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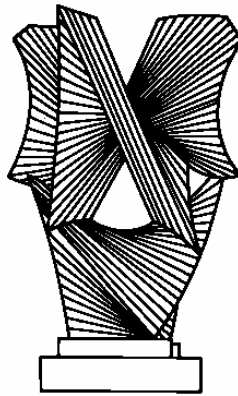
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Animal Rights without Controversy[♦]

Jeff Leslie^{*} and Cass R. Sunstein^{**}

Abstract

Many consumers would be willing to pay something to reduce the suffering of animals used as food. The problem is that 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.

I. 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 . . . 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

[♦] Many thanks are due to the McCormick Companions' Fund for its support of the Chicago Project on Animal Treatment Principles, out of which this paper arises. Excellent research assistance was provided by Salma Bakht, Susie Cowen, Laura Lалlos, Vicki Lovei, Arden Rowell, and Ben Sirota.

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¹ See Richard A. Posner, “Animal Rights: Legal, Philosophical, and Pragmatic Perspectives,” in *Animal Rights: Current Controversies and New Directions* 74 (Cass R. Sunstein and Martha C. Nussbaum eds. 2004).

² Richard A. Epstein, “Animals as Objects, or Subjects, of Rights,” in *id.* at 157.

prominent defender of animal rights, contends that animals should have “the right not to be treated as our property.”³

We believe that 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 recent 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 probably 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.

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. We believe that if those practices were highly visible, they would change, because many people already believe that they are morally unacceptable. This point makes existing treatment of animals extremely unusual. A great deal of progress could be made, not by challenging existing moral judgments, but by ensuring that they are actually respected.

Our goal here is to suggest a simple way to bring our practices and our 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 have the virtue of making markets work

³ Gary L. Francione, “Animals—Property or Persons?” in *id.* at 108.

⁴ See David Foster, “Animal-Rights Tenets Are Gaining Support in U.S., Poll Shows,” *The Seattle Times*, December 3, 1995, p.A4. Ninety-one percent of Americans also believe that the U.S. Department of Agriculture should be involved in safeguarding human treatment of animals. See Amanda Tolles with Steve Dyott, “Consumers Seek to Curb Farm Animal Suffering,” *96 Business & Society Review* 19 (Winter 1996). A study on New Jerseyans’ opinions on animal treatment found that the vast majority of consumers were opposed to several treatment practices common among producers: 83% 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; 82% were against cutting off the tails of cows or pigs without use of pain killers; 81% were against withholding food from chickens for up to 14 days to increase egg production; 78% were against transporting livestock that are emaciated or unable to stand up; and 74% 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), available at http://www.njfarmers.org/NJ_opinions.pdf (last visited February 9, 2006). The study also asked how important it was to respondents that farm animals and livestock in New Jersey be treated humanely; 65% replied that it was very important and 24% somewhat important. *Id.* at 16.

better; it would also have the advantage of ensuring more and better in the way of 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. We might, in short, obtain an agreement on a relevant practice – one of disclosure – amidst uncertainty or disagreement about the most fundamental issues, and protect animals from serious suffering in the process. To understand these claims, it is necessary to back up a bit.

II. Laws and Gaps

In 1789, the year of 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 withheld 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? The question is not, Can they reason? Nor, Can they talk? But, Can they suffer?”⁵

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.⁶ 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 “rights.”⁷ But if the idea of rights is taken in the pragmatic terms of positive law, to mean legal protection against harm, then many animals already do have rights, because they enjoy such protection. And if we take “rights” to mean a moral claim to such protection, there is general agreement that animals do have rights of certain kinds.

⁵ See Jeremy Bentham, *The Principles of Morals and Legislation* 310-11 n 1 (Prometheus 1988).

⁶ 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 50 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).

⁷ 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* (The Tanner Lectures on Human Values) ch. 6 (Harvard Univ. Press 2005).

