District of Columbia); see also Stephan K. Otto, *State Animal Protection Laws—The Next Generation*, 11 *ANIMAL L.* 131 (2005) (detailing the modern trend towards strengthening anticruelty laws still further).

8. See JOHN RAWLS, *A THEORY OF JUSTICE* 505 (1971) (suggesting that animals deserve consideration but not justice). For a critique, see MARTHA C. NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* ch. 6 (2006).

protection, there is general agreement that animals do have rights of certain kinds.

Of course, some people, including Descartes, have argued that animals are like robots and lack emotions—and that people should be allowed to treat them however they choose.⁹ But almost everyone agrees that people should not be able to torture animals or to engage in acts of cruelty against them. It is in response to this agreement that state laws contain a wide range of protections against cruelty and neglect.¹⁰

In the United States, state anticruelty laws go well beyond prohibiting beating, injuring, and the like, and impose affirmative duties on people having animals in their care. In New York, for example, people may not transport an animal in a cruel or inhumane manner, or in such a way as to subject it to torture or suffering, conditions that can come about through neglect.¹¹ People who transport animals by railroad or car are required to allow the animals out for rest, feeding, and water every five hours.¹² Nonowners who have impounded or confined an animal are obliged to provide good air, water, shelter, and food.¹³ Those who abandon an animal, including a pet, in public places face criminal penalties.¹⁴ A separate provision forbids people from torturing, beating, maiming, or killing any animal, and also requires people to provide adequate food and drink.¹⁵

Indeed, New York makes it a crime not to provide necessary sustenance, food, water, and shelter.¹⁶ New York also forbids overworking an animal, or using the animal for work when it is not physically fit.¹⁷ Compare in this regard the unusually protective California statute, which imposes criminal liability for negligent as well as intentional overworking, overdriving, or torturing of animals.¹⁸ “Torture” is defined not in its ordinary sense, but includes any act or omission “whereby unnecessary or unjustifiable physical pain or suffering is caused or permitted”¹⁹

If taken seriously, provisions of this kind would do a great deal to protect animals from suffering, injury, and premature death. But protection of animal welfare under state law is sharply limited for two major reasons. First, enforcement can occur only through public prosecution. If horses and cows are

9. See RENE DESCARTES, DISCOURSE ON THE METHOD AND MEDITATIONS ON FIRST PHILOSOPHY 34–36 (David Weissman ed., Elizabeth S. Haldane & G. R. T. Ross trans., Yale Univ. Press 1996) (1637).

10. See *supra* note 7.

11. See N.Y. AGRIC. & MKTS. LAW § 359(1) (McKinney 1991).

12. See *id.* § 359(2).

13. See *id.* § 356.

14. See *id.* § 355.

15. See *id.* § 353.

16. See *id.* §§ 353, 356.

17. See *id.* § 353.

18. See CAL. PENAL CODE §§ 597(b), 599b (West 1999).

19. *Id.* § 599b.

being beaten at a local farm, or if greyhounds are forced to live in small cages, protection will come only if the prosecutor decides to provide it. Of course prosecutors have limited budgets, and animal protection is rarely a high-priority item. The result is that violations of state law occur with some frequency, and, realistically speaking, there is no way to prevent those violations. In this respect, the anticruelty prohibitions sharply contrast with most prohibitions protecting human beings, which can be enforced both publicly and privately. For example, the prohibitions on assault and theft can be enforced through criminal prosecutions brought by public officials, and also by injured citizens, proceeding directly against those who have violated the law.

Second, and even more significantly, the anticruelty provisions of state law contain extraordinarily large exceptions. They generally do not apply to the use of animals for medical or scientific purposes. More importantly, they do not apply to the production and use of animals as food. About ten billion animals are killed for food annually in the United States;²⁰ twenty-three million chickens and some 268,000 pigs are slaughtered every day.²¹ The cruel and abusive practices generally involved in contemporary farming are largely unregulated at the state level. On factory farms, animals

live out their short lives in a shadow world. The vast majority never experience sunshine, grass, trees, fresh air, unfettered movement, sex, or many other things that make up most of what we think of as the ordinary pattern of life on earth. They are castrated without anesthesia, on occasion deliberately starved, live in conditions of extreme and unrelieved crowding, and suffer physical deformities as a result of genetic manipulation.²²

Consider, for example, the lives of pregnant pigs, which spend much of their time in small metal stalls, lined up in such a way that they are unable to turn around or take more than a single step forward or back. After giving birth, they are impregnated again, and again, until they are slaughtered at three years of age.²³ Young calves spend their lives in small wooden stalls, unable to turn around. To ensure that their flesh remains white, they are frequently kept anemic.²⁴ Almost all egg-producing chickens live in battery cages. Typically, eight or more hens are placed in cages that are twenty inches by nineteen inches, where they are unable to spread their wings. Because the cages are so crowded, the weakest birds become ill and die. Producers cut off the hens' beaks because of the wounds that would occur from fighting, which is inevitable in such close quarters. Because beaks are the major method by which hens explore their world, the loss of beaks causes lifelong suffering.²⁵

20. 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*, *supra* note 1, at 206. By contrast, hunters and trappers, animal shelters, biomedical research, product testing, dissection, and fur farms combined are responsible for 218 million animal deaths per year. *Id.*

21. *Id.*

22. *Id.* at 217–18.

23. See *id.* at 218 for a description of customary pig-farming practices.

24. *Id.* at 219.

25. See *id.* at 218 for a description of customary chicken-farming practices.

This is simply an illustration of the kind of suffering that is ensured by existing practices.²⁶ Short of radical change of the kind that is sought by some animal rights activists,²⁷ what might be done by way of correction?

IV

GAP-FILLING

It would be possible to respond to the gaps in existing anticruelty laws in various ways. The least controversial response might be to narrow the “enforcement gap” by allowing private suits to be brought in cases of cruelty and neglect. Reforms might be adopted with the limited purpose of stopping conduct that is already against the law so that the law actually means, in practice, what it says on paper. With such reforms, representatives of animals would be able to bring private suits to ensure that anticruelty and related laws are actually enforced. If, for example, a farm is treating horses cruelly and in violation of legal requirements, a suit could be brought on behalf of those animals to bring about compliance with the law. At first glance, it is not clear why anyone should oppose an effort to promote greater enforcement of existing law by supplementing the prosecutor’s power with private lawsuits.

