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## The Lawyer's Role in Improving "Humane" Meat Labeling

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# THE LAWYER’S ROLE IN IMPROVING “HUMANE” MEAT LABELING

Ryne P. Smith †

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## I. INTRODUCTION

American consumers are becoming increasingly aware farmed animals suffer greatly during farming processes that aim to provide meat at the lowest possible price. It has become standard practice on industrial farms for animals to be crowded into spaces so small they cannot move freely; deprived of sunlight and outdoor access; denied basic social interaction; artificially inseminated or restrained for forced insemination; painfully dehorned, debeaked, detailed, and castrated; and forced to endure unsanitary conditions, promoting diseases that lead to antibiotic resistance from frequent treatment.<sup>1</sup>

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<sup>1</sup> See generally, *Industrial Agriculture 101*, NAT. RES. DEF. COUNCIL (Jan. 31, 2020), <https://www.nrdc.org/stories/industrial-agriculture-101> [https://perma.cc/KET8-F98Z] (listing several examples of inhumane treatment); *Inhumane Practices on Factory Farms*, ANIMAL WELFARE INST., <https://awionline.org/content/inhumane-practices-factory-farms> [https://perma.cc/428T-J4CD] (explaining the impact of widespread antibiotic use on the creation of antibiotic-resistant bacteria).

Consumers' buying patterns increasingly reflect consideration for animal welfare due to awareness of such practices.<sup>2</sup> Because these consumers are voting for more humane treatment with their wallets, it is not surprising that corporations are starting to cater to this growing market.<sup>3</sup> A prime example is the popular certification program Whole Foods uses to rate food based on animal welfare using a six-point scale.<sup>4</sup> The scale requires, as a baseline, room for animals to move around, no cages, and extends, at the highest level, to ensure an animal spends its life on the same farm with no physical alterations like those described above.<sup>5</sup> Consumers who desire to use their buying power to avoid causing animal suffering are also turning to meat alternatives that are becoming increasingly realistic replicas of the meat they attempt to evoke.<sup>6</sup>

Despite these strides in the availability of "humane" meats and alternatives, the conscientious consumer is currently faced with the daunting task of making sense of a patchwork of private labeling standards, each of which promises a different level of care. Moreover, serious questions have been raised about the accuracy of many private labeling regimes. High-profile exposés spearheaded by animal rights organizations have repeatedly shown the conditions for animals whose meat later bears a "humane" label to fall far short of their advertised goal, undermining consumer trust in their efficacy. All the while, the largest agribusinesses hide behind so-called agricultural gag ("ag-gag") laws that criminalize independent investigations and exposés of their operations, narrowing the gap between well-meaning businesses that opt into a private labeling scheme and those which close the doors and insist that the public take them at their word.

Governmental regulations of meat labeling claims have largely focused on consumer welfare instead of the animals themselves. One of the only governmental standards addressing farmed animal welfare is the regulation of the term "organic." However, even this standard is lamentably underenforced. Other standards, such as the Animal Welfare Act and the Humane Methods of Slaughter Act, provide some requirements for humane treatment for some animals in some circumstances. There has

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<sup>2</sup> C. Victor Spain, Daisy Freund, Heather Mohan-Gibbons, Robert G. Meadow & Laurie Beachman, *Are They Buying It? United States Consumers' Changing Attitudes Toward More Humanely Raised Meat, Eggs, and Dairy*, 8 ANIMALS, no. 128, 2018, at 12.

<sup>3</sup> See *id.*

<sup>4</sup> *Our History*, GLOB. ANIMAL P'SHIP, <https://globalanimalpartnership.org/about/history/> [<https://perma.cc/9MAL-SEML>]; *Our Standards*, GLOB. ANIMAL P'SHIP, <https://globalanimalpartnership.org/standards> [<https://perma.cc/7LEZ-NG72>].

<sup>5</sup> See *Our Standards*, *supra* note 4.

<sup>6</sup> See THE GOOD FOOD INST., *Plant-Based Market (2020 Release)*, <https://www.gfi.org/marketresearch> [<https://perma.cc/67X7-ADLM>]; Amelia Nierenberg, *Plant-Based 'Meats' Catch On in the Pandemic*, N.Y. TIMES (May 24, 2020), <https://www.nytimes.com/2020/05/22/dining/plant-based-meats-coronavirus.html> [<https://perma.cc/8DFE-Q79K>] (noting the increase in plant-based alternatives in the time of COVID-19 due to meat shortages and the virus's spread in processing facilities).

been success when existing regulations are violated and brought to the government's attention. Such success shows a promising path towards more rigorous public labeling standards that meet the desires of the public and lend themselves to ready enforcement. In this morass, lawyers have had and will continue to play a role in improving and enforcing labeling standards in three different realms.

Part I will discuss the lawyer's role in ensuring transparency of farmed animal welfare conditions by challenging ag-gag laws and agency failures to comply with the transparency required by the Freedom of Information Act and the Administrative Procedure Act. Part II will discuss current governmental regulations and legal routes to their successful enforcement. Part III will discuss avenues for challenging private "humane" meat labeling that falls short of consumer expectations. This Note argues that lawyers have an important, if constrained, role to play in the improvement of meat labeling claims.

## II. ENSURING TRANSPARENCY

### A. Challenging Ag-Gag Laws

Agricultural gag ("ag-gag") laws criminalize whistleblower activities for agricultural operations.<sup>7</sup> These laws were created to protect from prying eyes the activities taking place at agricultural facilities, including activities that the public might find objectionable.<sup>8</sup> Such laws have been proposed at one time or another in more than half of states and currently exist in six: Alabama, Arkansas, Iowa, Missouri, Montana, and North Dakota.<sup>9</sup> The details of these laws vary, but one can look at Alabama as an example.

