

Do Animal Protection Laws Address Widespread Cruelty? Unique Challenges and Potential for Addressing Institutional Abuse to Farmed Animals

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ABSTRACT

There has been an increase in recent years in both the interest in the enforcement of and the reformation of criminal animal cruelty laws. This increased focus has come in the context of addressing shortfalls in procedural avenues, the interest in preventing animal cruelty, and as part of larger discussions around criminal justice reform broadly. This Article looks at the shortcomings and the potential for the greater enforcement and reform of existing animal protective laws through the lens of institutionalized cruelty and neglect to farmed animals in large-scale industrial settings. It first discusses the role of animal protective laws in the field of animal law broadly. It then shifts to analysis of the applicability of U.S. state-level animal cruelty laws and the federal Humane Methods of Slaughter Act in industrial settings, where animals are housed and killed for meat, dairy, and eggs. The Article argues these settings are where the majority of widespread human-inflicted acute suffering, neglect, and frustration of natural behaviors takes place. As such, analyzing these laws and the efforts made by animal advocates to enforce them is vital to advancing legal protections for animals. Next, using case studies, this paper highlights enforcement efforts, trends, and dynamics that have arisen in approximately the past decade to functionally exclude farmed animals from the scope of the laws' coverage. The Article argues that this stems largely

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from poor enforcement and access to enforcement avenues, more than from inherent flaws in the laws as drafted or in their conceptualization by the legislatures. Lastly, this paper asserts there is unique value in laws overtly meant to protect animals from undue suffering and killing, and for that reason, it presents ideas for reform of these animal cruelty law structures.

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Why is the government only made of humans?

– Logan, author’s son, age 6

I. THE ROLE OF ANIMAL PROTECTIVE LAWS TO ACHIEVE ANIMAL LAW OBJECTIVES

In its purest form, the field of animal law was originally conceived to bring societal institutions of fairness and adjudication of harms and harm prevention to govern our species’ interactions with other species. It was meant to cover interactions up to and especially including the violation of bodily integrity and taking the lives of members of these nonhuman species, sometimes in massive numbers. Once our legal infrastructure is pointed in the direction of nonhuman animals,¹ recognition of some form of rights of these animals—however weakened—is unavoidable. If one accepts the premise that our legal structure should apply in some way to govern human treatment of animals, and that treatment should ideally take place in a humane way, this premise presupposes that animals in fact do have legally cognizable interests and that those interests can be violated by inhumane treatment, however defined. The importance of this concept cannot be overstated. The core premise of animal law is that animals matter, and treatment of animals can be just or unjust. This is also reflective of public opinion on the moral relationship between humans and animals.² Moreover, there are laws in place in every state and at the federal level that overtly recognize this principle.

¹ This paper uses the term “animal” to mean “nonhuman animal” unless otherwise indicated.

² See, e.g., Rebecca Riffkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP (May 18, 2015), <https://news.gallup.com/poll/183275/say-animals-rights-people.aspx> [<https://perma.cc/G68L-K36J>] (indicating that support in the U.S. for the opinion that animals should have the same rights as people increased over previous polling to 32%, while 62% say animals can be used for human benefit but deserve some protection, and only 3% say animals require little protection from exploitation and harm).

Of course, the reality of our legal system is more complex and contradictory than a purist integration of the rights of animals into our current system. This is the crux of the problem with, as Logan says, a “government only made of humans.” Our system is fully human-centric and inherently favors—and in fact sees—the interests of humans above all else. It is in this context that animal law as a field has long been plagued by two specters in achieving its objectives. Progress has been made in both of these areas, but these specters still sit heavily — impeding progress in access to the courts, meaningful change for, and enfranchisement of animals.

First, animals are seen as property under the law. Nearly every student of animal law learns as axiomatic that animals are treated as mere property by our legal system—an animal is an object—little different from a chair.³ For anyone interested in using the law to address the systemic abuse and killing of animals, this view can essentially stop any progress before it starts.

Second, and equally axiomatic in animal law, we learn that animals themselves cannot represent or have their interests directly represented in our judicial system, since they are not “persons” under the law. This means neither animal advocates nor animals themselves can reliably get standing to challenge harm to animals in court. This concept is generally presented with greater hope due to the work of groups like the Nonhuman Rights Project and others,⁴ as well as borrowing from the playbook of some of the thinking and successes and failures of environmental law in this area.⁵ However, this idea of achieving personhood under the law for animals is presented (with notable advancements outside of U.S. law⁶) as hope for future strategies, and not as the current legal status of animals.

This paper takes issue with the above framing and does not accept the categorical exclusion of animals as at least sentient beings, if not rising to the level of personhood. To be sure, these are significant impediments for systemic advancement of the interests of animals through the law. However,

³ See, e.g., STEVEN M. WISE, *RATTLING THE CAGE: TOWARD LEGAL RIGHTS FOR ANIMALS* (2000). The nuances of this issue and the acknowledgement of the in-between status of animals is recognized in multiple scholarly articles. See also David Favre, *Living Property: A New Status for Animals Within the Legal System*, 93 MARQ. L. REV. 1021 (2010).

⁴ E.g., Jill Lepore, *The Elephant Who Could Be a Person*, THE ATLANTIC (Nov. 16, 2021), <https://www.theatlantic.com/ideas/archive/2021/11/happy-elephant-bronx-zoo-nhrp-lawsuit/620672/> [<https://perma.cc/3RLB-TARY>].

⁵ See, e.g., CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING? LAW, MORALITY, AND THE ENVIRONMENT* (Oxford Univ. Press 2010).

⁶ Lawrence Wright, *The Elephant in the Courtroom*, THE NEW YORKER (Feb. 28, 2022), <https://www.newyorker.com/magazine/2022/03/07/the-elephant-in-the-courtroom> [<https://perma.cc/J2YE-2RY8>] (citing examples of recognition of the concept of legal personhood of animals in India, Hungary, Costa Rica, Chile, Argentina, and Colombia).

unquestioningly accepting the truth of these principles overly simplifies the legal landscape and may cause animal advocates to miss opportunities that are uniquely presented by these animal-protective laws. The law already embeds within its recognition of the value of animals and their legal protection. These avenues are underdeveloped and under-utilized for numerous reasons, including politically motivated challenges and procedural limitations. It is worth the exercise of analysis and strategy development to understand the opportunities animal protective laws present as well as the barriers we face and how to overcome them. The lack of private rights of action and standing issues continue to plague animal advocates working on a variety of species, but in certain corners of animal law, there have been real advancements made on those fronts. For example, Courtroom Animal Advocate Programs have arisen within the past decade, which allow for the private representation of the interests of companion animals in the prosecution of animal cruelty cases.⁷ We have also seen the use of special masters for animals in high profile cruelty cases, bringing additional emphasis on the interests of the animals in the courtroom.⁸ Outreach and education to prosecutors and collaboration with advocacy groups has led to greater recognition of the sociological causes of animal cruelty to companion animals, evidenced by programs like The Link, connecting domestic violence with cruelty to animals.⁹ Companion animal cruelty prosecutions also appear to be increasing along with an uptick in harsher penalties and convictions. Unfortunately, this appears to be happening in a way that is perpetuating the racial and economic disparities found in other areas of criminal law, and it also seems to be heavily weighted toward companion animal and urban cases.¹⁰ This paper returns to discussion of these topics in the context of proposed solutions and applicability to farmed animals, *infra*. Both the value of animal protective laws and their challenges are evident for the purposes of achieving animal law objectives. However, flawed or inconsistently applied, the reality is that

⁷ Jessica Rubin, *Desmond's Law: Early Impressions of Connecticut's Court Advocate Program for Animal Cruelty Cases*, 134 HARV. L. REV. 263 (2021).

⁸ Rebecca J. Huss, *Lessons Learned: Acting as Guardian/Special Master in the Bad Newz Kennels Case*, 15 ANIMAL L. REV. 69 (2008) (discussing her appointment as guardian/special master of the dogs in the Michael Vick dogfighting case).

⁹ NATIONAL LINK COALITION, <https://nationallinkcoalition.org/> [<https://perma.cc/4SKE-A788>] (last visited Sept. 13, 2022). The FBI has also recognized this link. See Charlie Robinson and Victoria Clausen, *The Link Between Animal Cruelty and Human Violence*, LEB (Aug. 10, 2021), <https://leb.fbi.gov/articles/featured-articles/the-link-between-animal-cruelty-and-human-violence> [<https://perma.cc/53LP-UNS6>].

¹⁰ JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* 166-92 (2019).

legislatures have taken a stance recognizing the government interest in protecting against the cruel treatment of animals. These laws are in fact enforced in some cases, and enforcement appears to be on the rise. Animal protective laws hold unique value in the fight to achieve animal law objectives.

II. FARMED ANIMALS AND THE LAW

In the context of farmed animals in the meat, dairy, and egg industries, there are very few laws that directly recognize an interest in protecting the treatment of animals. On the federal level, the Twenty-Eight Hour Law applies to livestock (defined to exclude birds, meaning the law applies to only a small percentage of animals in agriculture), and requires that livestock being transported by a “common carrier” for greater than twenty-eight consecutive hours be given 5 hours of food, water, and rest.¹¹ The law was first enacted in the 1880s and was last amended in 1906,¹² and the legislative history strongly indicates an animal protective intent.¹³ It was frequently enforced in the early part of the 20th century.¹⁴ In 2005, Animal Outlook, the Humane Society of the United States, Animals Angels, and Farm Sanctuary submitted a petition—which included evidence from investigations done by Animal Outlook and Animals Angels showing transport routes longer than the statutory limit—arguing that the interpretation of the definition of vehicle to exclude trucks was arbitrary, capricious, and contrary to law under the Administrative Procedure Act (APA).¹⁵ In 2006, the United States Department of Agriculture (USDA) returned a favorable response to the petition, agreeing to include trucks in the definition of vehicle.¹⁶ Still, the law has been enforced only a handful of

¹¹ 49 U.S.C. § 80502(a).

¹² Twenty-Eight Hour Law, 34 Stat. 607 (1906).

¹³ PETER BRANDT, *INDEFENSIBLE: ADVENTURES OF A FARM ANIMAL PROTECTION LAWYER*, (2021) (discussing the nature and history of the Twenty-Eight Hour Law and quoting federal lawmakers’ remarks in debating the original law before its passage in 1872 in the face of industry opposition, including Senator Morrell, arguing “that the Government of the United States should interpose its authority, and at least in some way give an admonition which shall teach men that even dumb animals have rights which are not to be violated.”) (internal citations omitted).

¹⁴ Petition Before the United States Department of Agriculture, Humane Soc’y of the U.S. v. Johanns, (Aug. 2005), <https://cok.net/wp-content/uploads/2013/02/Twenty-Eight-Hour-Law-Petition-2005.pdf> [<https://perma.cc/8ASB-5MXG>].

¹⁵ *Id.*

¹⁶ Letter from W. Ron DeHaven, Administrator, U.S. Dep’t of Agric., to Peter A. Brandt, Humane Soc’y of the U.S. (Sept. 22, 2006) (on file with author) (“We agree that the plain meaning of the statutory term ‘vehicle’ in the Twenty-Eight Hour Law includes ‘trucks’ which operate as express carriers or common carriers.”).

times in decades.¹⁷ A noteworthy feature of the Twenty-Eight Hour Law is that it has mandatory enforcement language in it. Upon receiving evidence of a violation, the law “shall” be enforced.¹⁸ Despite this, none of five investigations by Animal Outlook and Animals Angels (in 2005, 2012, and 2021), each of which documented routes in excess of twenty-eight hours, succeeded in yielding enforcement.¹⁹ There are two important takeaways from the Twenty-Eight Hour Law. First, it is a clear example of legislative intent to protect animals. It’s an interesting historical snapshot showing the evolution of the animal protection movement, which originally did not give dogs and cats special consideration as contrasted with cattle and pigs, and over time the interpretation and enforcement of the Twenty-Eight Hour Law tracked with that trend to uplift dogs and cats and downgrade farmed animals in status and protection. Still, the statute remains on the books, and the legislative intent to protect farmed animals is clear, full stop. We see this kind of contrast in other animal protective laws between the statutory purpose and language versus the interpretation and enforcement that weakens or ignores the objective of the law. Second, mandatory enforcement language alone is not enough to yield meaningful enforcement, even when the factual evidence is present. The Twenty-Eight Hour Law is still a tool in this landscape, albeit with very narrow substantive applicability and likelihood of enforcement.

The Humane Methods of Slaughter Act (HMSA) is the federal statute that has been enforced the most of any federal statute relating to farmed animal treatment.²⁰ This is relative, though, and the low enforcement of HMSA is the subject of a lot of criticism.²¹ This statute also applies only to livestock rather than poultry²² or fish. In addition, the Food Safety and Inspection Service (FSIS) is the agency tasked with enforcing the law, and it has taken the position that the HMSA does not apply to the slaughter of animals killed to produce animal food (such as pet food), even if these are

¹⁷ Michelle Pawliger, *Animals in Transport Languish as Twenty-Eight Hour Law Goes Off the Rails*, 25 ANIMAL L. 1, 2-3 (2018).

¹⁸ 49 U.S.C. § 80502(d).

¹⁹ *Animal Transport: Torture Hidden in Plain Sight*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/animal-transport-torture/> [https://perma.cc/PUG4-4K88] (last visited Dec. 28, 2022).

²⁰ 7 U.S.C. §§ 1901-1907.

²¹ See Bruce Friedrich, *When the Regulators Refuse to Regulate: Pervasive USDA Underenforcement of the Humane Slaughter Act*, 104 GEO. L. J. 197 (2015).

²² The poultry industry may voluntarily elect to follow so-called “Good Commercial Practices” (GCPs) in poultry slaughter. 9 C.F.R. § 381.65(b). These have a nominal relationship to animal welfare and refer to “humane handling” but are geared toward food safety and process control rather than treatment of individual animals.

livestock species that would otherwise be covered.²³ These are some of the most vulnerable animals, a disproportionate number of whom fall into the “4D” category—dying, diseased, disabled or dead. For the first three of these four categories, this means there is no disincentive to drag, shock, or otherwise mistreat animals whose movement is impaired. For the animals within its scope, the HMSA sets forth two methods that qualify as “humane.” All federally inspected livestock slaughter must comply with one of the two: conventional slaughter which requires insensibility from a single blow or shot, and ritual slaughter which requires a method in compliance with a ritual or religious tradition that renders the animal insensible via anemia to the brain through simultaneous and instantaneous severing of the carotid arteries.²⁴ FSIS is the agency that inspects slaughterhouses, and the HMSA regulations also include FSIS oversight of humane handling at the slaughter plant, such as the offloading process from trucks, their treatment in the yards, and moving them through kill chutes.²⁵ FSIS is also the only agency that can enforce the HMSA since it has no private right of action. When FSIS does enforce the HMSA, it uses a tiered system of enforcement actions, such as noncompliance reports (NRs), notices of intended enforcement (NOIEs), and others, which often give the slaughter plants the opportunity to remedy the issue to avoid escalation.²⁶ It also appears as though we as the public are not getting the full picture of HMSA violations as found by FSIS. A former FSIS inspector, Dr. Dean Wyatt, gave congressional testimony in 2008 indicating that the records of the worst violations are only accessible to a small number of people within the USDA and cannot be publicly accessed through FOIA.²⁷ These are all very real problems with HMSA but it is still worth working to maximize its impact, given its unusual position as an active federal statute whose overt purpose is to protect the interests of animals.

²³ U.S. DEP’T OF AGRIC. FOOD SAFETY AND INSPECTION SERV., FSIS DIRECTIVE 6300.1 REV. 2 (2019).

²⁴ 7 U.S.C. § 1902.

²⁵ U.S. DEP’T OF AGRIC. FOOD SAFETY AND INSPECTION SERV., FSIS DIRECTIVE 6900.2 REV. 3 (2020).

²⁶ See *Animal Welfare Inst., Humane Slaughter Update: Federal and State Oversight of the Welfare of Farm Animals at Slaughter*, ANIMAL WELFARE INST. 4 (Apr. 2020) <https://awionline.org/sites/default/files/uploads/documents/20HumaneSlaughterUpdate.pdf> [<https://perma.cc/9TR8-KHX9>].