An increase in enforcement would not, however, do anything to reduce the mistreatment of animals used for food, which is the most important problem. In many nations, regulatory steps have been taken to reduce that mistreatment. The United States lags far behind Europe on this count. Sweden forbids gestation crates, requires cows and pigs to have access to straw and litter in their stalls, and bans drugs or hormones except for the treatment of disease.²⁸ Switzerland prohibits battery cages and requires calves to receive sufficient iron in their diets.²⁹ The United Kingdom forbids both anemic diets for veal calves and veal crates.³⁰ The European Union has banned veal crates, gestation crates, and all battery-egg production; it is replacing the latter system with much larger spaces for hens and free-range farming.³¹

The United States could easily move in this direction—and it could do so without getting into especially contested moral territory (though perhaps at significant cost). But we propose an alternative, or perhaps complementary,

26. For a more detailed overview, see PETER SINGER, *ANIMAL LIBERATION* 95–157 (rev. ed., Ecco 2002) (1975).

27. See, e.g., Francione, *supra* note 3, at 108. However one may view the argument on the merits, the contention that animals should receive equal consideration with humans, and should not be viewed in any way as property or as resources for human use, has not made much headway in practical, political terms. The disclosure proposal set forth in this article is much more modest, and could lead to real improvements in animal welfare of a kind that could be supported by people with a range of beliefs about the moral status of animals.

28. Wolfson & Sullivan, *supra* note 20, at 222.

29. *Id.*

30. *Id.*

31. *Id.* For an overview, see PETER STEVENSON, *EUROPEAN UNION LAW ON THE WELFARE OF FARM ANIMALS* (2004), http://www.ciwf.org.uk/publications/reports/EU_Law_2004.pdf.

approach. Among the most dramatic developments of the last decades of American law has been the shift from command-and-control regulation to disclosure of information as a regulatory tool.³² In countless areas, government has required agencies and companies not to alter their practices, but to disclose them. Sometimes the goal is to make democratic processes work better by providing people with information to inform their political judgments. The Toxic Release Inventory, for example, requires companies to disclose their toxic releases in a way that can activate political processes.³³ So too, the National Environmental Policy Act makes agencies discuss, in public, the environmental effects of their activities, in part so that citizens can bring their concerns to bear.³⁴ And sometimes the goal is to make markets work better by giving people information that bears on their choices. Most familiarly, cigarette manufacturers must offer information about the health risks associated with smoking;³⁵ much more ambitiously, food is now sold with information about the ingredients and nutritional content.³⁶ In all these contexts, significant behavioral changes have occurred.³⁷

It is worth underlining the two different justifications for disclosure strategies. First, such strategies can improve markets by letting consumers know what they are purchasing. This point holds most obviously when consumers lack information that bears on their own welfare—as, for example, when consumers do not know about a safety risk associated with a product or activity. But if consumers also have moral concerns that bear on the use of a product, the market-improving potential of disclosure continues to hold. When people purchase a good, they care whether it will do what it is supposed to do and whether it will impose risks. But sometimes they also care about its production, and in particular about whether their decisions are producing moral or immoral

32. For an overview, see MARY GRAHAM, *DEMOCRACY BY DISCLOSURE: THE RISE OF TECHNOPOPULISM* (The Brookings Institution 2002); CASS R. SUNSTEIN, *RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT* 191–228 (2002).

33. See 42 U.S.C. § 11023 (2000). For a discussion of the success of the Toxic Release Inventory, see Archon Fung & Dara O'Rourke, *Reinventing Environmental Regulation from the Grassroots Up: Explaining and Expanding the Success of the Toxics Release Inventory*, 25 ENVTL. MGMT. 115 (2000).

34. See 42 U.S.C. §§ 4321–70 (2000).

35. See Comprehensive Smoking Education Act, 15 U.S.C. §§ 1331–40 (1994) (requiring inclusion of one of four warnings on cigarette advertising and packaging: (1) Smoking Causes Lung Cancer, Heart Disease and May Complicate Pregnancy; (2) Quitting Smoking Now Greatly Reduces Serious Risks to Your Health; (3) Smoking by Pregnant Women May Result in Fetal Injury, Premature Birth, and Low Birth Weight; and (4) Cigarette Smoke Contains Carbon Monoxide).

36. See Federal Food, Drug, and Cosmetic Act, 21 U.S.C.S. § 343(i) (requiring ingredient list to avoid misbranding), § 343(q) (requiring nutritional information to avoid misbranding) (2001).

37. See COUNCIL ON ENVTL. QUALITY, *THE NATIONAL ENVIRONMENTAL POLICY ACT: A STUDY OF ITS EFFECTIVENESS AFTER TWENTY-FIVE YEARS* 29 (1997) (noting that prior to NEPA, agency decisions were made without reference to environmental information); Fung & O'Rourke, *supra* note 33 (detailing the success of the TRI and recommending application of TRI structure to other contexts); Madhu Khanna et al., *Toxics Release Information: A Policy Tool for Environmental Protection*, 36 J. ENVTL. ECON. & MGMT. 243, 243–45 (1998) (discussing the regulatory effect of the Toxic Release Inventory on industry behavior); Sunstein, *supra* note 32, at 191–228 (discussing the effects of various informational regimes).

behavior. Many consumers are willing to pay to produce less in the way of moral damage and more in the way of moral benefit.

Second, disclosure requirements can serve democratic functions by enabling citizens to receive information that bears on democratic judgments. Perhaps most consumers would be willing to pay little to improve animal welfare; perhaps the social role of consumer, when costs may be paramount, will dampen their ordinary moral concerns; perhaps the obvious collective-action problem may lead most or many consumers to pay little attention on the theory that their individual decisions will have little or no effect. But even if this is so, information about animal suffering may have significant effects on the political domain. It may energize public debate, activating ordinary citizens and representatives alike. To the extent that this effect is a product of increased information, exposing practices previously hidden from public view, there is every reason to welcome it.

Now engage in a thought experiment, one with a science fictional element: Imagine that people could be informed, immediately and costlessly, of the treatment of animals used in the food they purchase. Imagine too that the disclosure is not tendentious or biased—that every effort is made to present the relevant facts and to do so accurately. If so informed, consumers could purchase food as they see fit. To the extent that they were willing to pay for improvements in animal welfare, they could do exactly that. Extending the thought experiment, imagine a market in which consumers not only knew about the treatment of animals used for food, but also could pay in specified increments for better treatment (including no suffering at all). By hypothesis, the “animal welfare market” would be perfected in the sense that animal welfare would be bought and sold and in a way that is highly likely to lead to real improvements.

Of course, there is much to say about this thought experiment. Many animal welfare advocates would see a step in this direction as distressingly cautious and even problematic. What if consumers are not, in fact, willing to sacrifice much for animal welfare? Should animal welfare really be bought and sold, or does this create a kind of market in suffering in a way that would be self-evidently unacceptable in the domain of human beings? Should we not be able to agree that the welfare of animals counts, independently of how much consumers are willing to pay to improve it? Why should the suffering of animals depend on how much people are willing to pay to reduce it? These are excellent questions, and we do not attempt to answer them here.³⁸ But at least it can be said that for those who are interested in animal welfare, a movement in the direction of the

38. Clearly, those who believe that society should prohibit the use of animals for food will not be satisfied with a disclosure regime. They might even conclude that it is counterproductive to their cause if the disclosure regime led consumers to conclude that buying humanely produced meat satisfied all their moral obligations to animals. On the other hand, animal-use abolitionists might embrace a disclosure regime for instrumental reasons if they thought it would cause society to confront the harms suffered by animals and move society closer to an abolitionist perspective.

thought experiment is likely to do far more good than harm, or some good and no harm—and that if one goal of law is to ensure that social practices are in line with social values, the experiment is highly suggestive.