In Alabama, the Farm Animal, Crop, and Research Facilities Protection Act prohibits obtaining access to agricultural facilities by deception, obtaining documentation of facilities by deception, and possession of any documentation of facilities without the owner's authorization.<sup>10</sup> For example, if an animal rights activist gets a job at a chicken farm and takes a video of the horrendous conditions to which the chickens are subjected, then obtaining the job, taking the video, and later possessing the video are all violations of the Act.<sup>11</sup> Violations of this section

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<sup>7</sup> *Ag-Gag Laws*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/issue/ag-gag/> [https://perma.cc/TZ6M-EGVY].

<sup>8</sup> Alicia Prygoski, *Brief Summary of Ag-Gag Laws*, ANIMAL LEGAL & HIST. CTR. (2015), <https://www.animallaw.info/article/brief-summary-ag-gag-laws> [https://perma.cc/CG45-7PNE]. Those who advocate for these laws say that they "protect well-meaning farmers against animal protection organizations who present the footage in a misleading way." *Id.*

<sup>9</sup> *What Is Ag-Gag Legislation?*, AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, <https://www.aspca.org/animal-protection/public-policy/what-ag-gag-legislation> [https://perma.cc/9WTX-K72M].

<sup>10</sup> ALA. CODE § 13A-11-153 (2021).

<sup>11</sup> *See id.*

are classed as either Class A misdemeanors or Class C felonies, depending on the financial value of the loss.<sup>12</sup> The form of these laws varies—for example, Missouri's ag-gag law requires turning over recordings to authorities within twenty-four hours of creation instead of outright prohibiting them<sup>13</sup>—but they all serve a similar purpose of “chilling one specific type of speech: [that] detrimental to the agricultural industry.”<sup>14</sup>

Challenges to ag-gag laws have mostly centered on the First Amendment's Free Speech Clause.<sup>15</sup> Ag-gag laws restrict two forms of speech: “false statements made by the investigator that are necessary to gain entry into animal facilities and the actual recording within the facility,” both of which are protected speech according to the Supreme Court.<sup>16</sup> False statements are generally protected unless they are fraudulent, requiring a legally cognizable harm, and statements made to potential employers with the goal of gaining access to facilities do not rise to this level.<sup>17</sup> And while it is acceptable to restrict recording on private property, ag-gag laws' breadth prohibits recording on public property as well, thus restricting a protected form of expression.<sup>18</sup>

Direct challenges to ag-gag laws are infrequent, likely because they have been enforced infrequently,<sup>19</sup> but where they have been challenged, they have consistently been held unconstitutional.<sup>20</sup> So far, such laws have been struck down in five states: Idaho, Kansas, North Carolina, Utah, and

<sup>12</sup> ALA. CODE § 13A-11-154 (2021).

<sup>13</sup> MO. ANN. STAT. § 578.013 (West 2021).

<sup>14</sup> Jeffrey Vizcaino, *Sinclair's Nightmare: SLAPP-ing Down Ag-Gag Legislation as Content Based Restrictions Chilling Protected Free Speech*, 7 J. ANIMAL & ENV'T L. 49, 56 (2016). The veil thrown over the agricultural process by ag-gag laws has not reduced consumer demand for transparency, as evidenced by the burgeoning market for third-party certifications. See *infra* Section III. The inspections demanded by these standards require businesses who wish to cater to consumers concerned with animal welfare to voluntarily invite observers into their operations. *Id.* Another form of business opt-in has taken the form of increased offerings of plant-based alternatives. See, e.g., IMPOSSIBLE FOODS, <https://impossiblefoods.com/burgerking> [<https://perma.cc/Y23K-3332>]. In recent years, major fast-food chains have increased their offerings, which, considering the nature of for-profit corporations, is an apparent attempt to get their cut of the growing faux meat market. *Id.*

<sup>15</sup> ANIMAL LEGAL DEF. FUND, *supra* note 7; ANIMAL LEGAL DEF. FUND, *The Dangers of Ag-Gag Laws*, YOUTUBE (Sept. 13, 2021), <https://www.youtube.com/watch?v=3S4r3KcoGis&t=748s> [<https://perma.cc/4PQZ-6JZD>].

<sup>16</sup> Vizcaino, *supra* note 14, at 57.

<sup>17</sup> *Id.* at 58–59.

<sup>18</sup> *Id.* at 59. Instead of prohibiting clandestine information collecting, Missouri has tried, successfully so far, to avoid such constitutional problems by requiring evidence of animal abuse or neglect to be turned over to authorities within twenty-four hours, punishable by up to a year's imprisonment and a fine of up to \$5,000. *Id.* at 54.

<sup>19</sup> *Id.* at 65.

<sup>20</sup> See AM. SOC'Y FOR THE PREVENTION OF CRUELTY TO ANIMALS, *supra* note 9 (noting that ag-gag laws have been defeated in twenty states and that an increasing number are being found unconstitutional).

Wyoming.<sup>21</sup> In the most recent of these cases, North Carolina's ag-gag law, the Property Protection Act, was gutted when a federal district court, in granting summary judgment, held that vital sections of the Act violated the First Amendment's free speech protections.<sup>22</sup> The repeated success of challenges to ag-gag laws should inspire lawyers to challenge remaining ag-gag laws. Should these lawyers be successful, striking down these laws will remove the looming threat of prosecution, which would allow those who seek to bring animal abuses to public attention to do so without fear of liability.