²⁷ *Continuing Problems in USDA’s Enforcement of the Humane Methods of Slaughter Act: Hearing Before the Subcomm. on Domestic Pol’y of the H.R. Comm. on Oversight and Gov’t Reform*, 111th Cong. 40–47 (2010) (statement of Dr. Dean Wyatt, FSIS Supervisory Public Health Veterinarian).

A new federal statute that shows some promise but has not yet been tested for cruelty to farmed animals is The PACT Act.²⁸ This statute was enacted in response to the U.S. Supreme Court striking down a crush videos²⁹ statute on First Amendment grounds in *U.S. v. Stevens*, 559 U.S. 460 (2010).³⁰ This statute was meant to remedy some of the issues of vagueness and inconsistency in cruelty statutes that the court raised in *Stevens*, but also serves as a broader federal animal cruelty statute. It does have language in it that exempts common or normal practices for animals in agriculture,³¹ which mirrors many of the state cruelty statutes. This should not be read as a categorical exemption of all farmed animal cruelty, or even for widespread cruel practices in animal agriculture, as discussed *infra*. This law is too new to have been tested in this way, but it could present an opportunity.

For most farmed animals and for most of the life cycle of farmed animals, the relevant laws in play are the state animal cruelty laws. There are animal cruelty laws in every state; in most states they are exclusively criminal and therefore they have no private right of action. However, in some states, there are partial or total workarounds to this. For example, North Carolina has a civil animal cruelty law with an injunctive remedy that is nearly identical to its criminal counterpart.³² Pennsylvania has both a private prosecution doctrine that allows for judicial review of District Attorney decisions³³ as well as the ability for humane officers to act on behalf of the commonwealth and prosecute animal cruelty cases.³⁴ Some states allow private citizen complaints specifically for cruelty, including

²⁸ 18 U.S.C. § 48 (prohibiting animal crushing and defining animal crushing to include animals “purposely crushed, burned, drowned suffocated, impaled, or otherwise subjected to serious bodily injury”).

²⁹ Crush videos are fetish videos where people are filmed crushing small animals to death, such as with a bare foot or high heel shoe.

³⁰ Press Release, Pat Toomey, United States Senator for Pennsylvania, Toomey-Blumenthal Landmark Animal Cruelty Bill Signed into Law (Nov. 25, 2019) <https://www.toomey.senate.gov/newsroom/press-releases/toomey-blumenthal-landmark-animal-cruelty-bill-signed-into-law> [<https://perma.cc/6WXE-Z2VV>]; L.S. Stegman, *Do We Need to Make a Federal Case Out of It? The Preventing Animal Cruelty and Torture Act as Over-Federalization of Criminal Law*, 57 AM. CRIM. L. REV. 135, 138–39 (2020).

³¹ 18 U.S.C. § 48(d)(1) (“This section does not apply with regard to any conduct, or a visual depiction of that conduct, that is—(A) a customary and normal veterinary, agricultural husbandry, or other animal management practice; (B) the slaughter of animals for food . . .”).

³² N.C. GEN. STAT. §§ 14-360, 19A-4 (LEXIS through 2022 Reg. Sess.).

³³ 234 PA. CODE § 506 (2022).

³⁴ 22 PA. STAT. AND CONS. STAT. ANN. §§ 3701–3718 (West, Westlaw through 2022 Reg. Sess. Act 96).

California and Idaho.³⁵ Others, like Virginia, New Jersey, and New Hampshire, have citizen complaint provisions that are not isolated to cruelty (but sometimes apply only to misdemeanors).³⁶ Other states such as Maryland arguably allow citizens to approach a grand jury.³⁷ Minnesota has a mechanism for judicial review that can require an investigation where it finds probable cause.³⁸ A number of states grant humane officers or animal control officers power to investigate and/or file charges for animal cruelty.³⁹ While the sheriff, animal control, district attorneys, and their equivalents still hold the lion's share of power in determining whether the cruelty laws are enforced in most jurisdictions, these alternative and additional routes to enforcement can be very valuable.

State animal cruelty laws are also substantively limited. In most states, there are exemptions, such as the one for "common" or "normal" farming practices. In the remainder of states, there is often language like "unnecessary" or "unjustified" that modifies cruelty, terms which enforcement agencies and courts could interpret as being identical to standard practice exemptions.⁴⁰ However, it is important to note that nothing in the statutes or the caselaw (where there is applicable caselaw) categorically excludes all standard or widely used practices from the cruelty law's coverage. This is an area ripe for development to keep the scope of the exemptions narrow and the deference to industry limited. Other issues with the cruelty laws are discussed in case studies *infra*.

Advances for farmed animals have been made using civil litigation, almost entirely through causes of action that are facially unrelated to animal protection or animal cruelty. Novel and successful cases have been brought by animal advocates. For example, animal advocates have brought consumer protection litigation over claims about animal treatment on

³⁵ CAL. PEN. CODE § 599a (West 2022); IDAHO CODE ANN. § 25-3513 (West 2022).

³⁶ *Fifty States and D.C. Survey of Laws that Authorize or Recognize Private Citizen-Initiated Investigation and/or Prosecution of Criminal Offenses*, NAT'L CRIME VICTIM L. INST., (2018), <https://law.lclark.edu/live/files/26911-50-states-victim-initiated-investigation> [<https://perma.cc/P29R-VKSA>].

³⁷ *Id.*

³⁸ MINN. STAT. § 343.22 (2021).

³⁹ Cynthia F. Hodges, *Table of Enforcement Powers Granted to Humane Societies by State*, ANIMAL LEGAL & HIST. CTR. (2012), <https://www.animallaw.info/topic/table-humane-society-enforcement-powers> [<https://perma.cc/FMN5-5VYG>].

⁴⁰ David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 208–13 (Cass R. Sunstein & Martha C. Nussbaum, eds., 2005).

advertising and packaging,⁴¹ unfair business practices,⁴² complaints to Attorneys General, the Federal Trade Commission, and other administrative agencies,⁴³ unfair competition lawsuits,⁴⁴ and False Claims Act cases.⁴⁵ They have also defended the constitutionality of animal welfare laws such as California's Proposition 12⁴⁶ and foie gras bans.⁴⁷ The impact and promise of this kind of litigation is great, though mostly outside the scope of this paper. Importantly, however, each of these lawsuits relies at its core

⁴¹ Carter Dillard, *False Advertising, Animals, and Ethical Consumption*, 10 ANIMAL L. 25, 26 n.1 (2004); *see, e.g.*, Complaint at 12, *Animal Outlook v. Cooke Aquaculture, Inc.*, No. 2020 CA 002908 B, 2021 D.C. Super. LEXIS 100 (D.C. Super. Ct. June 24, 2021) <https://animaloutlook.org/wp-content/uploads/2020/06/true-north.pdf> [<https://perma.cc/6DAW-DFWV>]; Alison Frankel, *D.C. Appeals Court Empowers Consumer Nonprofits in Hormel False Ad Case*, REUTERS (Sept. 3, 2021, 2:38 PM), <https://www.reuters.com/legal/litigation/dc-appeals-court-empowers-consumer-nonprofits-hormel-false-ad-case-2021-09-03> [<https://perma.cc/D2R4-4K4G>].

⁴² *See* Donna Mo, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. REV. 1313 (2005); *see Cal-Cruz Hatcheries Lawsuit & Settlement*, ANIMAL OUTLOOK, <https://animaloutlook.org/inv/cal-cruz/legal> [<https://perma.cc/54RC-MVZT>] (last visited Sept. 14, 2022) [hereinafter *Cal-Cruz Hatcheries*].

⁴³ *See United Egg Producers* ("Animal Care Certified" Program), FED. TRADE COMM'N (Sept. 30, 2006), <https://www.ftc.gov/es/node/53997> [<https://perma.cc/HB39-2L4E>]; <https://perma.cc/YZ7W-7GGC>; <https://perma.cc/7TQX-Y9PE>; *see "Animal Care Certified" Eggs Exposed*, ANIMAL OUTLOOK, <https://animaloutlook.org/animal-care-certified-eggs-exposed> [<https://perma.cc/8XB9-8Z7J>] (last visited Sept. 15, 2022).

⁴⁴ *See The Dairy Industry's \$9.5 Billion Price-Fixing Scheme*, ANIMAL OUTLOOK, <https://animaloutlook.org/legaladvocacy/dairy-lawsuit> (last visited Sept. 15, 2022) [<https://perma.cc/5G6B-BPG5>]; *see* Mike Hughlett, *Land O'Lakes Settles Suit Over Egg Price Fixing*, STAR TRIBUNE (June 10, 2010, 10:25 PM), <https://www.startribune.com/land-o-lakes-settles-price-fixing-suit/96106824> [<https://perma.cc/FE6R-MXDE>]; *see Broiler Chicken Antitrust*, HAGENS BERMAN SOBOL SHAPIRO LLP (May 27, 2022), <https://www.hbsslaw.com/cases/broiler-chicken-antitrust-litigation> [<https://perma.cc/VR79-JVHR>]; *see* Press Release, U.S. Dep't of Just., Senior Executives at Major Chicken Producers Indicted on Antitrust Charges (June 3, 2020), <https://www.justice.gov/opa/pr/senior-executives-major-chicken-producers-indicted-antitrust-charges> [<https://perma.cc/8YUF-V34S>].

⁴⁵ Press Release, U.S. Dep't of Just., U.S. Intervenes in Suit Against Former Beef Suppliers to National School Lunch Program (May 1, 2009), <https://www.justice.gov/opa/pr/us-intervenes-suit-against-former-beef-suppliers-national-school-lunch-program> [<https://perma.cc/QG85-L7P4>]; Final Judgment on Consent as to Westland Meat Company, Inc. at 1–2, *United States ex rel. Humane Soc'y of the U.S. v. Hallmark Meat Packing Co.*, No. EDCV 08-0221 VAP (OPx), 2013 U.S. Dist. LEXIS 126946 (C.D. Cal. Apr. 30, 2013); *Horror at Superior Farms—Lamb Slaughter Exposed*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/superior-farms/> [<https://perma.cc/S3B5-QVNR>] (last visited Sept. 14, 2022) [hereinafter *Horror at Superior Farms*].

⁴⁶ Anna Starostinetskaya, *Federal Judges Reject Meat Industry's Attempt to Overturn Animal Welfare Law*, VEGNEWS (July 30, 2021), <https://vegnews.com/2021/7/federal-judges-animal-welfare-law> [<https://perma.cc/3S6J-A2EZ>].

⁴⁷ Mona Holmes, *U.S. Supreme Court Decision Leaves California Foie Gras Ban in Place*, EATER L.A. (Jan. 9, 2019, 12:35 PM PST), <https://la.eater.com/2019/1/9/18174211/california-foie-gras-ban-upheld-supreme-court-lawsuit> [<https://perma.cc/79YD-P4AR>].

on the recognition of the governmental interest in preventing the cruel treatment of farmed animals, specifically codified in an animal protective law. While the civil litigation does not directly enforce the animal protective laws, usually because they have no private right of action attached, there is a subcategory of these cases where the viability of their claim using a separate cause of action is dependent on the underlying animal protective law. That is, animal advocacy lawyers have strategically built a body of law to functionally enforce animal cruelty laws while working around the access limitations of those laws.

These cases address cruelty using nontraditional avenues outside the realm of criminal law including the use of alternative causes of action and/or alternative enforcement mechanisms. The substantive cruelty definitions are still central to those actions. For example, after the prosecutor declined to prosecute following Animal Outlook's Cal-Cruz Hatchery investigation, Animal Outlook and Animal Legal Defense Fund (ALDF) worked together to use California's unfair business practices statute to address the hatchery cruelty, discussed *infra*. Following ALDF's Tyson investigation, ALDF made administrative complaints, including to the FSIS alleging violations of the Poultry Products Inspection Act which, while it does not cover animal welfare, does cover food safety and incorporates Good Commercial Practice guidelines which address both food safety and animal welfare.⁴⁸ Following its pig investigation at the Maschhoffs farms, ALDF submitted complaints to the Illinois and Nebraska Attorneys General alleging violations of the states' respective consumer protection statutes because of claims being made by the company indicating the animals were treated humanely while the investigation showed otherwise.⁴⁹ Legislative codification of the interest in protecting animals from cruelty and neglect through the cruelty statutes is the engine that drives these other legal strategies. It is important to expand the effectiveness of the cruelty laws to address large-scale institutionalized cruelty, and it is likewise important to continue building these workarounds to address this cruelty through other legal strategies.

Why is this issue of farmed animal treatment and the law important? One must be concerned about farmed animals if one is at all concerned about the treatment of animals, whether that concern is motivated by a more conservative approach to reducing harm by limiting suffering, or whether it

⁴⁸ *Undercover Investigation Documents Tysons' Cruel, Illegal Treatment of Chickens*, ANIMAL LEGAL DEF. FUND (Sept. 14, 2015), <https://aldf.org/article/undercover-investigation-documents-tysons-cruel-illegal-treatment-of-chickens/> [https://perma.cc/8PYB-L56H].

⁴⁹ *Investigation Reveals Cruelty and Neglect at Hormel Foods' Pig Supplier*, ANIMAL LEGAL DEF. FUND (May 25, 2016), <https://aldf.org/article/investigation-reveals-cruelty-and-neglect-at-hormel-foods-pig-supplier/> [https://perma.cc/4JBE-3KWF].

is seeking abolition of human use, exploitation, and killing of animals altogether. In fact, surveys around the world show that most of the population⁵⁰ falls somewhere on the spectrum of concern for treatment of animals.⁵¹ It is only a tiny percentage of people who take the position that humans should have no legal or moral restrictions on their treatment of animals.⁵²

The cruelty and killing inflicted on farmed animals dwarves all other types of human-animal cruelty in the U.S. Over 10 billion land animals alone are killed each year in the U.S., and if fish are included in the calculation, the number increases into the trillions.⁵³ In addition to the sheer numbers, these animals are subject to the most prolonged and acute cruelty. For example, most egg-laying hens, pregnant and gestating pigs, and calves in the dairy industry are confined so tightly—for months or years—they often cannot even turn around.⁵⁴ Examples of acutely cruel practices that are so widespread in these industries that they are inherent features of the way the industries operate include: hot iron or chemical burning of calves' sensitive horns in the dairy industry, manual castration and tail cutting of piglets, debeaking in the turkey and egg industries, force-feeding in the foie gras industry, maceration—grinding alive—of chicks deemed to be unprofitable in the poultry industry (including males in the egg industry),

⁵⁰ See, e.g., Francesca Carnovale et al., *Chinese Public Attitudes Towards, and Knowledge of, Animal Welfare*, 11 ANIMALS 855 (2021) (citing data showing 94% of Europeans consider protecting farmed animal welfare to be important, and presenting research showing 97% of Chinese respondents showing some support for the importance of caring for animals, with only 3% answering “not at all” to the question, “how important is caring for animals to you as a person?”).

⁵¹ Riffkin, *supra* note 2 (U.S. opinion poll indicating only 3% say animals do not deserve protection from exploitation and harm).

⁵² *Id.*

⁵³ Tellingly, fish are not counted individually but by tonnage, so there is no way to estimate the number of fish killed each year with any precision.

⁵⁴ In fact, these ‘intensive confinement’ issues have been the major focus of the farmed animal protection movement for over a decade. Initial efforts to end these practices included largely unsuccessful attempts to get animal cruelty law enforcement and litigation to address the cruelty. The movement then shifted to legislative tactics, including state ballot initiatives to ban the use of some of these intensive confinement methods and in some cases to ban the sale of products from intensively confined animals. In addition, focus largely shifted to corporate engagement in an effort to get large corporations to phase out or commit to the refusal to purchase products from intensively confined animals. These two strategies have been significantly more successful in addressing some of the intensive confinement standard practices than cruelty enforcement and litigation. For this reason, much of the focus within the farmed animal advocacy movement remains on securing corporate animal welfare commitments and legislative efforts.

and gassing of unwanted animals in a number of industries.⁵⁵ This is in addition to neglectful and crowded conditions that are an essential part of the industry and cause illness, injury, lack of access to food and water, and slow and painful death. The slaughter of animals is also poorly regulated and often results in violence and suffering. All of this is in addition to the so-called “egregious” or excessively violent treatment of animals in agriculture facilities, which is also very widespread, and is not so distinct from the day-to-day operational cruelty of these businesses. Looking at this through the lens of the definitions and intent of animal protective laws, it’s clear that many of these practices rise to the level of animal cruelty under these statutes. In essence, animal cruelty laws are being broken every day repeatedly to the detriment of billions of animals.

