

THE ANTICRUELTY STATUTE: A STUDY IN ANIMAL WELFARE

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INTRODUCTION

Anticruelty statutes exist on the books of every state and are viewed as

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important, or at least potentially important, legislation by those who promote the animal *welfare* model of advocacy, a model which focuses on the humane treatment of animals rather than the prohibition of animal exploitation.¹ This Article contends that anticruelty statutes, while noble in theory, are ineffective in practice because they do not challenge the majority of modern practices that exploit animals. Broad exemptions for animal agriculture, animal experimentation, hunting, and other institutional or “customary” activities exist in some form in the anticruelty statutes of every state, whether drafted by legislatures or read in by courts.

Advocates of the animal welfare approach concede that anticruelty statutes suffer from many deficiencies but argue that the statutes could be improved, either legislatively or judicially. Legislatively, they argue, common exemptions could be removed or narrowed, thus increasing the amount of animal exploitation encompassed. Judicially, they argue, judges in those states without significant statutory exemptions could choose not to read such exemptions into the statutes. As this Article will show, however, neither of these paths can be fruitful in a legal framework that focuses on the humane treatment of animals rather than on their underlying exploitation. To make meaningful reductions in animal suffering requires that we stop using animals for human purposes, as dictated by the animal *rights* model of advocacy.

¹ The legislative framework for animal protection in the United States includes many state and federal laws, the most notable being state anticruelty statutes, the federal Animal Welfare Act, 7 U.S.C.S. §§ 2131-2159 (2005), and to a lesser extent the federal Humane Methods of Slaughter Act, 7 U.S.C.S. §§ 1901-1906 (2005). This article examines only anticruelty statutes. Commentators who have examined the Animal Welfare Act (AWA) and the Humane Methods of Slaughter Act (HMSA) have found them to be highly ineffective at preventing animal suffering. For criticism of the AWA, see GARY L. FRANCIONE, ANIMALS, PROPERTY, AND THE LAW 185-249 (1995) [hereinafter FRANCIONE, ANIMALS] (contending that the AWA focuses on animal treatment, not use; is symbolic rather than substantive legislation; is laxly administered by the U.S. Department of Agriculture; and, due to standing limitations on who may bring challenges under the AWA, is undercut because of the limited role of courts); Darian M. Ibrahim, *Reduce, Refine, Replace: The Failure of the Three R's and the Future of Animal Experimentation*, 2006 U. CHI. LEGAL F. (forthcoming 2006) (arguing that the “reduce, refine, and replace” approach to animal welfare, which is incorporated into the AWA, is underinclusive in both theory and practice). For criticism of the HMSA, see GAIL A. EISNITZ, *SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLECT, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY* 24 (1997) (“[V]iolations of the Humane Slaughter Act carry no penalties at all”); 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 205, 208 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (“There can be little doubt that the [HMSA] is not being effectively enforced”). The HMSA does not even apply to poultry, which makes up approximately 8.5 billion of the 9.5 billion farm animals slaughtered in the U.S. each year. *Id.*

Part I of this Article discusses the animal rights and animal welfare approaches and also the concept of “humane exploitation.” Part II introduces the anticruelty statute and proposes reasons why legislatures have littered many of these statutes with broad exemptions. It also explores whether these statutes can be legislatively reformed. Part III discusses the judicial interpretation of anticruelty statutes and the notion of interpreting these statutes to include a wider range of commonly accepted practices that harm animals.

I. ANIMAL RIGHTS, ANIMAL WELFARE, AND THE CONCEPT OF HUMANE EXPLOITATION

In his 1996 book *Rain Without Thunder: The Ideology of the Animal Rights Movement*,² Professor Gary Francione observed that there are two general approaches to animal advocacy: the animal welfare approach and the animal rights approach, which he promotes. The animal rights approach maintains that we ought to abolish, rather than regulate, animal exploitation through the application of both legal and non-legal measures. More specifically, Professor Francione urges animal advocates to seek the incremental eradication of the property status of animals through significant legislative prohibitions on animal use, although the political base for such change will only arise after significant social education about the benefits to animals, humans, and the environment that result from adopting a vegan diet (i.e., one that eschews all animal products).³

The animal welfare approach, on the other hand, seeks incremental improvements in the lives of exploited animals, but does not directly challenge the underlying exploitation itself or the property status of animals. Some advocates of the welfare approach, which Professor Francione refers to as

² GARY L. FRANCIONE, *RAIN WITHOUT THUNDER: THE IDEOLOGY OF THE ANIMAL RIGHTS MOVEMENT* 1 (1996) [hereinafter FRANCIONE, *RAIN*].

³ *Id.* at 190-219. See also Gary L. Francione, *Animals, Property, and the Law and Rain Without Thunder: Ten Years Later*, 70 *LAW & CONTEMP. PROBS.* (forthcoming 2006). Professor Tom Regan also argues in favor of a rights approach in his book *The Case for Animal Rights*. See generally TOM REGAN, *THE CASE FOR ANIMAL RIGHTS* (2nd ed. 2004). There are differences between the approaches proposed by Professors Francione and Regan, however. For instance, Professor Regan would ascribe rights only to animals he classifies as “subjects-of-a-life,” which he defines as “mentally normal mammals of a year or more,” *id.* at 78, while Professor Francione’s rights theory argues in favor of basic rights for any sentient being. See GARY L. FRANCIONE, *INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG?* xxxii-xxxiv (2000) [hereinafter FRANCIONE, *INTRODUCTION*] (critiquing Regan’s subject-of-a-life limitation on would-be rightsholders).

“new welfarists,”⁴ believe that this approach will later lead to rights. In theory, therefore, these advocates support the abolition of animal exploitation, yet their short-term focus remains on regulating such exploitation, making this somewhat of a hybrid approach.

As Professor Francione discusses in *Rain Without Thunder*, a central tenet of animal welfare—whether traditional welfare or new welfare—is that animal suffering can be significantly reduced even as animal exploitation continues (i.e., that animal exploitation can be effectively *regulated*). All animal welfare advocates seek measures that would require animals to be treated “humanely” and not subjected to “unnecessary suffering” even as their exploitation continues. This is the concept of “humane exploitation,” or as it is positively referred to, “humane treatment.” To determine whether an animal is subjected to unnecessary suffering, the human interests from animal exploitation must be balanced against the animal interests in not suffering.⁵ If the human interest prevails in any given situation, the animal suffering is permitted; if the animal interest prevails, the suffering is not permitted. Professor Francione persuasively argues, however, that the human interests will almost always prevail, and that in fact this is an “unbalanced balance,” because animals are classified as legal property while humans are classified as legal persons.⁶

Despite its claimed deficiencies, the welfare approach is the prevailing model of animal advocacy in the United States and other nations. For example, the Humane Society of the United States (HSUS), the world’s largest animal protection organization,⁷ states its mission as the creation of a “humane” world and seeks to promote “respect and compassion” for animals.⁸

⁴ FRANCIONE, RAIN, *supra* note 2, at 36 (defining “new welfarism” as the view that “the means to the long-term goal of animal rights is short-term welfarist reform”).

⁵ Professor Francione contends that this idea of a balancing test is the implementation of the utilitarian philosophy toward animal treatment first espoused by the eighteenth-century English philosopher Jeremy Bentham, and more recently by Professor Peter Singer. FRANCIONE, INTRODUCTION, *supra* note 3, at 130-50. For Bentham and Singer’s best-known writings on the subject of animals, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION, ch. XVII, § IV (J.H. Burns & H.L.A. Hart eds. Athlone Press 1970) (1781), and see generally PETER SINGER, ANIMAL LIBERATION (2nd ed. 1990).

⁶ See generally FRANCIONE, INTRODUCTION, *supra* note 3.

⁷ The HSUS has approximately 3.5 million members. DEBORAH RUDACILLE, THE SCALPEL AND THE BUTTERFLY: THE CONFLICT BETWEEN ANIMAL RESEARCH AND ANIMAL PROTECTION 294 (2000).

⁸ According to the HSUS website, “The mission of The Humane Society of the United States is to create a humane and sustainable world for all animals, including people, through education, advocacy, and the promotion of respect and compassion.” Mission Statement of

The HSUS does not seek rights for animals, but seeks to eliminate “gratuitous harm” and would “take into account [animal] interests” during exploitation.⁹ The well-known advocacy group People for the Ethical Treatment of Animals (PETA) also favors the welfare approach, even though PETA is thought of as a “radical” group that purports to seek animal rights, because PETA views the rights approach as “unrealistic.”¹⁰ Many legal scholars also support the welfare approach. For example, Professor Cass Sunstein believes that “meat-eating would be acceptable if decent treatment were given to the animals used for food,”¹¹ and Professor David Favre claims that “[i]t is the height of human arrogance to sacrifice the welfare of existing animals because the political system will not give complete and immediate satisfaction.”¹²

The welfare approach is also embodied in all U.S. animal protection laws, including state anticruelty statutes. These statutes seek to balance the human benefits from animal exploitation against the animal suffering that this exploitation requires. Anticruelty statutes often predetermine, however, that animals used for common institutional purposes such as food production or experimentation can *never* win this balancing test and therefore explicitly exempt customary institutional conduct from their scope. The remainder of this Article examines the efficacy of these statutes and argues that their deficiencies, which manifest themselves through the presence of broad exemptions, are linked to the fact that these statutes are welfare-oriented.