There are also evident pragmatic problems. This thought experiment is just that. No technology can ensure that consumers could be immediately and costlessly informed of the treatment of animals in relevant foods. But if the thought experiment is of interest, we can immediately see that it is possible to take steps in its direction. Some animal-welfare organizations and even industry groups have attempted to do exactly that by developing guidelines and certification programs for food producers who claim to use humane animal-husbandry techniques. These are laudable steps and warrant close examination. For reasons discussed below, however, the existing guidelines and certification programs do not go nearly far enough in giving consumers the information they need to make informed choices. Much more can be done to give consumers relevant information at the point of purchase, allowing them to compare producers and take account of the treatment of animals in their purchasing decisions. Let us now turn to existing practice.

V

GUIDELINES AND CERTIFICATION: A PROGRESS REPORT

The first animal-welfare organization to promulgate humane animal-husbandry guidelines was the Royal Society for the Prevention of Cruelty to Animals (RSPCA), headquartered in the United Kingdom.³⁹ Various animal-welfare organizations in the United States and Canada have followed suit with their own guidelines, including Humane Farm Animal Care,⁴⁰ the American Humane Association,⁴¹ the Animal Welfare Institute,⁴² and the British Columbia Society for Prevention of Cruelty to Animals.⁴³ Some of these groups, like

39. The RSPCA guidelines program began in 1994. See Freedom Food—About Us, http://www.rspca.org.uk/servlet/Satellite?pagename=RSPCA/RSPCARedirect&pg=About_the_rspca (last visited Feb. 8, 2006). For the RSPCA's substantive guidelines on Chickens, Beef Cattle, Dairy Cattle, Ducks, Laying Hens, Pullets, Pigs, Farmed Atlantic Salmon, Sheep (including Dairy Sheep), and Turkeys, see <http://www.rspca.org.uk/servlet/Satellite?pagename=RSPCA/RSPCARedirect&pg=welfarestandards> (last visited Feb. 8, 2006).

40. Humane Farm Animal Care: Animal Care Standards, <http://www.certifiedhumane.com/documentation.asp> (last visited Jan. 31, 2006) (listing guidelines for Beef Cattle; Broiler Chickens; Egg Laying Hens; Dairy Cows; Dairy, Fiber, and Meat Goats; Pigs; Sheep, including Dairy Sheep; Turkeys; and Young Dairy Beef). All guidelines are available with registration.

41. American Humane Association, Free Farmed Certification Program, <http://www.americanhumane.org/freefarmed> (last visited Jan. 31, 2006). Animal welfare standards are not available online, but can be requested by calling (303) 792-9900 or by writing American Humane, 63 Inverness Drive East, Englewood, CO 80112.

42. Animal Welfare Institute, <http://www.awionline.org/farm/standards.htm> (last visited Jan. 31, 2006) (listing Humane Husbandry Criteria for Pigs, Beef Cattle and Calves, Rabbits, Ducks, and Sheep).

43. British Columbia Society for the Prevention of Cruelty to Animals, <http://www.spc.bc.ca/farm/standards.asp> (last visited Jan. 31, 2006) (listing SPCA Certified Standards for the Raising & Handling of Laying Hens, Broiler Chickens, Beef Cattle, Pigs, and Dairy Cattle).

RSPCA, go further and license producers who conform to their guidelines. The RSPCA authorizes producers to carry the “Freedom Food” logo, Humane Farm Animal Care has its own “Certified Humane Raised and Handled” logo,⁴⁴ and the American Humane Association sponsors the “Free Farmed” logo.⁴⁵ Trade groups that have adopted humane animal husbandry guidelines include the American Meat Institute,⁴⁶ the National Chicken Council,⁴⁷ the National Pork Board,⁴⁸ United Egg Producers,⁴⁹ and the Food Marketing Institute, a trade group for supermarkets, food retailers and wholesalers, which has issued guidelines jointly with the National Council of Chain Restaurants.⁵⁰ Whole Foods, a prominent grocery store chain, recently announced its own “Animal Compassionate” standards, though its website indicates that no producers have yet met these new standards.⁵¹

At first glance, guidelines of this kind might be taken as a form of voluntary self-regulation, in a way that could do considerable good. Imagine that market pressures, in which consumers lack information, lead to a kind of competition that produces increasingly harsh treatment of animals. Suppose that those who produce and sell food have every incentive to produce tasty food cheaply and that the market creates high levels of neglect, cruelty, and suffering simply because producers will lose customers if producers take animal-protective steps. Imagine too that if they seek to protect animal welfare, companies need to cartelize in some way in order to break (or brake) the competition. A set of guidelines might seem ideally suited to that task, at least if they are enforceable through informal sanctions (including moral suasion). Rather than activating consumer concerns, such guidelines might even reflect moral judgments on the part of producers themselves, operating as the motivation for a check on the profit motive.

In actual operation, existing guidelines have four different uses. First, they serve as a self-assessment tool for producers, helping them to see whether their

44. The Royal Society for the Prevention of Cruelty to Animals, *supra* note 39. For more details on the “Certified Raised and Handled” logo, see Humane Farm Animal Care, <http://www.certifiedhumane.com> (last visited Jan. 31, 2006).

45. American Humane Association, *supra* note 41.

46. AMERICAN MEAT INSTITUTE, RECOMMENDED ANIMAL HANDLING GUIDELINES AND AUDIT GUIDE (2005), <http://www.animalhandling.org/guidelines/2005RecAnimalHandlingGuidelines.pdf>.

47. NATIONAL CHICKEN COUNCIL, ANIMAL WELFARE GUIDELINES AND AUDIT CHECKLIST (2005), <http://www.nationalchickencouncil.com/files/AnimalWelfare2005.pdf>.

48. NATIONAL PORK BOARD, SWINE WELFARE ASSURANCE PROGRAM MANUAL (2003), <http://www.pork.org/Producers/SWAP/swapManual.aspx>.

49. UNITED EGG PRODUCERS CERTIFIED, ANIMAL HUSBANDRY GUIDELINES FOR U.S. EGG LAYING FLOCKS (2006), <http://www.uepcertified.com/abouttheprogram.html>.

50. Food Marketing Institute, http://www.fmi.org/animal_welfare (last visited Dec. 6, 2006). Guidelines can be requested from Karen Brown at FMI by calling (202) 452-8444.