If we are to have any realistic opportunity to address widespread and institutionalized cruelty and neglect to farmed animals, we must acknowledge the qualitative uniqueness of animal protective laws, including state-level animal cruelty laws and the federal laws where they apply. There is inherent potential in these laws for farmed animals that cannot be found anywhere else in the law. Equally important is recognizing the need to address the shortcomings in the law and its enforcement. That requires identifying troubling trends and finding ways to reverse them, as well as designing remedial alternatives to the status quo.

III. FARMED ANIMAL PROTECTION ENFORCEMENT EFFORTS AND FINDINGS

The case studies discussed herein are worth reviewing and analyzing to understand the factual and legal landscape as it applies to cruelty to farmed animals. This section is meant to give some depth and takeaways on what the animal advocacy movement has done in this area and what difficulties we have encountered as well as to offer insight into what opportunities there might be for future strategies and reform. The cases here are selected from approximately the past decade. Previous cases and more information on the applicability of cruelty law to large-scale abuse and neglect of farmed animals can be found in an earlier writing on this topic.⁵⁶ The author’s objective of this paper, as an animal advocate and practitioner

⁵⁵ See, e.g., *Foster Farms Exposed: A Nightmare for Baby Birds*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/foster-farms/> [https://perma.cc/8AXK-MWHR] (last visited Dec. 28, 2022).

⁵⁶ Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETHICS 63 (2011).

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of animal law, is to bring legal accountability for the massive amounts of animal cruelty perpetrated against farmed animals. This institutionalized cruelty is so deeply woven into the fabric of the meat, milk, and egg industries that it could not continue to operate as the same industries without it. So often we are thwarted in our ability to present this reality and seek recompense for this cruelty. While animal cruelty prosecutions in other areas may be increasing—where a defendant is of low social status and/or perceived to be engaged in socially undesirable behavior—institutionalized cruelty is left largely untouched by the law and its processes and enforcement: it is in fact protected by it. This is not merely cruelty that is done to promote a business interest or purpose. It goes beyond that: in a very real way, the business is the cruelty. Many other industries have widespread problems of exploitation and harm and are in serious need of reform. Unique to animal agriculture, however, is that reform alone will never address the intrinsic cruelty of the system—as it stands in its modern iteration, cruelty is the animal agriculture industry’s very identity. The legal system has largely failed to recognize this, let alone provide any meaningful avenues to address it. Instead, we are left with a set of animal protective laws that substantively recognize animals’ interests but have process and enforcement mechanisms that concentrate excessive power and deference in the hands of a few who repeatedly use that power to block progress and recognition of this cruelty wherever they can. This is a system failure: animal agriculture largely operates as though it is above the law.

What does this cost us as a society? Law is unique in its potential to bring forth meaningful cultural change by driving and legitimizing moral progress. Our best source of data and insights comes from animal advocacy organizations’ undercover investigations of animal agriculture facilities. These are rare opportunities to see the truth of what happens when people are not looking (and in fact are systematically prevented from accessing this information otherwise), rather than relying on information as filtered through the industry’s marketing departments or in limited government inspection reports. Each of the below cases give us valuable information about what has and has not worked and where we may have levers of opportunity in future enforcement, litigation, and reform strategies. Despite the barriers faced and disappointment of some of the outcomes in the cases below, there is an overriding message of hope and opportunity. Together, they can help us pave a way forward to address institutionalized cruelty in a meaningful way.

A. CAL-CRUZ HATCHERY, ANIMAL OUTLOOK,⁵⁷ 2009,
CALIFORNIA

Animal Outlook conducted this investigation of a commercial chicken (broiler) and duck hatchery located in the city of Santa Cruz, California in 2009. The investigator documented chicks regularly getting killed and mangled on machinery, including skin and limbs being ripped off. The injured animals, along with ill birds, were discarded and left in trays or on the floor for hours or overnight. In one tray, a chick was documented eating alive a mangled chick with large open wounds. In another instance, a bird was thrown into a bucket of liquid waste to drown. One bird was trapped in a plastic tray and killed in the hot steam of the cleaning machine.⁵⁸ Full trays of live chicks and eggshells were being dumped into the narrow opening of a macerator, then hosed down in an attempt to relieve the clog this caused, as the machine sucked them into a tube where they were to be slammed against a “kill plate” that then ground and pulverized the birds into a “slurry.”⁵⁹ The owner of the hatchery was documented standing near the live chick dumping, indicating he was aware of it.⁶⁰ The investigator wrote in his notes, “Towards the end of my [job] interview, the owner asked me if I would be bothered by seeing birds that are not handled properly.⁶¹ Having already seen many dead birds on the ground and parts of their bodies in the machines, I asked if some of the birds get caught in the machinery, and he said yes.”⁶²

Shortly after the investigation, Animal Outlook met with the local Santa Cruz Animal Services Officer and the District Attorney and presented the evidence and the legal arguments, asking for prosecution. Animal Services was very responsive, conducting its own follow up investigation of the hatchery, which corroborated the abuse and neglect allegations Animal Outlook was making, and resulted in the seizure of 88 ducklings, many of which survived and were taken in by Farm Sanctuary.⁶³ However, the District Attorney’s office held onto the case for nearly a year and repeatedly instructed Animal Outlook not to publicly release the

⁵⁷ Animal Outlook’s organizational name prior to 2020 was Compassion Over Killing. It will be referred to as Animal Outlook throughout.

⁵⁸ *Cal-Cruz Hatcheries Closes Down*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/cal-cruz> [https://perma.cc/56WK-L29D] (last visited Sept. 16, 2022).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

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investigation or go to media while they were still purportedly considering their decision on the case. Ultimately, the DA declined to prosecute the hatchery at all, giving no indication of her reasoning.

One immediate takeaway from this is the implications for the role of media in cases like these. During the year in which she was representing to Animal Outlook that she was considering whether or not to prosecute this case, she regularly and sternly told Animal Outlook both that she had no updates to share and that Animal Outlook should not go to media with this investigation. The implication was that if Animal Outlook had gone to the media, any chance of prosecution would be lost. This had the effect of keeping the case quiet for nearly a year, after which time she simply declined to move forward. Note that Animal Services had also followed up on Animal Outlook's investigation by doing its own "official" investigation that the prosecutor could have used as the basis for her charges, in addition to the Animal Outlook evidence. While the reluctance to file charges is frustrating, it did not present a barrier here, because Animals Services had done additional investigative legwork. The lesson here is that there is no value to be had in thwarting transparency in cases like this, and that the best practices is to go forward with media unless there is a specific compelling legal reason not to. Perhaps if media had covered the case right away, there would have been a more open and thorough investigative process. In any event, certainly the District Attorney's office would have taken note.

Notably, Cal-Cruz Hatcheries' customers included higher-value producers, including brands sold at Whole Foods.⁶⁴ Some of these producers were part of third-party certification systems but no industry hatchery standards existed at the time of the investigation, making this a blind spot for private enforcement as well.

Animal Outlook was ultimately able to secure a positive outcome in this case. Because the District Attorney declined to prosecute, Animal Outlook and Animal Legal Defense Fund (ALDF) filed a civil suit in 2011⁶⁵ under California's Unfair Business Practices law, the UCL section 17200. The argument was that the pattern of animal cruelty at this hatchery rose to the level of criminal conduct, which was allowing the hatchery to benefit financially from its crimes. This kind of substantive argument is supported

⁶⁴ See, e.g., Joanna Zelman, *Whole Foods Market to End Ties with Cal-Cruz Hatcheries, California Company Accused of Animal Abuse*, HUFFINGTON POST (Jan. 14, 2012), https://www.huffpost.com/entry/whole-foods-cal-cruz-hatchery_n_1204759 [<https://perma.cc/32AC-PKG5>].

⁶⁵ *Cal-Cruz Hatcheries*, *supra* note 42.

by section 17200.⁶⁶ More challenging was the standing argument, because the standing requirements for suits under this law had been significantly complicated after Proposition 64 in 2004.⁶⁷ This suit utilized the concept of *Havens* standing, which allows NGOs who have diverted resources to address a harm that is in frustration of their mission to sue to stop that harm.⁶⁸ This case settled for a small monetary amount and an agreement ensuring the permanent closure of the hatchery.⁶⁹ This was the first use of the UCL as a civil route to address criminal animal cruelty and it was the first use of *Havens* standing to allow an investigative advocacy group to be a plaintiff alleging animal cruelty. While it ended in a settlement, *Havens* has been used in similar situations since then, and the doctrine has evolved,⁷⁰ providing ongoing opportunity to access the courts over institutionalized cruelty, since this is specific to organizational standing.

B. CENTRAL VALLEY MEAT, ANIMAL OUTLOOK, 2012, CALIFORNIA

Animal Outlook investigated a large cattle slaughterhouse in California in the summer of 2012 called Central Valley Meat (CVM). This slaughterhouse primarily kills so-called “spent” dairy cows. That is, cows used by the dairy industry until they are no longer producing enough milk to be profitable, which is generally around the age of 4-6.⁷¹ Often, these animals are in particularly bad shape, even at the farm or feedlot before they are trucked to the slaughterhouse. Transport stress can exacerbate this. At Central Valley Meat, cows arrived injured or sick, or down on the truck, and a number went down in both the trucks and the yards they were held in outside of the slaughter chute. It was then regular practice to try to get the animals up by pushing, pulling, or pushing up on their tails and electrically shocking them. Electric prods were also used to move animals through the concrete chute leading into the slaughter building. In one instance, in an

⁶⁶ CAL. BUS. & PROF. CODE § 17200 (Deering, LEXIS through Chapter 175 of 2022 Reg. Sess.) (defining unfair competition to “mean and include any unlawful, unfair, or fraudulent business act or practice”).

⁶⁷ See CAL. BUS. & PROF. CODE § 17204.

⁶⁸ *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

⁶⁹ *Cal-Cruz Hatcheries*, *supra* note 42.

⁷⁰ See, e.g., *People for the Ethical Treatment of Animals v. U.S. Dep’t of Agric.*, 797 F.3d 1087, 1093 (D.C. Cir. 2015).

⁷¹ See, e.g., Dan Charles, *So, Who Sent Those Sick Cows to the Slaughterhouse?*, NPR (Aug. 23, 2012, 2:09 PM), <https://www.npr.org/sections/thesalt/2012/08/23/159914915/so-who-sent-those-sick-cows-to-the-slaughterhouse> [<https://perma.cc/P6WP-BLQM>].

attempt to get three cows to reverse, slaughterhouse workers kicked, jabbed, electrically shocked, and sprayed the cows in the face with water for more than half an hour. One cow was shocked over 40 times. Animals that went down in the trucks or yards were often shot multiple times with the captive bolt pistol over the course of several minutes—two, three, or even four times. After shooting downed cows in the head, some workers and supervisors would regularly stand on the cows' nostrils to suffocate them. At the point of slaughter, a number of cows continued to move after being shot with the captive bolt pistol. Cows thrashed their heads—apparently attempting to “right themselves” or get up from the conveyor belt after having their legs chained to be hoisted—vomiting, struggling while hanging from the chain, bleeding and breathing for a length of time before being shot again.⁷²

This facility is a federally inspected slaughterhouse, so it is under the jurisdiction of the Food Safety and Inspection Service (FSIS), which is required to comply with the federal Humane Methods of Slaughter Act (HMSA). The HMSA notably requires (at a non-ritual establishment like this one) the method of slaughter to meet the following standard: “all animals are rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective, before being shackled, hoisted, thrown, cast, or cut.”⁷³ There are also extensive regulations⁷⁴ governing handling and killing during slaughter and on the slaughterhouse grounds, which apply to the yards as well. It is clear from both the statute as well as the regulations and detailed FSIS directives⁷⁵ that animals are required to be rendered insensible to pain effectively with one shot, rather than multiple shots. Certainly, where the first shot is botched, they are required to be quick with the second one. Suffocation or other methods are clearly outside the scope of what is allowable. FSIS also requires minimal use of electric prods, no use of the tails to attempt to force the animals to stand, and overall minimization of pain.⁷⁶ Animal Outlook alleged over 100 instances of violations, and ultimately FSIS issued a Notice of Suspension based on issues in four areas: dragging of downers, excessive shocking, tailing up, and the mistreatment of the cows they

⁷² *Central Valley Meat Shut Down Again by USDA – This Time for Unsanitary Conditions*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/central-valley-meat> [<https://perma.cc/Z4SR-7U8Y>] (last visited Sept. 16, 2022).

⁷³ 7 U.S.C. § 1902(a) (discussing humane slaughtering standards for “cattle, calves, horses, mules, sheep, swine, and other livestock”).

⁷⁴ 9 C.F.R. Pt. 313.

⁷⁵ U.S. DEP'T OF AGRIC. FOOD SAFETY AND INSPECTION SERV., FSIS DIRECTIVE 6900.2 REV. 3 (2020).

⁷⁶ *Id.*

attempted to reverse through the chute.⁷⁷ They suspended operations at the facility for a week to investigate food safety allegations brought up by Animal Outlook's complaint. They did not agree with Animal Outlook's allegations of improper stunning at slaughter, finding no evidence of sensibility, nor did they enforce HMSA for any of the kill attempts done through multiple knocks and delays or the standing on the nostrils of the cows.⁷⁸

Separate and distinct from the federal jurisdiction, CVM is also subject to the jurisdiction of the District Attorney and California's animal cruelty law. Animal Outlook brought the evidence and legal arguments to the DA's office and repeatedly encouraged them to enforce the law, which they declined to do. They did not give an official reason, but they did tell Animal Outlook orally that they believed this was in federal jurisdiction, despite Animal Outlook's legal arguments showing their ability to enforce the state law regardless of federal jurisdiction or action. The HMSA does not have any provisions preempting state cruelty law. Yet, in every case Animal Outlook has sought enforcement on based on evidence from a federally inspected slaughterhouse, the state authorities have deferred to the federal agencies and declined to act. This is a major barrier, despite its lack of legal justification.

The Central Valley Meat investigation garnered massive national media, which immediately caused some fast-food outlets to cut ties with CVM. The media may have been an important factor in the USDA's response and decision to enforce the HMSA based on humane handling violations. A USDA Food Safety and Inspection Service spokesperson publicly stated, "[u]pon confirming several humane handling violations, FSIS suspended operations at the facility and is prepared to take further

⁷⁷ Notice of Suspension Letter from Yudhbir Sharma, FSIS District Manager, to Brian Coelho, Central Valley Meat General Manager (Aug. 19, 2012) (on file with author).

⁷⁸ Central Valley Meat was also a supplier to the federal government for its largest food purchasing programs, including the National School Lunch Program. To become eligible and maintain that eligibility to bid for government purchases, a slaughter establishment like CVM must comply with certain contractual requirements, including compliance with the Federal Meat Inspection Act (FMIA), which incorporates a requirement to comply with the Humane Methods of Slaughter Act (HMSA). Animal Outlook filed a *qui tam* action under the False Claims Act arguing that the humane handling violations it documented constituted a material breach of these contractual requirements and therefore cause damage to the USDA. However, the Department of Justice declined to intervene in this case based on the USDA's low prioritization of humane handling, which prohibited Animal Outlook from moving forward. See *Superior Farms* case study discussed *infra* (discussing a successful FCA case based on humane handling allegations).

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action as warranted by the investigation.”⁷⁹ The owner of CVM made a public statement using the authority of FSIS as a protective shield, saying, “[w]e take these allegations seriously and we are committed to correcting any problems identified on the video as quickly as we possibly can.” Coelho said the allegations ‘are both disturbing and surprising’ because the plant is ‘under continuous inspection by USDA Food Safety and Inspection personnel who are empowered to take immediate action when they observe a problem.’”⁸⁰ It is encouraging and relatively rare⁸¹ that USDA did take action on humane handling violations in this case. The unusual factors in this case likely put pressure on them to do so: buying from the facility, food safety allegations, video footage, and the public pressure and media attention that resulted from that. However, the HMSA’s enforcement only involved a tiny fraction of the instances Animal Outlook determined were in violation of the law and excluded entire categories of treatment that appear to be black and white violations. The enforcement also resulted in a mere week of closure for the plant, which does not appear to have had long-term consequences. The companies’ cutting ties certainly stood to have more of an impact. The minimal enforcement actions USDA did take—and the very fact of its jurisdiction over the facility—seems to have incentivized the state authorities not to act, and allowed the owner of the facility to shift blame away from himself and towards the protection of the USDA’s inspection. FSIS inspectors spent only a tiny fraction of their time with live animals and spent much of their time either on the post-mortem side or in their trailers.⁸² Essentially, FSIS is occupying the territory of responsibility for humane handling oversight and then minimally performing those duties. As a result, this repels accountability for any other party responsible for meeting the basic humane handling requirements under the law.