II. LEGISLATURES, SOCIETAL TENSION, AND THE INEFFECTIVE ANTICRUELTY STATUTE

A. *The Anticruelty Statute*

The legislatures of all 50 states and the District of Columbia have enacted anticruelty statutes that purport to protect animals against “unnecessary suffering,” “unjustified suffering,” or “cruel mistreatment.” For example, the Delaware anticruelty statute defines animal cruelty as “mistreatment

the Humane Society of the United States, http://www.hsus.org/about_us/hsus_at_a_glance_financials_board_and_mission/mission_statement_of_the_humane_society_of_the_united_states.html (last visited Jan. 17, 2006).

⁹ FRANCIONE, RAIN, *supra* note 2, at 43.

¹⁰ *Id.* at 33.

¹¹ Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 395 (2003).

¹² David Favre, *Integrating Animal Interests Into Our Legal System*, 10 ANIMAL L. 87, 90 (2004).

of any animal or neglect of any animal . . . whereby unnecessary or unjustifiable physical pain or suffering is caused.”¹³ Similarly, the South Carolina anticruelty statute states that “[w]hoever knowingly or intentionally . . . inflicts unnecessary pain or suffering upon any animal . . . is guilty of a misdemeanor.”¹⁴ Although anticruelty statutes may upon first glance appear to be meaningful legislation, they in fact provide a very narrow range of protection, often for only a limited subset of animals.¹⁵

Specifically, many of these statutes exclude from coverage the very activities that cause the vast amount of animal suffering, including food production, a category that alone constitutes approximately 98% of animal use nationwide, or approximately 9.5 billion farm animals slaughtered per year.¹⁶ Other numerically significant activities that are commonly exempted from coverage include animal experimentation, hunting, trapping, fishing, and forms of animal entertainment such as rodeos, zoos, and circuses.¹⁷ The efficacy of anticruelty statutes is further diminished by lax enforcement that stems from many factors, including “real or perceived limited resources; inexperienced staff; incomplete or botched investigations, pressure from the community to focus on other crimes; and personal or political bias against taking animal abuse seriously as a violent crime.”¹⁸

Anticruelty statutes are an encapsulation of the animal welfare approach in that they do not seek to prevent animal exploitation, but rather seek to prevent only animal “cruelty.”¹⁹ Stated differently, they do not seek to pre-

¹³ DEL. CODE ANN. tit. 11, § 1325 (2005).

¹⁴ S.C. CODE ANN. § 47-1-40 (2004).

¹⁵ FRANCIONE, ANIMALS, *supra* note 1, at 117-60 (detailing some of the reasons that anticruelty statutes are ineffective, which are linked to the status of animals as legal property).

¹⁶ See, e.g., Wolfson & Sullivan, *supra* note 1, at 206 (“Approximately 9.5 billion animals die annually in food production . . . [the industry has] persuaded legislatures to amend criminal statutes . . . so they cannot be prosecuted for any farming practice that the industry itself determines is acceptable”).

¹⁷ See Pamela D. Frasch et al., *State Animal Anticruelty Statutes: An Overview*, 5 ANIMAL L. 69 (1999) (discussing survey from 1999 which examined common exemptions in anticruelty statutes of every state).

¹⁸ *Id.* at 70. See also Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 IOWA L. REV. 1, 3 (2001) (“The flaw in the legal system lies with inadequate penalties for animal abuse and apathetic enforcement of existing laws.”); Wolfson & Sullivan, *supra* note 1, at 210 (“Enforcement of anticruelty statutes, like other criminal statutes, is left primarily to the police and public prosecutors, who have substantial other obligations to which they may assign a higher priority.”).

¹⁹ See Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, 10 ANIMAL L. 125, 131 (2004) (“Animal welfare theory forms the basis of most presently existing anti-cruelty and similar legislation in the United States”).

vent animal use, only animal mistreatment *given that use*. Anticruelty statutes attempt to balance human and animal interests, and the categorical exemptions listed above reveal instances where it has been predetermined that the human interest will always prevail.

Adherents to the welfare approach concede that anticruelty statutes have many deficiencies, but nevertheless argue that they have merit in theory and can be of some use in practice.²⁰ For instance, the Animal Legal Defense Fund (ALDF), the legal arm of the animal welfare movement, focuses its efforts on anticruelty prosecutions through its “zero tolerance for cruelty” campaign.²¹ Animal welfare advocates also contend that the deficiencies in anticruelty statutes can be fixed. For example, Stephan Otto, the director of legislative affairs for ALDF’s Anti-Cruelty Division, concedes that animal cruelty laws, including anticruelty statutes, are “less strong and comprehensive than might be desired” but argues that such laws “provide some statutory protections, raise awareness of animal abuse issues, and provide a foundation on which the next generation of laws may be developed.”²² Otto’s specific suggestion for reform is for legislatures to require that institutional exploitation be “reasonable”—in other words, to conduct the balance of human and animal interests on a case-by-case basis rather than predetermine its outcome in favor of humans. He states:

One simple, yet useful proposal for improving [anticruelty statute] exemptions is to change “customary and accepted practices” (a commonly used phrase) to “customary and reasonable practices.” Such a change would enable the trier of fact in animal abuse cases to determine whether a certain practice was reasonable, regardless of whether it may be customary. This change could result in the full prosecution of more abuse cases involving livestock.²³

²⁰ See Robert Garner, *Political Ideology and the Legal Status of Animals*, 8 ANIMAL L. 77, 83 (2003) (“Although the general anti-cruelty statutes that depend upon the difficult task of proving unnecessary suffering are not particularly effective, even these have some worth. As Tannenbaum remarks . . . ‘there is nothing in cruelty laws that prohibits the legal system from giving certain animal interests greater weight than has been done in the past.’”) (citations omitted); Sunstein, *supra* note 11, at 390 (“If taken seriously, [anticruelty statutes] would do a great deal to prevent animals from suffering, injury, and premature death.”).

²¹ See *Zero Tolerance For Cruelty!*, <http://www.aldf.org/action.asp?sect=action> (last visited Nov. 16, 2005) (discussing various Animal Defense League initiatives including the “zero tolerance” campaign).

²² Stephen K. Otto, *State Animal Protections Laws—The Next Generation*, 11 ANIMAL L. 131, 141 (2005).

²³ *Id.* at 145. David Wolfson argues that legislative improvements should be undertaken at the federal level to avoid industry capture of state legislatures:

The United States should legislate proper farming practices. In doing so, the government can reclaim, from the farming community, the power to define what is cru-

To properly address the suggestion that legislatures could retool anti-cruelty statutes, most notably by narrowing or removing broad exemptions, we must first understand the factors that cause many legislatures to include these exemptions.

B. Understanding Anticruelty Statute Exemptions

1. Societal Preference

Societal preference constitutes the primary reason why anticruelty statutes include broad exemptions. As representative bodies, legislatures are implementing a collective choice that society has made to allow the exploitation of animals so long as it produces a human benefit. This balancing effort stems from an ever-present tension in the human relationship with non-humans, or a “moral schizophrenia” as Professor Francione has characterized it.²⁴ On the one hand, when questioned about their beliefs, a majority of individuals say that they support the protection of animals from suffering.²⁵ On the other hand, society’s actions clearly demonstrate support for the continued use of animals, and the suffering it entails, where such use is of *any* benefit to society, no matter how trivial. In simple terms, when it comes to animals, society says one thing but does another.

This tension is palpable in anticruelty statutes. These statutes first purport to prohibit “unnecessary suffering,” “unjustified suffering,” or “cruel mistreatment.”²⁶ Yet the broad exemptions that follow reveal society’s desire to prohibit animal suffering only if it is *gratuitous*; i.e. sadistic, wasteful, or not resulting in a human benefit.²⁷ For example, as Professor Fran-

elty to animals. Given the intense economic pressures from agribusiness in certain states, the legislation should be federal to prevent amendments to state anticruelty statutes that effectively negate the law’s effect and result in uneven and inconsistent laws.

David J. Wolfson, *Beyond the Law: Agribusiness and the Systematic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 149 (1996).

²⁴ FRANCIONE, INTRODUCTION, *supra* note 3, at 1-30 (discussing how humans agree it is morally wrong for animals to suffer unnecessarily and yet allow animals to suffer unnecessarily on a regular basis).

²⁵ *See, e.g., id.* at xix (“Two-thirds of Americans polled by the Associated Press agree with the following statement: ‘An animal’s right to live free of suffering should be just as important as a person’s right to live free of suffering.’”).

²⁶ *See supra* notes 13-14 and accompanying text (giving two examples of anticruelty statutes that use such language).

