

WHAT'S GOOD FOR THE GOOSE . . . THE ISRAELI SUPREME COURT, FOIE GRAS, AND THE FUTURE OF FARMED ANIMALS IN THE UNITED STATES

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I

INTRODUCTION

The cruelties visited upon animals in modern agriculture are indisputable and truly staggering in their proportions. Approximately ten billion animals, excluding fish, are killed annually in the United States for food. These animals are regularly confined for life to very small areas—some no bigger than themselves—virtually unable to move a muscle, are mutilated and castrated without anesthesia, are handled and slaughtered in inhumane ways, and are genetically engineered to increase production in ways that cause them to be ill and malformed. This mistreatment goes on, day after day, animal by animal, endlessly. At the same time, laws that govern the welfare of these animals have been altered to exempt cruel common practices or, when it comes to such practices, are simply ignored. Our society willfully turns its back on the suffering of farmed animals or, perhaps more commonly, guiltily averts its gaze.¹

How we have created a world in which such a vast amount of animal suffering is tolerated is an interesting question. But what is more important for the purposes of this article is whether the legal system in the United States can be adjusted to significantly reduce such horrendous suffering. Sadly, it appears

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1. 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 206 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). *See also id.* at 216–19 (describing customary farming practices such as the gestation crate, veal crate, and battery cage).

to be very difficult to reform modern industrial farming in the United States in even the most minor ways. Among the reasons for this are the enormous economic interest defending the current system and the industry's relentless efforts to convince people that the animals in their hands are treated humanely, that their treatment is carefully regulated, and that welfare standards in the United States are higher than in other developed countries, when, in actuality, they are among the lowest.²

Just as significantly, however, it is necessary to acknowledge the strategic, and even psychological, difficulties created by the fact that cruelty is embedded in nearly every aspect and stage of animal food production. How do you initiate change when the entire system is so bad? How do you focus on one dreadful practice over another as a target for reform? How do you respond to arguments, not without merit, that one method is no more cruel than another? The sheer size of, and mess within, modern industrial farming and the consistently unethical treatment of animals means the problem cannot be easily untangled.

This consistency seems to encourage people to adopt an "all or nothing" view of animal agriculture. In response to allegations of cruelty within foie gras production in Israel, proponents quickly point to other cruelties in defense:

If we had a better lobby, better connections, this wouldn't be happening, said [a sales representative for an Israeli foie gras producer]. . . . People also say that kosher slaughtering and milk-fed veal are inhumane, but they attacked us.³

Similarly, in response to attacks on the force-feeding of ducks and geese for foie gras production in the United States, the executive chef and co-owner of an acclaimed restaurant in Manhattan said,

We can criticize how foie gras is produced and be concerned about the health of the duck and blah, blah, blah, O.K., fine. . . . But many processes in the production of food are cruel, . . . including the farming of chicken and fish. To me, it's more cruel to chew

2. See National Chicken Counsel, *About the Industry*, <http://www.nationalchickencouncil.com/aboutIndustry/> (follow "Physical Well-Being of Chickens" hyperlink) (last visited Aug. 25, 2006) (asserting that the physical well-being and humane treatment of chickens is a top priority of modern broiler industry and that "top-quality food can be produced only from top-quality birds that have been treated properly"); United Egg Board, *Learn More About Eggs: Treatment of Hens*, <http://www.aeb.org/LearnMore/Eggyclopedia/T.htm> (last visited Aug. 25, 2006) (arguing that "[l]ike humans, hens seem to be more productive when they're healthy" and that "[a]lthough the housing and caging of laying hens may seem to limit their freedom, the system is actually designed for the welfare of the birds as well as for production efficiency"); National Pork Board, *Pork Production Today*, <http://www.pork.org/newsandinformation/quickfacts/swinecare1.aspx> (last visited Aug. 25, 2006) (explaining that pork producers consider self-defeating anything short of providing humane care for their animals); American Meat Institute, *Animal Health/Welfare*, <http://www.meatami.com/Template.cfm> (follow "Animal Health/Welfare" hyperlink) (last visited Aug. 25, 2006) (stating that federal laws govern the humane treatment of animals and that the health and welfare of animals is a key concern of the meat and poultry industry because they contribute to high-quality products). Notably, there is no federal law governing the treatment of animals while on farms, where they spend the vast majority of their lives.

3. Daniel Kennemer, *Foie Gras Industry's Goose Cooked*, JERUSALEM POST, Mar. 19, 2006, available at <http://www.jpost.com/servlet/Satellite?cid=1139395631583&pagename=JPost%2FJPArticle%2FShowFull>.

on an oyster, which is live, because it must have feelings. Still, I am not ready to become a vegan.⁴

Even minimal reform, such as Whole Foods' recent decision to stop selling live lobsters because of inhumane treatment, can provoke derisive commentary on the inconsistency of such policies. One crabber responded by saying, "I laugh at that. Everything we eat is inhumane, if you want to follow that argument. Let's be realistic here . . ." ⁵ One restaurant owner said, "If we're going to worry about lobsters then we need to worry about salmon allowed to die in the sun or shrimp caught in giant nets then frozen to death. That's no way to go either. What about butchering cattle for hamburgers?" ⁶

And the fact is such defenders of the status quo have a logical, though not an ethical, point. Given the increasing popularity of vegan diets and their apparent health benefits,⁷ it is difficult to argue that anything we do to farmed animals is more necessary than anything else, since none of it is actually necessary at all.⁸ This conundrum creates a real challenge for anyone who is not "ready to become a vegan" but who is trying to decide whether a particular farming practice is really justifiable. As a result, it is far easier to think of the issue as an all-or-nothing proposition and justify each cruelty by there being so many others, than to try to make uncomfortable, and often inconsistent, choices separating the acceptable from the unacceptable and to hold industry to those choices.

Industry, of course, plays right into this discomfort by fighting wholeheartedly any reform, no matter how minor, as rooted in an animal rights philosophy that would end all human exploitation of animals. Virtually every

4. Anthony Ramirez, *Citing Treatment to Fowl, Groups Urge State to Ban Foie Gras*, N.Y. TIMES, June 22, 2006, at B3 (quoting Eric Ripert of Le Bernardin).

5. Stephen Kiehl & Rob Hiaasen, *A Hunger For Humane Foods; Ethical Worries Affect Retailers*, BALT. SUN, June 20, 2006, at A1.

6. Margery Eagen, *Lobster Laments Boil Down To Pure Claptrap*, BOSTON HERALD, June 27, 2006, at 7.

7. See American Dietetic Ass'n & Dietitians of Can., *Position of the American Dietetic Association and Dietitians of Canada: Vegetarian Diets*, 103 J. AM. DIETETIC ASS'N 6, 748 (2003).

Appropriately planned vegetarian diets are healthful, nutritionally adequate, and provide health benefits in the prevention and treatment of certain diseases . . . Well-planned vegan [pure vegetarian] and other types of vegetarian diets are appropriate for all stages of the life cycle, including during pregnancy, lactation, infancy, childhood, and adolescence.

Vegetarian diets offer a number of nutritional benefits, including lower levels of saturated fat, cholesterol, and animal protein as well as higher levels of carbohydrates, fiber, magnesium, potassium, folate, and antioxidants such as Vitamins C and E and phytochemicals. Vegetarians have been reported to have lower body mass indices than nonvegetarians, as well as lower rates of death from ischemic heart disease; vegetarians also show lower blood cholesterol levels; lower blood pressure; and lower rates of hypertension, type 2 diabetes, and prostate and colon cancer.

8. The practical reality is that the only necessity attached to animal products is not whether they are socially necessary, since none are, but whether the production of such food is necessary to the producer. In this context, it is difficult to imagine any necessity other than a particular practice being more economically efficient, thereby rendering the producer more competitive. This, of course, could justify anything, regardless of how cruel it may be. See generally GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? (2000).

reform proposed by animal advocates is challenged by the industry as the first step toward vegetarianism, as if the only choices are either allowing the industry the complete freedom to do anything it wants or shutting it down completely. For example, in response to a proposed ballot initiative that would require nothing more than providing pregnant pigs and veal calves sufficient space to turn around and extend their limbs, the president of the Arizona Farm Bureau stated, “They claim to be the protector of animals and our member farms, but the fact is they want to impose their antimeat agenda on Arizonans.”⁹ A representative of the Arizona Pork Council similarly commented, “They want to stop production of meat animals. . . . They’re using the stalls as a pretense to do this.”¹⁰ The industry cannot admit any wrongs, or it will condemn itself completely. Thus, the website of “Campaign for Arizona Farmers and Ranchers,” ominously warns:

Make no mistake about it, out-of-state animal rights groups would like to bring animal agriculture in this country to a screeching halt. These activists simply can’t stand the thought of an animal being raised for your dinner table, period. . . . The motivation behind Prop[osition] 204 is to ultimately end animal agriculture as we know it and eliminate meat/poultry products from our diets.¹¹

To be aware that one cannot easily change an industry by way of ethical argument because the ethical argument proves too much is truly depressing. A few jurisdictions outside the United States, however, have made some strides in devising a legal framework that appears to create a better environment for improvement in this area; for example, there have been some significant changes in Europe, and it appears more will take place in the near future.¹² And, of particular interest is the 2003 decision by the Supreme Court of Israel, sitting as the High Court of Justice, annulling, on animal cruelty grounds, regulations regarding the force-feeding of geese for the production of foie gras, and, ultimately, prohibiting the practice and thereby eradicating the industry.

In light of the uniqueness of this decision, it is worth examining it closely and identifying the factors that allowed the High Court to come to such a result, despite the economic and cultural considerations weighing against this outcome. It is worthwhile, as well, to ask whether any lessons can be gleaned from the decision that will illuminate the steps that might be taken in the United States toward meaningful reform. A key area of focus must be the willingness of the High Court to be inconsistent (or, perhaps, from another perspective, evolutionary) in order to come to the right result. It is a sad fact that for incremental improvements for farmed animals to occur, we will need to be

9. Dennis Welch, *Farmers, Ranchers Blast Effort to Curb Hog, Veal Production*, EAST VALLEY TRIB., Nov. 25, 2005, available at <http://www.eastvalleytribune.com/index.php?sty=53965>.

10. Howard Fischer, *Initiative Seeks Roomier Pens For Pigs, Calves*, ARIZ. DAILY STAR, July 5, 2006, available at <http://www.azstarnet.com/metro/136552>.

11. Arizona Farmers & Ranchers, *NO on 204 – It’s HOGWASH*, <http://www.azfarmersranchers.com/index.php?p=10#1> (last visited Nov. 17, 2006). The Campaign for Arizona Farmers and Ranchers was formed to oppose the Arizona ballot initiative to ban the use of the gestation crate for pigs and veal crate for calves, which was ultimately adopted by voters in the November 2006 election.

12. WOLFSON & SULLIVAN, *supra* note 1, at 221.

inconsistent; like suffering will not be treated alike, and even when cruel practices are prohibited, other equally cruel, and unnecessary, practices will continue.

II

NOAH V. ATTORNEY GENERAL

A. Background

Israel's system for regulating farmed-animal welfare is based in a statute of broad application, the 1994 Cruelty to Animals Law [Protection of Animals Law]. Section 1 of that law defines animals as "vertebrate animals, excluding man." Section 2 provides, in pertinent part, "A person will not torture an animal, will not be cruel toward it, or abuse it in any way."¹³ In addition, under section 19, the Minister of Agriculture is permitted (though not required) to promulgate regulations, which must then be authorized by the Education and Culture Committee of the Knesset (the Israeli Parliament), regarding "[t]he conditions under which animals are kept."¹⁴ If the Minister of Agriculture chooses to promulgate regulations, the regulations must take into account not only the purpose of the law, which is "to improve animals' welfare," but also "agricultural needs."¹⁵

In 1999, a coalition of Israeli animal-protection organizations known collectively as "Noah" petitioned the Supreme Court of Israel for an order requiring the Minister of Agriculture to issue regulations prohibiting the force-feeding of geese for the production of foie gras. The Supreme Court of Israel, sitting as the High Court of Justice, reviews the activities of public authorities to ensure they comply with the law.¹⁶ This review is original and there is no further judicial review. In this capacity, the Supreme Court is not required to review every case brought before it, but has discretion to determine standing and justiciability.

At the time of the *Noah* petition, Israel's foie gras industry was the fourth largest in the world. It had existed for about forty years and had developed with the support and encouragement of the Ministry of Agriculture. Israel produced over 500 tons of foie gras per year, half of which went to the local market and half of which was exported. The annual turnover of the industry was tens of millions of shekels.¹⁷ According to industry sources, at least 600 families

13. HCJ 9232/01 *Noah v. Att'y General* [2002-2003] IsrSC 215, 215. The English translation can be found on the High Court website: <http://elyon1.court.gov.il/eng/home/index.html> (last visited Aug. 25, 2006) (follow "Decisions of the Supreme Court" hyperlink, then enter "Noah" in "Parties" field).