C. BETTENCOURT DAIRY, MERCY FOR ANIMALS, 2012, IDAHO

In 2012, Mercy For Animals (MFA)⁸³ documented a high volume of egregious abuse to cows through its investigation of the largest dairy in

⁷⁹ Cindy Galli & Brian Ross, *Plant Closed by USDA Supplied Beef for In-N-Out Burger*, ABC NEWS (Aug. 21, 2012), <https://abcnews.go.com/Blotter/plant-closed-usda-supplied-beefburger/story?> [<https://perma.cc/U8DM-MKES>].

⁸⁰ *Id.*

⁸¹ *See, e.g.*, DENA JONES, CRIMES WITHOUT CONSEQUENCES: THE ENFORCEMENT OF HUMANE SLAUGHTER LAWS IN THE UNITED STATES (2008).

⁸² Cent. Valley Meat Investigation Notes, Animal Outlook, (on file with author).

⁸³ Mercy for Animals’ approach to the use of investigations for law enforcement has changed in recent years. These past prosecutions do not reflect the recent or current approach at MFA.

Idaho.⁸⁴ Video documentation included cows being chained to a tractor and dragged by the neck; being twisted by the tail and used in attempts to lift the animals; getting stuck in equipment (including dangling by the head) being kicked and hit with canes in the face and body repeatedly; being jumped on, slammed in the face with metal milking equipment, slapped and punched in the face (including in the eye and nose); getting stomped on and kicked in the face; limping; crawling; and dying.⁸⁵ The investigator said the cruelty happened daily at this 6,000 cow facility.⁸⁶ In this case, three “former” workers were charged with misdemeanor cruelty,⁸⁷ one of whom spent 102 days in jail⁸⁸ and received one year of probation along with a \$500 fine, with \$250 suspended.⁸⁹ The workers were fired, along with two additional workers in the video, and the company installed cameras and required its employees to sign a zero tolerance for abuse policy.⁹⁰ Two years later, when an “ag gag”⁹¹ bill was introduced in Idaho to criminalize these kinds of investigations, this investigation was a major tool to argue for the value of investigations.⁹² In fact, after the introduction of the ag gag bill in 2014, MFA released an additional clip from the 2012 investigation showing a worker sexually abusing a cow, which played an important role in the

⁸⁴ Rebecca Boone, *Idaho Dairy Workers Charged with Animal Cruelty*, ASSOC. PRESS (Oct. 10, 2012), <https://www.manufacturing.net/operations/news/13173848/idaho-dairy-workers-charged-with-animal-cruelty> [<https://perma.cc/A4Q5-B883>] (noting that the site was a 6,000 cow site but Bettencourt is Iowa’s largest dairy operation with 13 sites and 60,000 total cows).

⁸⁵ Mercy For Animals, *Burger King Cruelty – Video Exposes Horrific Animal Abuse at a Burger King Dairy Supplier*, YOUTUBE (Oct. 9, 2012), https://www.youtube.com/watch?v=IN_YcWOuVqk [<https://perma.cc/2BAJ-8RXV>].

⁸⁶ *Undercover Activist Details Secret Filming of Animal Abuse & Why “Ag-Gag” Laws May Force Him to Stop*, DEMOCRACY NOW! (Apr. 9, 2013), https://www.democracynow.org/2013/4/9/undercover_activist_details_secret_filming_of [<https://perma.cc/R3WL-RDVT>].

⁸⁷ Boone, *supra* note 84.

⁸⁸ Pares Dave, *Graphic Cow Abuse Video Released as Idaho Advances ‘Ag Gag’ Bill*, L.A. TIMES (Feb. 18, 2014, 12:00 AM), <https://www.latimes.com/nation/nationnow/la-na-nn-cow-abuse-video-idaho-ag-gag-bill20140218-story.html> [<https://perma.cc/95K6-KT9B>] [hereinafter *Graphic Cow Abuse*].

⁸⁹ Alison Gene Smith, *Man Sentenced in Dairy Cow Abuse Case*, MAGIC VALLEY (Mar. 1, 2013), https://magicvalley.com/news/local/crime-and-courts/man-sentenced-in-dairy-cow-abuse-case/article_923be7cf3bf5-5c57-af43-a3449181e3e9.html [<https://perma.cc/2CJ9-4GQU>].

⁹⁰ Boone, *supra* note 84.

⁹¹ “Ag gag” laws are laws that seek to prevent undercover activists and potential whistleblowers from revealing animal abuses on agricultural farms. They explicitly make investigations like the ones discussed in this article illegal.

⁹² See, e.g., Editorial Board, *Time for Idaho to Abandon Ag Gag Law, Move On*, IDAHO STATESMAN (Dec. 16, 2015), <https://www.idahostatesman.com/opinion/editorials/article50166795.html>.

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opposition to “ag gag”.⁹³ Nonetheless, the “ag gag” bill did ultimately become law,⁹⁴ although most of it was later struck down by the 9th Circuit on constitutional grounds.⁹⁵

This investigation is a vivid example of the blurred lines between so-called “egregious” abuse committed by workers and abuse that is inherent to the production of animal products. A large percentage of the violence against cows in this case was committed against so-called “downer” cows, who are too sick or weak to stand. The fact that downers are an inherent part of the dairy industry is a systemic issue, and the abuse is driven by the business purpose of moving these cows. More importantly, if one watches the video closely, the cruelty is both unequivocally vicious and done for the business purpose of moving the cows, which is a daily need at any dairy. The dairy industry may publicly condemn certain violent acts and carefully curate a narrative of care for the animals and purport to be outraged by the advocacy organizations’ videos.⁹⁶ However, the industry often attempts to use these public positions, after-the-fact firings, and internal policies as a shield to argue they are not being fairly treated by the advocacy groups and/or that no further action should be taken.⁹⁷ However, as shown by this investigation and the others described herein, this cruelty is both egregious and part of dairy. The industry may have variation within it with respect to the level of cruelty of an individual company or facility’s endorsement or tolerance of that cruelty, but these are questions of degree rather than kind. Cruelty is part of dairy.

D. QUANAH CATTLE COMPANY, ANIMAL OUTLOOK, 2013,
COLORADO

Animal Outlook’s investigation of a calf ranch in Colorado in 2013 called Quannah Cattle Company exposed a little-known facet of the dairy industry, where newborn (mostly male) calves—often with their umbilical cords still attached—are trucked from off-site dairies and kept in hutches or

⁹³ *Graphic Cow Abuse*, *supra* note 88.

⁹⁴ IDAHO CODE ANN. § 18-7042 (West through 2022-66 Special Sess. II).

⁹⁵ *Animal Legal Def. Fund v. Wasden*, 878 F.3d 1184 (9th Cir. 2018).

⁹⁶ *See, e.g., Paresh Dave, Idaho Dairy Responds to Undercover Video Showing Cow Abuse*, L.A. TIMES (Feb. 19, 2014, 7:39 PM), <https://www.latimes.com/nation/nationnow/la-na-nn-bettencourt-dairies-responds-ag-gag-20140219-story.html> [<https://perma.cc/YN4S-SY6P>] [hereinafter *Idaho Dairy Responds*] (“We make sure all employees . . . are suitable to be around our cows, but then again people can lie on their applications and their last employer may not know they beat animals or have a record. . . . We were sick when we too were showed the video; they are harmless animals.”). Boone, *supra* note 84.

⁹⁷ *Idaho Dairy Responds*, *supra* note 96.

stalls and bottle fed for about a week, after which they are trucked to another facility to be raised for meat. The video showed calves being kicked, flipped, dragged, dropped, and shoved on and off trailers by their ears, legs, and tails; being kicked, dragged, and lifted by their tails to move them; having holes punched in their ears for tagging; and showed some sick, injured, and dead calves.⁹⁸

Animal Outlook followed the usual process of bringing this evidence and legal argumentation to local law enforcement.⁹⁹ The investigator, herself, was then charged with animal cruelty¹⁰⁰ under the sheriff's office interpretation of the cruelty law that imposes a duty to report animal cruelty within the first day of witnessing it. To be clear, nothing in the Colorado animal cruelty statute set out any such duty.¹⁰¹ However, there was an iteration of ag gag bills being introduced in several states at the time, including Colorado, which would have imposed such a duty.¹⁰² This type of ag gag bill was meant to appear as though it had an animal protective purpose, requiring reporting of animal cruelty to authorities within 24-48 hours. However, its known and intended practical effect would have been to shut down animal advocacy organizations' investigations before they even had a chance to get started. More specifically, the proposed bill intended to prevent the uncovering of a pattern and extent of abuse as well as the systems that cause repeated abuse. The bill would cut the investigation short and paint the investigator as a bad actor.

In this case, the sheriff's department filed animal cruelty charges against the investigator, issued a press release which they sent directly to press outlets, and posted the investigator's name and mugshot on their Facebook page.¹⁰³ Animal Outlook also garnered media on the case. As a result, public support grew for the investigator and even attracted the attention of a well-known defense attorney in Denver. Ultimately, the charges were dropped, with the DA's press release indicating that the

⁹⁸ *Quanah Cattle Company: Shocking Abuse to Calves*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/quanah/> [https://perma.cc/6DDJ-L5KU] (last visited Sept. 17, 2022).

⁹⁹ DoggyTV, *Tales from the Trenches - Taylor Radig at 2014 Animal Rights National Conference*, YOUTUBE (Aug. 12, 2014), <https://www.youtube.com/watch?v=2Jd8iEQKwNg&t=178s> [https://perma.cc/6YMQ-G6S2].

¹⁰⁰ *Id.*

¹⁰¹ COLO. REV. STAT. § 18-9-202 (2019).

¹⁰² S.B. 15-042, 70th Gen. Assemb., Reg. Sess. (Colo. 2015) (proposing a 48-hour reporting requirement).

¹⁰³ Will Potter, *I Witnessed and Reported Animal Abuse . . . and Now Was Being Charged with a Crime Myself*, GREEN IS THE NEW RED (Jan. 7, 2014), <http://www.greenisthenewred.com/blog/taylor-radig-interview/7456/> [https://perma.cc/DU54-HH3R].

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sheriff's department stood by its assessment: "While the Sheriff's Office determined that probable cause existed to believe that [the investigator] committed that offense, the District Attorney's Office evaluates a case based on whether the charges can be proven beyond a reasonable doubt. The District Attorney's Office has concluded that the charges cannot be proven beyond a reasonable doubt and therefore those charges have been dismissed against [the undercover investigator]."¹⁰⁴

Some of the actual abusers were also prosecuted. Three workers were charged with misdemeanor cruelty and plead guilty to one count each. All three were ultimately sentenced to probation and a \$500 fine.¹⁰⁵ The investigator won a Whistleblower of the Year award, which considered whistleblowers in any field, as well as the Patty Shenker Animal Rights Activist Award.¹⁰⁶ However, having her image and name publicly revealed and covered by media outlets meant she could no longer conduct investigations.

This case is unique, but it is another example of the failings and shortcomings of basic criminal law process. The charge against the investigator was always legally baseless, and it is important that her charge was dropped while those engaged in active abuse were charged. However, charging her served a greater political purpose outside the scope of the legitimate duties of the sheriff's department because it discredited and chilled future investigations. The politics of ag gag and the fight for the public narrative; legitimacy of animal protective viewpoints in a massive agricultural county; and the diversion away from the higher-level players at Quannah and the industry at large all seemed to be more important factors driving this case than the enforcement of the law as written.

E. PILGRIM'S PRIDE, ANIMAL OUTLOOK, 2014, NORTH
CAROLINA

Animal Outlook investigated a broiler grow-out facility in North Carolina in 2014, which was a contract grower for Pilgrim's Pride. The investigation documented a number of standard practices that lead to illness, injury, leg deformities, heart attacks, ammonia burns, and crowding. The practices that lead to such harm would arguably be exempt from coverage

¹⁰⁴ Smith, *supra* note 89.

¹⁰⁵ Nick McGurk, *Two Men Sentenced to 2 Years Probation for Animal Cruelty*, 9 NEWS (April 29, 2014, 5:59 PM), <https://www.9news.com/article/news/local/two-men-sentenced-to-2-years-probation-for-animal-cruelty/73-249758938> [<https://perma.cc/9UFN-FBM6>]; *Quannah Cattle Company*, *supra* note 98.

¹⁰⁶ *Quannah Cattle Company*, *supra* note 98.

based on the wording of North Carolina's standard agricultural practices exemption in the animal cruelty statute.¹⁰⁷ There were also things Animal Outlook determined to be outside the scope of the exemption and therefore cruel under the law, including birds being thrown and beaten with metal rods, live birds being left to die in buckets full of dead birds, and the practice of burying birds alive by dumping them into a pit in the ground and closing them inside.¹⁰⁸ The prosecutor declined to prosecute on Animal Outlook's evidence, despite the fact that there was massive public outrage about this case: hundreds of thousands of people asked the prosecutor to enforce the law for the live dumping.¹⁰⁹ However, most of these people were outside of the prosecutor's small rural jurisdiction and heard about the case through the media or social sharing of the video, so there was no incentive for the prosecutor to weigh this public interest in his decision. Pilgrim's and other similar companies are significant employers in the DA's jurisdiction and his job is to serve his constituency. This case highlights a fundamental structural failing of our legal system when it comes to widespread systemic cruelty to farmed animals. The cruelty and neglect revealed by the tiny handful of investigations relative to the many billions of animals affected and the massive companies controlling most of these industries has implications well beyond the borders of any one county. In fact, these are global companies and globally relevant issues for citizens and consumers. A system that places full discretion—regardless of the strength of the evidence or the nature of the cruelty—over enforcing the only law that governs the abuse of animals in the hands of an office that serves only a small community is a formula for a systematic breakdown.

The facility did lose its contract with Pilgrim's Pride and shut down.¹¹⁰ Incidentally, that is what made it unnecessary and impracticable to use the civil version of North Carolina's animal cruelty law, N.C.G.S. section 19A,

¹⁰⁷ See N.C. GEN. STAT. § 14–360(c)(2) (2015) (noting exemption language for lawful activities conducted for purposes of biomedical research or training or for purposes of production of livestock, poultry, or aquatic species); see N.C. GEN. STAT. § 14–360(c)(2)(a) (2015) (noting lawful activities conducted for the primary purpose of providing food for human or animal consumption).

¹⁰⁸ *Pilgrim's Shame: Chickens Buried Alive*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/pilgrims/> [<https://perma.cc/ML5P-9LUZ>] (last visited Sept. 17, 2022).

¹⁰⁹ Petition by Curt Albright, *Burying Animals Alive is Cruel and Should be Prosecuted*, CHANGE.ORG, <https://www.change.org/p/burying-animals-alive-is-cruel-and-should-be-prosecuted> [<https://perma.cc/P48E-NUZV>] (last visited Sept. 17, 2022).

¹¹⁰ *Greeley-Based Processor Halts Use of Chickens from N.C. Farm Over Cruelty Allegations*, GREELEY TRIB. (July 8, 2014, 11:26 PM), <https://www.greeleytribune.com/2014/07/08/greeley-based-processor-halts-use-of-chickens-from-n-c-farm-over-cruelty-allegations/> [<https://perma.cc/BB29-USM6>].

since its remedy is an injunction. This could be a promising route in the future where a practice is ongoing in North Carolina and the prosecutor declines to move forward.