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.⁸ 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 law contains a wide range of protections against cruelty and neglect.⁹

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 inhuman manner, or in such a way as to subject it to torture or suffering, conditions that can come about through neglect.¹⁰ People who transport an animal on railroads or cars are required to allow the animal out for rest, feeding, and water every five hours.¹¹ Nonowners who have impounded or confined an animal are obliged to provide good air, water, shelter, and food.¹² Those who abandon an animal in public places, including a pet, face criminal penalties.¹³ A separate provision forbids people from torturing, beating, maiming, or killing any animal, and also requires people to provide adequate food and drink.¹⁴

Indeed New York makes it a crime not to provide necessary sustenance, food, water, and shelter.¹⁵ New York also forbids overworking an animal, or using the animal for work when she or he is not physically fit.¹⁶ Compare in this regard the unusually protective California statute, which imposes criminal liability on negligent as well as intentional overworking, overdriving, or torturing of animals.¹⁷ “Torture” is defined not in its ordinary language sense, but to include any act or omission “whereby unnecessary or unjustified physical pain or suffering is caused or permitted.”¹⁸

⁸ See Rene Descartes, *Discourse on the Method and Meditations on First Philosophy* 34-36 (David Weissman ed., Yale Univ. Press 1996) (1637).

⁹ See *supra* note 6.

¹⁰ See NY Agr & Mkts Law § 359(1) (McKinney 1991 & Supp 2002).

¹¹ See *id.* § 359(2).

¹² See *id.* § 356.

¹³ See *id.* § 355.

¹⁴ See *id.* § 353.

¹⁵ See *id.* §§ 353, 356.

¹⁶ See *id.* § 353.

¹⁷ See Cal Penal Code §§ 597(b), 599b (West 1999).

¹⁸ *Id.* § 599(b).

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, and for two major reasons. First, enforcement can occur only through public prosecution. If horses and cows are 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. The anticruelty prohibitions sharply contrast, in this respect, 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 do not apply to the use of animals for medical or scientific purposes. Much more important, 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;¹⁹ twenty-three million chickens and some 268,000 pigs are slaughtered every day.²⁰ 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.”²¹

Consider, for example, the lives of pregnant pigs, who spend much of their time in small metal stalls, lined up in such a way that they are unable to turn around and can

¹⁹ See David J. Wolfson and Mariann Sullivan, “Foxes in the Hen House: Animals, Agribusiness and the Law: A Modern American Fable,” in *Animal Rights: Current Controversies and New Directions* 206 (Cass R. Sunstein and Martha C. Nussbaum eds. 2004). 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.*

²⁰ See *id.*

²¹ See *id.* at 217-18.

take only a single step forward or back. After giving birth, they are impregnated again, and again, until they are slaughtered at three years of age.²² For their part, young calves spend their lives in small wooden stalls, disabling them from turning around. To ensure that their flesh remains white, calves are frequently kept anemic.²³ Almost all egg-producing chickens live in battery cages; more specifically, eight or more hens are typically placed in cages that are twenty inches by nineteen inches. These birds 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, inevitable in such close quarters. Because beaks are the major method by which hens explore their world, the loss of beaks causes lifelong suffering.²⁴

This is simply an illustration of the kind of suffering that is ensured by existing practices.²⁵ Short of radical change, of the kind that is sought by some animal rights activists, what might be done by way of correction?

III. 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. On this view, representatives of animals should 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

²² See *id.* for a description of customary pig farming practices.

²³ See *id.* at 219.

²⁴ See *id.* at 218 for a description of customary chicken farming practices.

²⁵ For a more detailed overview, see Peter Singer, *Animal Liberation* 95-157 (rev. ed., Ecco 2002) (1975).