14. *Id.* at 237.

15. *Id.*

16. See Knesset Basic Law: The Judiciary, 1984, Section 15(d)(2) (dealing, in the absence of a formal constitution, with governance matters such as judicial authority, the appointment of judges, the powers of the Supreme Court, the right to appeal, and the principle of settled law), available at http://www.knesset.gov.il/description/eng/eng_mimshal_yesod1.htm (last visited Dec. 19, 2006).

17. HCJ 9232/01 *Noah* IsrSC at 221.

depended on foie gras production for their livelihoods.¹⁸ In addition, at least some contend that foie gras had an important place in the history of Ashkenazi Jews dating back to the Middle Ages and thus constituted a traditional food, just as it does to the French, who are the world's largest producers of foie gras and who consider it part of their culinary tradition.¹⁹

Foie gras, the fatty liver of a goose or duck, can only be produced if birds are force-fed, since, on their own, birds would not eat enough to cause their livers to reach the desired state of fattiness. Birds raised for foie gras are force-fed, with an air pump, through a long metal tube three times a day. The tubing can cause bruising, lesions, and even perforations of the esophagus. This process continues for up to a month, by which time the birds' livers have swelled up to twelve times their natural size. The resulting swelling of the liver is commonly considered a pathological state called "hepatic lipidosis" or "fatty liver disease," and, presumably, the breakdown in liver function causes the birds to feel extremely ill. The dramatic increase in liver size also makes walking and breathing difficult. Mortality levels increase, and the birds would die if they were not taken for slaughter. The pre-slaughter mortality rate for foie gras production is up to twenty times the average rate on other bird farms.²⁰

The suffering of force-fed geese had been the subject of long-term, concerted efforts on the part of Israeli animal protection organizations and, as a result, was a serious social concern at the time the *Noah* petition was brought. One leader in the Israeli movement to ban force-feeding explained,

We believed that the court, as well as the parliament, would reflect in their decisions the trends of public opinion. At our starting point even animal rights activists did not know much about force-feeding. The goal was to make it a common perception in the entire population that force-feeding equals animal abuse. We had to go with our information to the public: demonstrations, vigils, education tables, banners, production of educational videotape (which was also shown on community TV) and a short TV ad, using celebrities and working with the media . . . all were part of the campaign. We also blocked a force-feeding facility, which got a lot of attention. I think that no one could escape our stickers: "Foie Gras—how much cruelty can one swallow?" which were everywhere, nor our leaflets, which were distributed overnight on cars and in mailboxes in whole neighbourhoods, including those where the judges lived. We also won the support of important rabbis who influenced the religious public

18. Daniel Kennemer, *Foie Gras Industry's Goose Cooked*, JERUSALEM POST, Mar. 19, 2006, available at <http://www.jpost.com/servlet/Satellite?cid=1139395631583&pagename=JPost%2FJPArticle%2FShowFull>.

19. Ironically, among the evidence offered to show the longstanding consumption of foie gras in European Jewish communities is eleventh century commentary on Jewish law by the scholar Rashi (1040–1105 C.E.) condemning the practice of force-feeding geese because of the suffering it causes. See Jane Ziegelman & Andrew Coe, *A Goose for All Seasons: For Jews, Foie Gras Is Not Chopped Liver*, MOMENT MAG., June 30, 2000, at 39, available at <http://www.momentmag.com/archive/june00/olam1.html>.

20. See generally REPORT OF THE SCIENTIFIC COMM. ON ANIMAL HEALTH & ANIMAL WELFARE, WELFARE ASPECTS OF THE PRODUCTION OF FOIE GRAS IN DUCKS & GEES (1998), available at http://ec.europa.eu/food/fs/sc/scah/out17_en.html; see also Humane Soc'y of the United States, *California Decides to Permanently Pull Foie Gras off the Menu*, Oct. 8, 2004, available at http://www.hsus.org/farm/news/ournews/california_bans_foie_gras.html.

and parties, and of top chefs who announced that they would not use Foie Gras in their restaurants . . . Force-feeding became a symbol of cruelty everywhere.²¹

Before the original petition could be decided, the Minister of Agriculture promulgated temporary regulations that set certain requirements for the force-feeding process that were duly authorized by the Knesset Education and Culture Committee.²² Consequently, Noah withdrew the initial petition and brought a new petition ultimately resulting in the decision that is the subject of this article, asking the High Court to find that the regulations violated Israeli law.

As a result, the High Court was squarely faced with determining how the regulations, which were required to take into account the interests of the animals *and* the interests of agriculture, fulfilled those essentially competing interests. This balancing process involved a number of factors, including economic considerations, social concerns for the welfare of the geese, and strong scientific evidence confirming the perception that force-feeding is cruel. Additional factors entering into the decision were rooted in certain features of the Israeli legal system, such as a broad-based proscription of cruelty, a regulatory system governing farmed-animal welfare (at least as to this particular practice), citizens' standing, and a generous standard of judicial review. Finally, the Israeli geese had the good fortune to come before a sympathetic, imaginative, and creative bench. All of these factors combined to create the possibility for reform.

B. The Decision

Each of the three justices wrote separately, with the first, Justice Asher Grunis, writing in the minority.

1. Justice Asher Grunis

Justice Grunis commenced his analysis by recognizing that the status of animals is changing and that the relationship between humans and “other animals” raises the “question, from a moral perspective, [of] whether, and to what extent, animals should serve the needs of men.”²³ While acknowledging that some hold the view, “unpopular today,” that humans have the right to do whatever they want to animals, and that others hold the view that sentient animals are the “legal equals” of humans, Justice Grunis noted that Israeli law expresses a third, central, position—that humans should be considerate of the

21. Claudette Vaughan, Interview with Yossi Wolfson, Anonymous Rights for Animals, Israel, http://www.animal-lib.org.au/more_interviews/yossi/ (last visited June 15, 2006). Mr. Wolfson is not related to the author.

22. The regulations required that force-feeding be conducted by way of a pneumatic machine, and set a maximum limit for the length and diameter of the feeding tube and for the amount the geese are fed daily (1 kg). Importantly, the regulations prohibited the establishment of new force-feeding farms and precluded existing facilities from expanding. Violations of the regulations were punishable by both imprisonment and fines. The regulations came into effect on March 12, 2001, and were to expire, by their own terms, on March 11, 2004. H.C.J. 9232/01 Noah v. Att’y General [2002-2003] IsrSC 215, 223.

23. *Id.* at 224.

welfare of animals and that the “use man makes of animals should be restricted, with the aspiration of gradually improving their situation.”²⁴ At the same time, he noted that the situation presented was very different from other animal cruelty cases the High Court had considered, in that it involved raising animals for food. Thus, he warned, “[O]ur ruling in this case may have ramifications for other agricultural methods used to raise animals for human consumption.”²⁵

After briefly discussing the work of philosophers Peter Singer and Tom Regan, Justice Grunis turned to the question of force-feeding. Initially, he discussed in detail the current state of European law and quoted the finding of the European Council’s Scientific Committee on Animal Health and Animal Welfare’s report, *Welfare Aspects of the Production of Foie Gras in Duck and Geese* (“European Council Report”), which found that force-feeding is “detrimental to the welfare of the birds.”²⁶ Significantly, he noted, in spite of European officials’ awareness of the “problematic nature of force-feeding geese,” the practice had neither been banned nor modified by the European Council or the European Union, although the practice was to be reevaluated in the future.²⁷

Justice Grunis then conducted an extensive analysis of Israeli law as applied to animals, noting that its principles are derived from British law, as well as from Jewish religious law, and that Israeli law recognizes that animals are property, albeit property as to which the owner’s rights may be limited.²⁸ In focusing on the specific statute at issue, the Protection of Animals Law, which prohibits torture, cruelty, and abuse, he concluded that to determine whether an act violated the statute, the Court must first ask whether a bystander would consider the act cruel, and, if so, whether the means that cause the suffering are proportionate to the purpose towards which they are employed—that is, whether the suffering is “unnecessary.”²⁹ Notably, with respect to this element, he did not start with the proposition that suffering is necessary simply because it is economically expedient. Instead, the activity, or the product it creates, must “reflect a worthy social value.”³⁰ If it does, then the question should be asked whether the animal suffering can be avoided even while preserving the activity.³¹

Justice Grunis easily concluded, based on the European Council Report, that the geese undoubtedly suffered,³² though he was not entirely comfortable with that conclusion: “It seems a difficult, perhaps impossible task, to assess the

24. *Id.*

25. *Id.* at 225.

26. *Id.*

27. *Id.* at 229.

28. *Id.* at 230.

29. *Id.* at 233–34.

30. *Id.* at 234.

31. *Id.* at 247.

32. *Id.* at 235.

suffering of animals. Is the geese's suffering indeed more severe than that felt by calves and hens?"³³

But determining that the geese suffered, and determining subsequently that the regulations did not prevent such suffering, did not end the inquiry.³⁴ The geese were raised for food—in his mind obviously a worthy social value. Did the “ends justify the means? What, indeed, are the ends? The purpose of the force-feeding process is to produce food for human consumption. This is the same purpose of raising hens for eggs or poultry, raising cattle for food or milk, and raising calves for veal.”³⁵ In the United States, he noted, “[t]raditional agriculture, based on family farms, has disappeared. It has been replaced by enormous farms, where animals are raised in harsh conditions. Thousands of chickens are crowded together in cages; calves are kept in extremely narrow stalls; their movement is greatly restricted, and they are fed special food. . . . We mention these examples to demonstrate that imposing a complete ban on a certain agricultural industry may have far-reaching economic and social consequences.”³⁶

Justice Grunis also distinguished between the social value of food for basic consumption—“regular basic foods”—and foie gras, a “culinary delicacy”; yet he found this a difficult principle on which to base a distinction: “We may, however, find ourselves entangled in hairsplitting distinctions; what would we say of veal?”³⁷

Justice Grunis then turned to the issue of whether the geese's suffering could be avoided while preserving the foie gras industry. If the High Court were to “accept petitioner's position, we would be forced to say that force-feeding is a criminal offence, and thus the farmers involved in the industry must stop all activity at once.”³⁸ This he could not countenance, for, in his opinion, it was not the way in which the law dealt with situations in other industries when regulatory requirements were changed and people were given an appropriate amount of time to adjust: “It is unacceptable to transform those who have been employed in force-feeding geese for decades into felons in a day . . . it cannot be that the general and vague provision prohibiting torture, cruelty or abuse toward animals imposes a ban on force-feeding geese that contains no transitional provision.”³⁹ Noting that the industry is totally dependent on force-feeding, he could not locate a single example of an entire agricultural industry eliminated all at once for reasons of cruelty.⁴⁰ The inappropriateness of such a solution gained added force by his analysis of section 19 of the Protection of

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.* at 235–36.

37. *Id.* at 236.

38. *Id.* at 241.

39. *Id.* at 243.

40. *Id.*

Animals Law, which authorized the Minister of Agriculture to promulgate regulations to achieve the “purpose of the law” (to improve animals’ welfare), but required that, in doing so, he take into consideration the “needs of agriculture.”⁴¹ In Justice Grunis’ opinion, agricultural needs are not necessarily identical to farmers’ interests and include the public’s interest in food production.⁴²

Finally, Justice Grunis noted that a committee of the Knesset had approved the regulations after “a thorough and comprehensive discussion”; he reasoned, “If we were to accept petitioner’s position that force-feeding geese is inconsistent with section 2(a) of the Protection of Animals Law, we would be forced to say that both the Minister of Agriculture and the Education Committee worked in vain and issued regulations that contradict the law.”⁴³

For all these reasons, Justice Grunis held that force-feeding could not constitute torture, cruelty, or abuse within the meaning of the law. In conclusion, while reiterating that the suffering of the geese was proportionate to the benefit of producing foie gras, particularly when “agricultural needs” are taken into account, Justice Grunis pointed out that the situation could change in the future, as the “terms torture, cruelty and abuse . . . are vague terms that are naturally open to flexible interpretation, taking into account economic and social changes and the prevailing cultural climate.”⁴⁴ He noted that the regulations were only temporary, expiring in 2004, and that “[t]he current arrangement . . . should not continue indefinitely, for the suffering of the geese should not be ignored.”⁴⁵ Such change, however, would have to be achieved through new regulations issued by the Ministry of Agriculture, which, unlike the High Court, could either require improvements in the welfare of the geese without ending the industry, or set a transitional period in which the industry would be gradually phased out.⁴⁶

2. Justice Tovah Strasberg-Cohen

At the outset of her decision, Justice Strasberg-Cohen recognized the need to protect the interests of animals, specifically referencing the roots of this obligation in Jewish religious law. Like Justice Grunis, she recognized two opposing views on the topic: disregarding the interests of animals completely, or affording animals rights so that “any ‘use’ of animals as a means of improving man’s welfare is morally dubious.”⁴⁷ She agreed that neither view represented the state of modern Israeli law, which, in some instances, recognizes animals as property, but generally adopts a balancing test between the interests of humans

41. *Id.* at 237.