F. WIESE BROTHERS DAIRY, MERCY FOR ANIMALS, 2014,
WISCONSIN

MFA documented egregious cruelty at a Wisconsin dairy, including cows being hoisted, dangled, and dragged by a metal hip clamp device attached to a tractor; punched, thrown, and dragged by the tail; kicked and whipped with chains; and repeatedly shocking with electric prods—including in the genitals.¹¹¹ They also documented the separation of calves from their mothers and then throwing them into trucks, as well as untreated or badly treated illnesses and injuries, such as pus-filled abscesses, lameness, and using a chain to rip a dead calf fetus out of a cow with no veterinary care, who then died the next day as a result.¹¹² Following the investigation, the farm, the collective where it sold milk, and the corporate purchaser, Nestlé, issued press statements condemning cruelty.¹¹³ The collective and Nestlé cut ties with the farm.¹¹⁴ “Wiese Brothers Farm said the company was unaware of the abuse taking place in its facility and was ‘shocked and saddened to see a few of our employees not following our farm’s policies for proper animal care.’”¹¹⁵ They also said they had “zero tolerance” for animal abuse and asked their employees to “demonstrate ongoing respect for every animal at all times.”¹¹⁶ They fired two employees and reassigned a third to a non-animal handling position.¹¹⁷ Foremost, the collective issued a public statement cutting ties with the farm and saying it was “extremely disappointed,” while Nestlé issued a similar statement severing ties and saying “Nestlé is outraged and deeply saddened by the mistreatment of animals shown in this video . . . we will not knowingly work with companies that violate our Responsible Sourcing Guidelines,” which

¹¹¹ mercyforanimals, *Must See: Hidden-Camera Video Reveals Secret Pizza Topping*, YOUTUBE (Sept. 16, 2014), <https://www.youtube.com/watch?v=OGc3samj8N8> [<https://perma.cc/QR4E-FTQU>].

¹¹² *Id.*

¹¹³ Lee Ferran, *Undercover Video Catches Brutal Alleged Cow Abuse at DiGiorno Supplier*, ABC NEWS (Dec. 10, 2013, 7:57 AM), <https://abcnews.go.com/Blotter/undercover-video-catches-alleged-cow-abuse-digiorno-supplier/story?id=21161908> [<https://perma.cc/75JF-ULZW>].

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

include basic animal welfare standards of minimum care based on world health (OIE) principles.¹¹⁸ Several months later, four workers were charged with 11 counts of animal cruelty.¹¹⁹

This case is a strong illustration of the near lockstep reaction of the corporate entities involved, which is in line with that in other cases as well. Here, Nestlé disclaimed the farm, the middle-level collective disclaimed the farm, and the farm disclaimed the abuse and puts all the responsibility on the employees. All three corporate entities claimed not to have known about the abuse. In fact, the public statements of the three corporate entities are so alike in their wording they could have been written by the same crisis public relations team, even sharing words like “saddened.” Yet, like in other cases, the violent abuse here was committed in furtherance of the business purposes of the farm: i.e., these workers were moving animals, including “downers,” too sick or injured to stand or walk. Certainly, the violent abuse was not somehow separate and apart from the daily operations inherent in the dairy industry. It is also contrary to basic principles of law that would apply here—if the law had been enforced—to place the blame solely on the individual workers, since the management, ownership, and corporation are all equally legally culpable here.

Perhaps a more important takeaway than the frustrating scapegoating of workers for this cruelty is the removal of the legal process from the law enforcement and prosecutor’s decision-making on how and whether to enforce the cruelty law. Basic criminal law analysis of the adequacy of the evidence against all potential defendants was apparently usurped here. Instead, the corporate actors used two tools as a shield against serious inquiry into their criminal culpability. First, the media statements: these are shrewdly written because they admit and agree with the animal advocates’ position and with the law itself. The statements come from a point of view that the animal cruelty laws do apply to these animals in a commercial setting, that there is a duty of care to each animal (see the Weise statement here for a particularly good illustration of this, using the wording “every animal at all times”), and that these standards were in fact violated. There is no meaningful disagreement on the substance of the law or the strength of the evidence here. Rather, their position is that they are not the party to

¹¹⁸ *Nestlé Responsible Sourcing Standard*, NESTEC LTD. (July 2018), <https://www.nestle.com/sites/default/files/asset-library/documents/library/documents/suppliers/nestle-responsible-sourcing-standard-english.pdf> [https://perma.cc/76XU-X5J8].

¹¹⁹ Mary Ann Georgantopoulos, *Wisconsin Dairy Workers Charged with Abusing Cows*, ABC NEWS (Feb. 14, 2014, 1:09 PM), <https://abcnews.go.com/Blotter/caught-tape-dairy-workers-charged-animal-abuse/story?id=22525235> [https://perma.cc/5NXA-PJWY] (noting that the charges carry a maximum penalty of a \$10,000 fine and 9 months in prison each).

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be held responsible. This is simply inconsistent with the law. Second, corporations often point to private industry-drafted standards of animal welfare, as Nestlé did here. Nestlé took care in its statement to clarify both its commitment to those standards and its interpretation of the level of responsibility it has for those standards being triggered only by “knowing” violations, keeping Nestlé’s culpability limited to very narrow situations. And even within the narrow scope of those facts, Nestlé sees its role as merely to cut ties with the bad actor. This allows it to take a socially acceptable public position against animal cruelty but never to be accountable for it in practice. The private industry standards themselves are often vague, barely address specific acts or practices, demonstrate poor auditing, corrective, or oversight mechanisms, and are entirely voluntary. Across industries and without exception, these third-party industry standards do not align with the standard for animal cruelty set out in the law. The result is often, as it was here, a highly effective use by corporations of two tactics to prevent law enforcement and prosecutors from even seriously considering enforcing the law. In the cases where they do consider it, they use both process and substantive standards wholly apart from and inconsistent with the law they are responsible for enforcing.

Often, this kind of strategy by the corporation helps prevent charges in a case altogether. For example, another MFA Wisconsin dairy investigation in 2014 resulted in a video showing kicking, punching, and dragging cows.¹²⁰ Here, the corporate purchaser was again “outraged and deeply saddened” by the animal treatment in the video and cut ties, and the owner contested the actions were abusive at all.¹²¹ The prosecutor declined to file charges because he recommended the owner of the farm instead be “informed” of the issues and fire or retrain employees.¹²²

G. HORMEL QUALITY PORK PROCESSORS HIGH SPEED PIG
SLAUGHTER, ANIMAL OUTLOOK, 2015, MINNESOTA

In 2015, Animal Outlook conducted an investigation of one of a small number of pilot facilities operating under a new deregulated high-speed slaughter system.¹²³ The new system removes line speed caps and shifts

¹²⁰ *Investigation: Undercover Video Reveals Animal Abuse at Dairy Farm*, CLEV. 19 NEWS (Nov. 11, 2014, 8:59 PM), <https://www.cleveland19.com/story/27358552/investigation-undercover-video-reveals-animal-abuse-at-dairy-farm/> [<https://perma.cc/AGQ4-XSVY>].

¹²¹ *Id.*

¹²² *Id.*

¹²³ Scott David, *America’s Horrifying New Plan for Animals: Highspeed Slaughterhouses*, GUARDIAN (Mar. 6, 2018, 11:15AM), <https://www.theguardian.com/commentisfree/2018/mar/06/ive-seen-the-hidden-horrors-of-high->

much of the inspection responsibilities to the private company, reducing the duties and number of USDA inspectors.¹²⁴ At the time, this high-speed slaughter program was in its early stages, but it has since become the subject of a number of lawsuits challenging the intent for the USDA to expand the high-speed system nationwide, which plaintiffs (including Animal Outlook) allege will not only increase the cruelty to pigs, but would increase the number of pigs killed each year in the U.S. by 11.5 million.¹²⁵ This litigation is in progress at the time of this writing. The investigation plays a role in the lawsuits but was one factor that led to them and is independent of the efforts Animal Outlook made to seek enforcement of animal protective laws from the investigation.

The investigation took place at Quality Pork Processors (QPP), which kills pigs for Hormel at a rate of approximately 1,300 pigs per hour.¹²⁶ The video showed pigs shaking; dragging themselves by the front legs; being improperly stunned and sent to the scald tank alive and conscious; regaining sensibility; hanging on the kill line; being hit with rattle paddles; and being shocked, kicked, and dragged along the floor by metal objects in their mouth.¹²⁷ One worker said, “if USDA is around, they could shut us down,” and a supervisor was documented sleeping on the job. It also showed green pus-filled abscesses on dead animals going for processing.¹²⁸ This investigation took place in Minnesota, and like in Central Valley Meat discussed *supra*, Minnesota law enforcement declined to investigate or seriously consider filing charges under state law, in apparent deference to the USDA. Animal Outlook turned the material over to the Minnesota authorities and the USDA immediately after the investigation in 2015.¹²⁹

speed-slaughterhouses [https://perma.cc/X34A-RG6X]. Scott David is Animal Outlook’s current Director of Investigations and former investigator. *Id.*

¹²⁴ *Id.*

¹²⁵ Plaintiff’s Memorandum of Law in Opposition to Defendants’ Motion to Dismiss, Farm Sanctuary v. USDA, No. 19-cv-6910-EAW, 545 F. Supp. 3d 50 (W.D.N.Y. 2021), <https://drive.google.com/file/d/1p7pJ-dVtDq15Hc-oyT9rUR81WRGBm-ee/view> [https://perma.cc/6H5K-GNB3].

¹²⁶ *USDA Deregulates Pig Slaughterhouses Despite Horrible Consequences for Animals*, ANIMAL OUTLOOK (Sept. 17, 2019), <https://animaloutlook.org/usda-deregulates-pig-slaughterhouses/> [https://perma.cc/LSY4-D3TV].

¹²⁷ *Hormel: USDA-Approved High Speed Slaughter Hell*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/hormel/> [https://perma.cc/7DBT-LGY4] (last visited Sept. 15, 2022).

¹²⁸ *Id.*

¹²⁹ Memorandum from Lisa Winebarger, Counsel, Compassion Over Killing to Kristen Nelson, Attorney, Mower County (Oct. 27, 2015) (on file with author); *see also* Steve Karnowski, *Group Unveils Undercover Video from QPP Slaughterhouse*, POST BULLETIN (Nov. 12, 2015, 3:37 AM), <https://www.postbulletin.com/newsmd/group-unveils-undercover-video-from-qpp-slaughterhouse> [https://perma.cc/3HMP-NFPT].

The Minnesota authorities did nothing.¹³⁰ After months passed and Animal Outlook had difficulty reaching the County Attorney's office, Animal Outlook filed suit under Minnesota law, which allows citizens to petition a court for a warrant and investigation of a cruelty complaint, and if the court finds probable cause, it shall issue a search warrant and order an investigation.¹³¹ QPP argued that the evidence was stale and that it did not violate the animal cruelty law.¹³² Ironically, the basis of the claim Animal Outlook made was in part the unreasonable delay to consider the evidence or act after it was turned over in a timely manner, along with the legal arguments alleging cruelty.¹³³ The case ultimately failed at the lower and appellate court levels.¹³⁴ For advocates seeking to use this provision of the law, perhaps the best course is to file a complaint under this provision simultaneously with the request to the law enforcement and prosecutor's offices immediately after the investigation or basis of the allegation is complete.

Animal Outlook's request to USDA to enforce the HMSA was also declined.¹³⁵ Upon release of the investigation, USDA publicly stated "the actions depicted in the video under review are appalling and completely unacceptable, and if we can verify the video's authenticity, we will aggressively investigate the case and take appropriate action." USDA spokesman Adam Tarr, added that the agency can't comment definitively in the middle of the probe.¹³⁶ The USDA said that the actions depicted in

¹³⁰ See Kay Fate, *Appeals Court Rules Against Group in QPP Animal Cruelty Case*, POST BULLETIN (Oct. 24, 2017, 2:57 AM), <https://www.postbulletin.com/newsmd/appeals-court-rules-against-group-in-qpp-animal-cruelty-case> [https://perma.cc/N7TH-AHD8].

¹³¹ MINN. STAT. ANN. § 343.22 (West 2022).

¹³² *Compassion Over Killing, Inc. v. Quality Pork Processors, Inc.*, No. A17-0464, 2017 Minn. App. Unpub. LEXIS 894* (Minn. Ct. App. Oct. 23, 2017).

¹³³ The original evidence was turned over to county authorities on October 27, 2015, and the investigation took place between May and October 2015. Memorandum from Lisa Winebarger, Counsel, Compassion Over Killing to Kristen Nelson, Attorney, Mower County (Oct. 27, 2015) (on file with author); see also Steve Karnowski, *Group Unveils Undercover Video from QPP Slaughterhouse*, POST BULLETIN (Nov. 12, 2015, 3:37 AM), <https://www.postbulletin.com/newsmd/group-unveils-undercover-video-from-qpp-slaughterhouse> [https://perma.cc/34YL-FB55].

¹³⁴ *Compassion Over Killing*, 2017 LEXIS 894*.

¹³⁵ Letter from Carl A. Mayes, Assistant Administrator, Off. of Investigation, Enf't, and Audit, FSIS, to Lisa Winebarger, Couns. for Compassion Over Killing, (Feb. 2, 2016) (on file with author).

¹³⁶ Roberto A. Ferdman, "That One Was Definitely Alive": An Undercover Video at One of the Nation's Biggest Pork Processors, WASH. POST (Nov. 11, 2015), <https://www.washingtonpost.com/news/wonk/wp/2015/11/11/that-one-was-definitely-alive-an-undercover-video-at-one-of-the-fastest-pork-processors-in-the-u-s/?variant=116ae929826d1fd3> [https://perma.cc/M789-QABD].

the video likely occurred outside of the purview of government inspectors, but that by law all federally inspected plants, whether using the HIMP inspection model or not, must abide by the Humane Methods of Slaughter Act.¹³⁷ “Had these actions been observed by the inspectors, they would have resulted in immediate regulatory action against the plant,” Tarr said.¹³⁸ USDA very much defended the high-speed slaughter program, which certainly may be coloring its approach here. When USDA ultimately decided not to enforce the law based on the video, they used their customary reasoning, saying, “the actions depicted in the video occurred at times when USDA inspection personnel were not performing verifications. Had these actions been observed by FSIS inspectors, they would have resulted in immediate regulatory action against the plant.”¹³⁹ In essence, they are not denying that the violations took place or contesting the validity or the strength of the video evidence. The USDA is simply saying that they would only enforce if the evidence came to their attention via one of their inspectors. The fact that this is being said in the context of a push to move a small deregulation and high line speed pilot program into a nationwide norm adds a concerning element to the implications of deregulation. But even leaving that aside, the agency is making a unilateral decision narrowing their enforcement process to evidence that comes to the agency only in a specific way. Such an approach may exceed their authority and contravene the rulemaking process. In addition, this raises issues of agency bias, since this system provides no checks on FSIS inspectors who may be corrupt or otherwise unmotivated to enforce the law that they have a duty to enforce. For animal advocacy organizations, this may be a message from the USDA attempting to warn these groups not to bring them future investigative footage and maybe to deter groups from conducting investigations at all. The agency is not explicitly saying this, but we have been unable to find any instances since this letter on QPP where USDA has enforced the HMSA based on investigative footage brought to them by an advocacy organization, although the data set is admittedly small.¹⁴⁰

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ Letter from Carl A. Mayes, *supra* note 135.

¹⁴⁰ Animal Outlook conducted an investigation of a high-speed poultry slaughterhouse in Maryland in 2018 called Amick Farms. This investigation revealed birds being thrown, shoved, and punched during the hanging and shackling phase of the process before they are moved by conveyor belt to be submerged upside-down in electrified water, “stun” baths. Red carcasses indicated that birds were alive before the scalding tank. Also, apparently higher line speeds contributed to regular breakdowns of the line, which meant animals’ heads are regularly submerged in the electrified water—sometimes for several minutes—to drown before they reach the kill blade. *Amick Farms: High-Speed Chicken Slaughterhouse Exposed*, ANIMAL OUTLOOK,

QPP responded to the investigation by publicly stating “early on, there may very well be contamination present in the process, but we have multiple interventions that ensure that it will not only be visually removed, but completely removed Had it been allowed to show the entire sequence of these events, all of these hogs were all handled appropriately.”¹⁴¹ It also said in its newsletter, “we just finished an investigation from the USDA on a hidden video in livestock. I am happy to report that all of our livestock employees did their jobs well. The hogs were treated humanly [sic]. It is against company rules to film in the livestock area and possibly illegal. Please report any suspicious activity in livestock.”¹⁴² This kind of response is a departure from the PR strategies large animal agriculture companies were employing in response to investigations by 2015. More typically, a company this size would employ the scapegoating strategies discussed in other cases herein and make a public statement condemning cruelty. What might explain this departure is the mention of the USDA in QPP’s statement. QPP may have known by the time it made this statement that USDA would opt against enforcing the law against QPP, and therefore may have felt bold enough in stating they did nothing wrong, assuming USDA would act in a protective role, and that USDA’s authority and decision would give credibility to QPP’s position, despite the video evidence otherwise. This is another case where USDA’s occupation of the role of enforcement authority effectively eliminated accountability for state-level players and for the company itself, even when—and perhaps especially because—USDA decided not to take any enforcement action.