²⁷ *See, e.g., McDonald’s v. Steel and Morris (McLibel)*, [1997] EWHC (QB), available at http://www.mcspotlight.org/case/trial/verdict/verdict_jud2c.html (last visited Feb. 1, 2006) (“The majority of people in [the U.K.] . . . eat meat and must be taken not to think badly of

cione has discussed at length, we buy the flesh of animals for food, their skin for leather, and their pelts for fur—activities that all cause animals tremendous pain and suffering, and none of which are *necessary* for humans to live and thrive.²⁸ It is well known that humans do not need to eat animal products to live or be healthy, and that the exclusion of such products from our diets leads to a reduction in many types of illness and disease.²⁹ Moreover, it is extremely difficult to argue that the use of animal products for clothing is necessary in this modern age of synthetic materials and other non-animal sources, such as cotton. Finally, the exploitation of animals for entertainment, including hunting, rodeos, and circuses, cannot be said to approach the level of a necessity.

For the most part, society does not question these everyday practices yet expresses outrage at conduct that results in similar or even less suffering but that produces no benefit to humans.³⁰ In effect, society's practical desire for the benefits of animal exploitation outweighs its theoretical desire that animals suffer only if necessary, and, consequently, the exceptions to anticruelty statutes swallow the rule. Facially, anticruelty statutes may indicate that they prohibit unnecessary suffering, but, as applied, what they prevent is gratuitous suffering, a much, much smaller subset of conduct. It is only logical that this societal tension is reflected in the legislative enactment of anticruelty statutes that prevent only gratuitous animal suffering.

those who are responsible for killing animals to provide that meat.”).

²⁸ See FRANCIONE, INTRODUCTION, *supra* note 3, at 9.

²⁹ See, e.g., Paul Appleby et al., *The Oxford Vegetarian Study: An Overview*, 70 AM. J. CLINICAL NUTRITION 525S (1999) (finding in a 16-year study of 6000 vegetarians and 5000 non-vegetarians in the U.K. that the vegetarians generally had lower LDL cholesterol levels and lower death rates for each of the mortality endpoints studied); P.K. Newby et al., *Risk of Overweight and Obesity Among Semivegetarian, Lactovegetarian, and Vegan Women*, 81 AM. J. CLINICAL NUTRITION 1267 (2005) (concluding that semivegetarian, lactovegetarian, and vegan women have a lower risk of being overweight and obese than do omnivorous women); P.A. Philips & M. Segasothy, *Vegetarian Diet: Panacea for Modern Lifestyle Diseases?*, 92 Q.J. MED. 529 (1999) (reviewing the beneficial effects of vegetarian diets, including lower risks of diabetes, coronary heart disease, ocular macular degeneration, and colon and breast cancers); Joan Sabate, *The Contribution of Vegetarian Diets to Health and Disease: A Paradigm Shift?*, 78 AM. J. CLINICAL NUTRITION 502S (2003) (concluding that well-balanced vegetarian diets could best prevent nutrient deficiencies as well as diet-related chronic diseases). But see Cass R. Sunstein, *Slaughterhouse Jive*, NEW REPUBLIC, Jan. 29, 2001, at 40 (reviewing GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS (2000)) (arguing that “eating animals seems to be an intermediate case” of necessity and suggesting that “eating animals is desirable” for a well-balanced diet).

³⁰ Consider, for example, the hoarding of large numbers of animals. See Colin Berry et al., *Long-Term Outcomes in Animal Hoarding Cases*, 11 ANIMAL L. 167 (2005) (discussing the practice of hoarding).

2. Legislative Capture

A second reason that anticruelty statutes contain broad exemptions is legislative capture by powerful interest groups that profit from exploiting animals.³¹ Groups that profit from animal exploitation, including agricultural corporations,³² vivisectors and pharmaceutical corporations,³³ and hunters/the National Rifle Association,³⁴ do wield considerable political power. In some states this power may be exacerbated; e.g., in rural states where animal agriculture is a large source of revenue.³⁵

³¹ See Wolfson & Sullivan, *supra* note 1, at 212 (arguing that “the farmed-animal industry has persuaded the majority of state legislatures to actually amend their criminal anticruelty statutes to simply exempt all ‘accepted,’ ‘common,’ ‘customary,’ or ‘normal’ farming practices It is hard to imagine any reason for this aggressive legislative agenda on the part of industry other than a fear that it is using farming methods that might be considered illegal under prior criminal law”); Wolfson, *supra* note 23, at 145 (“The power of the farming industry in the United States must be recognized in order to fully understand the conflict that such a simple subject as the prevention of cruelty to animals raises and the difficulties facing any attempted reform.”).

³² See James A. Albert, *A History of Attempts by the Department of Agriculture to Reduce Federal Inspection of Poultry Processing Plants – A Return to the Jungle*, 51 LA. L. REV. 1183 (1991) (tracing the history of meat inspection in the U.S. and criticizing the USDA’s efforts to ensure food safety); Dion Casey, *Agency Capture: The USDA’s Struggle to Pass Food Safety Regulations*, 7 KAN. J.L. & PUB. POL’Y 142 (1998) (discussing the capture of the USDA by the meat industry); Rebecca P. Lewandoski, *Spreading the Liability Net: Overcoming Agricultural Exemption with EPA’s Proposed Co-Permitting Regulation Under the Clean Water Act*, 27 VT. L. REV. 149, (2002) (stating that the powerful agricultural industry has been able to gain wholesale exemptions from environmental laws due to its active lobbying of the legislature); J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 308-309 (2000) (stating that, under “tremendous farm industry lobby pressure,” Congress extended the implementation phase-out date for methyl bromide, a dangerous pesticide used on crops); Betsy Tao, *A Stitch in Time: Addressing the Environmental, Health, and Animal Welfare Effects of China’s Expanding Meat Industry*, 15 GEO. INT’L ENVTL. L. REV. 321, 349 (2003) (arguing that the weakening of U.S. anticruelty statutes through exemptions and lack of enforcement is due to the significant political power wielded by the American agricultural industries).

³³ See, e.g., John C.P. Goldberg, *Twentieth-Century Tort Theory*, 91 GEO. L. J. 513, 560 (2003) (“[P]harmaceutical companies capture the regulatory process”).

³⁴ See, e.g., Dena M. Jones & Sheila Hughes Rodriguez, *Restricting the Use of Animal Traps in the United States: An Overview of Laws and Strategy*, 9 ANIMAL L. 135, 152 (2003) (attributing the failure of federal anti-trapping legislation to the efforts of powerful lobby groups representing hunting, trapping, agricultural, and commercial fur interests); see also Rachel Shaffer, *Child Access Prevention Laws: Keeping Guns Out of Our Children’s Hands*, 27 FORDHAM URB. L.J. 1985, 1987 (noting that gun lobbyists, such as the National Rifle Association, exert “extreme political power” on the legislative process).

³⁵ This is why David Wolfson has proposed that the regulation of animal agriculture be undertaken at the federal level. See Wolfson, *supra* note 23, at 149 (“Given the intense economic pressures from agribusiness in certain states, the legislation should be federal to prevent amendments to state anticruelty statutes that effectively negate the law’s effect.”).

But while legislative capture does contribute to the weakening of anti-cruelty statutes, it must be viewed in relation to the broader underlying factor: societal preference. Given the current societal preferences discussed in the previous section, the influence exerted by many interest groups, most notably agricultural interest groups, is not *undue* influence. Ninety-seven percent of Americans are not vegetarians, and ninety-nine percent of Americans are not vegans.³⁶ Public demand fuels the exploitation of animals by agribusiness corporations, and therefore it cannot be said that society objects to this exploitation. If these corporations are able to buy legislative influence, it is because consumers are providing them with the means and the motivation to do so.³⁷ Consequently, when legislatures include exemptions for food production, they are not acting in a counter-majoritarian fashion. Rather, they are implementing widely held societal beliefs that meat-eating is acceptable, and that meat, like any commodity, should be as affordable as possible.

A more difficult question is presented by hunting, the wearing of fur, and similar activities that harm animals, are legal, but that a majority of Americans do not engage in or support.³⁸ Here industry capture and public choice theory become more relevant.³⁹ To oversimplify matters, a small but vocal group supports the exploitation while a large but passive group does not. Lurking beneath the surface, though, is the question of why the larger

³⁶ The Vegetarian Resource Group, *How Many Vegetarians Are There?*, <http://www.vrg.org/journal/vj2000may/2000maypoll.htm> (last visited Jan. 26, 2006) (summarizing the results of the 2000 National Zogby Poll sponsored by the Vegetarian Resource Group showing 2.5% of the U.S. population was vegetarian and 0.9% was vegan).

³⁷ See SINGER, *supra* note 5, at 161-62. There, Singer observes:

The people who profit by exploiting large numbers of animals do not need our approval. They need our money. The purchase of corpses of the animals they rear is the main support the factory farmers ask from the public (the other, in many countries, is big government subsidies). They will use intensive methods as long as they can sell what they produce by these methods; they will have the resources needed to fight reform politically; and they will be able to defend themselves against criticism with the reply that they are only providing the public with what it wants.