51. Whole Foods, Animal Compassionate Program, <http://www.wholefoodsmarket.com/products/meat-poultry/qualitystandards.html> (last visited Dec. 6, 2006); *see also* Andrew Martin, *Meat Labels Hope to Lure the Sensitive Carnivore*, N.Y. TIMES, Oct. 24, 2006, at A1 (describing the Whole Foods program).

activities comply with certain baseline moral requirements. Second, guidelines operate as a means for retailers to assess and hold accountable their suppliers, transporters, processors, and other links in the chain of production. Third, and not trivially, they work as a public relations strategy for enhancing the image of a producer group—a goal that should not be underrated in light of the risks of bad publicity and eventual regulation. Finally, guidelines provide a basis for certification programs for producers who want to make certain claims about their humane methods. This last purpose is the only one directly connected to consumer disclosure, which is our emphasis here. Note, however, that even guidelines not explicitly aimed at the consumer market are part of an ongoing campaign to win over consumers (and, most likely, to forestall government initiatives in this area). Consider in this regard the National Pork Board's explanation for launching the Swine Welfare Assurance Program:

Animal rights and humane groups have escalated their efforts to a new level—one that impacts what consumers think of pork. Communications with fast food chains and retailers indicate that responsibility for animal welfare assurances may be transferred back to the producer. . . . [T]he Swine Welfare Assurance Program™, or SWAP™, . . . [is] the pork industry's proactive initiative to this increasing consumer awareness of animal welfare.⁵²

Guidelines of this sort could do a great deal of good, and both producers and trade groups have trumpeted their existence. In light of their goals, the trumpeting is understandable. Unfortunately, the guidelines have proved woefully inadequate, at least as a means of disclosing useful information to consumers. A central reason is that the guidelines address different aspects of animal treatment with different levels of detail, making comparisons exceedingly difficult. Consider the guidelines for pigs. The American Meat Institute's (AMI) guidelines address humane handling and slaughtering practices at meatpacking facilities for pigs.⁵³ Humane Farm Animal Care adopts the AMI guidelines for slaughter; it also covers a host of farming practices, including guidelines for food and water, design of buildings, lying areas, space allowances, and transportation, to name a few.⁵⁴ The Animal Welfare Institute guidelines and the National Pork Board guidelines each address farming practices for pigs but not slaughtering issues.⁵⁵

The competing guidelines for pig farming are complex and cover many, but not all, of the same activities. The National Pork Board guidelines address, in close to forty pages, herd health and nutrition, caretaker training, animal observation, body condition, euthanasia, handling and movement, facilities including ventilation, heating and cooling, physical space, pen maintenance, feeder space, water availability, and hospital pens, emergency support, and

52. Swine Welfare Assurance Program, Why a Welfare Assurance Program?, <http://www.porkboard.org/SWAPHome> (last visited Feb. 1, 2006).

53. AMERICAN MEAT INSTITUTE, *supra* note 46.

54. See Humane Farm Animal Care: Animal Care Standards, Pigs, *supra* note 40.

55. See Animal Welfare Institute, *supra* note 42; NATIONAL PORK BOARD, *supra* note 48.

continuing assessment and education.⁵⁶ The Animal Welfare Institute addresses, in nine pages, environmental enrichment and shelter; access to the outdoors; space and grouping requirements; light; bedding management; environmental minimums and enrichment; hygiene and safety; loading, unloading, and transport; actions in case of injury or illness; antibiotics and other treatments; and food and water.⁵⁷ Many of the guidelines are quantitative—laying out, for instance, precise dimensions of farrowing pens for pigs⁵⁸ and specifying permissible water flow rates required in drinking systems.⁵⁹

How well could the average consumer draw comparisons based on these guidelines? The length and complexity of the guidelines make them quite inaccessible to the lay reader. Unless a consumer is an expert on animal husbandry, or is willing to become one, it will be impossible to detect and evaluate the substantive differences between the competing guidelines. And much care is taken not to distinguish one producer from another, at least not in any way that is visible to consumers.⁶⁰ By themselves, then, existing guidelines are hopelessly inadequate as a tool for informing those who buy food.

The certification programs for producers hold far more promise. In the United States, Humane Farm Animal Care has developed the “Certified Humane” certification and labeling program,⁶¹ and the American Humane Association maintains the “Free Farmed” certification and labeling program.⁶² Both programs are voluntary, user-fee-based services whereby producers submit information and undergo inspections leading up to certification. Inspectors have training in veterinary medicine, animal science, and related fields, and may be employees of the certifying organization or independent contractors.⁶³ On the industry side, only the United Egg Producers (UEP) has developed a certification program.⁶⁴ To be certified to carry UEP’s label on its eggs, a producer must follow UEP’s guidelines at all of its production facilities,

56. NATIONAL PORK BOARD, *supra* note 48.

57. See Animal Welfare Institute, *Humane Husbandry Criteria for Pigs*, *supra* note 42.

58. See, e.g., Humane Farm Animal Care: Animal Care Standards, Pigs, *supra* note 40, at 9 (requiring that farrowing pens be a minimum of 5 ft. x 7 ft., but recommending pens of 10 ft. x 10 ft., with a piglet protection zone of at least 8 sq. ft.).

59. See, e.g., *id.* at 4 (requiring a minimum flow rate of .75-quarts per minute for drinkers used by lactating sows).

60. For example, the American Meat Institute voted in 2002 to make animal welfare a non-competitive issue in the industry on the theory that this would promote open sharing of ideas, information, and expertise to enhance animal handling and welfare. American Meat Institute, *AMI Board Votes to Make Animal Welfare a Non-Competitive Issue: Vote Signifies Industry’s Ongoing Commitment to Optimal Animal Handling in Plants* (Oct. 24, 2002), <http://www.meatami.com/Template.cfm?Section=Archived&template=PressReleaseDisplay.cfm&PressReleaseID=1317>.

61. Humane Farm Animal Care, *supra* note 40.

62. American Humane Association, *supra* note 41.

63. Certified Humane Certification Program Frequently Asked Questions, <http://www.certifiedhumane.org/faq.html> (last visited Feb. 1, 2006) (describing the Certified Humane certification process); The Free Farmed Certification Process, http://www.americanhumane.org/site/PageServer?pagename=pa_farm_animals_ff_cert_process (last visited Feb. 1, 2006) (describing the Free Farmed certification process).

64. See UNITED EGG PRODUCERS CERTIFIED, *supra* note 49.

file a monthly compliance report with UEP, and pass an annual audit conducted by independent auditors designated and approved by UEP.⁶⁵

The Certified Humane, Free Farmed, and UEP labeling programs should be distinguished from other auditing and monitoring regimes that have no certification component. Such programs have been prevalent on the industry side. The American Meat Institute promotes regular self-audits by slaughter plants to measure their compliance with AMI's animal-welfare guidelines.⁶⁶ The National Pork Board administers the voluntary Swine Welfare Assurance Program (SWAP) for American pork producers to assess the care and welfare of their pigs according to criteria set forth by the National Pork Board's Animal Welfare Committee.⁶⁷ After the assessment, and regardless of how well or poorly the assessment goes, SWAP registers the producer with the National Pork Board as a SWAP Assessed Site and the producer receives a SWAP Assessed Certificate.⁶⁸

One of the more robust programs on the industry side is the animal welfare program established by the Food Marketing Institute (FMI) and the National Council of Chain Restaurants (NCCR). The FMI and NCCR collectively represent food retailers, food wholesalers, and chain restaurants. They have developed animal-welfare guidelines for a variety of different species, in collaboration with the National Chicken Council, the National Pork Board, and similar trade groups.⁶⁹ Until recently, FMI and NCCR maintained the "Animal Welfare Assurance Program" by which producers could request an audit to measure their compliance with those standards.⁷⁰ Because of low participation rates, the AWAP program is no longer functioning, but producers and retailers remain able to arrange their own audits privately to measure compliance with the FMI-NCCR guidelines.⁷¹ There is no provision for release of audit results to the public.⁷² Increasing participation rates and making inspection results available to the public would help, but by themselves, these steps would not overcome the most serious problems facing the competing labeling, auditing, and monitoring regimes, which are their complexity and their sheer quantity.