### *B. Agency Transparency*

In addition to state ag-gag laws, which obstruct efforts to bring transparency to the treatment of farm animals, the federal government also has a transparency problem. The Freedom of Information Act ("FOIA") and Administrative Procedure Act ("APA") both require disclosure of certain information by agencies, including "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases."<sup>23</sup> In particular, while the FOIA ordinarily requires release of records only upon request, it now also requires agencies to maintain "reading rooms" containing records requested more than three times previously, inspection reports, and enforcement actions such as hearings before administrative law judges, settlement agreements, and warning letters intended to bring entities into compliance.<sup>24</sup> The public availability of these records allows advocacy groups to oversee government action and to petition for change as needed.<sup>25</sup> Yet agencies have not always complied with these requirements.

As an example, the United States Department of Agriculture ("USDA") is tasked with enforcing the Animal Welfare Act.<sup>26</sup> In 2017, the USDA removed public records of enforcement actions from its website.<sup>27</sup> The Animal Legal Defense Fund ("ALDF") sued the USDA, contending

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<sup>21</sup> *Id.*

<sup>22</sup> *People for the Ethical Treatment of Animals, Inc. v. Stein*, 466 F. Supp. 3d 547, 579 (M.D.N.C. 2020).

<sup>23</sup> 5 U.S.C. § 552(a)(2)(A); see The Animal Law Podcast, *Animal Law Podcast #52: The (Ongoing) Case of the USDA Records Blackout*, OUR HEN HOUSE (Sept. 27, 2019), <https://www.ourhenhouse.org/animal-law-podcast-52-the-ongoing-case-of-the-usda-records-blackout/> [<https://perma.cc/8S2L-XRAR>] [hereinafter *Animal Law Podcast #52*].

<sup>24</sup> *Animal Law Podcast #52*, *supra* note 23, at 04:41.

<sup>25</sup> *Id.*

<sup>26</sup> *Animal Welfare Act Enforcement*, U.S. DEP'T OF AGRIC. (June 2, 2020), [https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/ct\\_awa\\_enforcements](https://www.aphis.usda.gov/aphis/ourfocus/animalwelfare/ct_awa_enforcements) [<https://perma.cc/C5DZ-UGSD>].

<sup>27</sup> *Victory for Animal Rights Groups in 'USDA Blackout' Lawsuits*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (July 20, 2020), <https://www.peta.org/media/news-releases/victory-for-animal-rights-groups-in-usda-blackout-lawsuits> [<https://perma.cc/HQL5-K39G>]; accord *The Animal Law Podcast #52*, *supra* note 23, at 07:51.

that the FOIA and the APA required the agency to maintain those documents in its online reading room.<sup>28</sup> The U.S. Court of Appeals for the Ninth Circuit ruled for the ALDF, holding that a district court may order an agency to comply with the FOIA reading room requirement.<sup>29</sup> Essentially, the Ninth Circuit held that the remedy for not posting the records is to post the records.<sup>30</sup>

Enforcing the FOIA and the APA against agency opacity can yield short-term gains, but larger problems remain.<sup>31</sup> After the aforementioned case, the USDA still has been slow to restore the removed records, and those it does produce are so replete with redactions as to be of little value to animal advocacy groups.<sup>32</sup> The USDA claims that such changes are intended to maintain privacy and, ironically, improve transparency.<sup>33</sup> Margaret Kwoka, an attorney who assisted the ALDF in its suit against the USDA, believes that the agency originally removed the documents specifically in response to the ALDF's increased use of the information to challenge organizations.<sup>34</sup> The USDA's later redaction of the records appears to be another attempt to pursue the same goal.

Cases such as this one show there is a place for lawyers who choose to bring lawsuits targeting problematic policies surrounding transparency. This role, however, seems to be constrained by the limited latitude provided by law. While limitations such as difficulty proving standing and the general weakness of transparency requirements exist, lawyers should continue to make full use of what legal theories exist in this realm.

### III. PRESSURING THE GOVERNMENT TO ENFORCE EXISTING REGULATIONS

Lawyers have another role to play in applying pressure to the government to enforce existing labeling regulations. Current standards are feeble at best. Even the most heavily regulated animal welfare term—"organic"—leaves much to be desired in terms of coverage and enforcement. Beyond term regulation, the Animal Welfare Act attempts to address many animal welfare concerns but similarly fails to have the broad coverage necessary to ensure proper protections. Because of these shortfalls, lawyers in this realm have been forced to rely on other laws, such as those

<sup>28</sup> *Animal Legal Def. Fund v. U.S. Dep't of Agric.*, 935 F.3d 858, 864–65 (9th Cir. 2019).

<sup>29</sup> *Id.* at 877.

<sup>30</sup> Animal Law Podcast #52, *supra* note 23.

<sup>31</sup> Some of the difficulties encountered by government agencies that do not otherwise seem to have an interest in obfuscation might be explained by agency capture. The USDA has strong ties to agribusiness, which has a strong voice in the USDA's operation and policies. Bruce Friedrich & Stefanie Wilson, *Coming Home to Roost: How the Chicken Industry Hurts Chickens, Humans, and the Environment*, 22 ANIMAL L. 103, 157–61 (2015).

<sup>32</sup> Animal Law Podcast #52, *supra* note 23.