³⁸ See, e.g., FRANCIONE, INTRODUCTION, *supra* note 3, at xix (“More than 50 percent of Americans believe that it is wrong to kill animals to make fur coats or to hunt them for sport.”); see also *id.* at 29 (noting that although “80 percent of Americans are in favor of banning the [leghold] trap, only five states have done so, and efforts to obtain a ban at the federal level have thus far been unsuccessful.”). But see Rob Walker, *Pelt Appeal: How a Little Bit of Fur Went a Long Way Toward Reviving a Taboo Fashion Item*, N.Y. TIMES, Feb. 12, 2006, Magazine, at 30 (noting the recent rise in fur sales and that a 2004 Gallup poll “found that 63 percent of respondents pronounced the buying and wearing of clothing made with animal fur ‘morally acceptable’”).

³⁹ See MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (rev. ed. 1971) (discussing public choice theory).

group is passive.

The answer could be that animal issues are simply not a high political priority for most people; but it could also be that most individuals in the passive group are not vegetarians. On a fundamental level, exploitation is exploitation, and the slaughtering of animals for food is no more necessary than the hunting of animals for sport. Therefore, if individuals opposed to hunting speak out against it, they risk being called hypocrites for eating meat.⁴⁰ It is a slippery slope, people soon realize, to ban one type of unnecessary animal exploitation without banning them all.

This concern is evident in recent attempts in the U.S. to ban the slaughter of horses for human consumption, a legislative measure that enjoys public support.⁴¹ The *Wall Street Journal* recently reported that “many farm-state lawmakers . . . want to keep [horse] slaughterhouses open, in part because closing them might embolden animal-rights groups and vegetarians to demand a ban on the slaughter of beef cattle, pigs and sheep.”⁴² As Iowa Congressman Steve King (quite correctly) asked, “[w]hat is the distinction between a steer, a hog and a horse?” Ironically, the Humane Society of the United States, the world’s largest animal welfare organization, has attempted to allay fears that a ban on the slaughter of horses will lead to a ban on the slaughter of farm animals.⁴³ In sum, even though the majority of

⁴⁰ For instance, in response to CNN footage of a Japanese dolphin drive hunt in Futo Harbor and the ensuing objections by Western nations, Mr. Komatsu, a Japanese delegate at the annual meeting of the International Whaling Commission in Australia, pointed out that in the host country:

[F]our or five million kangaroos are slaughtered every year for meat consumed domestically, for leather products exported to Europe and America, and for the diversion of the country’s famed ‘weekend hunters’ firing from careening trucks. Surely these scenes are no prettier than anything one might witness in Futo Harbor How, he wonders, would the Australian delegates care to see that on film, or the British delegates some footage of their own abattoirs, or the New Zealanders their lambs at slaughter, or the Americans their industrial hog farms?

MATTHEW SCULLY, *DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY* 149 (2002).

⁴¹ See Equine Protection Network, *Horse Slaughter Polls and Survey Results*, <http://equineprotectionnetwork.com/slaughter/polls.htm> (last visited Sept. 23, 2005) (collecting polling data from various states).

⁴² See Mary Jacoby, *Why Belgians Shoot Horses in Texas for Dining in Europe*, *WALL ST. J.*, Sept. 21, 2005, at A1, A8.

⁴³ The Humane Society’s website contains the following information:
Myth: A prohibition on horse slaughter creates a negative precedent for beef, pork, and poultry producers by legitimizing efforts to end consumption of food derived from any animal.
Fact: Americans don’t eat horses, and unlike other livestock, we don’t breed them for human consumption. Additionally, horses are different from cattle (and other

Americans do not themselves benefit from exemptions for hunting and similar activities, these exemptions are not necessarily counter-majoritarian in nature because of concerns that the removal of some exemptions in anti-cruelty statutes will lead to the removal of *all* exemptions.

3. Animals as Legal Property

A third factor contributing to the inclusion of broad exemptions in anti-cruelty statutes is the legal classification of animals as property. As Professor Francione has explained, economic theory tells us that rational property owners will only harm their animal property for good reason; i.e., if it will produce a societal benefit.⁴⁴ Therefore, anticruelty statutes need only protect against the irrational property owner—one who causes or allows harm to his property that is of no benefit to society. Viewed in this manner, the focus of anticruelty statutes on the prevention of gratuitous suffering is effectively a regulation of the irrational property owner, while the conduct of rational property owners is exempted.

4. Efficiency and Competency

Finally, reasons of efficiency and legislative competency argue for the inclusion of broad exemptions in the anticruelty statutes. Legislatures that exclude “customary” or “normal” practices have made a decision to allow industries to determine the level of animal exploitation that is most efficient and therefore legally permissible. Underlying this deference to industry custom is the assumption that the industry will have a relative advantage in expertise over legislatures to determine the amount of suffering necessary to accomplish a societally accepted benefit.⁴⁵ The foregoing are all reasons

animals specifically bred, sold, and transported for human consumption) due to their instinctive flight response in stressful conditions, making it difficult to accurately stun them prior to slaughter. Undercover footage has demonstrated that many horses are dismembered while fully conscious, underscoring the need to ban this utterly inhumane process. The American public overwhelmingly supports a ban on horse slaughter—horses have a special place in our heritage and they are beloved companions to millions today.

Humane Society of the United States, Common Myths about Horse Slaughter, http://www.hsus.org/pets/issues_affecting_our_pets/quine_protection/horse_slaughter_common_myths.html#Fact_Americans_dont (last visited Sept. 22, 2005).

⁴⁴ FRANCIONE, INTRODUCTION, *supra* note 3, at 66-67; *see also* *McLibel* [1997] EWHC (QB) (“The U.S. has taken the approach that normal business practices will take care of that (stocking density). If a farmer over-stocks he is going to lose money. If he loses money he is not going to be in the business.”).

⁴⁵ *See infra* note 90 and accompanying text (giving the same reason for why courts defer

why exemptions for institutional acts of animal exploitation are wholesale, rather than case-specific as animal welfare advocates would prefer.

C. *Why Anticruelty Statutes Cannot Be Legislatively Improved*

As noted in Part II.A, *supra*, some animal welfare advocates argue that anticruelty statutes could be strengthened by removing or narrowing existing exemptions (i.e., by performing the human benefit/animal suffering balancing test on a case-by-case basis) to allow for the coexistence of animal exploitation and humane treatment. However, as this section will show, there are several reasons why effective legislative reform of anticruelty statutes is unlikely. First, and most importantly, the same factors that coalesced to originally lead to the inclusion of broad exemptions in anticruelty statutes—societal preference, legislative capture, the classification of animals as legal property, and arguments of efficiency and competency—continue to exist and would hamper any efforts to repeal or refine the existing exemptions. As these factors have been discussed, they need not be repeated in this section. Second, as will be discussed below, even retooled anticruelty statutes would be ineffective if they did not challenge the underlying animal exploitation, and the welfare approach would not reach this key deficiency. Welfare advocates instead rely on the notion of “humane exploitation”—the idea that animal exploitation and humane treatment can coexist with respect to industrial production—but that idea is viable only in theory, not in practice. Finally, as will also be discussed below, the prospect of legislative reform raises problems of implementation that have no easy answers.

1. Incompatibility of Exploitation and Humane Treatment

For many, it is enticing to imagine a world in which animals were not subjected to unnecessary suffering: where they could be utilized for human benefit yet treated “humanely” at all times during that process. This is what animal welfare advocates strive for, at least in the short-term, and what they believe that anticruelty statutes can move us toward if these statutes embodied a balancing test that ascribed more weight to animal suffering. Although exploited animals could be treated better under the existing legal framework, an approach that does not challenge the underlying exploitation can only prevent suffering that is in excess of what is required to carry out

to industry custom).

the exploitation.⁴⁶ Because animal exploitation *by its very nature*, even done under the best of circumstances, requires the infliction of substantial pain and suffering, and also often the death of the animal, the “excess” suffering involved is small in comparison to the amount of suffering *required*.⁴⁷

Global food production, medical and scientific research, and fur farms are just a few examples of animal exploitation where suffering cannot be prohibited if use is permitted. Food production, for example—the most numerically significant use of animals by far—requires the factory farming model to be affordable and thus sustainable, and it is well known that animals subjected to factory farming suffer considerably during their lives and during slaughter. As James Rachels has stated:

[I]t would be impossible to treat the animals decently and still produce meat in sufficient quantities to make it a normal part of our diets cruel methods are used in the meat-production industry because such methods are economical Humanely produced chicken, beef, and pork would be so expensive that only the very rich could afford them.⁴⁸

⁴⁶ See FRANCIONE, INTRODUCTION, *supra* note 3, at 50-80 (revealing that the status of animals as legal property results in human interests, however trivial, taking precedence over animal suffering, however great, thereby permitting most animal exploitation and the suffering that accompanies it).

⁴⁷ For many common methods of animal use, the argument that animal exploitation can be permitted while animal suffering is minimized is structurally the same as that which would exist in a law that permitted the torture of human beings but required such torture to be done “humanely.” Torture by definition requires the infliction of pain or suffering to be effective. It is ironic that there is little serious discourse regarding the idea of the “kinder torture” of human beings, yet humane treatment is a central tenet of the animal welfare approach. For a recent article rejecting the idea that the use of torture can be effectively regulated, see Marcy Strauss, *Torture*, 48 N.Y.L. SCH. L. REV. 201, 265-68 (2004).