H. BROILER GROW OUT PERDUE SUPPLIER, MERCY FOR ANIMALS, 2015, NORTH CAROLINA

MFA’s investigation of a Perdue supplier documented animals being kicked, stomped on the head to death, thrown across the building against the wall, thrown onto transport trailers, stood on in apparent attempt to suffocate to death, and spun by the head; as well as sick, dying, and dead

<https://animaloutlook.org/investigations/amick-farms/> (last visited Sept. 15, 2022) [<https://perma.cc/3N69-9HZU>]. Neither the USDA nor Maryland authorities took action in the 2018 Amick Farms case. Animal Outlook and other organizations did sue the USDA over its line speed rules, using *Humane Society v. Perdue* for factual support. Compl. Declaratory Injunctive Relief, *Humane Society v. Perdue*, No. 3:20-cv-01395 (N.D. Cal. 2020), <https://animaloutlook.org/wp-content/uploads/2020/03/chicken-line-speeds-hsus-v-perdue-complaint.pdf> [<https://perma.cc/BG4S-YH7R>].

¹⁴¹ Ferdman, *supra* note 136.

¹⁴² *November 2015 The Snort Report*, QUALITY PORK PROCESSORS (Nov. 2015), https://www.qppinc.net/newsletter/20151027_63/ (last visited Sept. 15, 2022) [<https://perma.cc/P6WW-L4U4>].

birds. The footage is juxtaposed with Perdue's stated zero tolerance positions on animal abuse.¹⁴³ The video also shows a Perdue manager saying, "they're growing so fast, their heart can't keep up with the demand . . . it keeps happening. They have a heart attack."¹⁴⁴ The video shows Perdue's position that the birds have adequate access to feed and water, contrasted with a Perdue manager describing the prevalence and normalcy of leg injuries causing immobility.¹⁴⁵ These statements refer to the state of the birds in the modern "broiler" industry, which is the type of bird raised for meat. These animals grow to slaughter weight by the time they are about 6 weeks old, which has led to a lot of concern among the animal advocacy community about the welfare of the birds. This rapid growth leads to widespread problems in the industry including heart attacks, so-called "flip over disease," leg deformities and breakage, ammonia burns from lying in their own waste, immobilization by their injuries, and inability to access food and water adequately.¹⁴⁶ The rapid growth is due to an aggressive selective breeding process by the industry, which has led to birds reaching double the weight at 6 weeks of age as their 1950's counterparts.¹⁴⁷ If human babies grew at this pace, they would be approximately 600 pounds at the age of two months.¹⁴⁸

The content documented in this investigation is typical of broiler grow out investigations. That is, there is both significant violent cruelties committed mostly around moving the animals and killing sick or injured "cull" birds, and widespread suffering caused by the health of the birds exacerbated by rapid growth and crowded conditions. In this case, MFA

¹⁴³ Vandhana Bala, *Perdue Worker Arrested and Charged with Felony Animal Cruelty Following MFA Investigation*, MERCY FOR ANIMALS (Dec. 11, 2015), <https://mercyforanimals.org/blog/perdue-worker-arrested-and-charged-with-felony/> [https://perma.cc/JNU4-8BK8].

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ Mary Baxter et al., *A Comparison of Fast-Growing Broiler Chickens with a Slower-Growing Breed Type Reared on Higher Welfare Commercial Farms*, PLOS ONE (Nov. 4, 2021), <https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0259333> [https://perma.cc/M5RR-4ZH3].

¹⁴⁷ Susannah Locke, *Chickens Have Gotten Ridiculously Large Since the 1950's*, VOX (Oct. 2, 2014, 9:10 AM), <https://www.vox.com/xpress/2014/10/2/6875031/chickens-breeding-farming-boilers-giant> [https://perma.cc/NC5S-E22Z].

¹⁴⁸ *A Growing Problem: Selective Breeding in the Chicken Industry: The Case for Slower Growth*, ASPCA (2015), https://www.aspc.org/sites/default/files/chix_white_paper_nov2015_lores.pdf [https://perma.cc/XB4N-LAC6] (citing R.F. Wideman et al., *Pulmonary Arterial Hypertension (Ascites Syndrome) in Broilers: A Review*, POULTRY SCI. 92, 64-83 (2013), <https://www.sciencedirect.com/science/article/pii/S003257911939827X?via%3Dihub> [https://perma.cc/779H-FA4K]).

was able to get some accountability for the violent cruelty: a worker was charged with four counts of felony animal cruelty. This was the first time in U.S. history that felony charges for cruelty to factory-farmed birds were brought because of an animal advocacy group's investigation.¹⁴⁹

Certainly, this violent cruelty is a major source of animal suffering and death. It is also a part of commercial broiler production (and other animal agriculture, as discussed herein). The type of violent cruelty documented here is consistent with that documented in other broiler grow out investigations, indicating that it is a systemic issue. Also consistent with other investigations, this cruelty is committed ostensibly for business purposes, namely moving animals and killing "cull" animals, which are animals who are sick, injured, small, or otherwise deemed unprofitable. These are both inherent functions in animal agriculture, not limited to broilers or to birds, and they are both areas where these kinds of investigations have regularly uncovered violent cruelty. There are also investigations revealing cruelty that is unrelated to a business function and appears to be merely sadistic, but those constitute a relatively small percentage of the violent acts revealed by investigations.

Charges for the type of violent cruelty in this investigation may be valuable as a deterrent in other facilities, and it stands to reason that felony-level charges would be a greater deterrent than misdemeanor charges. Investigators have been asked whether they are working for an animal group or warned that if an animal group was watching, they could get into legal trouble.¹⁵⁰ The fact that this happens on a regular basis indicates an awareness and some level of a deterrent effect that is much more widespread than the very few animal agriculture facilities that animal advocacy organizations can investigate. This phenomenon is difficult to quantify, but it is an important result of investigations, their publicity, and enforcement of animal cruelty laws.

The issue of the efficacy of the criminal law for practices that are not easily classified as violent or attributed to the "bad" acts of individuals is a more difficult one. It is not a question of whether they meet the standard for criminal animal cruelty. Leaving aside the issue of common or standard practices exemptions, with very few exceptions, state animal cruelty laws clearly impose a duty of care on the owners—including the corporate owners—of these animals, as well as those who interact with the animals. That duty is to each animal, and it clearly extends beyond active or sadistic

¹⁴⁹ Bala, *supra* note 143.

¹⁵⁰ See, e.g., Cody Carlson, *My Life as an Undercover Investigator*, VEGNEWS, (June 27, 2012), <https://vegnews.com/2012/6/my-life-as-an-undercover-investigator> [<https://perma.cc/GA6F-SAN5>].

violence to include neglect, an affirmative duty to provide access to food, water, and adequate shelter and not to allow untreated illness or injury. Widespread ammonia burns, heart attacks, bone breakage, inability to move to access food and water, and similar issues stemming from standard and inherent practices in the industry, including rapid-growth rates from selective breeding and confining 20,000 birds in one building where they live in their own waste for their entire lifespan (and often the waste of generations before them) have been almost completely outside the reach of animal cruelty law. This is because of an enforcement failure. It appears no U.S. prosecutor has charged a corporation based on animal advocacy groups' investigations, let alone for widespread standard practices. There is one notable exception to this on standard practice enforcement, discussed *infra*. There remains a clear divide between the cruelty law's enforcement against violent cruelty, particularly against workers (but managers and owners have also been charged in some of these cases) and widespread systemic suffering caused by the neglectful and poor conditions the industry employs. For the latter category, animal advocates have turned to methods outside of the enforcement of the law to address these issues, with mixed results.¹⁵¹

It is worth noting in the case of this Perdue investigation, that for this cruelty-by-conditions category, Perdue simply made public statements distancing themselves from the more violent and supposedly aberrant cruelty,¹⁵² but not doing so for the conditions of the birds themselves, insisting that their corporate position was opposed to cruelty and that the birds were in good health and their size was "natural." Despite video documentation and a manager's admissions otherwise, no legal enforcement was taken against Perdue or any of the cruelty in this category.

¹⁵¹ See, e.g., The Humane Soc'y of the U.S. & Humane Soc'y Int'l, *2020 Annual Report*, HUMANE SOC'Y OF THE U.S. (2020), https://www.humanesociety.org/sites/default/files/docs/HSUS-HSI_AR2020_LR.pdf [<https://perma.cc/X3RX-TMVE>]; see Barbara Grzincic, *Supreme Court Will Hear Challenge to Prop 12, Calif's Animal Caging Bill*, REUTERS (Mar. 29, 2022, 3:33 AM), <https://www.reuters.com/legal/government/supreme-court-will-hear-challenge-prop-12-califs-animal-caging-bill-2022-03-29/> [<https://perma.cc/C7R7-Z6WV>].

¹⁵² Justin Wm. Moyer, *Man Arrested After Undercover Video Reveals Alleged Abuse at Perdue Chicken Supplier*, WASH. POST (Dec. 11, 2015, 5:02 AM), <https://www.washingtonpost.com/news/morning-mix/wp/2015/12/11/man-arrested-after-undercover-video-reveals-alleged-abuse-at-perdue-chicken-supplier/> [<https://perma.cc/SV78-RJKX>] (quoting Perdue's statement, "We are appalled by the mistreatment and abuse by a contract catching crew and a farm worker shown in the video. We are committed to working with law enforcement to identify everyone involved and hope the Mercy for Animals will cooperate to facilitate those efforts. We are committed to taking aggressive actions to hold those involved accountable and prevent similar behavior in the future.").

As seen by the other examples in this paper, this is not an isolated example of corporate denial and lack of enforcement.

I. TYSON BROILER BREEDERS, ANIMAL OUTLOOK, VIRGINIA,
2016

In 2016, Animal Outlook investigated several breeding facilities in the broiler industry in Virginia. These are the parent flocks of the birds that are raised to the age of about 6 weeks before slaughter. The investigator documented chickens being thrown by their wings, thrown across the room or into transport crates, hit, punched (including in the head), kicked, stuck in equipment, slammed, run over with forklifts, suffering after botched kill attempts, and live birds being left to die in dead piles.¹⁵³ This investigation also documented clear evidence of intent and a cultural acceptance of cruelty. From the investigator's daily notes:

I documented [a worker] talking about how he punched a chicken to death earlier in the shift because the chicken scratched his face. [The worker] said [he] "punched him right in the back" [the worker] imitated the sound and seizure of a chicken dying) and I confirmed "The one that scratched you in the face?" [He] responded "yeah" as I asked him "how did you do it" [He] said "punched him dead center in the back as hard as you can, he dead." [He] again imitated the sound and seizure of a chicken dying. He added "yeah, scratched me in the fucking face, he said, go ahead." I said "what? [Another worker] said it was ok?" and [the worker] corrected me by saying "[the forklift operator]."¹⁵⁴

There are also numerous instances caught on camera showing knowledge and admission of wrongdoing. For example, the investigation documented a chicken with her neck skin missing, and a supervisor told a worker to "kill it, either step on it or kill it", "just step on his head, it's just stepping on his head." In a later conversation the investigator had with the supervisor about the ineffectiveness of killing by stepping on the animal's head, the supervisor admitted it was inhumane and should be hidden, saying "But actually, you can't let nobody see that. If a stranger or somebody here, you don't know if he working for the Animal Rights, you can't let him see you

¹⁵³ *Tyson Exposed: A Tradition of Torture*, ANIMAL OUTLOOK, <https://animaloutlook.org/tyson-exposed-a-tradition-of-torture/> [<https://perma.cc/AWE4-PD3A>] (last visited Sept. 14, 2022).

¹⁵⁴ *Tyson Broiler Breeder Investigation*, Investigator Log Notes, ANIMAL OUTLOOK (June 1, 2016).

do that.” “Because it's inhumane standing on his head and letting him suffocate. They'll take you to court for that and take you to trial and the judge will sentence you, fine you, do all kind of crap, might give you some jail time.”¹⁵⁵

In another instance, the supervisor kills a bird by standing on its head, while the bird clearly continues to move for over a minute and then he stands on the bird's head for over two more minutes before finally declaring the animal dead.¹⁵⁶ During this process, he explains to the investigator what the correct method would be but indicates that he is not using that method because he wants to avoid getting blood on his gloves.¹⁵⁷ He says to the investigator that he will hold the bird down by the head, “until he start kickin’. This ain't the right way to do it now, but he bloody, get all over my gloves. But you can't let nobody see you doing this, ‘cause it will get you terminated . . . the right way is to hold the legs and pop. This [standing on his head] is actually got him suffering here”¹⁵⁸

In addition, this investigation showed a practice that was heretofore little-known publicly: the use of “nose bones:” plastic rods shoved through the nostrils of the breeding males to keep them perpetually under-satiated by preventing them access to the females' feed, which was higher cost and quality, in an effort to support egg production. Nose bones also had the effect of slowing down the excessive growth of the bird, which the industry has genetically manipulated to grow to slaughter weight at 6 weeks of age. Since breeder birds are kept alive longer, the unchecked rapid growth to obesity would cause too many deaths. Underfeeding them would mitigate that. In addition to these cruel effects of the nose bone's use, the insertion of the nose bones themselves is a violent and painful process. “[The supervisor] said, ‘I got his eyes, he going to kick a little bit, see how I put it right in his nose. They going to kick, they more they kick, the more you squeeze on that head. You got to shove it on through there, bam. Each time a chicken is ‘boned’, the chicken struggles rigorously, flipping on his back and clawing upward, wincing his eyes closed, pulling away very hard. The bone does not go in effortlessly; there is tissue being pierced/ punctured. The chickens then bleed from their nasal cavity once the ‘bone’ has punctured through.”¹⁵⁹

¹⁵⁵ *Id.*; see also *Tyson Exposed*, *supra* note 153.

¹⁵⁶ *Tyson Broiler Breeder Investigation*, *supra* note 154.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*; see also *Tyson Exposed*, *supra* note 153.

This was not the first time Tyson had been the subject of an animal advocacy organization's investigation (nor would it be the last).¹⁶⁰ Animal Outlook's assessment was that the cruelty documented was not of greater or lesser quantity or a different type than similar investigations, but that the fact that the workers, supervisor, and general culture of this crew was both very aware of the nature and possible consequences of their wrongdoing and intent on doing it anyway, was unusual. Perhaps they had been trained on the issue in the wake of the previous investigations, but clearly it did not change the day-to-day operations of the facility, nor impose a sense of duty to avoid cruelty and neglect. In fact, Tyson's public statement admitted awareness of these issues and still both states that it has these issues under control and puts the blame on the workers, saying, "I'm disgusted and outraged by what's shown in this video. We do not tolerate animal abuse and have fired ten people who were members of this crew The people shown in the video . . . were all trained in proper animal handling, yet chose to ignore it and failed to alert management about the despicable treatment on these farms. Animals in our care deserve to be treated humanely. It's our responsibility to ensure that everyone who works for our company behaves properly. Our management team is dedicated to continue fostering a culture of proper animal handling."¹⁶¹

Virginia is unusual in that it has a dedicated office for prosecution of animal cruelty in the Attorney General's office, called the Animal Law Unit. This is the nation's first program of its kind, established in 2015.¹⁶² Michelle Welch, the senior assistant attorney general who directs the Animal Law Unit, was well-received by the local prosecutors and law enforcement, and was willing and able to handle this case. Because of Welch's specialized knowledge and experience in animal cruelty cases—despite the fact that this was her first agricultural animals case—the Animal

¹⁶⁰ *Tyson: A Tradition of Torture Exposed – Again*, ANIMAL OUTLOOK, (Sept. 13, 2022, 4:10 PM), <https://animaloutlook.org/investigations/tyson2/> [https://perma.cc/3L5C-UQC2].