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

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

prohibiting misleading labeling, to fill the gap. However, lawyers should remain conscious of the ultimate goal of changing inadequate regulation and legislation through cooperative efforts with the broader animal advocacy community and society at large.

### A. *Inadequacy of Current Regulations*

Federal and state regulation of meat labeling claims is woefully inadequate. In many cases, terms appearing on labels have no regulated meaning whatsoever.<sup>35</sup> In other cases, the meaning is constrained, misleading, or applies differently to different products.<sup>36</sup> The key regulatory structures involve federal “organic” standards and the federal Animal Welfare Act.

#### 1. *Organic Standards*

A prime example of the problems inherent in public labeling can be seen in regulation of the term “organic.” In a survey designed by the American Society for the Prevention of Cruelty to Animals (“ASPCA”) and administered by a neutral surveying firm, a majority of respondents indicated that they believed organically raised animals were permitted consistent outdoor access, allowed more space to move compared to other farms, were not genetically engineered for growth, and regularly inspected by the government—none of which is inherently required by existing regulation.<sup>37</sup> But the regulations governing organic production and handling do not mandate all of these conditions.

At first glance, the standards provided in the Code of Federal Regulations (“CFR”) appear to protect animal welfare. For livestock, the CFR provides guidelines for feed,<sup>38</sup> health care,<sup>39</sup> and mammalian living conditions.<sup>40</sup> The last requires that organic farms accommodate animals’

<sup>35</sup> *A Consumer’s Guide to Food Labels and Animal Welfare*, ANIMAL WELFARE INST. <https://awionline.org/content/consumers-guide-food-labels-and-animal-welfare> [https://perma.cc/L9SZ-HFDZ]; see also Zac Franklin, *Giving Slaughterhouses Glass Walls: A New Direction in Food Labeling and Animal Welfare*, 21 *ANIMAL L.* 285, 307–11 (2015) (explaining that terms like “humanely raised” and “cruelty-free” have no legal definition and that even those bearing the privately regulated “Certified Humane” label could still permit farms to “remove birds’ beaks or castrate cattle without painkillers.”).

<sup>36</sup> *A Consumer’s Guide to Food Labels and Animal Welfare*, *supra* note 35. To take a few examples, “cage free” is only regulated when referring to eggs, “ethically raised” can be defined by the company using the label, and “free range” means different things for egg-laying hens and non-egg-laying birds. *Id.*

<sup>37</sup> Memorandum from the Am. Soc’y for the Prevention of Cruelty to Animals to Interested Parties (Apr. 2014), [https://www.aspca.org/sites/default/files/aspca\\_organic\\_labeling\\_public\\_memo\\_4-10-14.pdf](https://www.aspca.org/sites/default/files/aspca_organic_labeling_public_memo_4-10-14.pdf) [https://perma.cc/3WR5-WJPF] [hereinafter ASPCA Memorandum].

<sup>38</sup> 7 C.F.R. § 205.237 (2021).

<sup>39</sup> *Id.* § 205.238.

<sup>40</sup> *Id.* § 205.239.



health and natural behavior, including “[y]ear-round access . . . to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment.”<sup>41</sup> It also requires allowing grazing during the appropriate season, providing clean bedding, giving shelter that allows for comfortable temperature and airflow, and allowing opportunity for exercise.<sup>42</sup>

However, each of these standards is subject to extensive exceptions. These exceptions include, among others, confinement for bad weather, the animal’s safety or wellbeing, risk to soil quality, and breeding.<sup>43</sup> Accordingly, farm owners operating under the organic regulations have broad discretion in how they treat animals, and inspections are performed only after notice is given to the farm.<sup>44</sup> Most strikingly, these welfare standards apply only to mammalian livestock.<sup>45</sup> The organic regulations provide no standards for the welfare of chickens, turkeys, and other birds raised for food, including eggs. Poultry’s exclusion allows farmers to label birds and their eggs as organic even if those birds were raised in densely packed, unsanitary, indoor conditions.<sup>46</sup> These conditions are in stark conflict with the image of husbandry on a bucolic family farm that many businesses encourage.

## 2. *Animal Welfare Act*

The Animal Welfare Act (“AWA”) is another example of a framework within which animal welfare is regulated.<sup>47</sup> As the largest piece of legislation concerning animal welfare, the AWA imposes standards for, among others, laboratory animals,<sup>48</sup> dog breeders,<sup>49</sup> marine mammals,<sup>50</sup> and infant exotic animals.<sup>51</sup> Where the AWA has standards, there has been good success in enforcing those standards.

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<sup>41</sup> *Id.* § 205.239(a)(1).

<sup>42</sup> *Id.* § 205.239(a).

<sup>43</sup> *Id.* § 205.239(b).

<sup>44</sup> ASPCA Memorandum, *supra* note 37.

<sup>45</sup> 7 C.F.R. § 205.239.

<sup>46</sup> Peter Whoriskey, *July 13, 2017: More Than a Million Hens, Filling Barns at Three per Square Foot. And Yes, They're USDA Organic*, CHI. TRIB. (July 13, 2017, 9:55 AM), <https://www.chicagotribune.com/business/ct-egglands-best-organic-herbruck-farm-20170713-story.html> [<https://perma.cc/D6LR-493V>]. Bruce Friedrich with the Good Food Institute and Stefanie Wilson with the ALDF suggest that the exceptions granted to poultry are due to the poultry industry’s outsized influence in the USDA, amounting to agency capture. Friedrich & Wilson, *supra* note 31 at 157–59. They point out many instances of agribusiness executives or others with severe conflicts of interest being appointed to leading roles in the agency, regardless of the political party making the appointments. *Id.*

<sup>47</sup> 7 U.S.C. §§ 2131–2160.