42. *Id.* at 238.

43. *Id.* at 244.

44. *Id.* at 248.

45. *Id.* at 249.

46. *Id.* at 248–49.

47. *Id.* at 252.

and the interests of animals.⁴⁸ Even with a balancing test, she noted, “the circumstances under which other interests will override the interest of protecting animals cannot be precisely demarcated.”⁴⁹ As an example of this balancing process, she pointed to her own decision in *The Cat Welfare Society of Israel v. Municipality of Arad*, in which, while recognizing that the stray cats involved therein had “a right to live,” she concluded that the danger of infectious diseases was adequate to overcome that right.⁵⁰ Of course, as Justice Strasberg-Cohen recognized, “[b]alance between interests is part and parcel of our legal system,” whether the interests are animal or human.⁵¹

Justice Strasberg-Cohen also discussed the particular considerations involved in performing such a balancing test when animals are raised for food. She compared the statute at issue with other sections of the Protection of Animals Law, which set forth more specific provisions for the protection of animals used in experimentation, working animals, and animals used in fighting (which is prohibited), but which excludes the “putting of animals to death for the purposes of human consumption.”⁵² Nevertheless, it was clear to her that the raising of animals destined to be slaughtered for food was not completely excluded from the general prohibition of cruelty.⁵³

One of the most fascinating aspects of Justice Strasberg-Cohen’s decision, certainly from the point of view of those in the United States, is her analysis of comparative law on whether accepted farming practices should ever be classified as cruel. Specifically, she identified and contrasted two trends. With respect to the first trend, she noted:

In the United States, where the lion’s share of the animal protection regulations have been issued by the states, [thirty] states have excluded accepted animal husbandry practices from the application of animal protection laws. . . . Similar rules excluding agricultural practices from the application of animal protection laws can also be found in Canadian provincial legislation.⁵⁴

That such provisions even exist shows that “in their absence, these same ‘accepted’ and ‘reasonable’ practices might have been considered animal abuse.”⁵⁵ Such provisions thus protect “cruel practices, even if they are not carried out for an appropriate purpose or even if they inflict a disproportionate degree of suffering.”⁵⁶

The second trend, “dominant in Europe and other countries, emphasizes animal welfare. It does not exclude agricultural practices from the application of animal-protection laws, but establishes specific statu[to]ry arrangements, which

48. *Id.* at 253–54.

49. *Id.* at 254.

50. *Id.*

51. *Id.*

52. *Id.* at 256.

53. *Id.* at 259.

54. *Id.*

55. *Id.* at 260.

56. *Id.* at 260 (citations omitted).

include rules regarding agricultural methods.”⁵⁷ The Israeli approach, Justice Strasberg-Cohen determined, is more similar to the approach in Europe and New Zealand, which “does not overlook the need to provide for the protection and welfare of farm animals. Rather, it provides for clear rules regarding . . . raising . . . farm animals for food production . . . [and] provides a flexibility that allows the legislature to tailor the rules and make changes, according to available scientific expertise and changing social ideas.”⁵⁸

Turning to Israeli law, Justice Strasberg-Cohen did not see the section 19 requirement that the needs of agriculture be taken into account as significantly different from the general anti-cruelty provisions of the Protection of Animals Law, which also requires such interests to be weighed. Instead, section 19 is a marginally more specific reiteration of how such balancing would take place for farmed animals. She agreed with Justice Grunis that the needs of agriculture represent both the public’s interest in food production and the interest of farmers who rely on the industry for their livelihood, though she afforded less emphasis to the latter: “Nevertheless, according to my interpretation, ‘agricultural needs’ do not take sweeping precedence over the interest of animal protection. Long-accepted agricultural practices do not have immunity from the application of . . . the law, although this may be an indication of society’s legitimization of them.”⁵⁹ Recognizing that the needs of agriculture and the protection of animals may conflict, Justice Strasberg-Cohen aptly noted, “This is the source of the central difficulty in our case.”⁶⁰

Justice Strasberg-Cohen identified three factors that must be taken into account to address the conflict between the needs of agriculture and the protection of animals: whether the means used minimized the suffering; the social value of the purpose; and the proportionality between the suffering and the purpose and means.⁶¹ Applying these factors to the practice of force-feeding, she acknowledged at the outset that “there is no real disagreement that the practice of force-feeding causes the geese suffering”; like Justice Grunis, she looked to the European Council Report for this conclusion.⁶² Noting that foie gras production was prohibited in some countries but not in others, she acknowledged that the Ministry of Agriculture had obviously struggled with the animal-welfare implications of force-feeding inasmuch as, in 2000, it had frozen the industry at its current level and had set forth the current regulations with the goal of minimizing suffering.⁶³ Thus, the Minister of Agriculture, as a procedural matter, had done what he was instructed by the legislature to do: balance the interests of the animals against the needs of agriculture.

57. *Id.*

58. *Id.* at 261–62.

59. *Id.* at 262.

60. *Id.* at 256.

61. *Id.* at 257 (citing CA 1684/96 *Let the Animals Live v. Hamat Gader Recreation Enters.*, [1997] IsrSC 51(3) 832, 853–54).

62. HCJ 9232/01 *Noah* IsrSC at 262–63.

63. *Id.* at 266.

With respect to the social value of foie gras production, Justice Strasberg-Cohen drew a crucial distinction between “luxury” and “necessary” food products:

[T]he “production of food” will have greater weight the more the food item is necessary for human existence. Thus, basic foods are different than luxuries. . . . Unlike my colleague, I do not think the distinction between foods should be completely ignored. This is particularly true when the food is a luxury and its production inflicts grave suffering on animals. . . . Indeed the legitimate interest of the farmers in maintaining their livelihood as part of an agricultural industry should be considered. This interest, however, cannot automatically override the counter-interest of the protection of animal welfare. The legislature considered both interests, but it seems it did not give each one the appropriate weight. One was given excessive importance, and the other was given too little.⁶⁴

Thus, while the stated purpose of the regulations was to “prevent the suffering of the geese,” the regulations did not, in fact, succeed in doing so; they did not achieve a “proper balance.”⁶⁵ The regulations “to some extent, measure up to the test of appropriateness between the means and the end, but they are not sufficient to stand up to this test. They do not establish the means that will minimize the injury, nor do they answer the test of proportionality, which measures the relation between the benefit and the harm.”⁶⁶

Consequently, Justice Strasberg-Cohen declared the regulations invalid. However, she clearly shared Justice Grunis’ concern over repercussions should the High Court declare the practice of force-feeding illegal overnight. But, unlike Justice Grunis, who believed that to hold that force-feeding criminal was to require its immediate cessation, she did not find this problem insoluble. Instead, she invoked the Israeli legal doctrine of “relative invalidity,” whereby the High Court could delay the applicability of its decision (until March 2005), while the Ministry of Agriculture and its oversight committee continued to study the issue. If the Ministry of Agriculture were to decide “to allow the foie gras industry to continue, the legislature w[ould] have to issue regulations that will assure the use of means that will significantly reduce the suffering of the geese.”⁶⁷

3. Justice Eliezer Rivlin

Justice Strasberg-Cohen’s holding was supported by Justice Rivlin in a very short and poetic opinion in which he stated that animal suffering cannot be ignored solely for gastronomic pleasure or for profit. Animals, he contended,

possess a soul that experiences the feelings of happiness and grief, joy and sorrow, affection and fear. . . . All would agree . . . that these creatures feel pain inflicted upon them by physical injury or by violent intrusion into their bodies. Indeed, one could justify the force-feeding of geese by pointing to the livelihood of those who raise geese and the gastronomical pleasure of others. Indeed, those wishing to justify the practice might paraphrase Job 5:7 []: It is right that man’s welfare shall soar, even at the price

64. *Id.* at 268–69.

65. *Id.* at 268.

66. *Id.*

67. *Id.* at 272.

of troubling birds of light.⁶⁸ Except that it has a price—and the price is the degradation of man’s own dignity.

C. Subsequent Events

After the decision came down, a number of unsuccessful efforts were made by the Minister of Agriculture to obtain the approval of the Knesset Education and Culture Committee for alternate regulations permitting force-feeding. Initially, the High Court extended the effective date of its decision several times, but it ultimately took effect in July 2005. However, the practice of force-feeding continued; the Ministry of Agriculture posited that this was permissible since the regulations had been invalidated and therefore force-feeding could continue with no regulations in place. Agriculture Ministry Director-General Yosef Yishai stated, “This is the first time the Knesset has decided that an entire sector of agriculture is illegal. If we don’t stop the animal-rights groups, tomorrow you won’t be able to milk cows or keep chickens in coops.”⁶⁹

The Ministry of Agriculture continued to work with farmers in presenting proposals to the Knesset Education and Culture Committee that would permit continued force-feeding within the limits of the High Court’s decision. After several failures, the Ministry of Agriculture proposed that geese simply be exempted from the cruelty code for three years. Although this suggestion was rejected, force-feeding nevertheless continued until February 2006, when, pursuant to a new petition brought by animal protection groups, the High Court instructed the state to enforce the law within two months and ordered the state to pay petitioners’ legal expenses.⁷⁰ In this decision, Justice Ayala Procaccia stated,

The outcome of this situation is problematic from the point of view of the ongoing suffering to the birds. . . . But beyond that, a state of affairs in which the law is disregarded by the state, is, in and of itself, deserving of harsh criticism, in view of the deviation from proper government procedures and from elementary constitutional norms inherent in the basis of the democratic process.⁷¹

D. The High Court’s Conclusions

Unlike Justice Rivlin, whose opinion on this matter was unequivocal, the opinions of Justices Grunis and Strasberg-Cohen demonstrate that they both found the analysis and resolution of the competing factors involved in the case a complex task. Their opinions differ in four crucial respects, and these differences led to dramatically different conclusions.

68. *Id.* A better translation of this portion of Justice Rivlin’s opinion might be, “It is right that man’s welfare shall soar, even if it means the suffering of birds that fly like sparks from a fire.” (alternative translation of the *Noah* decision on file with author).

69. Chai Online, *Geese & Ducks: Foie Gras & Meat*, http://www.chaionline.org/en/compassion/foiegras/food_foiegras.htm (last visited Dec. 9, 2006).

70. *See id.*

71. *Id.*

First, unlike Justice Grunis, Justice Strasberg-Cohen was willing to distinguish between more common food items that are “necessary for human existence” and foie gras, which she characterized as a “luxury,” entitled to less weight when balanced against the suffering it caused. By contrast, Justice Grunis felt that to differentiate between food items based on “luxury” status was a slippery slope, which would soon lead to the abolition of veal and other similar “luxury” items, or indeed, other basic food items, since “substitutes” can be found:

Of course, it is possible to distinguish between different foods produced from different animals according to how essential they are, and to argue that a culinary delicacy like foie gras does not deserve the same measure of consideration as other, more basic, foods. And yet, as we have said, making this distinction might open the door to the most microscopic distinctions.⁷²

It seems obvious that Justice Grunis is correct, in that no animal-based food is actually necessary for human existence, at least in a society where numerous plant-based “substitute” foods are available. But Justice Strasberg-Cohen’s distinction is crucially important and is at least an attempt to define society’s views regarding when animals should be forced to endure suffering. Most significantly, it provided the High Court with a path that led to the prohibition of force-feeding without creating a precedent that, if followed faithfully, would require the abolition of all farming practices that cause suffering.

Second, Justice Strasberg-Cohen was far less deferential to the Knesset and the Ministry of Agriculture. Whereas Justices Grunis and Strasberg-Cohen agreed that because the subject regulations had been approved by a Knesset Committee, the High Court should proceed with “special caution” in determining their validity, Justice Strasberg-Cohen believed the High Court could nevertheless substitute its judgment for that of the agency in determining how competing interests should be balanced. Concluding that the Ministry had failed to properly balance these interests and that this failure was so substantial that the regulations deviated significantly from the law’s purpose, she annulled the regulations.⁷³ In sharp contrast, Justice Grunis afforded the Minister of Agriculture extraordinary deference in light of the extensive work undertaken in devising the regulations.⁷⁴

Third, unlike Justice Strasberg-Cohen, Justice Grunis was unable to resolve his concerns that a prohibition of this particular method of food production would terminate the industry entirely, there being no alternative method. In this respect, he found it particularly important that the force-feeding of geese has not been prohibited in European countries that employ the practice, despite scientific evidence of suffering.⁷⁵

72. HCJ 9232/01 Noah IsrSC at 237–38.

73. *Id.* at 269.