¹⁶¹ Alice Mitchell, *Tyson Foods Sacks Workers Over Chicken Abuse*, POULTRY SITE, (Aug. 12, 2016), <https://www.thepoultrysite.com/news/2016/08/tyson-foods-sacks-workers-over-chicken-abuse> [https://perma.cc/VG9M-UA2K].

¹⁶² *Herring Creates Nation's First Attorney General Animal Law Unit*, AUGUSTA FREE PRESS (Jan. 23, 2015) <https://augustafreepress.com/herring-creates-nations-first-attorney-general-animal-law-unit/> [https://perma.cc/2A6Y-8MYL] ("serving as a resource for local law enforcement and state agencies on issues involving animal welfare and animal fighting or abuse. Because of the specialized and relatively infrequent nature of cases involving animal welfare, many prosecutors and law enforcement agencies seek assistance from the Office of Attorney General in effectively investigating and prosecuting these cases. The power to initiate an investigation or prosecution will remain with local agencies, but the Animal Law unit will be available to provide assistance or handle a case by request from a commonwealth's attorney or law enforcement agency.").

Law Unit engaged in case strategy and evidence review at an in-depth level, anticipated counterarguments, used Animal Outlook and other resources to learn about this factual and legal area, and found relevant experts. Ultimately, the Animal Law Unit filed 24 charges against 8 individuals, including the Tyson breeder facility owner and the supervisor, all of whom received fully suspended sentences and conditions requiring they do not work with animals for a period ranging from one to five years.¹⁶³ The charges included one for the practice of boning, which resulted in a conviction via plea bargain, despite the fact that Virginia law includes an exemption for “farming activities,” although “farming activities” are not clearly defined and there are no relevant regulations which would cover the nose bones practice.¹⁶⁴ This marks the first-ever cruelty conviction for a standard agricultural practice, which is an important step toward making the industry accountable under the law for standardized cruelty, and should put them on notice that they are not categorically exempt from the law, nor do they have carte blanche to determine what is acceptable in their industry.

In parallel to the legal advocacy on this investigation, Animal Outlook also presented Tyson with the video of the investigation, including the nose bones practice and asked them to end the practice. Shortly before the media release, Tyson agreed to shortly cease the practice of using nose bones. Animal Outlook contacted the other top chicken producers, and ultimately secured commitments from 17 of the top 20 companies either that they were not engaged in the practice or that they would cease the practice.¹⁶⁵

This case represents a high watermark in holistic thinking about what constitutes animal cruelty in an industrial setting and remedies tied to prevention of ongoing cruelty. In addition to this being the first ever conviction for a standard practice, these were the first-ever trials for broiler chickens, the first broiler breeder convictions, and an unusually high number of charges, including for the facility owner and supervisor, and the tangible outcome was to remove these people from situations where they

¹⁶³ E-mail from Michelle K. Welch, Senior Assistant Att’y Gen., to Cheryl Leahy (Aug. 25, 2017) (on file with author); *see also* Lara Sisselman, *Attorney General Herring Secures More Convictions in Animal Cruelty Cases*, COMMONWEALTH OF VA., OFF. OF THE ATT’Y GEN. (Aug. 29, 2017), <https://web.archive.org/web/20180113193422/https://www.oag.state.va.us/media-center/news-releases/1021-august-29-2017-ag-herring-secures-more-convictions-in-animal-cruelty-cases> [<https://perma.cc/934K-7PTX>].

¹⁶⁴ VA. CODE ANN. § 3.2-6570(D) (Lexis through Ch.2 of 2022 Special Sess. I) (“This section shall not prohibit . . . farming activities as provided under this title or regulations adopted hereunder.”).

¹⁶⁵ *National Chicken Council: Ban the Outdated, Barbaric Use of Nose Bones*, ANIMAL OUTLOOK (June 1, 2019), <https://animaloutlook.org/ncc-ban-nose-bones/> [<https://perma.cc/9849-8PAB>].

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were likely to continue to mistreat animals. There is one additional thing Animal Outlook sought—and seeks as a matter of course—which was not done: corporate charges against Tyson. Unlike many broiler operations, this was not a contract growing facility, but Tyson employees, which made the legal argument much more compelling for corporate liability. However, to date, charges still have not been filed against a corporate actor as a result of an investigation.

J. SUPERIOR FARMS LAMB, ANIMAL OUTLOOK, CALIFORNIA,
2016

Animal Outlook investigated the nation's largest lamb slaughterhouse, Superior Farms in California, which is owned by the largest U.S. lamb company. The video¹⁶⁶ shows lambs abused from the moment they arrive on trucks, including being electrically prodded while still confined inside the truck; using dogs to bite and compress the lambs together on a crowded entry ramp; lambs being ineffectively stunned before slaughter causing them to be shocked multiple times (causing bleeding from the mouth and nose); an employee who slits the throats of the lambs kissing his knife; and the kill method for each lamb constituting two cuts with the knife in an apparent attempt to preserve the esophagus—which Animal Outlook believed may have been for the purpose of selling them for dog treats, since the esophagi dog treats from Superior were being sold on Amazon at the time. The video also appears to show signs of sensibility in the lambs after their throats are cut, and particularly at the moment their tails are cut off down the line, where nearly 90% of the lambs documented showed movement after the tail cut.¹⁶⁷ The video also shows the practice of moving boxes of meat to avoiding metal detectors (a food safety step intended to detect metal shavings or other metal contamination in the meat), as well as the practice of changing date labels on the meat to make it appear fresher than it actually was—by as much as 15 days.¹⁶⁸ This facility sold lamb to the largest retailers in the U.S., including Kroger and Wal-Mart,¹⁶⁹ and the story garnered a feature in the New York Times.¹⁷⁰

¹⁶⁶ *Horror at Superior Farms*, *supra* note 45.

¹⁶⁷ *Horror at Superior Farms*, *supra* note 45.

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ Stephanie Strom, *Animal Rights Group Says Video Shows Abuse of Sheep*, N.Y. TIMES (Feb. 2, 2017), <https://www.nytimes.com/2017/02/02/dining/sheep-abuse-video.html> [<https://perma.cc/JB8Q-6BB5>].

Animal Outlook took the position that the documented evidence constituted violations of the Humane Methods of Slaughter Act (HMSA). While this was a ritual establishment—purportedly operating under halal methods—it is still subject to federal humane slaughter law, as well as state animal cruelty law. As was the case in other investigations involving federally inspected slaughterhouses, despite Animal Outlook’s request¹⁷¹ to the Solano District Attorney’s office to prosecute Superior under California’s animal cruelty law for improper slaughter, improper stunning, and rough handling of the lambs, and engaging with animal control on the complaint, the DA’s office ultimately took no action. Concurrently, Animal Outlook made a similar complaint and enforcement request to the USDA, which also did not act.¹⁷²

However, Animal Outlook was able to pursue a third course of action because of the circumstances Superior presented. At the time of the investigation, Superior was a supplier to two federal government agencies: USDA’s Agricultural Marketing Service (AMS) as well as the Department of Defense (DOD).¹⁷³ Federal procurement contracts have certain legal compliance requirements in them—including compliance with the Federal Meat Inspection Act (FMIA) for meat purchasing contracts such as these. FMIA incorporates within it the HMSA. Animal Outlook believed there were violations of the HMSA documented in the footage, which would mean by extension that there were also violations of the purchasing contracts. This gave rise to a False Claims Act (FCA) claim. Animal Outlook filed a FCA complaint under seal just prior to the public release of the material and the enforcement requests it sent to the DA and USDA.

To make its FCA case, Animal Outlook alleged inhumane handling, inhumane slaughter, halal fraud, and food safety issues based on the metal detector and date label issues. The fact that this facility was a ritual slaughter establishment impacts the humane slaughter analysis here. The HMSA sets forth two ways in which a slaughter method can meet the definition of “humane” under the statute: so-called “conventional” slaughter, which requires rendering the animal immediately insensible by single blow or gunshot.¹⁷⁴ Alternatively, a slaughter method can meet the “ritual” slaughter definition if it is a method that is “in accordance with the ritual requirements

¹⁷¹ Memorandum from Cheryl Leahy, Compassion Over Killing, to Krishna A. Abrams, District Attorney, Solano County (Feb. 1, 2017) (on file with author).

¹⁷² Memorandum from Cheryl Leahy, Compassion Over Killing, to Phyllis K. Fong, Off. of Inspector Gen., USDA (Jan. 31, 2017) (on file with author).

¹⁷³ U.S. *ex rel.*, *Compassion Over Killing v. Transhumance Holding Company, Inc.*, False Claims Act Complaint, U.S. Dist. Ct. E.D. (Cal. 2017).

¹⁷⁴ 7 U.S.C. § 1902.

of the Jewish faith or any other religious faith that prescribes a method,” which renders the animal insensible via exsanguination of the brain, “caused by the simultaneous and instantaneous severing of the carotid arteries with a sharp instrument.”¹⁷⁵ The Food Safety and Inspection Service (FSIS) of the USDA has inspection duties at slaughterhouses, and ritual establishments are no exception. FSIS does alter its inspection for ritual slaughter, however. It has instructed its inspectors to operate identically for both ritual and non-ritual slaughter for all of the handling and practices leading up to and immediately following the slaughter itself, which includes issues in this investigation like excessive or ineffectual electric stunning, regaining sensibility on the line after the throat cut during dismemberment, etc.¹⁷⁶ Where it differs is that FSIS abstains from inspecting that which it considers to be inside the “ritual bubble”—the moment of slaughter itself.¹⁷⁷ It considers that to be the domain of the religious authority. Here, that is the moment the throat is sliced. Once the establishment represents itself as employing a method that meets the “ritual” definition of “humane” slaughter under the HMSA, FSIS essentially defers its inspection duties and places them in the hands of the religious enforcement body. However, Animal Outlook’s argument here was that to meet the statutory definition for ritual slaughter, the slaughter method itself must cause the animal to bleed out through a sharp instrument slicing both carotids at once, noting the statutory language “simultaneous and instantaneous severing of the carotid arteries.”¹⁷⁸ There is little doubt that this requires both carotids to be sliced at in one instant and at the same time. In Superior’s case, they were using a two-cut method, slicing one carotid, lifting the knife, and then slicing the second carotid. This was the method they were using on every animal documented, and Animal Outlook argued that by its nature it could not meet the statutory requirement, which implicitly but unequivocally requires a one-cut method. Animal Outlook’s position was that in order to release FSIS from its inspection duties inside the ritual bubble, the method the plant used must comply with the (single-cut) requirement of the statute. There are additional arguments Animal Outlook used. They alleged that there was inadequate oversight of the private halal certifier, lack of clarity about what information the Superior had communicated to them, and

¹⁷⁵ 7 U.S.C. § 1902(b).

¹⁷⁶ U.S. DEP’T OF AGRIC. FOOD SAFETY AND INSPECTION SERV., FSIS DIRECTIVE 6300.1 REV. 2 (2019); U.S. DEP’T OF AGRIC. FOOD SAFETY AND INSPECTION SERV., FSIS DIRECTIVE 6900.2 REV. 3 (2020).

¹⁷⁷ See *Humane Handling Verification for Livestock and Good Commercial Practices for Poultry*, FSIS (Oct. 1, 2021), https://www.fsis.usda.gov/sites/default/files/media_file/2021-11/21_IM_Humane-Handling-GCP-10012021.pdf.

¹⁷⁸ 7 U.S.C. § 1902.

additional compliance issues with halal law that appear to be required in the statute as well. But the key issue is the apparent incompatibility between the two-cut method Superior used and the statutory requirement. Also, there were additional humane handling arguments in the complaint based on things outside the ritual bubble which those should be analyzed in the same way as non-ritual establishments.¹⁷⁹

Ultimately, the Department of Justice (DOJ) intervened in the FCA case, which it does in a small minority of cases. Interestingly, it intervened only on the humane handling allegations, and chose not to do so on the food safety issues. This was the first-ever DOJ intervention based on an FCA case arising from lamb slaughter, and appears to only be the second at any slaughterhouse in the U.S. The FCA case here ended in a settlement and a consent decree.¹⁸⁰ The settlement contained a small monetary award, although Superior never admitted to any wrongdoing or any of the allegations in the complaint. The consent decree required greater humane handling compliance oversight and an increased penalty for violating the HMSA and FSIS regulations.¹⁸¹ However, in the years since, Superior has gotten FSIS enforcement based on improper stunning and despite Animal Outlook's effort,¹⁸² that did not result in enforcement of the settlement or consent decree. In addition, there is no reason to believe that Superior has ended its two-cut method, nor that other slaughterhouses may not be using the two-cut method. This issue of ritual slaughter compliance and oversight failures is an area that is worth further attention, as is the use of the FCA where it applies.

¹⁷⁹ U.S. *ex rel.*, *Compassion Over Killing v. Transhumance Holding Company, Inc.*, False Claims Act Complaint, U.S. Dist. Ct. E.D. (Cal. 2017).

¹⁸⁰ *Consent Decree Between the United States Department of Agriculture, Food Safety and Inspection Service and Defendant Transhumance Holding Company, Inc.*, PUB. JUST. (May 14, 2019), <https://cok.net/wpcontent/uploads/2019/06/consent-decree-1.pdf>; *Settlement Agreement* (May 14, 2019), <https://cok.net/wp-content/uploads/2019/06/settlement-1.pdf> [<https://perma.cc/NP6J-JCT5>].

¹⁸¹ *Consent Decree Between the United States Department of Agriculture, Food Safety and Inspection Service and Defendant Transhumance Holding Company, Inc.*, PUB. JUST. (May 14, 2019) <https://cok.net/wpcontent/uploads/2019/06/consent-decree-1.pdf>.

¹⁸² Letter from Will Lowrey, Couns., Animal Outlook, to Carl-Martin Ruiz, Deputy Assistant Administrator, USDA, and Scott Safian, Branch Chief, Enforcement Operations, USDA (Feb. 1, 2017), <https://animaloutlook.org/wp-content/uploads/2020/10/Transhumance-Superior-Farms-Enforcement-Letter-FINAL2.pdf> [<https://perma.cc/M8DQ-8ALH>].

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K. MASON DIXON DAIRY, ANIMAL OUTLOOK, PENNSYLVANIA,
2017

Animal Outlook investigated a large dairy in Pennsylvania in 2017. The video shows cows stuck on a water trough and being forced violently backward in an attempt to free them as well as cows stumbling backward over the trough.¹⁸³ In one instance, the owner of the dairy is shown ramming his fingers into a cow's nostrils in an attempt to force her backward over the trough¹⁸⁴. The video also shows cows being punched in the udders and ribs, kicked in the face and udders, jabbed, having their tails twisted, and struggling to stand.¹⁸⁵ One such "downed" cow is electrically shocked over 100 times and forced to the milking machine.¹⁸⁶ This dairy also uses machines for hoof trimming that immobilizes the cows and turns them sideways. The video shows these practices as well as manual artificial insemination and the use of formaldehyde as a disinfectant.¹⁸⁷

Animal Outlook sought cruelty charges against the cruelest workers, the co-owner of the dairy, and the corporate entity itself. Mason Dixon's response was to fire one worker. Ultimately, one worker was charged with three counts of cruelty and pled guilty. His penalty was the payment of fines and court costs.¹⁸⁸ Animal Outlook argued that under Pennsylvania law, Mason Dixon as a corporate entity was liable for the cruelty documented because it violated its duty of care to the animals, and through the conduct of its employees.¹⁸⁹ Animal Outlook argued the co-owner was also liable for that reason, as well as for his direct cruelty. It is disappointing but not surprising that the higher-level potential defendants were not charged, but this does not appear to be for reasons of inadequacy within the law. In addition to this downward scapegoating shown in this case, Animal Outlook's investigation reveals issues that regularly arise in farmed animal cruelty cases. These issues include pursuing charges for only a small number of instances despite a long list of documented occurrences, remedies that are both too mild to be a deterrent and too disconnected from

¹⁸³ *Behind Big Dairy's Closed Doors*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/mason-dixon-dairy> [<https://perma.cc/KM74-W5QS>] (last visited Sept. 14, 2022).

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Midstate Man Pleads Guilty to Animal Cruelty Charges*, WITF (May 18, 2017, 3:24 PM), https://www.witf.org/2017/05/18/midstate_man_pleads_guilty_to_animal_cruelty_charges [<https://perma.cc/EX79-SEBL>].