<sup>48</sup> Cathy Liss, Kimberly Ockene, Naomi A. Rose, Georgia Hancock Snusz & Anna Frostic, *Animal Welfare Act: Welfare Standards*, 25 ANIMAL L. 157, 157 (2019).

<sup>49</sup> *Id.* at 164.

<sup>50</sup> *Id.* at 168.

<sup>51</sup> *Id.* at 178.

First, courts have ensured that agencies do not depart from the statute's text and thus its requirements for animal welfare. In 1992, a judge held that a regulation excluding rats, mice, and birds from its definition of "animal" was contrary to the AWA's definition.<sup>52</sup> Second, the USDA, which enforces the AWA, regularly sends warning letters and imposes fines on violators, often repeatedly.<sup>53</sup> The Department of Justice, working with the USDA, enforces the AWA's prohibitions on activities such as animal fighting, unlicensed exhibition, unlicensed dealing, improper marking, and the use of unsafe environments for dogs for sale.<sup>54</sup>

The problem is not imperfections in enforcement, but rather that the AWA has exceptions that render it ineffective for large groups of animals. While rats, mice, and birds fall under the definition of "animal," the AWA contains an exception for them when they are bred for research purposes.<sup>55</sup> What this means in reality is that the vast majority of animals used for research are not covered by the AWA, since many of them are genetically engineered mice.<sup>56</sup> A second exception is for aquatic animals.<sup>57</sup> The AWA does not cover any of the cold-blooded fish, crustaceans, or bivalves in the U.S. food, research, or pet industries.<sup>58</sup>

But the most egregious of the AWA's exceptions is for farmed animals. Because animals raised for food are not covered, "[n]inety-eight percent of animals raised for human benefit are excluded" from its protections.<sup>59</sup> Michael McFadden with Farm Forward speculates that this exception exists because covering farmed animals under the AWA was considered "too costly" and "unnecessary."<sup>60</sup> Focusing on the second of these, the necessity of protecting farmed animals, McFadden points out that "back in 1970, while industrialized farmed animal production had already begun in earnest, it was still, relative to today, very much in its infancy."<sup>61</sup> However, as the factory-farming industry increased efficiency, the explosion of cruel practices in the name of profits has become the norm.<sup>62</sup> Today,

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<sup>52</sup> *Animal Legal Def. Fund v. Madigan*, 781 F. Supp. 797, 806 (D.D.C. 1992); Joyce Tischler, Valerie Stanley, Jenni James & Katherine Meyer, *Animal Welfare Act: Related Litigation and Other Efforts*, 25 ANIMAL L. 225, 227 (2019). But note that the AWA was amended in 2002 to exclude these same animals. *Id.* at 226.

<sup>53</sup> Delcianna Winders & Varu Chilakamarri, *Animal Welfare Act: Enforcement*, 25 ANIMAL L. 249, 252-55 (2019).

<sup>54</sup> *Id.* at 261-63.

<sup>55</sup> Michael McFadden, Sue Leary & Kathy Hessler, *Animal Welfare Act: Excluded Animals*, 25 ANIMAL L. 203, 210 (2019).

<sup>56</sup> *Id.* at 214.

<sup>57</sup> *Id.* at 215-16.

<sup>58</sup> *Id.* at 217-18, 220-21.

<sup>59</sup> *Id.* at 204. While the number of animals raised as pets is about 200 million, the number raised for non-rodent research is about one million, and the number used for exhibition is likely less than one million; farmed animals number around 9.2 billion. *Id.*

<sup>60</sup> *Id.* at 205.

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* at 206-07.

"[n]inety-nine percent of farmed animals are factory farmed."<sup>63</sup> The farmed-animal exception ensures that the AWA will continue to ignore these animals.

The inadequacies of the AWA close off a route for challenges to claims of legal compliance because many inhumane practices are, simply put, legally allowed. This difficulty, combined with the government's unwillingness to adopt meaningful definitions for animal welfare claims, has forced attorneys to creatively search for other methods to challenge misleading labels.

### *B. Use of Other Laws as a Stopgap*

Despite these shortcomings, lawyers have pressed for the enforcement of regulations that will improve consumers' access to meaningful labels. This effort has included looking beyond laws specific to animal welfare and finding levers in laws meant to protect consumers. An excellent case study of this advocacy is the Humane Society of the United States' ("HSUS") efforts to force Pilgrim's Pride, one of the nation's largest poultry producers, to stop using misleading labels relating to animal welfare.<sup>64</sup>

Pilgrim's Pride's advertising claimed that the company's practices were entirely humane and that "Pilgrim's is helping to ensure that our birds are raised, transported, and processed as humanely as possible," guaranteeing "the best possible grow out conditions."<sup>65</sup> HSUS investigations, however, showed "instances of abuse and cruel practices" at Pilgrim's Pride facilities, including "kicking chickens, . . . swinging them around to try [to] euthanize them, . . . punching [them], shackling them excessively hard and repeatedly such that . . . their limbs would be dislocated."<sup>66</sup> The company's response to these allegations was often that these abuses were isolated incidents that could be corrected by "firing or sanctioning the individual employee that is participating in that abuse."<sup>67</sup>

In response to these cruel practices, the HSUS decided to challenge unethical conditions that regulations technically allowed. These conditions included overcrowding in warehouses without cages but also without windows or access to the outdoors and with "less than a square foot of space to move around, [which] causes injury to birds, . . . causes them to not be able to engage in natural behaviors, [and] other conditions";<sup>68</sup> growth processes that selectively breed chickens to grow faster resulting in "chronic

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<sup>63</sup> *Id.* at 207.