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.²⁶ Battery cages have been prohibited in Switzerland, which also requires calves to receive sufficient iron in their diets.²⁷ The United Kingdom forbids both anemic diets for veal calves and also veal crates.²⁸ 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.²⁹

The United States could easily move in this direction - and it could do so without getting into especially contested moral territory. But we suggest an alternative, or perhaps complementary, 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.³⁰ 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.³¹ So too, the National Environmental Policy Act makes agencies discuss, in public, the environmental effects of their activities, so that citizens can bring their concerns to bear.³² 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;³³ much more ambitiously, food is now

²⁶ See Wolfson and Sullivan, *supra* note 19, at 222.

²⁷ See *id.*

²⁸ See *id.*

²⁹ See *id.* For an overview, see Peter Stevenson, *European Union Law on the Welfare of Farm Animals* (2004), available at http://www.ciwf.org.uk/publications/reports/EU_Law_2004.pdf (last visited February 1, 2006).

³⁰ For an overview, see Mary Graham, *Democracy by Disclosure: The Rise of Technopopulism* (2002); Cass R. Sunstein, *Risk and Reason: Safety, Law, and the Environment* 191-228 (2002).

³¹ See 42 U.S.C. §11023; for a discussion of the success of the Toxic Release Inventory, see Archon Fung and 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).

³² See 42 U.S.C. §§ 4321-4270 (2000).

³³ See the Comprehensive Smoking Education Act, 15 U.S.C. §§ 1331-1340 (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

sold with information about the ingredients and nutritional content.³⁴ In all of these contexts, significant behavioral changes have occurred.³⁵

It is worth underlining the two different justifications for disclosure strategies. First, such strategies can make markets work better, 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 make a purchasing decision, they care whether it will do what it is supposed to do, and also 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 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, where money may be paramount, will dampen their ordinary moral concerns; perhaps the obvious collective action problem may lead many consumers to pay little attention on the theory that their individual decisions will have little 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.

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).

³⁴ See Federal Food, Drug, and Cosmetic Act, 21 U.S.C. § 343(i) (2001) (requiring ingredient list to avoid misbranding) and § 343(q) (requiring nutritional information to avoid misbranding).

³⁵ See Council on Env'tl. 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); Madhu Khanna et al., *Toxic Release Information: A Policy Tool for Environmental Protection*, 36 *J. Env'tl. Econ & Mgmt.* 243, 243-45 (1998) (discussing the regulatory effect of the Toxic Release Inventory on industry behavior); Fung and O'Rourke, *supra* note 31, at 115 (detailing the success of the TRI and recommending application of TRI structure to other contexts); Sunstein, *supra* note 30, at 191-228 (discussing the effects of various informational regimes).

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 that they are purchasing. 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 perhaps 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? Does not the welfare of animals count, independently of how much human beings 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.³⁶ But at least it can be said that for those who are interested in animal welfare, a movement in the direction of the 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 of interest,

³⁶ Clearly, those who believe that we 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.

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 that 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.

IV. 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, headquartered in the United Kingdom.³⁷ Various animal welfare organizations in the United States and Canada have followed suit with their own guidelines, including Humane Farm Animal Care,³⁸ the American Humane Association,³⁹ the Animal Welfare Institute,⁴⁰ and the

³⁷ The RSPCA guidelines program began in 1994. See Freedom Food – About Us, at <http://www.rspca.org.uk/servlet/Satellite?pagename=RSPCA/RSPCARedirect&pg=AboutUs> (last visited February 8, 2006). For the RSPCA’s substantive guidelines, see RSPCA Welfare Standards for Chickens (January 2002 edition); RSPCA Welfare Standards for Beef Cattle (June 2000 edition); RSPCA Welfare Standards for Dairy Cattle (August 2004 edition); RSPCA Welfare Standards for Ducks (February 2006 edition); RSPCA Welfare Standards for Laying Hens and Pullets (February 2006 edition); RSPCA Welfare Standards for Pigs (October 2003 edition); RSPCA Welfare Standards for Farmed Atlantic Salmon (June 2002 edition); RSPCA Welfare Standards for Sheep including Dairy Sheep (September 2001 edition); RSPCA Welfare Standards for Turkeys (August 2004 edition). All welfare standards are available at <http://www.rspca.org.uk/servlet/Satellite?pagename=RSPCA/RSPCARedirect&pg=welfarestandards> (last visited February 8, 2006).