⁴⁸ James Rachels, *Vegetarianism and ‘the Other Weight Problem,’* reprinted in JAMES E. WHITE, CONTEMPORARY MORAL PROBLEMS 496, 503 (7th ed. 2003). See also Darian M. Ibrahim, *A Return to Descartes: Property, Profit, and the Corporate Ownership of Animals*, 70 LAW & CONTEMP. PROBS. (forthcoming 2006) (arguing that the cost of animal welfare is too great to be an affordable option for the vast majority of consumers); *Farm Subsidies Debated in Global Trade Talks* (NPR radio broadcast Oct. 11, 2005), <http://www.npr.org/templates/story/story.php?storyId=4953604> (last visited Feb. 1, 2006) (discussing Swiss agriculture, which is supposed to be kinder to animals but to be economically viable requires government subsidies of up to 90% of a farmer’s income. One farmer interviewed quoted the price differential between Swiss pork chops and German pork chops, which are not produced by the more humane methods, as 600%); SINGER, *supra* note 5, at 160 (“It is not practically possible to rear animals for food on a large scale without inflicting considerable suffering. Even if intensive methods are not used, traditional farming involves castration, separation of mother and young, breaking up social groups, branding, transportation to the slaughterhouse, and finally slaughter itself.”).

In *McDonald's v. Steel and Morris*,⁴⁹ more commonly known as the "McLibel" case, a McDonald's executive was asked, "As the result of the meat industry, the suffering of animals is inevitable?," to which he replied "The answer to that must be 'yes.'" The judge posing the question responded, "I do not suppose that his reply surprised anyone."⁵⁰ Similarly, it is difficult to see how laboratory animals can be subjected to deadly diseases such as anthrax, botulism, tularemia, smallpox, and the plague without suffering considerably in the process, yet such experiments are increasingly a part of bioterrorism research after the September 11, 2001 terrorist attacks and subsequent anthrax attacks.⁵¹

Therefore, while it may be theoretically possible to refine anticruelty statutes to provide animals with some comfort, the amount of comfort provided would be minimal if the underlying use is allowed to continue. *To permit the exploitation is to permit the suffering*, and an approach that seeks to reduce suffering without abolishing use can accomplish very little.

2. Further Problems of Implementation

Even if humane exploitation were an attainable ideal, it would be difficult to implement and police. For instance, it would be difficult to expect those who profit from exploiting animals to have enough respect for the animals they exploit to treat them humanely. By classifying animals as legal property, as *things* that we can kill or harm for even trivial reasons, we have devalued animal life to the point where it is unrealistic to expect anything other than inhumane treatment.⁵² It is an incoherent position to maintain that animals have value only as resources and at the same time argue that we should respect their interests in not suffering.

⁴⁹ *McLibel*, [1997] EWHC (QB), available at http://www.mcspotlight.org/case/trial/verdict/verdict_jud2c.html. This case is discussed in Part III.C, *infra*.

⁵⁰ *Id.*

⁵¹ See *Code Orange for Animals in Bioterrorism Research*, http://www.hsus.org/animals_in_research/animals_in_research_news/code_orange_for_animals_in_bioterrorism_research.html (last visited Jan. 12, 2006) (predicting that tens of thousands of animals will be subjected to these and other deadly diseases); Ibrahim, *supra* note 1.

⁵² See SINGER, *supra* note 5, at 159-60, where Singer notes that:

[P]ractically and psychologically it is impossible to be consistent in one's concern for nonhuman animals while continuing to dine on them. If we are prepared to take the life of another being merely in order to satisfy our taste for a particular type of food, then that being is no more than a means to our end. In time we will come to regard pigs, cattle, and chickens as things for us to use, no matter how strong our compassion may be; and when we find that to continue to obtain supplies of the bodies of these animals at a price we are able to pay it is necessary to change their living conditions a little, we will be unlikely to regard these changes too critically.

Also, the enforcement of broader anticruelty statutes would be highly problematic. In their present inception, anticruelty statutes are most often used to prevent gratuitous cruelty to dogs and cats—animals that our society views as special and unique. Yet as previously noted, animal welfare advocates concede that anticruelty statutes are laxly enforced even for this very limited purpose.⁵³ Therefore, it is difficult to imagine that the concern will be greater for animals that end up on our dinner plates or that are being used in experiments that scientists claim will benefit humans. Of course enforcement may improve if we allowed individuals and entities besides prosecutors to initiate anticruelty actions.⁵⁴ But to even discover violations requires access to private or government property,⁵⁵ and it is an increasing concern that federal laws such as the USA PATRIOT Act⁵⁶ or the Animal Enterprise Protection Act⁵⁷ will be used against peaceful animal advocates whose sole purpose is to film what happens to animals inside factory farms and laboratories.

III. ANTICRUELTY STATUTES AND THE COURTS

A. *Anticruelty Statutes Without Legislative Exemptions*

Anticruelty statutes that do *not* exempt animal husbandry and other institutional uses of animals are no stronger than those that do contain these exemptions.⁵⁸ This is because courts have exempted broad categories of

⁵³ See *supra* note 18 and accompanying text (giving some reasons for lax enforcement of anticruelty statutes).

⁵⁴ See Cass R. Sunstein, *Can Animals Sue?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 251, 252 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (discussing the potential benefits of giving private parties standing to sue on behalf of animals); William A. Reppy, Jr., *Citizen Standing to Enforce Anti-Cruelty Laws by Obtaining Injunctions: The North Carolina Experience*, 11 ANIMAL L. 39, 41-44 (2005) (discussing civil enforcement of North Carolina's anticruelty statute).

⁵⁵ Wolfson & Sullivan, *supra* note 1, at 210 ("Even if the police and prosecutors were eager to enforce criminal anticruelty statutes, it is virtually impossible for enforcement agents to ascertain what occurs on the average farm because a farm is private property.")

⁵⁶ Uniting and Strengthening America by Providing Appropriate Tools Required to Interpret and Obstruct Terrorism (USA PATRIOT) Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (2001).

⁵⁷ Animal Enterprise Protection Act of 1992, 18 U.S.C.S. § 43 (2005). On the state level, for example, the Missouri legislature has recently reintroduced Missouri Bill SB 615, known as the "Animal Production Facility Act," which would make it a felony to distribute photos of any agricultural or animal facility. http://www.senate.mo.gov/06info/BTS_Web/Bill.aspx?SessionType=R&BillID=197 (last visited Feb. 12, 2006).

⁵⁸ The following states do not exempt animal husbandry: Alabama, Arkansas, California, District of Columbia, Hawaii, Louisiana, Maine, Massachusetts, Minnesota, Mississippi,

animal use from the reach of anticruelty statutes even when the statute itself contains no explicit exemption.⁵⁹ Even though courts have consistently read anticruelty statutes very narrowly, some animal welfare advocates have argued that courts retain the discretion to extend the application of these statutes to common uses of animals so long as the statute itself contains no explicit exemption. In other words, these advocates argue that the absence of explicit exemptions gives courts discretion to find that even common uses of animals may constitute statutory cruelty. Both Professor Jerrold Tannenbaum and Professor Mike Radford, for example, view the use of “unnecessary suffering” language in anticruelty statutes as permitting the definition of animal cruelty to judicially evolve. Professor Tannenbaum states:

The ability of cruelty laws to expand their range of prohibited activities as society’s views about appropriate treatment of animals changes allows for vigorous ethical debate about how animals should be treated. It also allows for inclusion within the class of legally prohibited behavior activities that come, over time, to be generally seen as inappropriate.⁶⁰

Professor Radford echoes this view in discussing British animal welfare laws:

The concept of unnecessary suffering, which has been developed by the courts and widely adopted by the legislature, has two very considerable merits. First, it may be applied to a multitude of different situations. Secondly, it can be constantly reinterpreted by the courts in light of greater understanding about animal suffering, and changing social attitudes regarding the proper treatment of animals. These valuable characteristics dispense with the need constantly to amend and update the legislation. The prohibition on unnecessary suffering has undoubtedly made a major contribution to improving the treatment of animals.⁶¹

David Wolfson appears to adopt a similar view when he suggests that anticruelty statutes might be used to prohibit use of the veal crate.⁶² While

New York, North Dakota, Oklahoma, and Rhode Island. For a survey of exemptions in anti-cruelty statutes from 1999, see Frasch et al., *supra* note 17, at 75-79.

⁵⁹ See FRANCIONE, INTRODUCTION, *supra* note 3, at 58 (“Even if an anticruelty statute does not explicitly exempt particular animal uses, courts have effectively exempted our common uses of animals from scrutiny by interpreting these statutes as not prohibiting the infliction of even extreme suffering, so long as it is incidental to an accepted use of animals.”).

⁶⁰ Jerrold Tannenbaum, *Animals and the Law: Property, Cruelty, Rights*, 62 SOC. RES. 539, 588 (1995).