74. *Id.* at 244.

75. Justice Grunis’s reliance on this fact as support for concluding that foie gras production should continue is somewhat disturbing; according to this logic, truly egregious farming practices will have complete immunity so long as such methods are the only way of producing a food product.

Finally, although none of the justices could accept that the practice should become illegal overnight, Justice Strasberg-Cohen was willing to resort to a judicial solution for this problem: a transition period by way of the principle of “relative invalidity.”⁷⁶ It is not clear from the opinion why Justice Grunis would not accept this approach, which would certainly have addressed his major concern of turning farmers into criminals overnight; it appears that he believed, however, that only the agency, and not the High Court, had the authority to act in this way. Inasmuch as the annulment of the regulations was based on finding that force-feeding was cruel, extended suspension of the annulment, during which time thousands of birds would live and die subjected to what had already been determined to be illegal cruelty, is inherently problematic. However, Justice Strasberg-Cohen’s willingness to accept this inherent contradiction was crucial to the High Court’s decision and resulted in many heretofore law-abiding citizens being put out of work (albeit not immediately) on the grounds that what they had been doing was illegal.

As a result of these distinctions, the highest court in Israel recognized animal interests in the face of real economic concerns, paving the way for the prohibition of a customary farming practice—and the eradication of an industry—despite significant opposition to such change. The question remains, however, whether this decision sets a precedent for additional incremental change in Israel,⁷⁷ and, in particular, whether it sheds any light on a possible legal approach to address the disgraceful conditions in which farmed animals live and die in the United States.

III

THE REGULATORY APPROACH

A. What Lessons Can Be Learned from *Noah*?

Whereas a broad-based legal proscription against unnecessary cruelty was the critical underpinning of the High Court’s decision in *Noah*, there is no question that it is not, in and of itself, sufficient to require legal change that will reduce the suffering of farmed animals. The experience in the United States demonstrates this beyond cavil. Although all fifty states currently have criminal laws ostensibly prohibiting unnecessary or unjustifiable cruelty to animals, these laws have not, as of yet, limited in any way even the cruelest farming practices. A majority of states simply exclude “customary” farming practices from legal

76. HCJ 9232/01 *Noah* IsrSC at 271.

77. Notably, in 2005, the Knesset’s Education and Culture Committee approved regulations prohibiting certain abuses of calves raised for veal, including keeping calves in solitary confinement, denying them drinking water, and providing a diet that fails to produce a minimal level of hemoglobin in the blood or a minimal intake of fiber. The Committee also enacted requirements regarding ventilation and footing material. The new regulations are similar to the E.U. directive laying down minimum standards for the protection of calves, and in several respects—such as minimal cell dimensions—exceed it. Anonymous for Animal Rights, Regulation to Reduce the Suffering of Veal Calves in Israel, <http://www.anonymous.org.il/e-veal.htm> (last visited June 15, 2006).

restriction, thereby handing the industry an exemption that it can simply stretch to fit itself: any practice the industry chooses to employ regularly becomes automatically exempt from the law. But, even in states that do not have such an exemption, current anti-cruelty laws have not limited the development of the most egregious farming methods imaginable.⁷⁸

The reasons U.S. laws do not touch such practices are many⁷⁹ and include the fundamental fact that the growth in cruelty to animals is connected to cheap food⁸⁰ and that the animal-protection movement in the United States has not, until recently, focused on cruelty to farmed animals in a coordinated and consistent manner. But the failure of state anti-cruelty laws is also a result of certain legal realities inherent in the laws themselves. For example, if a state merely has a criminal anti-cruelty statute in place, the only avenue to legal reform of widespread cruel farming practices is criminal prosecution, by a local district attorney,⁸¹ of an individual farmer who, up until the moment he is arrested, has no reason to believe his conduct is considered illegal. Of course, this farmer is doing the same things as other farmers. And the particular practice the prosecutor has chosen to prosecute is only one among innumerable cruelties the prosecutor has chosen, apparently arbitrarily, not to prosecute. Obviously, this legal system presents obstacles that make it, at best, a cumbersome method to achieve widespread reform of customary practices.⁸²

78. WOLFSON & SULLIVAN, *supra* note 1, at 209.

79. This article does not address in detail the different social, cultural, and political factors that inevitably play a significant role in animal protection. For an excellent background in these issues, see ROBERT GARNER, *POLITICAL ANIMALS: ANIMAL PROTECTION POLITICS IN BRITAIN AND THE UNITED STATES* (1998); Robert Garner, *Political Ideology and the Legal Status of Animals*, 8 *ANIMAL L.* 77, 77–91 (2002) (arguing that the benefits of changing the legal status of animals from their position as items of property have been exaggerated); Robert Garner, *Animal Welfare: A Political Defense*, 1 *J. ANIMAL L. & ETHICS* 161, 168 (2006) (asserting that animal advocates too hastily dismiss the concept of animal welfare).

80. For a detailed discussion of this issue, see Gaverick Metheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 *LAW & CONTEMP. PROBS.* 325, 346–48 (Winter 2007).

81. Unlike in Israel, the vast majority of jurisdictions in the United States do not allow prosecutions under the anti-cruelty laws by animal-welfare organizations. A few states do permit some type of private enforcement of anti-cruelty laws, whether by individuals or by organizations dedicated to the protection of animals. These include North Carolina (N.C. GEN. STAT. § 19A-1 (2006)), New Jersey (N.J. STAT. § 4:22-26 (2006)), and Pennsylvania (PA. CONS. STAT. § 5511(i) (2006)). See Jennifer H. Rackstraw, *Reaching for Justice: An Analysis of Self-Help Prosecution for Animal Crimes*, 9 *ANIMAL L.* 243 (2003). For an extensive analysis of the North Carolina citizen-suit provision, as well as its unintended consequences, see William A. Reppy, Jr., *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 *LAW & CONTEMP. PROBS.* 255, 256–86 (Winter 2007).

82. See generally Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 *J. ANIMAL L. & ETHICS* 175, 194–98 (contending that anti-cruelty statutes are practically ineffective because they do not challenge the majority of modern practices that exploit animals). These obstacles are not necessarily insurmountable. For example, in 2005, a local prosecutor brought charges against MOARK Industries, a Missouri-based egg producer, for throwing live “spent” hens in a dumpster, apparently a regular practice. While the misdemeanor cruelty charges were ultimately dropped, this was not until MOARK had agreed to adopt less inhumane euthanasia practices and to donate \$100,000 to the local animal shelter. Humane Soc’y of the U.S., *MOARK Must Pay \$100,000 and Overhaul Its Spent Hen Procedures to Settle Animal Cruelty Charges*, http://www.hsus.org/farm/news/ournews/Moark_settles_case.html (last visited Nov. 18, 2006). See also

Indeed, it is entirely possible that the Israeli High Court, despite its sympathetic and thoughtful disposition, might have rendered a different decision had the issue of whether force-feeding was illegally cruel been presented in such a legal posture. But, in addition to proscribing cruelty, Israeli law authorizes the Minister of Agriculture to promulgate regulations regarding farming practices. This is what allowed the matter to come before the High Court in the particular posture that it did—as an action to invalidate regulations pursuant to administrative law.⁸³

This leads to an obvious question. Should the goal of animal advocates in the United States be to create a regulatory system governing farmed animals so as to make possible the type of change seen in *Noah*? Those seeking legal reforms to better protect animals should be aware of the serious roadblocks that could undermine any such attempt.

B. Advantages to the Regulatory Approach

Theoretically, the regulatory approach has a number of apparent advantages, and, as Europe and Israel have shown, it can produce reform.⁸⁴ One advantage is that it permits change in an incremental manner, which is crucial in light of the monolithic nature of animal abuse inherent in industrial farming in the United States. Such incrementalism can apply to either the timing or the subject matter of desired reforms.

First, an agency can promulgate regulations that will take effect over an extended period of time, avoiding the problem of turning farmers into criminals overnight and giving them time to adjust to new methods and to phase out newly banned equipment. Finding a practice unacceptably cruel but allowing it to continue for a period of time is part of virtually every successful effort to reform industrialized farming.⁸⁵ As noted, the Israeli High Court imposed such a grace period.⁸⁶ Second, a regulatory statute can incrementally limit which practices (for example, space limitations or transport) and which animals to

the discussion of *Commonwealth v. Jay Musser & Esbenshade Farms*, NT 12-80/06 (D.J.C., Lancaster Co.), *infra* note 154. Indeed, it could be argued that anticruelty statutes provide certain advantages in that a prosecutor can focus on an individual defendant to encourage change as opposed to challenging the entire industry.

83. For another example of how the particular legal posture of a case can determine its outcome in the context of farmed animal cruelty, see the discussion of the “McLibel” case, WOLFSON & SULLIVAN, *supra* note 1, at 219.

84. *Id.* at 221.

85. For example, the European Union has prohibited the battery cage, veal crate, and gestation crate, but those prohibitions do not take effect until 2012, 2007, and 2013, respectively. Similarly, a Florida ban on the gestation crate and an Arizona ban on gestation and veal crates have six-year phase-in periods. WOLFSON & SULLIVAN, *supra* note 1, at 222; *Prop. 204: Yes*, ARIZ. DAILY STAR, Oct. 22, 2006, available at <http://www.azstarnet.com/opinion/152082>. A prohibition on the production and sale of foie gras in California does not take effect until 2012. John M. Broder, *National Briefing/West: California: Foie Gras Process is Banned*, N.Y. TIMES, Oct. 1, 2004, at A24.

86. See *supra* text accompanying note 76.

regulate. As in Israel, a statute can permit, but not require, the agency to regulate, thus leaving it up to the agency which practices it will take on.⁸⁷

Regulations are also capable of being specific. They need not merely ban a particularly egregious practice, such as keeping an animal in a crate so small that the animal cannot turn around, but can set detailed, affirmative requirements for the animal's care that could theoretically go much further in protecting the animal from cruel treatment.⁸⁸ In addition, an administrative agency can also react relatively quickly to changes in public attitudes and to scientific discoveries. Agencies even have the potential to prohibit practices before they become widespread.

Another obvious reason, at least ostensibly, for placing farmed-animal welfare in the hands of a regulatory agency is the need to sort through and rely on scientific findings in formulating policy. Unless (or until) animal agriculture is abolished, any determination of animal welfare will inevitably involve balancing the suffering of animals with the demands of industry. Increasingly, both sides in this debate rely on science; the issue of science was critical to the Israeli High Court's decision in *Noah*. In theory, an administrative agency is precisely the appropriate body to make governmental decisions involving complex factual issues because “[s]uch determinations are the product either of scientific or expert inquiry and judgment or of an assimilation of detailed and varied evidence or experience, for which the agency is particularly well qualified by virtue of its bureaucratic organization of resources.”⁸⁹

Perhaps the most persuasive argument for a regulatory system is that it can provide substantial benefits for enforcement, such as by including an inspection system, obviating the necessity of undercover investigations, probable cause, and search warrants, which are now required to discover the most basic information about how farmed animals are actually treated. It can also enhance enforcement by creating civil penalties and eliminating the need for proof beyond a reasonable doubt and proof of mens rea.⁹⁰ A final benefit of a

87. For some, the possibility of creating small, incremental, and perhaps inconsistent changes—tinkering with the system while still leaving it substantially intact—may not seem advantageous, and may even be seen as fostering an environment in which significant change is less likely. In response, it could be argued that unless the legislature creates exceptions to satisfy industries with powerful constituencies, the legislature may well do nothing. As Robert Garner has noted, “at least while there are opponents of the animal protection movement with important economic functions, [political compromise] is not going to produce outcomes which will satisfy the animal rights movement. Nevertheless, getting something of what you want is better than nothing.” Garner, *Animal Welfare: A Political Defense*, *supra* note 79, at 172.

88. See Michael Radford, *The Legal Status of Nonhuman Animals*, 8 ANIMAL L. 1, 69 (2002) (“[I]n respect of the welfare legislation regarding farm animals in the United Kingdom, it’s by no means perfect . . . but there are significant schedules of objective requirements delineating space requirements, prohibiting things like slippery floors and protrusions that cause damage or injury, giving provisions about periods of light, provisions about ventilation, the way they are fed, the sort of diet, provisions about how often they have to be inspected.”).