³⁸ See Humane Farm Animal Care, Animal Care Standards: Beef Cattle (2004 edition); Animal Care Standards: Broiler Chickens (2004 edition); Animal Care Standards: Egg Laying Hens (2004 edition); Animal Care Standards: Dairy Cows (2004 edition); Animal Care Standards: Dairy, Fiber, and Meat Goats (2005 edition); Animal Care Standards: Pigs (2004 edition); Animal Care Standards: Sheep (including dairy sheep) (2005 edition); Animal Care Standards: Turkeys (2004 edition); Animal Care Standards: Young Dairy Beef (2005 edition). All guidelines are available with registration at <http://www.certifiedhumane.com/documentation.asp> (last visited January 31, 2006).

³⁹ See the American Humane Association, Free Farmed Certification Program website at <http://www.americanhumane.org/freefarmed> (last visited January 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.

⁴⁰ See Animal Welfare Institute, Humane Husbandry Criteria for Pigs (updated 2004); Humane Husbandry Criteria for Beef Cattle and Calves (updated 2005); Humane Husbandry Criteria for Rabbits

British Columbia Society for Prevention of Cruelty to Animals.⁴¹ Some of these groups, like the 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,⁴² and the American Humane Association sponsors the “Free Farmed” logo.⁴³ Trade groups that have adopted humane animal husbandry guidelines include the American Meat Institute,⁴⁴ the National Chicken Council,⁴⁵ the National Pork Board,⁴⁶ United Egg Producers,⁴⁷ 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.⁴⁸

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 increases neglect, cruelty, and suffering, simply because producers will lose customers if they take animal-protective steps. Imagine too that if they seek to protect animal welfare, companies need

(updated 2003); Humane Husbandry Criteria for Ducks (updated 2004); Humane Husbandry Criteria for Sheep (updated 2006). All welfare standards are available at <http://www.awionline.org/farm/standards.htm> (last visited January 31, 2006).

⁴¹ See British Columbia Society for the Prevention of Cruelty to Animals, SPCA Certified: Standards for the Raising & Handling of Laying Hens; Standards for the Raising & Handling of Broiler Chickens; Standards for the Raising & Handling of Beef Cattle; Standards for the Raising & Handling of Pigs; Standards for the Raising & Handling of Dairy Cattle. All welfare standards can be requested from the program website at <http://www.spc.bc.ca/farm/standards.asp> (last visited January 31, 2006).

⁴² See *supra* note 38; for more details on the “Certified Raised and Handled” logo, see <http://www.certifiedhumane.com> (last visited on January 31, 2006).

⁴³ See *supra* note 39.

⁴⁴ See American Meat Institute, Recommended Animal Handling Guidelines and Audit Guide (2005 edition), available at http://www.meatami.com/Template.cfm?Section=Animal_Welfare1&CONTENTID=3256&TEMPLATE=/ContentManagement/ContentDisplay.cfm (last visited January 31, 2006).

⁴⁵ See National Chicken Council, Animal Welfare Guidelines and Audit Checklist (2005 edition), available at <http://www.nationalchickencouncil.com> (last visited January 31, 2006).

⁴⁶ See National Pork Board, Swine Welfare Assurance Program Manual (2003 edition), available at <http://www.pork.org/Producers/SWAP/swapManual.aspx> (last visited January 31, 2006).

⁴⁷ See United Egg Producers, Animal Husbandry Guidelines for U.S. Egg Laying Flocks (2005 edition), available at <http://www.uepcertified.com/abouttheprogram.html> (last visited January 31, 2006).

⁴⁸ See the Animal Welfare Audit Program (AWAP) website at <http://www.awaudit.org> (last visited January 31, 2006). Audit program documents are not available online, but can be requested from SES, Inc., which administers AWAP, by calling (913) 307-0056 or writing Eric Hess or Frank Bryant, SES, Inc., 6750 Antioch Road, Suite 305, Merriam, Kansas, 66204. The AWAP audit documents are also on file with the authors.