65. Requirements of a United Egg Producers Certified Company, <http://www.uepcertified.com/abouttheprogram.html> (last visited Feb. 1, 2006). Of 204 applicants for certification, only eleven have failed the first audit. Failed applicants are given sixty days to improve conditions; only one producer has failed a second time. Telephone interview with Gene Gregory, Senior Vice President, United Egg Producers (Oct. 7, 2004).

66. See AMERICAN MEAT INSTITUTE, *supra* note 46, at 4.

67. Swine Welfare Assurance Program, *supra* note 52.

68. See Swine Welfare Assurance Program, How do I participate in SWAP as a Producer?, <http://www.pork.org/Producers/SWAP/SWAP.aspx> (last visited Feb. 1, 2006).

69. See Food Marketing Institute, *supra* note 50.

70. Food Marketing Institute & The National Council of Chain Restaurants, *Food Marketing Institute, The National Council of Chain Restaurants (NCCR) and the Food Marketing Institute (FMI) Announce Certification of First Auditors; Slaughter Plants Can Request Animal Welfare Audits*, Apr. 17, 2003, <http://www.fmi.org/media/mediatext.cfm?id=522>.

71. Telephone interview with Karen Brown, Senior Vice President, Food Marketing Inst. (Nov. 30, 2006).

72. *Id.*

The average consumer does not have, and will not expend the time and energy to obtain, an adequate understanding of the competing animal-husbandry guidelines or the variations in inspection methodologies and frequency.

The promulgation of best-practice guidelines and animal-welfare certification regimes for food producers is important and valuable. In terms of delivering useful information to consumers, however, these regimes have serious flaws. What might be done instead?

VI

A MODEST PROPOSAL

Food producers should make disclosures about their treatment of animals in a way that is genuinely useful to consumers. Existing moral commitments draw current practices into serious question, and consumers should be permitted to express their commitments through their purchasing decisions. Hence disclosure would serve a market-improving function in a domain in which many consumers should be expected to be willing to pay for more in the way of animal welfare. In addition, moral beliefs, with respect to treatment of animals, should be made a more significant part of democratic discussion and debate, in a way that would undoubtedly cause changes in both practices and beliefs. Animal welfare is infrequently a salient issue in political life in part because the underlying conduct is not seen. Indeed, many consumers would be stunned to see the magnitude of the suffering produced by current practices.⁷³ But deliberative discussion cannot occur unless citizens have the information with which to engage in it.

In fact, there are likely to be dynamic interactions between the market-perfecting and democracy-improving functions of disclosure. With respect to animal welfare, most people's values are not firm and fixed. Their moral commitments, and even their behavior, are endogenous to what they know and to what they learn from others. Many of those who think that they do not care about animal welfare might well change their minds and their behavior if they are exposed to certain kinds of mistreatment. Those who are relatively indifferent to the topic might be less indifferent once they hear what other citizens have to say. In the domain of race and sex equality, an emphasis on concrete practices helped to activate general public concern. The same is likely

73. In fact, the Better Business Bureau (BBB) recently recommended that United Egg Producers discontinue its "Animal Care Certified" label on the grounds that it misleads consumers. See Associated Press, *Business Group Shells Egg-industry Ads: Better Business Bureau Disputes Humane Claim*, May 11, 2004, available at <http://www.msnbc.msn.com/id/4951194/> [hereinafter *Egg-industry Ads*]. The BBB found that the UEP standards actually improved animal treatment, but that industry standards for the treatment of egg-laying hens—which allow for artificially inducing molting through food withdrawal and for trimming or burning off birds' beaks—would not be considered "humane" by most consumers. See *id.* In October 2005, with encouragement from the Federal Trade Commission, the United Egg Producers agreed to stop using the Animal Care Certified label, and instead agreed to label eggs as "United Egg Producers Certified." See Alexei Barrionuevo, *Egg Producers Relent on Industry Seal*, N.Y. TIMES, Oct. 4, 2005, at C18.

to be true here. For advocates of animal welfare, the hope would be for a kind of *virtuous spiral*, in which disclosure helped to heighten discussion and debate in a way that did not merely activate, but instead transformed and deepened, existing moral commitments.

Whether or not this is likely, disclosure policies, initiated voluntarily or required, could strengthen both market processes and political ones. In this way, our proposal draws on the market-improving and democracy-facilitating functions of many recent regulatory initiatives. Here, as elsewhere, it would be best if producers voluntarily disclosed the relevant information, spurred perhaps by growing consumer interest and by the hope on the part of some producers that disclosure of good practices would increase market share. But it is also worth considering disclosure mandates, at the state and even national levels.

What kind of disclosure should occur? This article does not attempt to create a blueprint. The aim is to suggest a general approach, not to specify a means of implementing it. But the first points, growing out of past experience with disclosure strategies,⁷⁴ are the simplest. Any disclosure must be relevant to consumers' moral beliefs, compatible with their existing routines, delivered at the right time, and written in concise, comprehensible language. On the producer side, disclosure will be most effective if it prompts consumers to act in ways that matter to producers and if producers find it feasible to respond to consumers' reactions.

As a threshold matter, whatever disclosure is made might well be contained on the food label itself. Consumers are accustomed to consulting labels for nutritional information and organic food claims; adding an animal welfare labeling component would be consistent with how consumers already shop. This is the central insight of the Certified Humane and similar logos. Information on the label stands a chance of reaching the average consumer, but off-label information is likely to be seen only by the most motivated of consumers.⁷⁵

Would significant numbers of consumers care enough about animal welfare to look at a label? Perhaps the best evidence of consumer interest in animal welfare is the speed with which producers and retailers are moving to position themselves as supporters of humane animal treatment through the certification and auditing programs discussed earlier.⁷⁶ Nor is industry missing the mark in reacting in this way. Many people believe that human beings can and should

74. See *supra* notes 32–37.

75. Labeling food sold in grocery stores is a familiar practice. Applying a labeling system to other food outlets—deli counters, restaurants, hot dog stands, and the like—is imaginable, but considerably more challenging. Should a restaurant have to trace and disclose the practices of each supplier of every kind of meat and other animal product on the menu? How available must the disclosure be? Must it be made part of the menu, or, as is the case with nutritional claims, is it enough to require restaurants to have the information available upon request? See 21 C.F.R. § 101.9(j)(2)(i) (2006). Although the practical difficulties are perhaps greater with non-grocery store food outlets, there are many possibilities for displaying a label or labels that could be effective, including menus, food packaging, and prominently displayed signs.