89. CHRISTOPHER F. EDLEY, JR., ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY 31–32 (1990).

90. WOLFSON & SULLIVAN, *supra* note 1, at 209.

regulatory system is that if the agency, in promulgating regulations, fails to appropriately carry out the purpose of the statute, U.S. courts have the power to review agency action, as did the High Court in *Noah*, and to require the agency to comply with the law.

Consequently, there are (or there appear to be) a number of good reasons for establishing a regulatory system rather than resorting exclusively to the criminal law to govern the treatment of farmed animals. As pointed out by Justice Grunis, first, a regulatory system would avoid the problems inherent in criminal penalties for “an existing practice used by farmers for years . . . with all the consequences attendant to such a classification.”⁹¹ Second, the criminal law merely “define[s] minimal conditions for animals’ welfare; the ministers were granted regulatory authority to improve their welfare by setting stricter conditions.”⁹² Finally, “granting the ministers authority allows them to deal with specific and local problems that necessitate a consideration of details, such as setting a minimum for every animal’s living space.”⁹³ Similarly, as Justice Strasberg-Cohen noted, such a system provides “for clear rules regarding . . . raising . . . farm animals for production,” provides for “flexibility,” and allows regulations to be altered in response to “available scientific expertise and changing social ideas.”⁹⁴

C. Disadvantages of the Regulatory System—At Least in the United States

1. Agency Bias

As the Israeli experience bears out, simply putting animal welfare into the hands of an agency is not, in and of itself, a recipe for reform. Indeed, administrative agencies governing agriculture are not at all likely to promulgate regulations that adequately protect animals because of the vast influence that industry has over agency policymaking. The problem of industry influence is the subject of widespread criticism of administrative agencies in the United States,⁹⁵ but it is fair to say that the risks of capture by industry are even greater than average when it comes to farmed animal welfare.⁹⁶ One oft-cited reason for this

91. HCJ 9232/01 *Noah v. Att’y General* [2002-2003] IsrSC 215, 239.

92. *Id.*

93. *Id.*

94. *Id.* at 261–62.

95. See, e.g., *Moss v. C.A.B.*, 430 F.2d 891, 893 (D.C. Cir. 1970) (“This appeal presents the recurring question which has plagued public regulation of industry: whether the regulatory agency is unduly oriented toward the interests of the industry it is designed to regulate, rather than the public interest it is designed to protect.”).

96. See Judge Charles Richey’s discussion of the United States Department of Agriculture’s role in the enforcement of the Animal Welfare Act, *Animal Legal Def. Fund, Inc. v. Glickman*, 943 F. Supp. 44, 50 (D.D.C. 1996), *vacated*, 130 F.3d 464, 464 (D.C. Cir. 1997), *aff’d* 154 F.3d 426 (D.C. Cir. 1998) (en banc), *rev’d in part, vacated in part*, 204 F.3d 229, 229 (D.C. Cir. 2000) (“[W]hile Congress set forth a clear mandate of humane treatment of animals, it then took away from that mandate by granting unbridled discretion to the agency which, as past experience indicates, will do little or nothing. The agency’s conduct in this and other cases that have come before this member of the Court not only is egregious because of its delayed nature, but represents, in the eyes of at least more than 50,000

influence is that the United States Department of Agriculture (USDA), as well as state agricultural agencies, are entrusted primarily with promoting agriculture, not just regulating it.⁹⁷ Moreover, the promotion of agriculture has increasingly meant the promotion of corporate agribusiness:

There is growing evidence . . . that the Department has been deliberately transformed from a servant of the public interest into a vehicle for promoting the narrow interests of large producers and major food processing and input . . . corporations, i.e., Big Agribusiness. This transformation has been carried out not only by a shift in policy orientation but also by a change in the composition of the Department itself. Many of the top positions in USDA are now held by individuals who previously worked for Big Agribusiness.⁹⁸

Recent concerns about animal–human disease transmission and the fear that agriculture may be a target of terrorism seem to have served as an excuse to allow agribusiness to further cement its power over the agency.

The problem of agency capture is not, of course, exclusive to the United States. It is hard to imagine an administrative agency fighting any harder to maintain a farming practice than the Israeli Ministry of Agriculture did for force-feeding. But a crucial difference between Israel and the United States is the vastly decreased likelihood of adequate judicial review in the latter because of differences in the law regarding both standing and standard of review.⁹⁹

members of the plaintiff organization, one of the basic reasons why the American people have lost faith in much of their government. The inaction and eventual failure to act in accordance with law remind the Court of the sage and accurate statement of the late Judge J. Skelly Wright of the Court of Appeals for this Circuit when, in essence, he noted that the regulators in Washington are regulated by the regulated.” (citations omitted).

97. The USDA describes its goals as follows:

USDA has created a strategic plan to implement its vision. The framework of this plan depends on these key activities: expanding markets for agricultural products and support international economic development, further developing alternative markets for agricultural products and activities, providing financing needed to help expand job opportunities and improve housing, utilities and infrastructure in rural America, enhancing food safety by taking steps to reduce the prevalence of foodborne hazards from farm to table, improving nutrition and health by providing food assistance and nutrition education and promotion, and managing and protecting America’s public and private lands working cooperatively with other levels of government and the private sector.

<http://www.usda.gov/wps/portal/usdahome> (follow “About USDA” hyperlink, then “Mission Statement” hyperlink) (last visited Aug. 26, 2006).

98. PHILLIP MATTERA, *USDA, INC.: HOW AGRIBUSINESS HAS HIJACKED REGULATORY POLICY AT THE U.S. DEPARTMENT OF AGRICULTURE* 8 (2004), available at http://www.agribusinessaccountability.org/bin/view.fpl/1198/cms_category/1836.html.

99. The differences between American and Israeli administrative law have been described as follows:

First, the Israeli doctrines of standing and justiciability are more tolerant of “public” actions against the government than their American counterparts. Second, judicial review in Israel is more substantively generous than in the United States, while American administrative law relies more heavily on procedural regularity as a device for disciplining administrative discretion. Third, at the rhetorical level, Israeli courts give somewhat greater emphasis to the “public law” objective of preserving the rule of law by policing the legality of official behavior. The administrative law opinions of American courts rely more heavily on the “private law” goal of protecting individuals against injury to legally recognized interests.

Colin S. Diver, *Israeli Administrative Law from an American Perspective*, 4 MISHPAT UMINSHAL I, II (1997).

2. Standing

As a general rule, individuals affected by agency action are afforded some sort of right to judicial review at the state and federal levels in the United States;¹⁰⁰ however, such individuals must ordinarily have standing in order to bring an action. In the federal courts, any attempt to assert standing must meet constitutional scrutiny, which requires that the plaintiff have suffered an injury in fact.¹⁰¹ This, of course, illuminates the fundamental standing dilemma of animal law in the United States: people, and animal protection groups, generally are held not to have been injured by harm to animals owned by other people (or with whom they have no significant relationship), and thus they often cannot bring suit to enforce statutes protecting those animals. Moreover, although it is not constitutionally required, a plaintiff bringing an action against an agency under the Administrative Procedure Act would also have to demonstrate prudential standing, which requires that the interest the plaintiff seeks to protect be “arguably within the zone of interests to be protected or regulated by the statute.”¹⁰² In contrast, the Israeli High Court has traditionally shown extraordinary flexibility in these areas and has frequently been willing to hear petitions brought by public organizations with no personal interest in the dispute, which nevertheless capably set forth the issues.¹⁰³

Still, although such stringent standing requirements can be difficult to satisfy, they are not necessarily insurmountable, even at the federal level. Moreover, states vary in their standing requirements for judicial review and some are more generous than others.¹⁰⁴ Assuming that a regulatory statute were in place, human plaintiffs who might suffer cognizable injury from the agency’s failure to carry out the statutory mandate include not only those who might

100. At the federal level, the Administrative Procedure Act, 5 U.S.C. §§ 702, 706(1) (2000) (APA) provides a right to bring suit against a government agency to any person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute,” and permits a reviewing court to, *inter alia*, “compel agency action unlawfully withheld or unreasonably delayed.”

101. See U.S. CONST. Art. III; *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–66 (1992).

102. *Nat’l Credit Union Admin. v. First Nat’l Bank & Trust Co.*, 522 U.S. 479, 488 (1998).

103. For example, in H CJ 910/86 *Ressler v. Minister of Def.* [1988] IsrSC 42(2) 441, the Court broadened the situations in which an ordinary citizen would be held to have standing to include matters alleging “a grave defect in administrative action” or those “of a public character that directly concern promotion of the rule of law.” It has been said that “after *Ressler*, one may fairly wonder whether anything of substance is left of the nominal requirement that a petitioner assert a personal ‘interest’ in order to establish standing to challenge administrative acts in Israeli courts.” Diver, *supra* note 99, at III–IV. Interestingly, in *Noah*, respondents argued that petitioner should not be granted standing because petitioner had other avenues of achieving its goal of protecting the geese, for the statutory framework gives certain officially recognized “animal rights organizations” the right to file a private criminal complaint based on a violation of the law or to seek an injunction. H CJ 9232/01 *Noah v. Att’y General* [2002–2003] IsrSc 215, 246–47. Justice Grunis rejected this “novel” argument as neither of these statutory remedies was what petitioner actually wanted—annulment of the regulations—and he was apparently joined in this respect by the other justices. *Id.*

104. See, e.g., *Env’tl. Prot. Info. Ctr. v. Cal. Dep’t of Forestry & Fire Prot.*, 43 Cal. App. 4th 1011, 1020 (Cal. Ct. App. 1996); *Salorio v. Glaser*, 414 A.2d 943, 947 (N.J. 1980); *Ohio Roundtable v. Taft*, 773 N.E.2d 1113, 1121 (Ohio Com. Pl. 2002).

suffer relevant aesthetic injury by witnessing animal abuse,¹⁰⁵ but also, conceivably, farmers who wish to treat their animals humanely and suffer competitive injury due to the government's failure to hold other producers to the statutory standard.

3. Standard of Review

In addition to standing, a second necessary component of effective judicial review is a sufficiently broad standard of review. In the United States, even if regulations were put into place and standing requirements were met, those litigating on behalf of animals would be faced with far more onerous standards of review than the litigants in *Noah*. In federal court, "*Chevron*" deference¹⁰⁶ requires that for regulations adopted by full "notice and comment" rulemaking, unless Congress has directly spoken to the precise issue in question, courts should defer to the agency on questions of statutory interpretation as long as the agency arrived at a reasonable, or permissible, construction of the statute. Notably,

By contrast, the *Chevron* principle of judicial deference does not apply in Israel. The position of its Supreme Court continues to be, as it was once supposed to be in America, that the rendering of authoritative interpretations of statutes is paradigmatically a judicial responsibility. Therefore the issue decided by a reviewing court in Israel is not whether an administrator's interpretation is "reasonable," but rather whether it is correct.¹⁰⁷

In addition to convincing a court that the agency's interpretation of the statute was unreasonable, plaintiffs would also have to convince the court that the agency, in exercising its judgment, had not merely balanced the factors incorrectly, as Justice Strasberg-Cohen concluded in *Noah*, but that its determinations were not based on "substantial evidence"¹⁰⁸ or were "arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law."¹⁰⁹ State courts have similar requirements.¹¹⁰ As was seen in *Noah*, the law in Israel

105. See, e.g., *Am. Soc'y for the Prev. of Cruelty to Animals v. Ringling Bros. & Barnum & Bailey Circus*, 317 F.3d 334, 334 (D.C. Cir. 2003); *Animal Legal Def. Fund v. Glickman*, 154 F.3d 426, 426 (D.C. Cir. 1998) (en banc); *Alternatives Research & Dev. Found. v. Glickman*, 101 F. Supp .2d 7, 7 (D.D.C. 2000).

106. See *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 837 (1984).

107. Diver, *supra* note 99, at VI.

108. 5 U.S.C. § 706(2)(D) (2000). Substantial evidence means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *Consol. Edison Co. v. Nat'l Labor Relations Bd.*, 305 U.S. 197, 229 (1938), *citing* *Appalachian Electric Power Co. v. Nat'l Labor Relations Bd.*, 93 F.2d 985, 989 (6th Cir. 1938).

109. 5 U.S.C. § 706(2)(A).