⁶¹ MIKE RADFORD, ANIMAL WELFARE LAW IN BRITAIN 258 (2001). See also Robert Garner, *Animal Welfare: A Political Defense*, 1 J. ANIMAL L. & ETHICS 161 (2006) (advocating an evolving notion of unnecessary suffering).

⁶² David J. Wolfson, *McLibel*, 5 ANIMAL L. 21, 50 (1999) (discussing the *McLibel* Court’s approach to cruelty, and stating that “[t]he proper application of this standard, both in

the notion of “unnecessary suffering” may be flexible in theory, there are several reasons why courts cannot or will not criminalize common institutional acts against animals, even absent a legislative exemption, including principles of statutory interpretation and the constitutional requirement of fair warning.

B. Why Courts Cannot Interpret Anticruelty Statutes More Broadly

1. Legislative Intent

Courts interpret anticruelty statutes with or without explicit exemptions narrowly in part because principles of statutory interpretation dictate that courts look to legislative intent when interpreting ambiguous statutes.⁶³ Phrases such as “unnecessary suffering” may be broad, but they are by no means prohibitions on all suffering. The modifier “unnecessary” presupposes that *some* suffering is acceptable, and the ambiguity lies in determining how much suffering is acceptable; or, to put it differently, what did the legislature mean by “unnecessary”? As stated in Part II.B.1, *supra*, societal preference has dictated that unnecessary suffering actually means gratuitous suffering; i.e., suffering inflicted without a corresponding societal benefit. Therefore, even when legislatures fail to explicitly exempt an activity that causes animal suffering, courts will find an implicit exemption if that activity produces a human benefit.

In *Taub v. State*,⁶⁴ for example, a well-known case in which the defendant/researcher Taub was accused of seventeen counts of animal cruelty for experiments on monkeys, the court stated that:

[I]t can readily be seen that the legislature has consistently been concerned with the punishment of acts causing “unnecessary” or “unjustifiable” pain or suffering. Furthermore, clearly the legislature recognized that there are certain normal human activities to which the infliction of pain to an animal is purely incidental and unavoidable, and in such instances, [the anticruelty statute] does not apply.⁶⁵

The anticruelty statute in *Taub* contained no statutory exemption for animal experimentation. In fact, the Maryland anticruelty statute explicitly

the United States and Europe, could prohibit numerous cruel common farming practices; for example, the veal crate.”). The *McLibel* case is discussed in Part III.C *infra*.

⁶³ For a recent discussion of statutory interpretation, see Caleb Nelson, *What is Textualism?*, 91 VA. L. REV. 347 (2005).

⁶⁴ 463 A.2d 819 (Md. 1983).

⁶⁵ *Id.* at 821.

exempted other animal uses but did not exempt experimentation.⁶⁶ Nevertheless, the court held that Taub's conduct was beyond the reach of the anti-cruelty statute because experimentation fell under the umbrella of the "normal human activities" for which animals are made to suffer. The court did not reach the issue of whether the experiments were cruel; it only asked whether the experiments were part of a normal human activity. Once the activity was condoned, anything customary that took place in its pursuit was also condoned. To hold otherwise would be to subject those conducting normal human activities to prosecution—a prospect that raises the significant constitutional issues addressed in the next section.

2. Criminal Statutes Require Fair Warning

Anticruelty statutes are criminal statutes, and criminal law requires that defendants have fair warning that their conduct is proscribed before acting. The constitutional requirement of fair warning, in short, "condemns judicial crime creation."⁶⁷ "The essential idea is that no one should be punished for a crime that has not been so defined in advance by the appropriate authority"—in most cases, the legislature.⁶⁸ Fair warning manifests itself in the "void-for-vagueness" doctrine⁶⁹ and the rule of lenity,⁷⁰ the former being the more important.⁷¹ The void-for-vagueness doctrine requires that a statute be sufficiently clear to enable a person of ordinary intelligence to deter-

⁶⁶ MD. CODE ANN., [Criminal] § 59 (1976). See also *Hammock v. State*, 592 S.E.2d 415, 418 (Ga. 2004) (interpreting a statute "[w]ith the aid of two well-known and related principles of statutory construction: *expressio unius est exclusio alterius* (expression of one thing implies exclusion of another) and *expressum facit cessare tacitum* (if some things are expressly mentioned, the inference is stronger that those not mentioned were intended to be excluded)").

⁶⁷ RICHARD J. BONNIE ET AL., CRIMINAL LAW 85 (2d ed. 2004).

⁶⁸ *Id.*

⁶⁹ See John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985) ("[T]he vagueness doctrine is the operational arm of legality").

⁷⁰ See *id.* at 200 (stating that lenity "has been presented as an implementation of legality").

⁷¹ See *id.* at 198 (stating that lenity "survives more as a makeweight for results that seem right on other grounds than as a consistent policy of statutory interpretation"). See also Trevor W. Morrison, *Fair Warning and the Retroactive Judicial Expansion of Federal Criminal Statutes*, 74 S. CAL. L. REV. 455, 455 (2001) (identifying a third form of the fair warning doctrine, "that a court may not apply a 'novel construction or a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope'" (quoting *United States v. Lanier*, 520 U.S. 259, 267 (1997))).

mine what is proscribed.⁷² A statute can be vague either on its face or as applied to a defendant under particular circumstances.⁷³

Both facial and as-applied vagueness challenges to anticruelty statutes have been largely unsuccessful—so far. The typical facial challenge has focused on general language regarding the provision of “necessary” or “proper” food, water, and shelter to an animal. Courts have overwhelmingly held that such provisions are not unconstitutionally vague on their face simply because they are general.⁷⁴ Similarly, although the term “animal” in an anticruelty statute may be generic and may hypothetically be deemed to include insects, for example, courts have not found such statutes vague when the nonhuman in question was clearly an animal as people of ordinary intelligence construe that term.⁷⁵ Several courts have noted that anticruelty statutes must be written in general terms because it would be impossible to list every variation that would constitute statutory cruelty.⁷⁶ Most as-

⁷² The case often cited for this requirement is *Bouie v. City of Columbia*, 378 U.S. 347 (1964). “The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed.” *Id.* at 351 (quoting *United States v. Harriss*, 347 U.S. 612, 617 (1954)).

⁷³ *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

⁷⁴ See *People v. Speegle*, 62 Cal. Rptr. 2d 384, 388 (Cal. Dist. Ct. App. 1997) (“[T]he terms ‘necessary,’ ‘needless,’ and ‘proper’ all give fair notice of an objective standard of reasonableness in the provision of sustenance, drink, and shelter, and in the avoidance of infliction of suffering”); *People v. Allen*, 657 P.2d 447, 449-52 (Colo. 1983) (citing numerous cases in support of the holding that anticruelty statute proscribing the failure to provide an animal with “proper food, drink, or protection from the weather” is not unconstitutionally vague); *State v. Webb*, 130 S.W.3d 799, 827-28 (Tenn. Crim. App. 2003) (adopting the reasoning in *Allen* and *Speegle*); *Wilkerson v. State*, 401 So. 2d 1110, 1111-12 (Fla. 1981) (holding that the modifier “unnecessary” does not render the statute unconstitutionally vague, and citing cases in support). *But see* *State v. Bright*, No. 22071-7-II 1997 Wash. App. LEXIS 1218, at *1 (Wash. Ct. App. July 2, 1999) (holding that a Washington anticruelty statute proscribing the failure to provide “the proper food, drink, air, light, space, shelter, or protection from the weather” was unconstitutionally vague).

⁷⁵ See *Wilkerson*, 401 So. 2d at 1111-12 (holding that a raccoon was within the statutory definition of “animal” which included “every living dumb creature”); *State v. Kaneakau*, 597 P.2d 590 (Haw. 1979) (holding that a gamecock was within statutory definition of “animal” which included “every living creature”). See also *United States v. Harriss*, 347 U.S. 612, 618 (1954) (“If the general class of offenses to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though marginal cases could be put where doubts might arise.”).

⁷⁶ See *Speegle*, 62 Cal. Rptr. 2d at 388 (“There are an infinite number of ways in which the callously indifferent can subject animals in their care to conditions which make the humane cringe. It is thus impossible for the Legislature to catalogue every act which violates the statute.”); *Tuck*, 467 A.2d at 733 (“To require more precision would be to require the legislature to draft a detailed code on the care and feeding of animals. The case law on vagueness is not so demanding.”). This issue is also encountered in child protection laws. See *Allen*, 657

applied vagueness challenges to anticruelty statutes have also failed, as in *Tuck v. United States*,⁷⁷ where the evidence was overwhelming that the conduct, the starvation of puppies, was of a nature that the ordinary person would know is proscribed.⁷⁸

The decisions which have upheld anticruelty statutes against vagueness challenges, both facial and as-applied, fit within a standard mold. The defendant's conduct was clearly gratuitous abuse and was of no benefit to society. For example, the starvation of animals typically serves no human end,⁷⁹ nor does the infliction of pain or suffering on animals for sheer sadistic pleasure. These do not present hard cases because there can be little doubt that these defendants knew their conduct was proscribed.