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 activities comply with certain baseline moral requirements. Second, they 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 regulation. Finally, they 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 that is 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.⁴⁹

Guidelines of this sort could in theory 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,

⁴⁹ See the Swine Welfare Assurance Program, *Why a Welfare Assurance Program?* at <http://www.porkboard.org/SWAPHome> (last visited February 1, 2006).

making comparisons exceedingly difficult. Consider the guidelines for pigs. The American Meat Institute's guidelines address humane handling and slaughtering practices at meatpacking facilities for pigs.⁵⁰ Humane Farm Animal Care adopts the AMI guidelines for slaughter, and 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.⁵¹ The Animal Welfare Institute guidelines and the National Pork Board guidelines each address farming practices for pigs but not slaughtering issues.⁵²

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 40 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 continuing assessment and education.⁵³ 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.⁵⁴ Many of the guidelines are quantitative -- laying out, for instance, precise dimensions of farrowing pens for pigs,⁵⁵ and specifying permissible water flow rates required in drinking systems.⁵⁶

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

⁵⁰ See supra note 44.

⁵¹ See supra note 38, Animal Care Standards: Pigs (2004 edition).

⁵² See supra notes 40 and 46.

⁵³ See supra note 46.

⁵⁴ See supra note 40, Humane Husbandry Criteria for Pigs (updated 2004).

⁵⁵ See, e.g., Humane Farm Animal Care, Animal Care Standards: Pigs 9 E22 (2004 edition) (requiring that farrowing pens be a minimum of 5 x 7 ft., but recommending pens of 10 ft. x 10 ft., with a piglet protection zone of at least 8 sq.ft.), available with registration at <http://www.certifiedhumane.com/documentation.asp> (last visited January 31, 2006).

⁵⁶ See, e.g., id. at 4 FW 16 (requiring a minimum flow rate of .75-quarts/minute for drinkers used by lactating sows).

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.⁵⁷ 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,⁵⁸ and the American Humane Association maintains the “Free Farmed” certification and labeling program.⁵⁹ 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.⁶⁰ On the industry side, only the United Egg Producers (UEP) has developed a certification program.⁶¹ To be certified to carry UEP’s “Animal Care Certified” label on its eggs, a producer must follow UEP’s guidelines at all of its production facilities, file a monthly compliance report with UEP, and pass an annual audit conducted by independent auditors designated and approved by UEP.⁶²

The Certified Humane, Free Farmed, and Animal Care Certified 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.

⁵⁷ 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. See Alberta Cattlefeeders’ Association, “AMI Board Votes to Make Animal Welfare a Non-Competitive Issue: Vote Signifies Industry’s Ongoing Commitment to Optimal Animal Handling in Plants,” October 24, 2002, available at www.cattlefeeder.ab.ca/manure/trade021024.shtml (last visited February 2, 2006).

⁵⁸ See supra note 38.

⁵⁹ See supra note 39.

⁶⁰ See Certified Humane Certification Program Frequently Asked Questions at <http://www.certifiedhumane.org/faq.html> (describing the Certified Humane certification process) (last visited February 1, 2006); The Free Farmed Certification Process at http://www.americanhumane.org/site/PageServer?pagename=pa_farm_animals_ff_cert_process (describing the Free Farmed certification process) (last visited February 1, 2006).

⁶¹ See supra note 47.

⁶² See Requirements of a United Egg Producers Certified Company at <http://www.uepcertified.com/abouttheprogram.html> (last visited February 1, 2006). Of 204 applicants for certification, only eleven have failed the first audit. Failed applicants are given 60 days to improve conditions; only one producer has failed a second time. Telephone interview with Gene Gregory, Senior Vice President, United Egg Producers, October 7, 2004.