110. Although states vary in the level of deference afforded to administrative rulemaking determinations, it is always substantial, ranging from constitutional substantive due process review, which requires only that the court determine there is a possible view of the facts that could support the agency determination to, at a minimum, a "hard look," that nevertheless precludes the court from substituting its judgment for that of the agency. See William Funk, *Rationality Review of State Administrative Rulemaking*, 43 ADMIN. L. REV. 147, 156 (1991).

is quite different—the standard of review is less narrow and less deferential—in ways that were probably outcome-determinative.¹¹¹

The difficulty of meeting the high standard imposed by U.S. law is particularly great when the determination rests on an agency's evaluation of science, which, of course, includes the science of animal welfare. When judging whether an agency has effectively balanced scientific studies, courts in the United States often defer to an agency's determination unless it had no support for its position at all.¹¹² Israeli courts appear to maintain a different attitude toward administrative conclusions based on science, as demonstrated by both Justices Grunis's and Strasberg-Cohen's rather easily resolving the question of animal suffering by resorting to a single scientific source, the European Council Report.¹¹³

One way in which a U.S. legislature could reduce the amount of discretion afforded to the agency is by making very specific requirements in the statute rather than simply setting a broad-based requirement for "humane" standards, or by merely prohibiting "cruelty." However, since the devil is in the details, this would make such a statute that much harder to enact.

111. Colin S. Diver observes,

Judicial review in Israel is more substantively generous than in the United States, while American administrative law relies more heavily on procedural regularity as a device for disciplining administrative discretion.

....

The standard for reviewing discretionary action in Israel, "reasonableness," embraces all of the grounds for reversal under American law, but adds several others. One is "balance of interests." That is, not only must the agency consider all of the relevant factors, but it must accord appropriate weights to those factors. . . . A second distinctive ground for the review of discretionary acts is the concept of "proportionality"—similar to the principle well-developed in Continental administrative law that the burden imposed by an administrative restriction or regulation must be proportional to the harm or risk prevented [citations omitted].

Diver, *supra* note 99, at II, VII.

112. See *Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 235 (D.C. Cir. 2000), *citing* *N.Y. v. U.S. Envtl. Prot. Agency*, 852 F.2d 574, 580 (D.D.C. 1988) (quoting *Citizen Health Research Group v. Tyson*, 796 F.2d 1479, 1505 (D.C. Cir. 1986) ("Where 'Congress delegated power to an agency to regulate on the borders of the unknown, courts cannot interfere with reasonable interpretations of equivocal evidence'; courts are most deferential of agency readings of scientific evidence.")).

113. HCJ 9232/01 *Noah v. Att'y General* [2002-2003] IsrSC 215, 228, 263. The particular facts in *Noah* may have made the Court's decision unusually easy. The report on which Justices Grunis and Strasberg-Cohen relied had determined, after review of the available scientific studies, that force-feeding was "detrimental to the welfare of the birds," even though it did not recommend prohibition of the practice. *Id.* at 223. It is unclear whether the High Court would have decided the issue of suffering in *Noah's* favor so easily had the agency not been so cooperative as to argue that Europe's failure to ban force-feeding was relevant to the case, thus allowing the presentation of European scientific evidence demonstrating that force-feeding caused suffering. As Justice Grunis stated, "[r]espondents . . . cannot have it both ways. They cannot justify the local arrangement, which is based on the European one, without also accepting the conclusion of the European bodies that force-feeding is detrimental to the geese's welfare." *Id.* at 235.

4. Science

In light of an administrative agency's ability to immunize its decisions by relying on science,¹¹⁴ it is fundamentally important that such science be unbiased. Unfortunately, in the United States, control over animal welfare science lies largely with agribusiness. By contrast, the science relating to farmed-animal welfare in Europe appears to have developed in a relatively objective manner. Such science has concluded that numerous intensive farming practices—the battery cage, gestation crate, and veal crate, for example—are detrimental to animals. However, foreign science is frequently ignored, or accorded little respect, by policymakers in the United States, and U.S. animal welfare scientists, who are heavily dependent on industry funding,¹¹⁵ have reached differing scientific conclusions.¹¹⁶ Animal welfare is often judged almost solely on the false assumption that, if animals are suffering, production will decrease.¹¹⁷ As the Campaign for Arizona Farmers and Ranchers recently stated

114. For a discussion of how this plays out in the context of the Endangered Species Act, see Daniel J. Rohlf, *Jeopardy Under the Endangered Species Act: Playing A Game Protected Species Can't Win*, 41 WASHBURN L.J. 114, 120 (2001) (“Even though biological opinions technically constitute only advice to an action agency, the Supreme Court has recognized the Services’ biological opinions as almost always constituting the last word on the issue of jeopardy. Thus, as a practical matter FWS [Fish and Wildlife Service] and NMFS [National Marine Fisheries Service] have the power to determine what does and what does not constitute jeopardy to listed species, or in other words, what is and is not prohibited under section 7.” (citations omitted)).

115. See, e.g., Press Release, Poultry Science Ass’n, Keeping Chicken America’s Number One Meat Will Require A Sustained Commitment To Basic And Applied Research, According To The Poultry Science Association (PSA) (June 22, 2006), available at <http://www.poultryscience.org/pr062206.asp>:

Said [PSA President S. F.] Bilgili, “Animal welfare groups are pressing for the development of improved animal welfare monitoring systems. . . . None of these issues has been adequately addressed, and all will depend on the work of poultry scientists for their resolution.”

[T]he bulk of poultry research—and virtually all encompassing basic research—is, according to PSA, conducted by scientists in . . . Colleges of Agriculture located in Land Grant Institutions, and in state or federal agricultural research centers. For the last 50 years or so, industry and academia have for the most part enjoyed a close relationship. Industry has benefited from scientific discoveries In return, poultry scientists have benefited from research funding (e.g., research grants) and scholarship support for students provided by the poultry and allied industries. The need for an even closer relationship between industry and academia is greater today than ever before, and the PSA is excited to have this as one of its strategic goals.

116. See, e.g., Task Force Report, *A Comprehensive Review of Housing for Pregnant Sows*, 227 J. AM. VETERINARY MED. ASS’N 1580, 1580 (2005) (arguing against the prohibition of gestation crates); DREW VERMIERE, THE SCIENCE OF VEAL CALF WELFARE & NUTRITION: EXECUTIVE SUMMARY (2006), <http://www.azfarmersranchers.com/downloads/Science%20of%20Veal%20Calf%20Welfare.pdf> (supporting use of veal crates).

117. For example, as pointed out by Wes Jamison, Ph.D., addressing veterinarians in the United States as recently as 2000, “Americans view welfare from a production parameter perspective. . . . Healthy, happy animals produce well. . . . That is fundamentally different [from] the European regulatory way of looking at things. They look at stressors. They want to measure baseline parameters independent of production.” Susan C. Kahler, *Animal Welfare Regulations: A Rough Crossing from Europe to U.S.*, J. AM. VETERINARY MED. ASS’N., Dec. 1, 2000, available at <http://www.avma.org/onlnews/javma/dec00/s120100c.asp>. For a criticism of the production assumption, see the comments of Mr. Justice M. Bell: “Having heard all of the evidence about broiler chickens I accept the view . . . that chickens are very low value birds individually so it can be economic [to lose] a percentage of them” McSpotlight.org, Justice Bell’s Verdict: The Rearing and Slaughtering of Animals, http://www.mcspotlight.org/case/trial/verdict/verdict_jud2c.html (last visited Oct. 16, 2006).

in defense of the veal and gestation crate, “We have a moral obligation to care for our animals and an economic motive to treat our animals more than just ‘humanely.’ We hope that voters’ instincts will help them recognize that farmers and ranchers will not stay in business if they are using inhumane productive methods.”¹¹⁸

In moving toward a more scientific, or at least more apparently scientific, method of evaluating animal welfare, scientists in the United States are focusing on biological measures of welfare, such as the absence of stress hormones and the satisfaction of basic biological needs. Yet, according to one prominent animal welfare researcher, biological measures are frequently not accurate if used as the exclusive, or even primary, method of judging welfare. Instead, they should be used only to corroborate the results of behavioral studies, including preference tests “in which the animal is allowed to choose some aspect of its environment, on the assumption that the animal will choose in the best interests of its welfare.”¹¹⁹

Additionally, virtually all scientific evaluation of farmed-animal welfare in the United States compares intensive confinement systems, such as the use of gestation crates for pigs during pregnancy, with industry-standard group-housing systems that, while not actually crating the animals individually, keep them in extremely crowded and barren conditions, with inadequate oversight. The unsurprising point is then made that, while intensive confinement systems restrict movement (completely and permanently), group housing can also lead to other detrimental outcomes, such as disease transmission or more injuries from fighting, and, therefore, one system should not be recommended over the other.¹²⁰ At no point is a comparison made between an intensive confinement system and a system in which animals actually have sufficient room to avoid the frustrations which lead to conflict, and in which good husbandry standards, known to farmers for thousands of years, are applied: for example, feeding animals simultaneously, providing them with enough space, or the common-sense practice of separating animals who do not like each other. Indeed, at no point is a real comparison even made between an individual stall or crate that

118. Press Release, Arizona Farmers & Ranchers, Arizona Farmers and Ranchers Warn Voters of ‘Hogwash Campaign’ (July 6, 2006), available at http://azfarmersranchers.com/newsitems/070606_release.htm.

119. I.J.H. Duncan, *Science-Based Assessment of Animal Welfare: Farm Animals*, 24 REV. SCI. TECH. OFF. INT. EPIZ. 483, 486 (2005). One example cited by Duncan demonstrates that “[a] population of broiler[] [chickens], some of which were lame, were given a choice of two different coloured feeds, one of which contained an analgesic. The lame broilers ate more of the drugged feed than did broilers with no lameness, and ate enough of it to improve their lameness. These birds are indicating very clearly that lameness hurts, and if given the chance they will take steps to alleviate it.” *Id.* at 487. Leg disorders are a major cause of poor welfare in “broiler” chickens, EUROPEAN COMM’N. SCIENTIFIC COMM. ON ANIMAL HEALTH & ANIMAL WELFARE, THE WELFARE OF CHICKENS KEPT FOR MEAT PRODUCTION (BROILERS) 104 (2000), who are bred to grow at an extremely fast rate so that they can be slaughtered at only six weeks. Farm Sanctuary, *Poultry Production*, <http://www.factoryfarming.com/poultry.htm> (last visited Aug. 26, 2006).

120. See, e.g., Task Force Report, *supra* note 116.

does not allow an animal to turn around or stretch his or her limbs and one that does.

Finally, even the most progressive farmed-animal-welfare science tends to focus exclusively on the avoidance of suffering, though most people would not define any creature's welfare solely by the absence of suffering. The idea that these animals should experience any pleasure in their short lives is one that is, by and large, not even considered.¹²¹ Taking a step back, and thinking for a moment of what U.S. industry is trying to prove "scientifically"—that animals do not suffer when they live their whole lives in confinement so intense that they are unable to turn around, stretch their limbs, or take one step—it is apparent that the entire endeavor is disquietingly divorced from both experience and intuition. It is hard to view such "science" as anything other than an attempt to confuse rather than illuminate, or to protect the industry rather than the animals. Clearly, the development of unbiased science demonstrating that suffering exists in common farming practices is an absolute necessity to achieve positive reform.

5. Enforcement

Of course, if, in spite of all these problems, useful regulations were nevertheless enacted, they would still have to be enforced. Although regulatory agencies have far more flexible enforcement mechanisms at their disposal than do criminal prosecutors, the enormity of the job, combined with a probable lack of interest by the agency entrusted with enforcement, make vigorous enforcement unlikely. Furthermore, in the United States at the federal level, "[t]he general exception to reviewability . . . include[s] agency refusals to institute investigative or enforcement proceedings, unless Congress has indicated otherwise."¹²² By contrast, in Israel "the Court has rather freely taken cognizance of claims involving decisions of prosecutors not to institute criminal or enforcement proceedings"¹²³

Consequently, if a regulatory regime for farmed animals were created at the federal or state level, the inclusion of a citizen-suit provision¹²⁴ like that in

121. See Duncan, *supra* note 119, at 488.

122. Heckler v. Chaney, 470 U.S. 821, 838 (1985).

123. Diver, *supra* note 99, at V.

124. Creating a private right of action at the federal level would require considering constitutional standing requirements. See text *supra* note 100. In addition to the possibility that plaintiffs with aesthetic or competitive injuries might use such a provision, were Congress willing, it is not impossible to imagine ways in which it could create much broader access to the courts. See, e.g., Association of the Bar of the City of New York, *Report of the Committee on Legal Issues Pertaining to Animals of the Association of the Bar of the City of New York Regarding Its Recommendation to Amend the Animal Welfare Act*, 9 ANIMAL L. 345 (2003), which, in the context of the Animal Welfare Act, suggests the creation of a citizen-suit provision that would overcome constitutional standing requirements by permitting a suit in the name of the injured animal, who would be represented by a guardian ad litem. See also *Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1175–76 (9th Cir. 2004) ("Animals have many legal rights, protected under both federal and state laws. . . . It is obvious that an animal cannot function as a plaintiff in the same manner as a juridically competent human being. But we see no reason why Article III prevents Congress from authorizing a suit in the name of an animal, any more than it prevents suits

Israel¹²⁵ would be crucial. Despite the checkered history of enforcement for statutes like the Endangered Species Act and the Clean Water Act, whose citizen-suit provisions are certainly no panacea, such a provision in animal-welfare laws would nevertheless reduce industry influence over the agency to some extent. Of course, for that very reason, there is no doubt that any attempt to include such a provision, no matter how carefully drafted to prevent frivolous private prosecutions, would be met with vehement opposition.¹²⁶

C. Examples of Animal-Protection Regulatory Systems in the United States

It is worth briefly focusing on two existing examples of animal-welfare regulation in the United States to evaluate their efficacy in protecting animals.