If anticruelty statutes are to evolve, however, as animal welfare advocates suggest, they must encroach upon customary and societally accepted human activities to have more than symbolic significance. This is because almost all animal suffering, statistically speaking, is caused by customary and societally accepted activities.⁸⁰ Therefore, the pertinent question is what would happen if courts began interpreting anticruelty statutes without legislative exemptions to prohibit societally accepted conduct. Could courts, for example, hold that institutional practices which cause immense animal suffering on the modern factory farm, such as intensive confinement

P.2d at 450 ("We have often evaluated the constitutionality of similar statutory standards proscribing child abuse. The principles developed in the child abuse and neglect cases are appropriately applied to the analysis of the statute forbidding cruelty to or neglect of animals.").

⁷⁷ 467 A.2d 727 (D.C. 1983).

⁷⁸ See *id.* at 733. There, the court noted:

Appellant argues . . . that even if the [anticruelty] statute is not unconstitutionally vague on its face, its application to him is so vague as to violate due process. He is wrong . . . Given extensive testimony that puppies in appellant's custody were suffering from dehydration and malnutrition, that they were being kept in cages without water, that they were weakened to the point where many were unable to stand up, and that they were desperate in their eagerness for the food placed before them, the jury had ample evidentiary basis for convicting appellant as charged.

See also *Webb*, 130 S.W.3d at 828 ("A statute is not invalid simply because it may be arguably vague in a hypothetical instance but is clearly applicable to the complaining party . . . We conclude that [the Tennessee anticruelty statute] is sufficiently specific to warn defendants of the proscribed conduct.").

⁷⁹ An exception to this general rule is the practice of "forced molting," where spent hens are starved for up to two weeks to induce one last cycle of egg production before the hens are slaughtered. See KAREN DAVIS, *PRISONED CHICKENS, POISONED EGGS: AN INSIDE LOOK AT THE MODERN POULTRY INDUSTRY* 74-76 (1996). Forced molting has not been prohibited by anticruelty statutes.

⁸⁰ See *supra* notes 16-17 and accompanying text (discussing customary and societally accepted uses of animals that cause the vast majority of animal suffering yet are exempted from the scope of anticruelty statutes).

and forced mutilation, violate anticruelty statutes that do not exempt animal husbandry? What about extremely painful animal experiments conducted in states whose anticruelty statutes do not exempt animal experimentation?

It seems that successful void-for-vagueness challenges could be raised if courts began to issue such rulings. These activities, however “cruel” in the ordinary sense of the word, are not the type of activities that courts have held are *legally* cruel.⁸¹ They do not cause gratuitous animal suffering, but rather are customary and efficient ways of furthering currently accepted societal ends. Individuals and businesses routinely engage in institutional acts that produce enormous amounts of animal suffering. These actors do not have reason to believe that anticruelty statutes prohibit this conduct because the statutes never have. Therefore, anticruelty statutes do not provide institutional exploiters of animals with fair warning that their conduct is prohibited.⁸²

Another aspect of the void-for-vagueness doctrine should be mentioned. That is, when analyzing a statute for vagueness, courts will also inquire into whether the statute provides an ascertainable standard of guilt so as to not invite arbitrary and discriminatory enforcement.⁸³ Challenges on this ground would almost certainly result if courts attempted to criminalize cus-

⁸¹ For further discussion of the difference between cruelty in the common sense and in the legal sense, see the discussion of the *McLibel* case in *infra* Part III.C.

⁸² Vagueness would also be a problem if applied to *non*-institutional animal uses that are accepted as legitimate, such as suffering inflicted for the purposes of training an animal. The case of *State v. Fowler*, 205 S.E.2d 749 (N.C. Ct. App. 1974), is a good illustration. In *Fowler*, the defendant beat his dog Ike and tied him up. His wife then filled a hole with water, and he submerged Ike’s head for forty-five seconds before bringing it back up. This went on for fifteen to twenty minutes. The defendant then untied Ike, hit and kicked him, and tied him to a pole near the water-filled hole. The court reversed Fowler’s conviction for cruelty to animals and ordered a new trial, stating that “the jury . . . should have been instructed that if it believed the defendant’s evidence, that the punishment was administered for a disciplinary purpose, it should return a verdict of not guilty.” *Id.* at 751. Training methods are not exempted from North Carolina’s anticruelty statute now, nor were they when *Fowler* was decided. See N.C. GEN. STAT. § 14-360 (1969). Nevertheless, because inflicting *some* pain to train companion animals is accepted in our society, and because it had not been proved that the defendant’s conduct was “willful” as required by the statute, the court granted a new trial.

⁸³ See *Kolender v. Lawson*, 461 U.S. 352, 357 (1983) (“The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.”); see also John F. Decker, *Addressing Vagueness, Ambiguity, and Other Uncertainty in American Criminal Laws*, 80 DENV. U. L. REV. 241, 246 (2002) (discussing due process concerns related to constitutionally vague laws, including notice issues and arbitrary and discriminatory enforcement); Jeffries, *supra* note 69, at 206-12 (opining that the notice test is an unpersuasive rationale and that the prevention of arbitrary and discriminatory enforcement is the “most important concern”).

tomary uses of animals, as defendants could argue that police and prosecutors targeted only certain types of institutional conduct that may in fact be indistinguishable from other types. For example, many people find the raising of veal calves reprehensible and do not eat veal. But it is difficult to see how veal crates differ from gestation crates for pigs and battery cages for hens, and most people eat pork and eggs.⁸⁴ Similarly, it is difficult to see how forced mutilation practices, such as tail docking⁸⁵ and debeaking,⁸⁶ differ from each other or from other factory farming practices. These are all routine practices on the factory farm, and all cause incredible amounts of animal suffering so that meat can be made affordable to the public. Judicial rulings that some of these customary practices are criminal while others are not would raise troubling issues under the void-for-vagueness doctrine.

3. Standards for Decision-Making

Compounding the other barriers to broader judicial interpretation of anticruelty statutes is the challenge of finding a workable standard for courts

⁸⁴ Gestation and farrowing crates are usually two feet wide and prevent sows from moving at all. See FRANCIONE, INTRODUCTION, *supra* note 3, at 10. In battery cages, chickens used for egg production are typically packed together four or five in a wire cage that is about the size of a folded newspaper. See *id.*

⁸⁵ "Tail docking" is where an animal has its tail cut off, usually at a very young age, with pliers and without anesthesia. Cows' tails are docked to make them easier to milk, although docking deprives cows of valuable protection against flies that land on their backs. Pigs' tails are docked in an effort to make them more sensitive to pain. When pigs are crowded together in factory farms they will go mad and bite each other's tails. Hog farmers want bitten pigs to resist these bites (or else the bitten pig may well be killed and mutilated, wasting a valuable source of income). As Scully writes:

Termed in the field a "short-term stressor," docking doesn't remove the target. The idea is to leave each tail more sensitive, so that the pain of a bite is sharper and the pigs will therefore try harder to avoid attack. Otherwise the pigs display what is known in both animal and human psychology as learned helplessness. They just give up, their tails get chewed and infected, the infection spreads, and they die an unauthorized death.

SCULLY, *supra* note 40, at 276. Evidence suggests that tail docking, in addition to being very painful for the animals, produces no benefits for humans or animals. See Carolyn L. Stull et al., *Evaluation of the Scientific Justification for Tail Docking in Dairy Cattle*, 220 J. AM. VETERINARY MED. ASSN. 1298, 1301-02 (2002) (reviewing various scientific studies on tail docking of cattle and concluding that "there are no apparent animal health, welfare, or human health justifications to support this practice").

⁸⁶ Young chickens are "debeaked" by having their beaks sliced off with hot metal, or even with a knife or scissors, so that they will not peck at each other during their intensive battery cage confinement. Evidence suggests that debeaking, in addition to causing chronic pain, has lasting repercussions for the animals such as making it difficult for them to eat or drink. See DAVIS, *supra* note 78, at 67-71.

to use in differentiating among various institutional practices. Rather than developing their own standards for determining animal cruelty, the legislatures that include explicit exemptions have made the choice to defer to industry custom. When there is no legislative exemption, the decisionmaking task falls to courts, which will defer to industry custom for the same reasons legislatures do. Both legislatures and courts have decided that if a practice which inflicts suffering on animals is customary in the industry, it is not within the scope of the statute.

Animal advocates have quite rightly decried this approach because it allows industries to determine the criminality of their own conduct.⁸⁷ Yet it is understandable why courts, in particular, may adopt this approach. First, judicial reliance on industry custom provides *ex ante* certainty, which, as discussed in Part III B.2, *supra*, is a requirement for fair warning. Second, deference to industry custom provides a discernible standard for judicial decision-making, which other standards could not do. For example, if the standard were a judge's own sense of what constitutes cruelty, the judge would be in the position of deciding, on an ad hoc basis, which institutional practices cause unnecessary suffering and which do not.⁸⁸ Because virtually *all* institutional uses of animals cause unnecessary suffering,⁸⁹ a judge (or jury) attempting to draw such distinctions would be hopelessly lost. Third, deference to industry custom provides for efficiency in administration. It would be inefficient for courts to inquire into each act of animal exploitation to determine whether it is "cruel." Further, it would be costly for judges to acquire the institutional competence necessary to rival that of the industry. The avoidance of such costs is one reason why the business judgment rule

⁸⁷ See generally Wolfson & Sullivan, *supra* note 1. In addition, Professor Francione has observed:

This [deference to industry custom] approach stands in marked contrast to that used to solve similar problems in the law. For example, in determining whether conduct constitutes negligence, juries may consider conformity to custom as evidence of reasonable behavior, but it has long been recognized that the customary nature of conduct does not make the conduct reasonable, and that the jury must determine whether the defendant balanced the amount of risk generated by her conduct with an appropriate amount of caution.