<sup>64</sup> The Animal Law Podcast, *The Animal Law Podcast #49: The Case of Pilgrim's Pride's Shame*, OUR HEN HOUSE (June 26, 2019), <https://www.ourhenhouse.org/animal-law-podcast-49-the-case-of-pilgrims-prides-shame/> [<https://perma.cc/8L52-V29Y>].

<sup>65</sup> *Id.* at 03:20.

<sup>66</sup> *Id.* at 05:10.

<sup>67</sup> *Id.* at 06:00.

<sup>68</sup> *Id.* at 06:35.

pain for the last twenty percent of their lives”;<sup>69</sup> and “unnatural lighting cycles which keeps them awake for twenty hours of the day, keeps them eating [and] growing” and doesn’t allow them to rest.<sup>70</sup>

Remember, however, that poultry are not covered by the organic standards or the Animal Welfare Act. Pilgrim’s Pride’s claims to follow all regulations were therefore meaningless. The HSUS thus took a creative turn and filed a complaint with the Federal Trade Commission (“FTC”), which is granted broad oversight of “anything material to consumers in their decision making and likely to mislead a consumer.”<sup>71</sup> The HSUS contended that Pilgrim’s Pride’s labeling was materially misleading consumers into believing that the chickens had been well-treated, leading consumers to choose Pilgrim’s Pride chickens over other companies’ chickens.<sup>72</sup> As evidence of the materiality of the deception, the HSUS used consumer surveys demonstrating that “consumers care about the humane treatment of animals . . . what . . . a reasonable consumer think[s] humane treatment means, and then whether . . . those representations about the humane . . . treatment of the animals would affect their purchasing habits.”<sup>73</sup> Several months later, the FTC met with Pilgrim’s Pride, which then removed all of the misleading labeling from its advertising.<sup>74</sup>

Despite this victory, Pilgrim’s Pride has disseminated different claims that, while avoiding clear deception, might still mislead consumers. For example, Pilgrim’s Pride stated, “We provide assistance and ensure adherence to our animal welfare standards,” which, while true, does not say much about the actual treatment of the animals.<sup>75</sup> Even though such methods provide only modest changes, lawyers should continue to apply pressure to claims that mislead consumers in cooperation with efforts to publicize such deception.

### *C. Goal of Improved Regulation*

As the Pilgrim’s Pride case illustrates, lawyers *can* score wins against misleading labeling. The persistent issue is that the relief obtained is often simply injunctive, resulting in a large expenditure of resources for the questionable benefit of a changed or removed label. The larger goal should be to improve regulation and legislation.

Animal welfare organizations have already won significant changes in

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<sup>69</sup> *Id.* at 07:40.

<sup>70</sup> *Id.* at 08:15.

<sup>71</sup> *Id.* at 15:25.

<sup>72</sup> *Id.* at 16:50.

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 22:30.

<sup>75</sup> *Id.* at 24:00. HSUS has also filed complaints with the Securities and Exchange Commission to enforce misrepresentations based on the fact that shareholders and investors are equally misled by these claims. *Id.* at 31:20. Regulatory complaints are often preferable to litigation because of the less time and money required. *Id.* at 35:32.

animal welfare protections, such as pressuring businesses to voluntarily abandon animal testing of cosmetics and banning horse slaughter.<sup>76</sup> Many such proposals prove to be uncontroversial and nonpartisan; even a divided Congress under the Trump administration unanimously passed the Preventing Animal Cruelty and Torture Act.<sup>77</sup> However, advocates have not yet succeeded in forcing Congress or regulatory agencies to adopt a coherent and comprehensive labeling scheme that would give consumers adequate knowledge of how the animals they eat were treated before slaughter. Regarding the reforms sought, one commentator asserted that:

The food labeling regime that would best align animal agricultural realities with consumer preferences has four basic elements: (1) mandatory disclosure of (2) a relatively comprehensive list of common industrial farming practices that signals which practices each producer employs, (3) articulated in a manner that most consumers can understand, and (4) backed by effective enforcement mechanisms.<sup>78</sup>

These changes would provide the transparency consumers need to meaningfully influence "production methods and amounts" via their buying choices.<sup>79</sup>

Lawyers should bear these lessons in mind as they consider how their efforts are best spent. While legal training puts the lawsuit at the forefront of an attorney's mind, it might often be more effective for lawyers to instead assist in proposed rulemaking and lobbying efforts that will broaden the scope of future challenges.

#### IV. PRESSURING PRIVATE INDUSTRY'S USE OF "HUMANE" LABELING

Because federal and state governments have failed to adopt comprehensive regulations concerning animal welfare labeling, private organizations have stepped in to fill the gap, such as the "Certified Humane" label administered by the nonprofit Humane Farm Animal Care and

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<sup>76</sup> See generally, Earl Blumenauer, *Changing Humanity: Fifteen Years of Progress in Animal Welfare and Protection*, 22 ANIMAL L. 203, 220–21 (2016). "Reacting to these trends, a large number of cosmetic companies have *voluntarily adopted* alternative test methods." *Id.* at 214 (emphasis added).