1. The Animal Welfare Act

The Animal Welfare Act requires the Secretary of Agriculture to promulgate standards to govern the humane care of “animals”¹²⁷ by certain dealers, research facilities, and exhibitors.¹²⁸ More specifically, the statute also requires the promulgation of minimum standards for the exercise of dogs and for “a physical environment adequate to promote the psychological well-being of primates.”¹²⁹

As numerous commentators have pointed out, an examination of the USDA’s history of enforcing this statute demonstrates many of the pitfalls facing a potential farmed-animal regulatory statute. First, industry influence can be detected quite easily by examining the minimal nature of some of the regulations. As just one example, when mandated by Congress to set forth exercise standards for dogs (a requirement that, perhaps for most people, brings up visions of leashes and balls), the agency promulgated a regulation that requires dogs housed in groups to be provided with “additional exercise opportunities” *unless* they are kept in cages that provide them each with floor space that is at least the dog’s length plus six inches, squared.¹³⁰ Similarly, in the

brought in the name of artificial persons such as corporations, partnerships or trusts, and even ships, or of juridically incompetent persons such as infants, juveniles, and mental incompetents.” (citations omitted)).

125. The ability of officially recognized animal rights organizations to bring a criminal complaint or seek an injunction under the Protection of Animals Law “solves a problem which arises in other countries, when it is argued that animals do not have legal standing.” H CJ 9232/01 Noah v. Att’y General [2002-2003] IsrSc 215, 247 (Grunis, J.), *citing* Cass R. Sunstein, *Standing for Animals (With Notes on Animal Rights)*, 47 UCLA L. REV. 1333 (2000).

126. For examples of the types of precautions that can be taken to avoid frivolous prosecutions, see Association of the Bar of the City of New York, *supra* note 124, at 352–53.

127. “Animal” is defined as “any live or dead dog, cat, monkey (nonhuman primate mammal), guinea pig, hamster, rabbit, or such other warm-blooded animal, as the Secretary may determine is being used, or is intended for use, for research, testing, experimentation, or exhibition purposes, or as a pet . . .” 7 U.S.C. § 2132(g) (Supp. II 2002). The Act also specifically excludes other classes of animals, such as birds, rats, and mice. *Id.*

128. *Id.* § 2143(a)(1) (2000).

129. *Id.* § 2143(a)(2)(B).

130. 9 C.F.R. § 3.6 (2006). If the dog is housed alone, in order to be exempted from the requirement for additional exercise, the facility must provide the dog with twice that amount of space. *Id.* § 3.8(a).

case of psychological enrichment for primates, the agency essentially delegated the responsibility for setting minimum standards to the regulated entities themselves.¹³¹ Perhaps the most shocking statutory interpretation did not relate to a “humane” standard but was the exclusion, by regulation, of rats, mice, and birds from the definition of “animal.” This effectively rendered the Act inapplicable to the overwhelming majority of animals used in research.¹³²

Industry influence can also be seen in the woeful history of regulatory enforcement.¹³³ Notably, Congress, concerned with the Act’s poor enforcement, has often had to foist more money upon the agency than requested,¹³⁴ demonstrating what appears to be USDA’s fundamental disinterest in the task. Nonetheless, such congressional generosity is paltry: regardless of the reasons, the amount appropriated for the most recent fiscal year—\$17,500,000—remains a veritable drop in USDA’s budget, which totals \$94.6 billion¹³⁵ and provides for only 110 inspectors to cover the approximately 10,000 licensed facilities.¹³⁶

Apart from budgetary constraints, according to audits prepared by the USDA’s own Office of the Inspector General (OIG), other problems plague enforcement of the Act. The most recent of these audits, released in October 2005, sets forth a scathing indictment of frequent failures to initiate enforcement actions, even when inspectors found evidence of very serious violations. It was also extremely critical of the agency’s practice of regularly offering a seventy-five percent discount on stipulated fines as an incentive to settle enforcement proceedings, creating a situation in which “violators consider the monetary stipulation as a normal cost of conducting business rather than a deterrent for violating the law.”¹³⁷ Previous OIG audits have been similarly unfavorable.¹³⁸

131. See Collette L. Adkins Giese, *Twenty Years Wasted: Inadequate USDA Regulations Fail to Protect Primate Psychological Well-Being*, 1 J. ANIMAL L. & ETHICS 221, 227–28 (2006).

132. In a legal challenge, the definition of “animal,” from which the agency had excluded rats, mice, and birds, was found not to be a matter committed solely to the agency’s discretion, thereby allowing the case to go forward. See *Alternatives Research & Dev. Found. v. Glickman*, 101 F. Supp. 2d 7, 7 (D.D.C. 2000). However, Congress obviated the court’s decision by quickly acting to codify the exclusion.

133. The history of the enforcement of the Humane Methods of Slaughter Act, the other major Federal animal welfare statute, has been similarly dismal. See Jeff Welty, *Humane Slaughter Laws*, 70 LAW & CONTEMP. PROBS. 175, 182–89 (Winter 2007).

134. Association of the Bar of the City of New York, *supra* note 124, at 348.

135. U.S. Dep’t of Agric., Funding Overview, <http://www.usda.gov/agency/obpa/Budget-Summary/2006/03.FundingOverview.htm> (last visited Sept. 2, 2006).

136. Felicia Lee, *How Dogs Are Abused in a Scheme for Profit*, N.Y. TIMES, Feb. 21, 2006, at E1.

137. U.S. DEP’T OF AGRIC., OFFICE OF INSPECTOR GEN., WESTERN REGION, REPORT NO. 33002-3-SF, AUDIT REPORT: ANIMAL & PLANT HEALTH INSPECTION SERVICE (APHIS) ANIMAL CARE PROGRAM INSPECTION & ENFORCEMENT ACTIVITIES 4 (2005).

138. See U.S. DEP’T OF AGRIC., OFFICE OF INSPECTOR GEN., MIDWEST REGION, REPORT NO. 33099-0002-CH, AUDIT REPORT: APHIS MONITORING OF REGISTERED CARRIERS (1998); U.S. DEP’T OF AGRIC., OFFICE OF INSPECTOR GEN., MIDWEST REGION, REPORT NO. 33601-1-CH, AUDIT REPORT: APHIS LICENSING OF ANIMAL EXHIBITORS (1996); U.S. DEP’T OF AGRIC., OFFICE OF INSPECTOR GEN., MIDWEST REGION, REPORT NO. 33600-1-CH, AUDIT REPORT: APHIS ENFORCEMENT OF THE ANIMAL WELFARE ACT (1995).

In the face of such failures, some animal advocates have turned to the courts to enforce the Act. Their experience bears out all of the potential problems set forth above regarding the administrative regulation of animal welfare. Advocates originally attempted to bring actions directly against violators when the agency failed to enforce the law. However, the law does not provide for citizen enforcement, and the courts soon held none was implied.¹³⁹ Then, after many unsuccessful attempts by animal protection organizations to assert standing to obtain judicial review of agency rulemaking under the Administrative Procedure Act, the D.C. Circuit held that, under certain circumstances, standing was available to humans who suffered aesthetic injury as a result of witnessing animal abuse.¹⁴⁰ Although this was an enormous step forward, in that case, the plaintiffs ultimately lost on the merits of their challenge to primate-enrichment regulations because of the limited standard of review of agency action, particularly in light of the vague nature of the statutory requirement for enrichment.¹⁴¹ In denying the challenge, the court also demonstrated a willingness to defer to the agency on scientific issues.¹⁴²

2. New Jersey

The only jurisdiction in the United States that has attempted to regulate the welfare of animals on farms is New Jersey. In 1995, New Jersey amended its anti-cruelty statute to provide that the “raising, keeping, care, treatment, marketing and sale of domestic livestock” is legally presumed not to be cruel if the animals are kept in accordance with “humane” standards developed and adopted by the State Board of Agriculture and the New Jersey Department of Agriculture in consultation with the New Jersey Agriculture Experiment Station.¹⁴³

To date, the New Jersey statute has not had a particularly salutary effect on animal welfare. Interestingly, the process has tracked the Israeli one very closely. Like the Israeli Ministry of Agriculture, the New Jersey Department of Agriculture did not promulgate regulations until it was pressured to do so (even though it was statutorily required to produce them within six months), and, in fact, the standards did not take effect until 2004. Unsurprisingly, the regulations have been extremely disappointing in that they have codified as permissible virtually every intensive farming practice condemned by animal protection groups, including gestation crates and veal crates. What is particularly shocking is that the state agency built into the regulations an exemption for “routine

139. *See, e.g.*, *Int'l Primate Prot. League v. Inst. for Behavioral Research*, 799 F.2d 934, 940 (4th Cir. 1986) (affirming the dismissal of plaintiff animal advocate's claim against a laboratory because plaintiff lacked standing to bring suit and because the Animal Welfare Act did not provide an implied private right of action).

140. *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 426 (D.C. Cir. 1998) (en banc), *cert. denied*, 526 U.S. 1064 (1999).

141. *Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 235 (D.C. Cir. 2000).

142. *Id.*; Giese, *supra* note 131, at 227–28.

143. WOLFSON & SULLIVAN, *supra* note 1, at 214.

husbandry practices.” In addition, with respect to enforcement, the agency has failed to create any right to inspect.¹⁴⁴ Surprisingly, however, the administrative regulations, while on the whole absolutely disastrous, appear to have taken a step forward in protecting laying hens and, in doing so, appear to require significant improvement in general industry practices in that, unlike the conditions in the vast majority of U.S. egg production facilities, caged hens must be given sufficient room to spread their wings and turn around.¹⁴⁵ Unfortunately, it does not appear that this particular regulation is being enforced.

On a positive note, animal protection groups have been able to challenge these regulations in the courts. A lawsuit now before the New Jersey Appellate Division will bring up for review whether the Department of Agriculture was arbitrary and capricious in providing for a common farming-practice exemption, and in finding that gestation crates, veal crates, and other farming practices fit within the statutory definition of “humane.”¹⁴⁶ Hope exists that the courts will find a way, as did the Israeli High Court, to do the right thing.

V

CONCLUSION

In the context of farmed-animal law, the Israeli High Court’s decision is historic in many ways, but, most fundamentally, it is historic simply because it happened. It is one of the first instances of a court applying an anti-cruelty law to a common farming practice, and one of the few examples of the judiciary discussing the issue with seriousness and intelligence. As such, it is a crucially important precedent for any subsequent effort to obtain reform. It also suggests that in the right circumstances, judges, when presented with the truth, may act honorably and determine that common farming practices are cruel—even if they must be less than entirely consistent in order to achieve a just result.

In the United States, as this article has shown, there are substantial obstacles to establishing an effective legal system to govern farmed animals. To date, the most common type of legal reform pursued by animal advocates is the statute criminalizing a particular farming practice, although successes with this approach have so far been few.¹⁴⁷

Nevertheless, it is obvious that change is in the air in the United States, just as it is in Israel and Europe. Quite recently, bills have been successful in one state and one local legislature regarding the force-feeding of ducks and geese

144. Humane Treatment of Domestic Livestock, 36 N.J. Reg. 2367 (June 7, 2004).

145. N.J. ADMIN. CODE § 2:8-4.4(d) (2006) (“Cage housing, not including transport crates shall be: 1. Of sufficient size to allow each bird to stand upright in the cage without having its head protrude through the top of cage, lie down, get up, walk, spread its wings, move its head freely, turn around and rest.”).

146. N.J. Soc’y for the Prevention of Cruelty to Animals v. N.J. Dep’t of Agric., N.J. Super. Ct. App. Div., Docket No. A-006319-03T3 (Nov. 2, 2005).