The American Meat Institute promotes regular self-audits by slaughter plants to measure their compliance with AMI's animal welfare guidelines.⁶³ 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.⁶⁴ 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.⁶⁵

Perhaps the most robust program on the industry side is the Animal Welfare Assurance Program established by the Food Marketing Institute (FMI) and the National Council of Chain Restaurants (NCCR). 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.⁶⁶ The Animal Welfare Assurance Program (AWAP) measures compliance with those standards through a fee-based inspection and monitoring program similar to the Certified Humane and Free Farmed programs described above. In contrast to those programs, however, the AWAP approach confers no certification or license to carry a particular logo or label, and AWAP participants are free to retain their own auditors, choosing them from among the inspectors who are certified by the AWAP administrator and who have bid for the job.⁶⁷ Requests for audits, and audit results, are confidential.⁶⁸ In the period between 2004 and 2005, six non-poultry slaughter audits were completed under the AWAP program. In the current year, 2005 through 2006, two dairy, five poultry slaughter, one non-poultry slaughter and 16 broiler AWAP audits have been completed.⁶⁹ All audit results are confidential and can only be released by the audited facility.⁷⁰

⁶³ See supra note 44 at 4.

⁶⁴ See supra note 49.

⁶⁵ See Swine Welfare Assurance Program, How do I participate in SWAP as a Producer? <http://www.pork.org/Producers/SWAP/SWAP.aspx> (last visited February 1, 2006).

⁶⁶ See supra note 48.

⁶⁷ For a description of AWAP's audit program, see their website at <http://www.awaudit.org/> (last visited February 1, 2006).

⁶⁸ Id.

⁶⁹ Id.

⁷⁰ <http://www.awaudit.org/DesktopModules/ViewAnnouncements.aspx?AnnId=13>

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. 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 are important and valuable. In terms of delivering useful information to consumers, however, these regimes have serious flaws. What might be done instead?

V. A Modest Proposal

We propose that food producers should make disclosures about their treatment of animals in a way that is genuinely useful to consumers. The foundation for this proposal is the belief that 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 (certainly not all) consumers should be expected to be willing to pay for more in the way of animal welfare. In addition, we believe that moral beliefs with respect to treatment of animals should be 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 undoubtedly be stunned to see the magnitude of the suffering produced by current practices.⁷¹ But deliberative discussion cannot occur unless citizens have the information with which to engage in it.

⁷¹ In fact, the Better Business Bureau 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 adds: Better Business Bureau disputes humane claim,” May 11, 2004, reported at <http://www.msnbc.msn.com/id/4951194/> (last visited February 2, 2006). 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 to label eggs as “United Egg Producers Certified.” Alexei Barrionuevo, “Egg Producers Relent on Industry Seal,” *The New York Times*, October 4, 2005, at C18.

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, is 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 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, we suggest that 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? We do not attempt to create a blueprint here. Our 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,⁷² 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

⁷² See supra notes 30-35.

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.⁷³

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.⁷⁴ Nor is industry missing the mark in reacting in this way. Many people believe that human beings can and should take more steps to reduce animal suffering, and this concern is reflected in public opinion surveys,⁷⁵ studies on consumer's willingness to pay higher prices for better treatment of animals,⁷⁶ and the growing consumer interest in products that make claims regarding humane treatment of animals.⁷⁷ 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.

⁷³ 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 CFR § 101.9(j)(2)(i). 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.

⁷⁴ See supra notes 44-49.

⁷⁵ See supra note 4.

⁷⁶ See, e.g., David Dickinson & DeeVon Bailey, "Willingness-to-Pay for Information: Experiential Evidence on Product Traceability from the USA, Canada, the UK, and Japan," 12-13 (Utah State University Economic Research Institute Study Paper # 2003-12) (2003) (showing that consumers are willing to pay 4-9% more for pork and 9-28% more for beef that carries additional guarantees of humane animal treatment and meat safety), available at <http://www.econ.usu.edu/Research/03/ERI2003-12.pdf> (last visited February 2, 2006); R.M. Bennett, J. Anderson, and R.J.P. Blaney, "Moral Intensity and Willingness to Pay Concerning Farm Animal Welfare Issues and the Implications for Agricultural Policy," *J. Agric. And Env't'l Ethics* 15:187, 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).