FRANCIONE, ANIMALS, *supra* note 1, at 141.

⁸⁸ Chief Justice Bell's seemingly random conclusions in the *McLibel* case about which factory farming practices are and are not cruel illustrate this concern. See *infra* Part III.C (discussing the problems associated with determining whether a practice is legally cruel without workable standards, as illustrated by the *McLibel* case).

⁸⁹ See *supra* notes 26-30 and accompanying text (discussing the inadequacy of anti-cruelty states in preventing unnecessary animal suffering in industry practices across the United States).

exists in corporate law, where courts defer to the decisions of boards of directors provided those decisions meet minimal procedural criteria.⁹⁰ Therefore, courts deciding animal cruelty cases rely on industry custom, an inquiry which presents the singular question, more easily answered, of whether the defendant's act was customary for the industry.

C. *McLibel*

England's *McLibel* case of 1997 illustrates the dangers encountered when judges inquire into the cruelty of common institutional treatment of animals without a workable standard.⁹¹ *McLibel* was a defamation action brought by industry giant McDonald's against two individuals who distributed leaflets critical of McDonald's. The leaflets claimed, among other things, that McDonald's was responsible for the murder and torture of countless farm animals. The judge who decided the case, Chief Justice Bell, framed the issue as whether the leaflet accurately stated that McDonald's was "culpably responsible for cruel practices in the rearing and slaughter of some of the animals which are used to produce their food."⁹²

What makes this case notable is the standard that Chief Justice Bell used to determine whether a particular practice was legally "cruel," and accordingly whether the defendants were libel for defamation. He first rejected as potential standards the ordinary meaning of cruelty⁹³ and also standards set by governmental regulations.⁹⁴ He then rejected the American standard of industry custom.⁹⁵ Instead, he opted to differentiate the prac-

⁹⁰ See, e.g., *Joy v. North*, 692 F.2d 880 (2nd Cir. 1982) (discussing the business judgment rule); Lynn A. Stout, *In Praise of Procedure: An Economic and Behavioral Defense of Smith v. Van Gorkom and the Business Judgment Rule*, 96 NW. U. L. REV. 675 (2002) (describing the business judgment rule as a court's emphasis on the process of directors' business decisions, rather than the substance of those decisions).

⁹¹ *McLibel*, [1997] EWHC (QB).

⁹² *Id.*

⁹³ In rejecting the ordinary meaning of cruelty, Chief Justice Bell stated: The first [potential approach] was that any practice which caused an animal to suffer any degree of stress or discomfort or transitory pain was necessarily cruel. I cannot accept this . . . [An] ordinary person may know little about the detail of farming and slaughtering methods but he must find a certain amount of stress, discomfort or even pain acceptable and not to be criticised as cruel.

Id.

⁹⁴ See *id.* (finding that governmental standards "are useful measures of animal welfare . . . but they do not necessarily judge what is cruel or not").

⁹⁵ Specifically, Chief Justice Bell stated:

The second [potential] approach was to say that any practice which accorded with the norm in modern farming or slaughter practices was thereby acceptable and not to

tices based on his own opinions, aided by expert testimony. Chief Justice Bell framed the issue as “whether a practice is deliberate and whether it causes sufficiently intensive suffering for a sufficient duration of time to be justly described as cruel.”⁹⁶ Although there are significant differences between *McLibel* and a hypothetical U.S. anticruelty prosecution, *McLibel* provides the best example to date of a court attempting to implement the animal welfare idea of an evolving standard of animal cruelty. And at least one animal welfare advocate has suggested that *McLibel* could provide a judicial standard for U.S. courts deciding anticruelty cases.⁹⁷ For the reasons discussed in this Article, however, the *McLibel* standard could not be applied in U.S. anticruelty cases.

For instance, it is unclear how such a subjective standard could satisfy fair warning requirements. Judicial interpretations can serve to remove vagueness in statutes, and thereby provide fair warning to future defendants.⁹⁸ The *McLibel* standard of cruelty, however, is so subjective that fair warning could only be said to exist as to the particular institutional practices previously addressed by courts. Numerous favorable cruelty prosecutions would be required to develop this body of law.

Further, *McLibel* can only be viewed as unprincipled, ad hoc decision-making, the type of decisionmaking that deference to industry custom avoids. One commentator has suggested that Chief Justice Bell merely applied his own value judgments regarding animal cruelty.⁹⁹ The standard

be criticised as cruel. I cannot accept this approach either. To do so would be to hand the decision as to what is cruel to the food industry completely, moved as it must be by economic as well as animal welfare considerations.

Id.

⁹⁶ See *id.* (“I must use my own judgment, helped by the witnesses, when their views seem sensible, to decide [whether a practice is cruel].”).

⁹⁷ Wolfson, *supra* note 62, at 50 (discussing *McLibel* and stating that “[t]he proper application of this standard, both in the United States and Europe, could prohibit numerous cruel common farming practices; for example, the veal crate”). Wolfson does observe that anti-cruelty statutes “pose a myriad of problems for individuals who wish to argue that a particular animal production practice constitutes animal cruelty,” including a lack of interest in enforcement and the risk of trying the case to a jury “comprised of individuals from a farming district,” *id.* at 31, but he does not discuss the factors identified in this article.

⁹⁸ See Einer Elhauge, *Preference-Eliciting Statutory Default Rules*, 102 COLUM. L. REV. 2162, 2199 (2002) (“A [prospectively applied] judicial interpretation that itself is not vague cures any vagueness or fair warning problem in the original statute.”).

⁹⁹ In her article about *McLibel*, Marlene Nicholson states:

Defendants also benefited from Justice Bell’s willingness to find justification to support the label ‘cruel,’ even though he had not found justification for the label ‘bad’ to describe working conditions. Both issues should have been dealt with as matters of opinion, which are not provable as false. Instead, he treated them as facts, but sur-

adopted by Chief Justice Bell—“whether a practice is deliberate and whether it causes sufficiently intensive suffering for a sufficient duration of time to be justly described as cruel”—provides no guidance on what is sufficient, what is intensive, what is suffering, or how long is long enough. Compare, for instance, the court’s analysis of two common means of killing the unwanted male offspring of the egg industry: crushing them between a pair of rotating rollers, and suffocating them in a drum containing carbon dioxide. Most factfinders would have difficulty distinguishing between these practices from a normative perspective (e.g., while the rollers seem worse, the suffocation may take longer), and it is readily apparent that a criminal conviction—possibly a felony conviction—should not depend on such subjectivity. Yet the *McLibel* court held that crushing the chicks was cruel but gassing them was not.¹⁰⁰ In fact, the *McLibel* opinion is replete with such examples distinguishing seemingly indistinguishable conduct on an ad hoc basis. This illustrates the near-impossible task that U.S. courts would face if they were inclined to deem only some, but not all, institutional acts of exploitation to be legally cruel and thus in violation of anticruelty statutes.

CONCLUSION

Animal welfare advocates rely on the notion that animal exploitation and humane treatment can coexist with respect to the use of animals for food, experimentation, hunting, and other human benefits. Although these advocates recognize that existing anticruelty statutes have many deficiencies, most notably the inclusion of wholesale exemptions for institutional uses of animals, they nevertheless contend that these statutes could be reformed, either legislatively or judicially, to narrow these exemptions and ascribe more weight to an exploited animal’s interest in not suffering.

This Article reveals that, although legislatures could certainly require better treatment of exploited animals, a law that does not challenge the underlying exploitation itself can at best only prevent suffering that is in excess of what is required to carry out the exploitation. Because the very nature of animal exploitation requires the infliction of tremendous suffering,

prisingly found one fact to be true and the other to be false. In rejecting the one label and accepting the other, Justice Bell may well have been reflecting his own value system. It is certainly questionable whether such value choices are consistent with free and open expression in a democratic society.

Marlene Arnold Nicholson, *McLibel: A Case Study in English Defamation Law*, 18 WIS. INT’L L.J. 1, 102 (2000).

¹⁰⁰ *McLibel*, [1997] EWHC (QB).

the amount of excess suffering that a reformed anticruelty statute could prevent is minimal. This Article also reveals that courts do not have the discretion to interpret anticruelty statutes more broadly for a variety of reasons, including the constitutional requirement of fair warning. This Article concludes that anticruelty statutes, while noble in theory, are ineffective in practice precisely because they do not challenge the underlying exploitation of animals, but instead focus on humane treatment. To prevent animal suffering requires preventing animal use: a realization that presents difficult moral questions that society must begin to confront.