<sup>77</sup> Mihir Zaveri, *President Trump Signs Federal Animal Cruelty Bill into Law*, N.Y. TIMES (Nov. 25, 2019), <https://www.nytimes.com/2019/11/25/us/politics/trump-animal-cruelty-bill.html> [<https://perma.cc/7YYL-WMXA>]. It is important to note, however, that this law's up-to-seven-year imprisonment penalty arguably replaces one form of cruelty with another in our current prison system. *Id.*

<sup>78</sup> Franklin, *supra* note 35, at 314.

<sup>79</sup> *Id.*

“Certified Animal Welfare Approved” by A Greener World.<sup>80</sup> Unfortunately, these labeling schemes are inconsistent and have their own shortcomings. And, like any standard, these labels require enforcement to be effective, as this Part discusses.

*A. Shortcomings of Private Labeling Schemes*

Private labeling schemes like those mentioned above are one proposed solution to the inadequacies of governmental regulation. The suggestion is that “[i]f you are someone who eats animal products, you are voting with those dollars that you actually want a higher-welfare product.”<sup>81</sup> This suggestion assumes that private labeling is well-known, consistent, and truthful. In reality, it is a difficult task for even a well-educated consumer to make meaningful decisions given the patchwork of competing labels. In addition to being numerous and varied, these labels tend to have similar-sounding names, making it difficult to distinguish between them and use jargon in explanations the average consumer might not understand.<sup>82</sup> A review of even well-designed attempts to make sense of this morass reveals this conflict.

The Environmental Working Group (“EWG”) maintains a page that does as good a job as any at elucidating the differences between labeling schemes.<sup>83</sup> It requires customers to select from a list of ten product categories and then wade through a lengthy list of specific standards covered under each labeling scheme.<sup>84</sup> Even the most well-meaning and diligent consumer would be hard pressed to remember the requirements for each labeling scheme and would likely abandon the effort to use the labeling schemes to inform purchasing decisions.

All this assumes the animal product labels accurately reflect the animals’ treatment. Yet many products carrying a privately regulated label have not conformed to the standards they assert, with exposés revealing substandard conditions for “American Humane Association Certified” and “Humane Farm Animal Care,” among others.<sup>85</sup>

Apart from these formal private labeling schemes, producers use a variety of other terms to communicate welfare standards to consumers.

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<sup>80</sup> *A Consumer’s Guide to Food Labels and Animal Welfare*, *supra* note 35.

<sup>81</sup> McFadden et al., *supra* note 55, at 209.

<sup>82</sup> Franklin, *supra* note 35, at 311.

<sup>83</sup> *Decoding Meat and Dairy Product Labels*, ENV’T WORKING GRP., <https://www.ewg.org/research/labeldecoder> [<https://perma.cc/ZL8S-3LDG>].

<sup>84</sup> *Id.* For example, if chicken is selected, we see that the “Animal Welfare Approved” label requires outdoor access, prohibits feedlots, and discourages genetically modified feed, while “Certified Humane” requires none of these. *Id.* “USDA Organic” permits the use of feedlots, does not audit its claims, and uses a questionable standard for alterations. *Id.* There are thirteen terms explained for chickens alone, and the terms differ for each of the ten animal categories. *Id.*

<sup>85</sup> Friedrich & Wilson, *supra* note 31, at 115-16.

Some of these terms have strict legal definitions—the term “organic,” as discussed above, is federally regulated. Other terms have no meaning whatsoever.<sup>86</sup> Terms such as “farm fresh” and “all natural” have no legal meaning, “free range” guarantees a lot less than full outdoor access,<sup>87</sup> and “kosher” standards contain no humane requirements.<sup>88</sup> Consumers might trust labeling due to a vague understanding that it is illegal to lie on packaging and in advertising, but if the terms are vacuous, the fact that they are true is irrelevant. Therefore, producers that actually treat their animals well find it hard to compete because there is little they can say to convince consumers their product is higher quality.<sup>89</sup> That consumers “pay more for goods they mistakenly believe are produced humanely” is a “market failure.”<sup>90</sup>

### *B. Successful Methods for Challenges*

In addition to the regulatory complaints discussed above and the litigation alternative,<sup>91</sup> one of the most effective routes for achieving meaningful changes in welfare labeling has historically been consumer pressure. A prime example of this change is the shift in average grocers’ practices in response to Whole Foods’ increased market share.<sup>92</sup> Because consumers voted with their wallets for the increased welfare standards popularized by that chain,<sup>93</sup> other suppliers changed their practices to keep up.<sup>94</sup> Today, practices that used to belong to niche retailers “ha[ve] now become really par for the course, certainly among your larger chains and your progressive grocers.”<sup>95</sup> Because major suppliers generally use a consistent production method regardless of the final destination of the meat, “[t]he biggest difference between the store-brand chickens at Whole Foods

<sup>86</sup> Franklin, *supra* note 35, at 296.

<sup>87</sup> *Id.* at 296–97.

<sup>88</sup> Friedrich & Wilson, *supra* note 31, at 115.

<sup>89</sup> Franklin, *supra* note 35, at 294.

<sup>90</sup> *Id.* at 294–95. *But see* Sean P. Sullivan, *Empowering Market Regulation of Agricultural Animal Welfare Through Product Labeling*, 19 ANIMAL L. 391, 411–12 (2013) (asserting that labeling can improve credibility through programs that conduct external audits and through creative transparency solutions such as live streaming animal treatment).