⁷⁷ See "Consumer Views on Animal Production Pushing Toward More Ethical Husbandry," *Feedstuffs Magazine* (Jan. 1, 2001) (discussing the industry impact of consumers' preferences for humane treatment of food animals), available online at <http://www.upc-online.org/010101feedstuffs.html> (last visited February 10, 2006); Swine Welfare Assurance Program, *Why a Welfare Assurance Program?* supra note 49 (explaining that increased consumer awareness of animal welfare necessitates proactive industry action).

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 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-labels⁷⁸ -- but this just pushes the problem up a level.

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 which, if consumers were confronted with them, may 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 -- about what, exactly, is being done to animals in the production of food. Suppose that 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 where it was revealed that Animal Care Certified standards permitted beak trimming, crowded cages, and similar conditions.⁷⁹ If so, then even 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 on underlying animal treatment practices. A new form of label could be designed that would clearly and simply indicate the

⁷⁸ See Consumer Union, <http://www.eco-labels.org/home.cfm> (last visited February 1, 2006). Consumer Union provides ratings for some labels but not others. "Certified Humane Raised and Handled" and "Free Farmed" labels are both rated "highly meaningful; the United Egg Producer's "Animal Care Certified" logo is not rated at all.

⁷⁹ See supra note 65.

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 in use in the various auditing and certification regimes surveyed earlier.⁸⁰ Instead of a guideline requiring that atmospheric ammonia in broiler chicken facilities not exceed so many parts per million,⁸¹ for example, a consumer-focused label might contain disclosure of the frequency with which chickens suffer from chemical burns caused by lying in unsanitary litter.⁸² Instead of a guideline on the handling and catching of birds,⁸³ a label might disclose the frequency of bruises, broken wings, and birds that are dead on arrival at the processing plant, all of which can result from rough handling.

⁸⁰ See Part IV, *supra*.

⁸¹ The National Chicken Council Guidelines require ammonia levels to be below 25 parts per million. See *supra* note 45. The Humane Farm Animal Care guidelines require that ammonia levels not exceed 10 parts per million on average and never exceed 25 parts per million. See *Animal Care Standards: Broiler Chickens*, *supra* note 38, at 7E23.

⁸² 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 Committee on Animal Health and Animal Welfare, *The Welfare of Chickens Kept for*

Meat Production (Broilers) 39-40 (2000) (produced for the European Commission Health & Consumer Protection Directorate-General), available at http://europa.eu.int/comm/food/fs/sc/scah/out39_en.pdf (last visited February 9, 2006). 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*, *Cooperative Extension Bulletin 1267 (2005)*, available at <http://pubs.caes.uga.edu/caespubs/pubs/PDF/B1267.pdf> (last visited February 9, 2006).

⁸³ 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 *supra* note 45, at 8.

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 also are 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 chemical burns, foot and leg deformities, and bruises and broken bones 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. 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 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. 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.

If a labeling 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 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 would come into play, including how much it would cost producers to increase adherence to animal welfare standards, to what extent producers would be able to pass these extra costs on to consumers, how quickly producers could, as a logistical matter, shift to more humane techniques, and how easily food retailers could switch 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 cost and other feasibility concerns.