76. See *supra* notes 46–52.

take more steps to reduce animal suffering, and this concern is reflected in public opinion surveys,⁷⁷ studies on consumers' willingness to pay higher prices for better treatment of animals,⁷⁸ and the growing consumer interest in products that make claims regarding humane treatment of animals.⁷⁹ The challenge, then, is to design a food label that provides the maximum amount of useful, accessible animal-welfare information. There are two major possibilities here.

The first is to rely on a trusted intermediary, one who sifts through all the relevant information and comes up with a rating. Intermediaries of this kind—offering thumbs up or thumbs down, one to four stars, or letter grades from A to F—are pervasive; they figure in everything from movie ratings to automobile roll-over tests to investment analysts' buy-sell recommendations. Certified Humane and similar logos all rely on this approach, in the sense that the consumer turns over the analysis of the food producers to the certifying agency, which has expertise in humane animal treatment. Use of intermediaries makes sense when consumers ultimately can judge whether the intermediary is doing an adequate job.

For food, however, there is a serious difficulty: A consumer has no easy basis for deciding that the animal-welfare ratings of a particular certifying agency are wrong or inferior to that of a competing certifying agency. The meat does not look or taste any different. An intermediary could rate the intermediaries—witness Consumer Union's ratings of other organization's eco-labels⁸⁰—but this just pushes the problem up a level.

77. See *supra* note 5.

78. See, e.g., Agriculture Online, *Survey Shows Consumers Value Humane Treatment of Poultry*, Mar. 1, 2004, http://www.agriculture.com/ag/story.jhtml?storyid=/templatedata/ag/story/data/agNews_51370.xml (finding fifty-four percent of consumers would be willing to spend five to ten percent more for products certified as protective of animal care, and an additional ten percent would be receptive to paying fifteen to twenty percent more); David Dickinson & DeeVon Bailey, *Willingness-to-Pay for Information: Experiential Evidence on Product Traceability from the USA, Canada, the U.K., and Japan* 12–13 (Utah State Univ. Econ. Research Inst., Working Paper No. 12, 2003), available at <http://www.econ.usu.edu/Research/03/ERI2003-12.pdf> (showing that consumers are willing to pay four to nine percent more for pork and nine to twenty-eight percent more for beef that carries additional guarantees of humane animal treatment and meat safety); Richard M. Bennett & Ralph J.P. Blaney, *Estimating the Benefits of Farm Animal Welfare Legislation Using the Contingent Valuation Method*, 29 *AGRIC. ECON.* 85, 85–98 (2003) (surveying U.K. citizens' willingness to pay to support legislation to phase out the use of battery cages for egg production in the European Union and concluding that the estimated benefits of the legislation outweigh the costs); R.M. Bennett, J. Anderson, & R.J.P. Blaney, *Moral Intensity and Willingness to Pay Concerning Farm Animal Welfare Issues and the Implications for Agricultural Policy*, 15 *J. AGRIC. & ENVTL. ETHICS* 187, 193 (2002) (showing that survey participants in the U.K. were willing to pay approximately \$1.68 per week more for eggs from chickens raised outside of cages).

79. See Rod Smith, *Consumer Views on Animal Production Pushing Toward More Ethical Husbandry*, *FEEDSTUFFS*, Jan. 1, 2001, available at <http://www.upc-online.org/010101feedstuffs.html> (discussing the industry impact of consumers' preferences for humane treatment of food animals); Swine Welfare Assurance Program, *supra* note 52 (explaining that increased consumer awareness of animal welfare necessitates proactive industry action).

80. See Consumers Union, *The Consumers Union Guide to Environmental Labels*, <http://www.eco-labels.org/home.cfm> (last visited Feb. 1, 2006). Consumers Union provides ratings for some labels but not others. See *id.* "Certified Humane Raised and Handled" and "Free Farmed" labels are both rated "highly meaningful"; the United Egg Producer's logo is not rated at all. See *id.*

A second problem with relying on intermediaries is that such reliance misses a key opportunity to enlighten consumers about some of the actual, concrete practices that underlie the raising of animals for food—practices that, if consumers were confronted with them, might cause a rethinking of existing preferences for certain foods. Labels like “Certified Humane” and “Free Farmed” by themselves tell consumers nothing about the underlying methods involved—what, exactly, is being done to animals in the production of food. Suppose it is true that consumers have different intuitions from industry insiders about what counts as humane treatment of animals; recall the consumer reaction in polls when it was revealed that Animal Care Certified standards permitted beak trimming, crowded cages, and similar conditions.⁸¹ If so, then even the best practices in the industry may be found morally questionable.

It is possible to imagine an alternative approach: a label that gives consumers at least some concrete and pertinent information about underlying animal-treatment practices. A new form of label could be designed that would clearly and simply indicate the producer’s compliance with a select, limited number of standards that have the greatest impact on animal welfare, that reflect practices with the most salience to consumers, and that have the greatest potential to highlight differences among producers’ practices. The specific standards that would be reflected on the label would vary for different animal species, depending on the specific issues of concern for that species and that industry. The standards could change over time, as well, as the issues of concern change. This new form of label might appear on food packaging at the retail level, alongside the familiar nutritional information labeling. Such a labeling approach would deliver relevant information without being overwhelming; would facilitate comparisons across producers, thus fostering competition; and would give consumers some idea of the practices that are involved in producing the foods that they eat.

The criteria appearing on such a label would be very different from the criteria currently used in the various auditing and certification regimes surveyed earlier.⁸² For example, instead of a guideline requiring that atmospheric ammonia in broiler-chicken facilities not exceed so many parts per million,⁸³ a consumer-focused label might contain disclosure of the frequency with which chickens suffer from chemical burns caused by lying in unsanitary litter.⁸⁴

81. See *Egg-industry Ads*, *supra* note 73.

82. See *supra* Part V.

83. The National Chicken Council Guidelines require ammonia levels to be below twenty-five parts per million. NATIONAL CHICKEN COUNCIL, *supra* note 47. The Humane Farm Animal Care guidelines require that ammonia levels not exceed ten parts per million on average and never exceed twenty-five parts per million. Humane Farm Animal Care: Animal Care Standards, Broiler Chickens, *supra* note 40, at 7.