147. In 1995, after a campaign led by Farm Sanctuary, California enacted a statute prohibiting “downed” animals—those unable to walk unaided—from being sold at stockyards and requiring that they be humanely euthanized or removed from the premises. *See* CAL. PEN. CODE § 599(f) (2006).

for foie gras.¹⁴⁸ Even more telling, and further indicating that momentum is building for change, is the eagerness of animal advocates to bring these issues directly to voters by way of citizens' initiatives, thereby bypassing industry influence on state legislatures and agriculture committees (where farmed-animal-protection bills generally go to die). For example, in 2002, Florida citizens voted to ban the use of the gestation crate in pig farming,¹⁴⁹ and, in November 2006, an Arizona ballot initiative resulted in a ban on gestation and veal crates.¹⁵⁰

Such individual statutes are not by any means a perfect solution to the problem of inhumane, industry-wide practices. It is expensive for animal advocacy groups to work state by state, practice by practice, trying to reform industrial agriculture; and, ultimately, any changes are very limited in scope. Nor is a successful legislative strategy the end of the battle; industry will continue to expend enormous efforts to undo any reform. But these successes are clearly an important first step in laying the groundwork for more expansive change.

Animal advocates have also achieved increasing success using market strategies,¹⁵¹ and these efforts have led to interesting legislative strategies, such as potentially mandatory welfare labeling¹⁵² and the recent introduction of the Farm Animal Stewardship Purchasing Act, which takes a combined legislative

148. In 2004, California, one of only two states in which foie gras is produced, enacted a ban, to take effect in 2012, on the production and sale of foie gras. CAL. HEALTH & SAFETY CODE § 25981–82 (2006). In 2006, the city of Chicago also enacted a ban on the sale of foie gras, but without the extended phase-in period. CHI. MUN. CODE § 7-39-001 (2006). These laws are particularly powerful in that they ban sale, and not just production.

149. WOLFSON & SULLIVAN, *supra* note 1, at 225–26.

150. See Humane Soc'y of the United States, *Election '06: Animals Win in Arizona and Michigan*, http://www.hsus.org/legislation_laws/ballot_initiatives/election_06_animals_win.html (last visited Dec. 12, 2006).

151. The first major success was the adoption of animal welfare standards, albeit very minimal ones, in 2000 by McDonald's for its suppliers, shortly followed by Burger King and Wendy's, and then by the Food Marketing Institute/National Council of Chain Restaurants. *Id.* at 224. Another effort is the Humane Society of the United States' increasingly successful campaign to persuade supermarkets and university and corporate cafeterias, and their suppliers, to use eggs from cage-free hens. Marni Goldberg, *Freeing the Flock*, HARTFORD COURANT, July 8, 2006, at D1. PETA is also aggressively pursuing a multi-faceted campaign, using shareholder activism strategies focused on encouraging the use of controlled-atmosphere slaughter of chickens, who are not covered by the Humane Methods of Slaughter Act, and are currently slaughtered in very cruel ways. See, e.g., KentuckyFriedCruelty.com, *We Do Chickens Wrong*, <http://www.kfccruelty.com/index.asp> (last visited Sept. 4, 2006). As a result of this increased interest in the treatment of farmed animals, Whole Foods is currently creating species-specific "Animal Compassionate Standards," which "require environments and conditions that support an animal's physical, emotional, and behavioral needs." Producers who successfully meet these standards will be able to label their products with the "Animal Compassionate" designation. WholeFoodsMarket.com, *Farmed Animal and Meat Quality Standards*, <http://www.wholefoodsmarket.com/products/meatpoultry/qualitystandards.html#animalcompassionprogram> (last visited Sept. 4, 2006).

152. See Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 LAW & CONTEMP. PROBS. 115, 115 (Winter 2007).

and market approach to require one very large buyer—the federal government—to use animal welfare as a consideration in purchasing decisions.¹⁵³

Pressure for change has also increased as a result of creative efforts to use the currently inadequate legal structure to bring before the courts, and before the public, the question whether modern farming practices are cruel. For example, in 2006, after a Compassion Over Killing investigation showed hens impaled on cage wire and hens living among decomposing corpses, a Pennsylvania humane agent brought a criminal action against a major egg producer.¹⁵⁴ The action was brought in spite of a customary farming practice exemption in Pennsylvania law.¹⁵⁵ In *Humane Society of the United States v. California State Board of Equalization*, the plaintiffs, some of whom are asserting standing as California taxpayers,¹⁵⁶ have “challeng[ed] the California State Board of Equalization’s practice of granting tax exemptions to purchasers of battery cages which are designed and used to confine hens in violation of state animal cruelty laws.”¹⁵⁷

When industry responds to these efforts by claiming that animals are treated humanely, advocates are fighting back by successfully using consumer

153. Farm Animal Stewardship Purchasing Act, H.R. 5557, 109th Cong. (2006).

154. *Commonwealth v. Jay Musser & Esbenshade Farms*, NT 12-80/06 (D.J.C., Lancaster Co.). See Humane Soc’y of the United States, Current Docket: *State v. H. Glen Esbenshade*, http://www.hsus.org/in_the_courts/docket/esbenshade_farms.html (last visited Sept. 4, 2006).

155. Harold Brubaker, *Lancaster County Egg Farm Is Cited for Animal Cruelty*, PHILA. INQUIRER, Jan. 10, 2006, available at <http://www.philly.com/mld/inquirer/business/13587975.htm>.

156. For a discussion of the use of taxpayer standing to attack government subsidies, particularly as it relates to animal-protection litigation, see Varu Chilakamarri, *Taxpayer Standing: A Step Toward Animal-Centric Litigation*, 10 ANIMAL L. 251, 251 (2004).

157. See Humane Soc’y of the United States, *HSUS et al. v. Cal. State Bd. of Equalization* (battery-cage tax breaks), http://www.hsus.org/in_the_courts/docket/ca_battery_cages.html (last visited Sept. 4, 2006). The Humane Society of the United States has also brought an action against the United States Department of Agriculture contesting its regulatory exclusion of poultry from the definition of “livestock” under the Federal Humane Methods of Slaughter Act. Humane Soc’y of the United States, *Still a Jungle Out There: HSUS Takes USDA to Court to Ensure a Humane End for Birds*, http://www.hsus.org/farm_animals/farm_animals_news/still_a_jungle_out_there.html (last visited Sept. 4, 2006). Another example of recent litigation is *Farm Sanctuary v. CorcPork*, in which the plaintiff alleges that the defendant confined pigs in violation of California Penal Code § 597(t), which requires that confined animals have an “adequate exercise area.” Farm Sanctuary alleged standing based on a California unfair competition statute that provided broad, injury-free standing to sue a business that was competing unfairly in violation of the law. The case was dismissed after the law was amended, by ballot initiative, to limit the standing provision, but is currently on appeal. Erica Williams, *Pork Farm Wins Suit Dismissal*, L.A. TIMES, June 15, 2005, at C2. Similarly, in June 2006, the Animal Legal Defense Fund and others brought an action in California against the Mendes Calf Ranch, which raises calves to be used for milk production, for confining them in violation of section 597(t). The state of California is also named as a defendant for failing to enforce the law and for giving tax breaks for the crates in which the calves are confined. Two individual co-plaintiffs are alleging standing based on the harm they allegedly suffered by purchasing and consuming illegally produced dairy products. Animal Legal Def. Fund, *ALDF Files Suit to Stop Abuse of Newborn Dairy Calves at California Ranch*, <http://www.aldf.org/news.asp?sect=news> (last visited Sept. 4, 2006). Also, in June 2006, the Humane Society of the United States, along with Farm Sanctuary and others, petitioned the New York State Department of Agriculture and Markets to have foie gras declared an adulterated food within the meaning of New York law, in that it is the “product of a diseased animal.” Humane Soc’y of the United States, *N.Y. Foie Gras Farms Challenged*, http://www.hsus.org/farm/news/ournews/new_york_foie_gras_food_law.html (last visited Sept. 4, 2006).

protection law to discredit industry claims.¹⁵⁸ In 2005, Compassion Over Killing filed a false advertising complaint with the Better Business Bureau, which referred the matter to the Federal Trade Commission (FTC) for possible legal action. The FTC announced that egg producers could no longer stamp as “Animal Care Certified” cartons of eggs from hens kept in customary industry conditions.¹⁵⁹

No doubt because of all the potential problems described in this article, one avenue animal advocates have not pursued is a regulatory system to govern farmed-animal welfare. The idea of putting the care of animals in the hands of the USDA, or in the hands of state agricultural agencies, is one that horrifies most animal advocates. However, as market-based campaigns and aggressive litigation efforts see some success, and, as a result, more people realize how farmed animals are really treated—and that they are essentially unprotected by U.S. law—the need for legal change will certainly become more obvious. Given the success in *Noah* and the regulatory accomplishments in Europe, animal-protection advocates may become more optimistic about the advantages of a regulatory approach, especially if current efforts lead to a cultural shift creating a better environment for positive change. Additionally, even though it is hard to imagine at this juncture, industry may be less opposed to regulation in the future—perhaps because such regulation will appear inevitable due to societal concern—and industry would therefore be willing to support a regulatory statute that gives broad discretion to the agency, where industry can hope to influence the regulatory process. If this were to occur, other states, and eventually, the federal government, may join New Jersey in instituting a regulatory system. In light of all the factors discussed in this article, animal advocates face an uphill battle to ensure that any regulatory system effectively produces meaningful change.¹⁶⁰

158. For an extended discussion of the application of consumer protection law to animal law issues, see Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25, 25 (2004).

159. See Press Release, Compassion Over Killing, Federal Trade Commission Announces End to Misleading Egg Logo (Oct. 3, 2005) (on file with author).

160. An additional potential obstacle is the loss of market share, both in this country and in countries to which the United States exports, to cheap imports from countries that do not follow similar welfare guidelines. Sadly, to date, the European Union’s fear of losing market share to such products has been focused on the spectre of imports from the United States, since our welfare standards are so low. See, e.g., RSPCA/Eurogroup for Animal Welfare, *Hardboiled Reality: Animal Welfare-Friendly Egg Production in a Global Market* 20 (2001), available at <http://www.rspca.org.uk/servlet/Satellite?pagename=RSPCA/Campaigns/WTOrules&articleid=1011893998195> (“[B]y 2012 there will be a substantial difference between the EC and the USA—at current prices, a dozen eggs will typically cost 73 cents to produce in the EC and 42 cents in the USA. US producers could therefore theoretically export fresh battery eggs to the EC and remain competitive, even with import duties and the additional transport costs.”). The issue of what trade measures are obtainable and desirable on the international level in order to protect farmed-animal welfare is beyond the scope of this article, but is crucially important to the success of any legal reform. Notably, the foie gras that Israel was producing before the ban went into effect will certainly be replaced, possibly by Chinese producers. See China View, *China to Boost Foie Gras Production*, http://news.xinhuanet.com/english/2006-04/11/content_4409586.htm (last visited Dec. 12, 2006).

Despite the challenges involved in creating positive change by way of a regulatory system, its benefits, if constructed correctly, could be very real. Given the unimaginable number of animals raised for food and the intricacy of the issues and interests involved, a regulatory system may be the only means to provide, monitor, and enforce even the most basic protections for each of the animals in industry's possession.¹⁶¹

Ultimately, as *Noah* demonstrates, positive change can happen for farmed animals, even in the highest courts, and judges may surprise us given the chance to do so. Contrary to industry's claims, animal advocates may not have the power to "convert" people to vegetarianism against their will, but they might, with hard work, have the power to require industry to treat farmed animals the way the public thinks they should be treated, and, indeed, the way industry claims they are currently treated.¹⁶² The price we pay for failing to move forward is, as Justice Rivlin notes, the degradation of our own dignity.¹⁶³ The price billions of animals pay is far higher.

161. This is particularly the case because, although producers who have completely switched to less inhumane methods have a strong incentive to create a level playing field so other producers cannot undersell them, many producers have simply created distinct product lines. Thus, egg producers may have "McDonald's barns" where the hens receive somewhat more room than in their standard barns. See Rod Smith, *McDonald's Guidelines Send Signal Across All Animal Production Segments*, FEEDSTUFFS, Aug. 28, 2000, at 3. These producers have no need to level the field because they are profiting from both market sectors, and in the absence of regulation, they may have little incentive to alter their practices. This is one of the reasons consumers who wish to continue consuming animal products but wish to encourage less inhumane husbandry practices have a greater positive impact if they buy only from producers who treat all of their animals by the same standards. See PETER SINGER & JIM MASON, *THE WAY WE EAT: WHY OUR FOOD CHOICES MATTER* 109–10 (2006).

162. See Jonathan R. Lovvorn, *Animal Law in Action: The Law, Public Perception, and the Limits of Animal Rights Theory as a Basis for Legal Reform*, 12 ANIMAL L. 133, 133 (2006).

163. See Justice Rivlin, *supra* note 68.