Unfortunately, there is little systematic evidence one way or the other on the feasibility of humane food production practices in a global, industry-wide sense. An existing literature does address the feasibility of specific humane farming techniques,⁸⁴ 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,⁸⁵ piglets should have toys,⁸⁶ sheep should have moderate ventilation,⁸⁷ cows should not be continuously bred,⁸⁸ and dairy cows should not have

⁸⁴ See, e.g., H.L.I. Bornett, J.H. Guy, and P.J. Cain, "Impact of Animal Welfare on Costs and Viability of Pig Production in the UK," 16 *J. Agric. Env'tl. Ethics* 163-186 (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 and Helen H. Jensen, "Lessons from the Danish Ban on Feed-Grade Antibiotics," Center for Agricultural and Rural Development, Briefing Paper 03-BP 41 (June 2003) (available at <http://www.card.iastate.edu/publications/DBS/PDFFiles/03bp41.pdf>) (last visited February 9, 2006) (presenting an economic analysis of the consequences of a ban on antibiotic use in food animals in the United States).

⁸⁵ P.H. Hemsworth, G.J. Coleman, J. L. Barnett and S. Borg, "Relationships between Human-Animal Interactions and Productivity of Commercial Dairy Cows," 78 *J. Anim. Sci.* 2821-2831 (2000); P.H. Hemsworth, G.J. Coleman, J.L. Barnett, S. Borg and 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. Anim. Sci.* 68-78 (2002); Hemsworth, P.H., G.J. Coleman, and 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 Behavior Science*, 349-362 (1994); B.D. Voisinet, T. Grandin, J.D. Tatum, S.F. O'Connor and J.J. Struthers, "Feedlot cattle with calm temperaments have higher average daily gains than cattle with excitable temperaments," 75 *J. Anim. Sci.* 892-896 (1997).

⁸⁶ E.S. Jolly, J. B. Gaughan, and A. K. King, "Environmental enrichment for neonatal pigs and its influence on post weaning aggression," 80 *J. Anim. Sci.* 25-26 (Suppl. 1 2002).

⁸⁷ A.Sevi, M. Albenzio, G. Annicchiaric, M. Caroprese, R. Marino and L Taibi, "Effects of Ventilation regimen on the welfare and performance of lactating ewes in summer," 80 *J. Anim. Sci.* 2349-2361 (2002).

⁸⁸ L.A. Werth, S.M. Azzam, M.K. Nielsen, and 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. Anim. Sci.* 4710-4721 (1991).

their tails docked.⁸⁹ 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 in our minds, however, it is important to remember that there is nothing in a labeling system, in the form that we propose, 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. 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.

One other note. Our emphasis has been on disclosure through food labels, but a more modest approach would enlist the Internet so as 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 either of 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.

VI. Concerns and Counterarguments

Because disclosure strategies are so modest, we believe that it is difficult to support serious objections and counterarguments. But we can imagine the different 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

⁸⁹ C.A. Lunam, A.M. de Passille, and J. Rushen, Neuroma formation following tail docking of dairy calves, 80 *J. Anim. Sci. Suppl. 1/J. Dairy Sci.* Vol. 85, Suppl. 1 (2002). C.B. Tucker and D.M. Weary, Tail Docking in Dairy Cattle, *Animal Welfare Information Center Bulletin*, Winter 2001-Spring 2002, Vol. 11 No. 3-4

beings are willing to pay to reduce that suffering. In many contexts, the willingness to pay criterion is wholly inadequate. The Occupational Safety and Health Act requires employers to protect employees from certain risks, and it does not allow market forces to determine the level of worker 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 do not mean to challenge 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 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; our hope is that disclosure strategies might be favored by those with competing views about those claims.

Another objection is possible from a different direction. Why ought disclosure principles to focus on the use of animals? There are many possible candidates for disclosure to consumers, even if the focus is limited to food. Disclosure might be encouraged or mandated for environmental effects, salaries of high-level employees, salaries of low-level employees, workplace accidents, layoffs, charitable activities on part of firms, and 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 may 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?) For another, there is 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 we do not mean to 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.

Conclusion

With respect to animal welfare, people's practices do not correspond to their moral judgments, simply because the consequences of those practices are barely visible. 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 would be based on a real awareness of the stakes. We have referred to the possibility of a virtuous circle here. 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.

Defenders of animal rights are 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, we suggest, 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.

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