84. Litter saturated with urine and excrement leads to high ammonia concentrations, and chickens exposed to unsanitary litter for long periods can suffer blisters and burns on their feet, legs, and breasts. For a summary of research on the health effects of unsanitary litter, see REPORT OF THE SCIENTIFIC COMM. ON ANIMAL HEALTH AND ANIMAL WELFARE, THE WELFARE OF CHICKENS KEPT FOR MEAT PRODUCTION (BROILERS) 39–40 (2000), available at <http://europa.eu.int/comm/>

Instead of a guideline on the handling and catching of birds,⁸⁵ a label might disclose the frequency (or absence) of bruises, broken wings, and birds that are dead on arrival at the processing plant, all of which can result from rough handling. The label might also disclose the extent to which the producer provides the birds with access to straw, hay, or similar biodegradable material for environmental enrichment and expression of natural behaviors. The most effective label criteria are likely to be those that focus on health and welfare outcomes for the animals that are not only important from an animal-welfare perspective but are also easily imagined by consumers. Thus, some husbandry practices that are no doubt important from a welfare perspective—a lighting standard, for instance—may prove difficult to translate to a consumer-based label unless they can be cast in terms of tangible health and welfare effects. Consumers would not know, without further research, what happens to the birds if they get too little or too much light, whereas the frequency or absence of physical injuries, or opportunities for movement and environmental enrichment, are easily grasped.

Because of the need for brevity and the difficulty in distilling some animal-welfare criteria, a consumer-focused label could not hope to capture the full range of important factors that bear on animal welfare. Of course framing effects would greatly matter. Information can be conveyed in many different ways, and some ways of conveying information would have far more impact than others.⁸⁶ The label would most likely serve to complement, rather than supplant, the further development of certification and auditing regimes.

There is a hidden virtue, however, in the label's inevitable incompleteness. Decisions as to which factors make it on to the label, and how those factors will be described, will involve judgment calls, which will no doubt be subject to considerable discussion among producer groups, animal-welfare organizations, and (for mandatory disclosure regimes) government regulators as well. A producer may be reluctant to disclose welfare criteria that paint a grim picture in consumers' minds of how animals are treated (e.g., frequency of ammonia burns or broken bones for broiler chickens), even when the producer performs better on those criteria than its competitors. (Recall the importance of framing effects.) In voluntary labeling systems, at least, the language describing the welfare criteria will need to be crafted to accommodate this concern. This may

food/fs/sc/scah/out39_en.pdf (produced for the European Commission Health & Consumer Protection Directorate-General). For more details on the health and cost effects of poor litter quality management, see CASEY W. RITZ ET AL., LITTER QUALITY AND BROILER PERFORMANCE 1267 (2005), available at <http://pubs.caes.uga.edu/caespubs/pubs/PDF/B1267.pdf>.

85. The National Chicken Council guidelines provide, among other things, that “[w]henver birds are handled for any reason, including vaccinations, treatments, and movement to new facilities or to processing, handling should be accomplished in such a manner as to avoid injuries. Abuse of the animals should not be tolerated under any circumstances. . . . The number of birds in the catcher’s hand depends on the size of the bird and should not cause injury to the birds. For birds weighing more than four pounds, the maximum number of birds per hand is five.” See NATIONAL CHICKEN COUNCIL, *supra* note 47, at 8.

86. See Christine Jolls & Cass R. Sunstein, *Debiasing Through Law*, 35 J. LEGAL STUD. 199 (2006).

not be an insurmountable problem. A disclosure can be cast as “ninety-eight percent of the birds are injury-free” just as easily, and just as accurately, as “two percent of birds suffer from broken bones or ammonia burns.” The emphasis is different, of course, and producers and animal advocates will disagree about which they prefer; the “ninety-eight percent are injury-free” phrase seems far more comforting than the idea that “two percent suffer from broken bones or burns.” The larger point is that discussion of what should be on the label would help stimulate public debate on existing practices and animal welfare in much the same way that development of a federal definition of “organic” and related claims has focused debate on organic standards. Both the label and the process for developing the label would move animal-welfare issues into the fore.

The emphasis here has been on disclosure through food labels, but a more modest approach would enlist the Internet to publicize information about practices that bear on animal welfare. It is easy to imagine a new website that collects relevant information and makes it easily available to those who are interested, for purposes of either consumer choices or democratic initiatives. The Toxic Release Inventory is effective in part because of the easy availability, via the Internet, of relevant information. A private website might well initiate a similar process for animal welfare. If such a step would not do as much as a consumer label, at least it would provide a helpful start.

If a labeling or other disclosure regime could be created to give consumers insight into actual practices affecting animal welfare, how would producers be affected? Disclosure regimes are effective in inducing changes in behavior only to the extent that disclosers are able to detect and respond to audience reaction. There is every reason to believe that these conditions would be present for producers. Consumers vote with their pocketbooks and, to say the least, producers are sensitive to profits and market share. If disclosure of animal-welfare information causes a shift in consumer demand, producers will detect the shift and be motivated to accommodate that demand.

How easily could producers shift their methods to accommodate new demand for humane practices? A number of factors, all involving cost, would come into play: the cost, for producers, of increased adherence to animal welfare standards; the extent to which producers would be able to pass these extra costs on to consumers; the speed with which producers could shift to more humane techniques; and the cost, for food retailers, of switching their suppliers to those that use more humane methods. The answers to these questions would vary by industry, but there is little doubt that movement by food producers towards humane animal husbandry would be constrained by the expense of that movement. Producers would, in short, follow some kind of cost-benefit balancing, in which the benefits of humane treatment (measured by the intensity of consumer demand for it) would be measured by the costs of providing it.

Unfortunately, there is little systematic evidence one way or the other on the costs of humane food-production practices in a global, industry-wide sense.

An existing literature does address the feasibility of specific humane farming techniques,⁸⁷ and still other studies have identified changes in farming or production techniques that enhance both animal welfare and profitability. Thus, we know that stockpersons should treat animals non-aversively,⁸⁸ piglets should have toys,⁸⁹ sheep should have moderate ventilation,⁹⁰ cows should not be continuously bred,⁹¹ and dairy cows should not have their tails docked.⁹² As these studies show, it is possible to compare the animal welfare benefits of changing specific practices with the costs to producers of doing so, and research in this vein will be crucial in determining the feasibility of particular shifts in animal treatment that could arise through a disclosure regime.

Lest cost concerns loom too large, however, it is important to remember there is nothing in a labeling system like that proposed here that would *require* producers to change any of their practices. Producers who choose not to pursue animal-welfare-enhancing practices and instead prefer to compete only on the dimension of price would be free to do so. If the costs of increased animal welfare outweigh the benefits, measured in terms of consumer preferences, then our proposal would produce no behavioral change at all. Changes in producer behavior would occur only in response to market forces, as consumers are empowered to make food choices that take into account their preferences for different levels of animal welfare.

87. See, e.g., H.L.I. Bornett, J.H. Guy, & P.J. Cain, *Impact of Animal Welfare on Costs and Viability of Pig Production in the UK*, 16 J. AGRIC. ENVTL. ETHICS 163–86 (2003) (comparing profitability of different pig-rearing systems and concluding that pig welfare can be improved significantly with a modest increase in cost, but that the current higher cost for pigs raised in high welfare systems must be maintained if high welfare producers are to continue to be profitable); cf. Dermot J. Hayes & Helen H. Jensen, *Lessons from the Danish Ban on Feed-Grade Antibiotics*, CTR. FOR AGRIC. AND RURAL DEV., Briefing Paper 03-BP 41 (2003), available at <http://www.card.iastate.edu/publications/DBS/PDFFiles/03bp41.pdf> (presenting an economic analysis of the consequences of a ban on antibiotic use in food animals in the United States).