<sup>91</sup> While this Article has criticized litigation as a waste of resources, some organizations like the ALDF insist on its value, and it certainly has a place. *How False Advertising Lawsuits Help Animals*, ANIMAL LEGAL DEF. FUND, <https://aldf.org/article/how-false-advertising-lawsuits-help-animals/> [https://perma.cc/4D6J-FRQP].

<sup>92</sup> Deena Shanker & Polly Mosendz, *That Chicken from Whole Foods Isn't So Special Anymore*, BLOOMBERG (Aug. 14, 2017, 8:00 AM), <https://www.bloomberg.com/news/features/2017-08-14/that-chicken-from-whole-foods-isn-t-so-special-any-more> [https://perma.cc/8W8G-63QM].

<sup>93</sup> GLOB. ANIMAL P'SHIP, <https://globalanimalpartnership.org/> [https://perma.cc/3VN3-35RX].

<sup>94</sup> Shanker & Mosendz, *supra* note 92.

<sup>95</sup> *Id.*

and what's for sale at another supermarket is . . . the sticker price.”<sup>96</sup> Ironically, the consolidation of meat producers may have made it easier to create industry-standard welfare requirements after a critical mass of consumers demand them.<sup>97</sup>

The high-profile case of Fairlife provides an excellent example that ties together several topics discussed previously. Fairlife is a milk producer that prides itself on the humane treatment of its dairy cows and promotes itself based on these claims.<sup>98</sup> Its website stated, “As dairy farmers, we treat our cows with the utmost care, because we know that their health and happiness are the foundation of our business.”<sup>99</sup> In early 2019, an investigator with the Animal Recovery Mission (“ARM”) was hired at a dairy that supplies Fairlife and recorded rampant abuses.<sup>100</sup> A report disseminated by ARM stated:

On a daily basis, employees were observed hitting and punching cows, and using the milking claws to hit cows in the udders. Cows were also poked, stabbed, and shoved with metal tubes and broom sticks. When cows in the milking line would not cooperate, frustrated employees can be seen bending and breaking bones in the cows tails as punishment for not entering the confusing rotary system. The investigator also witnessed employees forcing cows into the stall by punching, kicking, slapping, and hitting [the cows] in the udders and reproductive system.<sup>101</sup>

ARM’s report, along with videos of the abuse, were sent to several news organizations.<sup>102</sup> After being made aware of the abuses, an educated public demanded that Fairlife no longer be sold at stores.<sup>103</sup> In response, large

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<sup>96</sup> *Id.*

<sup>97</sup> See Brian Burns, *Statements on “Certified Humane” Whole Foods Investigation*, DIRECT ACTION EVERYWHERE (Jan. 8, 2015) [<https://perma.cc/4KKE-ENJ6>] (accusing the Global Animal Partnership and Certified Humane labels used by Whole Foods of inhumane standards and conflicts of interest with the corporation); *Whole Foods ‘Happy Meat’ Supplier Exposed*, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, <https://investigations.peta.org/whole-foods-humane-meat-exposed/> [<https://perma.cc/SJC7-3KDF>] (exposé of abuse conditions on a farm certified under the Global Animal Partnership).

<sup>98</sup> FAIRLIFE, <https://fairlife.com/what-we-believe/> [<https://perma.cc/QQS7-KHTT>].

<sup>99</sup> *Operation Fairlife*, ANIMAL RECOVERY MISSION (June 12, 2019), <https://animalrecoverymission.org/reports/Operation-Fairlife-Full-Report.pdf> [<https://perma.cc/V3A3-RM2Q>].

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Michelle Gant, *Fairlife Dairy Products Pulled from Store Shelves Amid Animal Abuse Controversy*, TODAY (June 6, 2019, 5:34 PM), <https://www.today.com/food/fairlife-dairy-products-pulled-store-shelves-amid-animal-cruelty-controversy-t155783> [<https://perma.cc/S68P-BQK2>].



grocery chains pulled Fairlife products from their shelves, citing the public backlash.<sup>104</sup> While Fairlife took full responsibility for the abuses and promised changes,<sup>105</sup> its reputation has not fully recovered.

Fairlife provides an example for several previous points. If the dairy where the investigation took place was located in a state with ag-gag laws, ARM might not have investigated, or the investigator might have been open to criminal liability. If adequate governmental oversight was in place, the abuses might have been caught sooner. If laws were more stringent, the milk producer might have been deterred from permitting such abuses. If public outcry was insufficient, agency complaints or litigation could have been filed. And ultimately, the force behind the change was the public's desire to hold a deceptive business accountable over misrepresentations that partially explained the premium price customers were willing to pay. Because lawyers have a role to play in each of these facets, they will continue to have ample opportunity to assist in the improvement of transparent, meaningful labeling.

## V. CONCLUSION

When confronted with the realities of animal suffering in agriculture, it is a very rare person who says the suffering is good. The average consumer instead chooses ignorance, rationalizations, or higher-welfare alternatives. For animal welfare to improve, we need a system of oversight that provides the transparency necessary for consumers to see the reality of the industry and decide for themselves what to do about it. In making this change, lawyers have a real, if constrained, role to play. Among other tasks, they can ensure the transparency necessary to educate the public about conditions in agriculture, hold businesses accountable by enforcing regulations via complaints and litigation, and encourage better business practices by exposing abuses and corporate deception. All the while, lawyers should keep an eye to what is effective, giving heed to the non-lawyers in the movement, the public at large, and the part of themselves that cares about justice in all its forms.

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<sup>104</sup> *Id.*

<sup>105</sup> *Id.*