88. E.g., P.H. Hemsworth, G.J. Coleman, J.L. Barnett & S. Borg, *Relationships between Human-Animal Interactions and Productivity of Commercial Dairy Cows*, 78 J. ANIMAL SCI. 2821, 2821–31 (2000); P.H. Hemsworth, G.J. Coleman, J.L. Barnett, S. Borg & S. Dowling, *The Effects of Cognitive Behavioral Intervention on the Attitude and Behavior of Stockpersons and the Behavior and Productivity of Commercial Dairy Cows*, 80 J. ANIMAL SCI. 68, 68–78 (2002); P.H. Hemsworth, G.J. Coleman, & J.L. Barnett, *Improving the Attitude and Behavior of Stockpersons toward Pigs and the Consequences on the Behavior and Reproductive Performance of Commercial Pigs*, 39 APPLIED ANIMAL BEHAV. SCI. 349, 349–62 (1994); B.D. Voisinet, T. Grandin, J.D. Tatum, S.F. O'Connor & J.J. Struthers, *Feedlot Cattle with Calm Temperaments Have Higher Average Daily Gains than Cattle with Excitable Temperaments*, 75 J. ANIMAL SCI. 892, 892–96 (1997).

89. E.S. Jolly, J.B. Gaughan, & A.K. King, *Environmental Enrichment for Neonatal Pigs and its Influence on Post Weaning Aggression*, 80 J. ANIMAL SCI. 25, 25–26 (Supp. 1 2002).

90. A. Sevi, M. Albenzio, G. Annicchiarico, M. Caroprese, R. Marino & L. Taibi, *Effects of Ventilation Regimen on the Welfare and Performance of Lactating Ewes in Summer*, 80 J. ANIMAL SCI. 2349, 2349–61 (2002).

91. L.A. Werth, S.M. Azzam, M.K. Nielsen, & J.E. Kinder, *Use of a Simulation Model to Evaluate the Influence of Reproductive Performance and Management Decisions on Net Income in Beef Production*, 69 J. ANIMAL SCI. 4710, 4710–21 (1991).

92. C.A. Lunam, A.M. de Passille, & J. Rushen, *Neuroma Formation following Tail Docking of Dairy Calves*, 80 J. ANIMAL SCI. Supp. 1/85 J. DAIRY SCI. Supp. 1 (2002); C.B. Tucker & D.M. Weary, *Tail Docking in Dairy Cattle*, 11 ANIMAL WELFARE INFO. CTR. BULLETIN 3–4 (Winter 2001–Spring 2002).

VII

CONCERNS AND COUNTERARGUMENTS

Because disclosure strategies are so modest, we believe it is not easy to defend serious objections and counterarguments. But it is possible to identify some directions from which criticisms might be launched.

The first set of objections would come from those committed to animal welfare and animal rights. As we have suggested, those concerned about animal suffering will challenge the idea that the protection of animals should depend on how much human beings are willing to pay to reduce that suffering. In many contexts, the willingness-to-pay criterion is wholly inadequate. Various civil rights statutes forbid discrimination, and they do not stand or fall on the basis of an assessment of whether consumers, or potential victims of discrimination, are willing to pay a specified amount to reduce discrimination. The Endangered Species Act does not protect endangered species only to the extent that consumers are willing to pay enough to ensure their protection. If animal suffering is an independent concern—and our argument suggests that it is—then a market in such suffering seems wholly inadequate, perhaps even a kind of joke.

We have offered no challenge to the idea that the suffering of animals ought not to depend on how much people are willing to pay to prevent it. But at the very least, people should be allowed to provide further protection to animals if they are willing to pay for that protection. A serious problem with the current situation is that it does not provide an easy mechanism by which people can express their moral commitments. Even if such a mechanism would do far less than ought to be done, the argument on its behalf is straightforward. Those who have especially strong commitments to animal rights and animal welfare should welcome a step in this direction—if only because it will increase the visibility of the practices to which they object, in a way that might well lead to more significant change. Recall that our proposal is agnostic on the most ambitious claims about human treatment of animals; the hope is that disclosure strategies might be favored by those with competing views about those claims.

We can imagine a different kind of objection. Why should disclosure principles focus on the use of animals? There are many possible candidates for disclosure to consumers, even if food is our only concern. Disclosure might be encouraged or mandated for environmental effects, salaries of high-level employees and salaries of low-level employees, workplace accidents, layoffs, charitable activities on the part of firms, and much more. For all of these items, consumers might be willing to pay something to ensure compliance with their moral commitments. But a market in morality might create a range of problems. For one thing, consumers might not have an adequate understanding of the meaning of any particular disclosure, and their reactions might not be entirely rational. (What is the rational response to significant layoffs in the last year, or to \$25,000 annual salaries for many employees?) There is also a serious

question of priority-setting: Why should any particular item be singled out for disclosure, as opposed to various others?

These are perfectly legitimate questions, and our proposal does not make any general claims about the limits of disclosure or even about priority-setting. With respect to animal welfare, the argument for disclosure stems from the evident fact that many consumers do care, rationally, about suffering, and from the expectation that disclosure can be undertaken in a way that will be genuinely informative. Perhaps other information presents at least as strong an argument for disclosure. But it is not easy to find other areas in which existing moral commitments are so palpably ill-served by existing markets simply because the underlying practices are invisible.

VIII

CONCLUSION

With respect to animal welfare, people's practices do not correspond to their moral judgments, simply because people lack basic information about how animals are treated. A key question is how to make those practices more visible so as to enable consumers to choose as they wish. Our motivation here has been a belief that much more can be done to provide consumers with information that will enable them to make choices that fit with their values.

Existing animal-welfare certification and assurance programs run by trade groups and animal-welfare organizations are steps in the right direction—but they are no more than that. A better labeling system could improve both market processes and democratic ones. It would improve markets because many consumers care about animal welfare, and they lack relevant information when they decide what to buy and what to eat. A degree of market competition, with respect to the treatment of animals, would be valuable for human beings and animals alike. A labeling system would improve democratic processes as well, because it would ensure that political judgments be based on a real awareness of the stakes. The most modest step, helping to accomplish similar goals, would be a website that collects relevant information about the treatment of animals used for food. But we have explored approaches that go well beyond that modest step by ensuring labeling that informs consumers of animal treatment.

Defenders of animal rights are most unlikely to believe that a labeling regime will do all of what must be done. In their view, more aggressive measures, directly forbidding the cruelty and mistreatment, would be far better. But our goal here has been far more modest. A serious problem lies in the mismatch between people's moral commitments and their actual practices. A disclosure regime might not bring human practices into alignment with what morality requires, but it would have the important virtue of moving those practices in the direction of existing moral beliefs.