¹⁸⁹ Memorandum from Irina Anta, Couns., Compassion Over Killing, to Brian Sinnet, Adams County Dist. Att'y, 2, 15-16 (Mar. 28, 2017) (on file with author).

any human-animal behavior, and leaving the business operations of the farm untouched. In essence, this case illustrates what is realistically the “positive” outcome one can hope for when bringing such cases through traditional law enforcement channels, at least barring any factors that have led to notable outliers, such as a particularly committed prosecutor or a procedural route around law enforcement and prosecutor inaction.

L. MARTIN FARMS DAIRY, ANIMAL OUTLOOK, PENNSYLVANIA,
2019

Animal Outlook investigated a dairy in Pennsylvania in 2019 called Martin Farms. Video evidence included the manager killing a cow with a .22 gauge rifle who then remains conscious for almost a minute before she is shot a second time, another who continues to move after her throat is slit, the practice of rolling cows over on their backs and tying them to a tractor by their hooves, and in once instance the manager stabbing the cow in the abdomen with a sharp object in an attempt to avoid paying for a veterinary procedure to treat a presumed birthing-related condition, a cow entering the milking parlor with the placenta still attached, animals dragged by the ears, tails, or legs, electrically shocked, pushed with a tractor, hit, kicked, sprayed in the face with scalding water, left with untreated sores and uterine prolapses, use of a metal clamp on the hips chained to a tractor to hoist and suspend cows into the air and drag them, a cow in a milker after a manager cut off one of her teats (and then the investigator witnessed the manager throw the teat and joke that he hoped she liked hot dogs), calves removed from their mothers shortly after birth, and tied and with their heads wedged into the slats of stalls in an attempt to limit their thrashing and resistance before having their horns burned off by hot irons applied for minutes at a time without any pain relief.¹⁹⁰

Nestlé, who was being supplied by Martin Farms at the time, immediately cut ties with the facility. Martin’s said it had fired employees in the wake of the video, and stated, “[w]e do not tolerate any animal mistreatment . . . we are shocked that these incidents took place on our farm.”¹⁹¹ The National Milk Producer’s Federation, which is a massive dairy co-op that runs the industry’s FARM program that 98% of producers are

¹⁹⁰ *Nestle's Nightmare: The Hard-to-Swallow Truth*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/nestles-nightmare> [https://perma.cc/Y9L4-XM2H].

¹⁹¹ *Id.*

part of, including Martin Farms, said publicly about the video that it showed “instances of willful mistreatment.”¹⁹²

Animal Outlook had brought the material to the Pennsylvania State Police (PSP) and the District Attorney in January of 2019¹⁹³ before going to the media, which initially reached out to the farm in late March of that year, and aired its first story in early April.¹⁹⁴ PSP issued a report just prior to that news report saying that it had only first learned of the investigation and its content in late March, when the reporter reached out.¹⁹⁵ Animal Outlook had written confirmation and correspondence with PSP starting in January, which the reporter addressed in a follow-up story shortly afterward.¹⁹⁶ The first time PSP reached out in response to Animal Outlook’s materials to interview the investigator was immediately after the April news coverage. Despite Animal Outlook’s attempts before and after this to engage with law enforcement, both virtually and in-person, ultimately, after more than a year, the PSP issued a press release announcing the District Attorney’s decision not to pursue charges, with no explanation.¹⁹⁷

In response, Animal Outlook opted to use an unusual provision in Pennsylvania law¹⁹⁸ that allows for a citizen to petition the Court of Common Pleas to reverse the DA’s decision, which the court declined to do in 2021. The court was heavily deferential to the DA’s reasoning, which relied on a letter from a local livestock veterinarian (who was overtly

¹⁹² See also *In re Priv. Crim. Complaint Filed by Animal Outlook*, 271 A.3d 516 (Pa. Super. Ct. 2022) (arguing an appeal for an animal cruelty case).

¹⁹³ E-mail from Corporal Michael J. Spada, Animal Cruelty Off., Special Investigations Div., Bureau of Crim. Investigations, Pa. State Police to Keith Jamieson, Couns., Compassion Over Killing, (Jan. 31, 2019) (on file with author).

¹⁹⁴ Scott Taylor, *Nestle Dairy Supplier Accused of Animal Abuse; Cows Being Punched, Kicked, Stomped On*, WJLA (Apr. 4, 2019), <https://wjla.com/features/iteam/nestle-dairy-supplier-animalcow-abuse> [<https://perma.cc/HM94-CYNZ>].

¹⁹⁵ See *id.* (including an embedded Pennsylvania State Police Public Information Release Report that states “PSP was made aware of allegations of animal cruelty involving Martin Farms on 3/27/19.”).

¹⁹⁶ Scott Taylor, *Why Did It Take Pennsylvania State Police 55 Days to Check on Mistreated Cows?*, ABC7 (Apr. 5, 2019), <https://wjla.com/features/i-team/investigations/why-did-it-take-pennsylvania-state-police-55-days-to-check-on-cows-that-were-abused> [<https://perma.cc/K3R3-74K5>] (“The I-Team obtained an E-mail dated eight weeks earlier on Jan. 31. Animal cruelty officer, Cpl. Michael Spada with the State Police, acknowledges receipt of Compassion Over Killings animal abuse complaint against Martin Farms which included a copy of the undercover video.”).

¹⁹⁷ Taylor, *supra* note 192 (offering a report titled “Animal Cruelty investigation in Franklin County Concludes; No Charges Filed,” dated March 23, 2020).

¹⁹⁸ 234 PA. CODE § 506 (2000).

supportive of the dairy industry and opposed to advocacy organization videos¹⁹⁹), which made both factual and legal conclusions.²⁰⁰

Animal Outlook then appealed the case. Their main arguments were: (1) the lower court erred in allowing certain dairy industry practices to be exempt from the cruelty law's coverage as "normal," namely improper hot iron disbudding and using hip clamps and tractors to move downed cows, (2) the court was in error in manufacturing a mens rea requirement greater than the statutory standard of "willful," and (3) the court erred in not finding neglected animals were deprived of "necessary veterinary care" under the statute.²⁰¹ The DA's reply brief argues the evidence was not sufficient to show cruelty, that the exemption would apply, and that "after the investigation, it became readily apparent that the farmers, who were allegedly committing criminal acts, were simply ignorant and mistaken about the appropriate methods of conducting the business of nurturing animals within the dairy industry."²⁰² The brief reconfirms and endorses the DA's reliance on the veterinary expert witness to make the mens rea determination, saying "[s]pecifically the expert opinion by Dr. Wolfgang indicated that the intent element of the crimes alleged simply could not be established."²⁰³ With respect to the exemption, the DA's brief takes the position that the scope of the exemption is defined very broadly, essentially by the existence or non-existence of a practice within the industry. "The above language on its face means that anything can become a normal agricultural activity so long as the farmers adopt and use the methods year

¹⁹⁹ The expert, Dr. Wolfgang, wrote on behalf of the dairy industry about the importance of controlling perceptions after videos of farms are released. David R. Wolfgang, *Animal Care and Well-Being, Perceptions and Reality*, AG PROUD (Mar. 22, 2010), <https://www.agproud.com/articles/30576-animal-care-and-well-being-perceptions-and-reality> [<https://perma.cc/69G7-NFKH>]. He outwardly supported a proposed "ag gag" bill in 2013, which would have criminalized investigations like the one done at Martin Farms, saying "farmers working hard . . . have been hurt by exposés targeting their operations in ways they see as inaccurate." Karen Langley, *Pennsylvania Bill Would Limit Covert Farm Recordings*, PITT. POST-GAZETTE at A1 (May 2, 2013), <https://www.post-gazette.com/news/state/2013/05/02/Pennsylvania-bill-would-limit-covert-farm-recordings/stories/201305020345> [<https://perma.cc/5AMQ-JBWD>].

²⁰⁰ "[G]iven the unfamiliarity with the dairy farm industry and its acceptable standards, the Commonwealth requested that PSP investigators identify and consult with professionals in the field. PSP investigators subsequently identified an expert (who is retired) willing to give an official opinion on the evidence gathered by COK/AO (Expert Opinion attached as 'Exhibit A'). The expert, Dr. David Wolfgang, opined that the farm was not 'picture perfect,' was 'clumsy,' and employed personnel who were not properly trained, but that in his opinion the overall operations and specific actions of employees were not 'willfully cruel.'" *In re Priv. Crim. Complaint Filed by Animal Outlook*, 271 A.3d 506 (Pa. Super. Ct. 2022).

²⁰¹ *Id.* at 516, 518, 520, 530.

²⁰² *Id.* at 516.

²⁰³ *Id.*

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after year . . . the fact that it "includes" new practices means that it most certainly would cover the old or even ar[c]haic methods of farming as well The Martin Farms is a working industrial farm designed to produce milk. The farm itself takes care of cows and uses them for commercial purposes. Therefore, the activities they engage in year after year to produce the milk and sell to other market participants puts Martin Farms' activities within the normal agricultural operations exemption. This is especially true when considering that the animals were being processed to allow the agricultural purpose to take effect, namely milk production."²⁰⁴

It is important to note that the "normal agricultural operations" exemption in the Pennsylvania cruelty law has survived a vagueness challenge and resulted in a conviction for a practice the defendants argued was common in the industry, in that case starving horses before selling them for meat.²⁰⁵ The court found the "normal agricultural operations" exemption applied only to "routine and accepted" practices.²⁰⁶ This indicates some very important things the exemption is not. It is not a categorical exemption preventing the reach of the cruelty code for anything that happens at an agricultural facility. The analysis is not done from a bird's eye position averaging out the operation's activities to determine normalcy, but instead is done by analyzing the normalcy of each individual practice. The concept of a normal agricultural operation is not too vague to provide adequate notice of criminal acts. The fact alone that something is common in the industry is not enough to put it outside the scope of the cruelty statute—something more is needed to justify the practice and establish it as both routine and accepted. There is a duty of care to commercial animals at least not to neglect them even if it is not profitable to continue to care for them, and this duty extends even to animals destined for slaughter. All of this is important doctrinal development to guide analysis in a case like Martin Farms. And none of this was followed in the reasoning the DA used in deciding not to take the case. A main argument in the appeal was aligning the application of the law to the facts in this case, including for some of the practices that are common in the industry but that are performed in a high-pain and suffering inducing way, and/or are not able to be justified compared to accepted industry practices that are less painful. Taking one example, disbudding/dehorning is done by over 90% of the dairy industry, yet there are less cruel ways to perform disbudding, including using pain relief and performing the procedure when the calf is young and the bones have not ossified, which Martin did not do. This should clearly remove it

²⁰⁴ *In re* Priv. Crim. Complaint Filed by Animal Outlook, 271 A.3d 506 (Pa. Super. Ct. 2022).

²⁰⁵ *Commonwealth v. Barnes*, 629 A.2d 123, 129, 132 (Pa. Super. Ct. 1993).

²⁰⁶ *Id.* at 129.

from the exemption's protection. More importantly, the practice itself is not needed to achieve the result intended by the industry. Instead of removing horns at all, the industry could be using genetically polled cattle. If the industry were properly held accountable under the cruelty law for standard practices that have a less barbaric alternative—or even put on notice that they could be—significant suffering and death could be prevented, and much of the cost of the industry would be internalized. The animal cruelty laws have the potential to achieve this if they are applied to their potential, and a case like Martin Farms may be the vehicle to do so.

Pennsylvania law also makes the normal agriculture operations exemption an affirmative defense, which is not unusual in state cruelty laws. In a functioning system, this would put the burden on the facility—and on the industry more widely—to overtly defend and endorse a given practice in order for the practice to be covered by the exemption. Investigations like this one have shown that there are standard practices that are “normal” in the empirical sense but may not be something the industry would publicly endorse. To be protected under the exemption, a given practice would also need to meet the legal standard for “normal” operations, which in Pennsylvania would require using the standard set forth in Barnes, i.e., a specific practice that is routine and accepted.²⁰⁷ Many of these practices that fall into the grey area of “standard” or “normal” practices account for the vast majority of suffering. From the animals' point of view, these practices are worse than so-called egregious cruelty, and the substantive law seems to support finding these practices as cruel. In the Martin case, the DA proactively argued the affirmative defense on behalf of the facility, showing how far the enforcement scale has tipped away from protecting farmed animals.²⁰⁸ It is a matter of finding the right pathway to have these issues adjudicated fairly.

In February of 2022, the appellate court reversed the lower court's decision on this, ordering the lower court to order the District Attorney to prosecute this case.²⁰⁹ More importantly, the appellate opinion confirmed and drew out both substantive and process positions Animal Outlook had been making in this and other cases, providing for a fairer and more detailed roadmap for evaluation of these cases. Many of the issues addressed in this appellate decision are roadblocks that repeatedly come up in these kinds of cases, as discussed throughout this paper. The court taking a position that aligns with fair process and substantive legal interpretation has the potential to be incredibly valuable both for this case and future cases.

²⁰⁷ *Id.*

²⁰⁸ *In re Priv. Crim. Complaint Filed by Animal Outlook*, 271 A.3d at 516.

²⁰⁹ *Id.* at 516.

First, the opinion addresses the issue of downplaying or ignoring the video and other evidence captured by the animal organization investigation in favor of the evidence gathered directly by the police, and relatedly, the practice of ignoring large numbers or even entire categories of evidence without fairly evaluating whether it violates the law, saying, “next, and most consequential, the trial court erred in dismissing Animal Outlook’s petition in its entirety while addressing only a hand-picked few of the alleged instances of abuse. The trial court did not detail a *de novo* review of the entire record to determine whether Animal Outlook submitted evidence sufficient to establish any of the alleged crimes. Rather, the trial court referenced only the evidence obtained by the PSP [the Pennsylvania State Police] that supported the DA’s decision to disapprove the criminal complaints.”²¹⁰

The court also addresses the issue of after-the-fact visits and the duty to evaluate whether crimes have taken place in the past. “However, the fact that Martin Farms employees did not commit documented abuse of the animals while the farm was being inspected, or when Dr. Oliver was on the premises a couple of times per month, does not mean that the abuse [Animal Outlook’s investigator] witnessed did not happen or that her statements should be wholly disregarded.”²¹¹ And “the fact that the farm stopped committing or allowing the arguably criminal acts does not negate culpability for any past crimes perpetrated upon the animals. We are not considering enforcement of an administrative regulatory scheme seeking future compliance with better farming practices. We instead face proposed criminal actions vindicating laws that our legislature has deemed to be crimes against the people of this commonwealth. That remedial measures were taken here does not affect liability for prior criminal acts any more than the fact that a defendant stopped selling drugs would absolve him from prosecution for past drugs sold.”²¹²

The most interesting and perhaps most promising elements of the opinion, however, are the discussions around the normal agriculture operation exemption. The court’s reasoning seems to track with the logic laid out above—in essence, the exemption is not a categorical safe harbor for all acts committed on a farm, and at the very least, the evaluation must include whether a practice is done in a manner that is crueler than what is standardly accepted. “The most obvious evidence overlooked by the trial court was that concerning the dehorning of calves. Dr. Cheever explained that the technique used by Martin Farms as shown in the video caused the

²¹⁰ *Id.* at 525.

²¹¹ *Id.* at 523.

²¹² *Id.* at 524-25.

calves to be ‘in agonizing pain, shown by their violent thrashing and bellowing.’”²¹³ The DA had argued that any farming practice done repeatedly should be covered under the exemption. The court rejected that argument, saying “[T]he exception only applies when the conduct is an accepted standard within the agricultural industry and the defendant acted in the course of business within that industry.” The Court found the District Attorney’s argument “absurd.”²¹⁴

The Commonwealth petitioned for an allowance of an appeal to the Pennsylvania Supreme Court, mainly on constitutional grounds arguing against review of DA decisions. This is pending at the time of this writing. The appellate opinion in this case, however, is a major step forward for addressing institutionalized cruelty and for developing doctrine in this area of law, and it may provide a meaningful roadmap to avoid the obstacles and denial of fair process to which these cases have often been subjected.²¹⁵

M. TRILLIUM EGGS, PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS (PETA), OHIO, 2019

PETA investigated another major egg company, Trillium Farm Holdings, which revealed botched kill attempts, including repeatedly twisting the head of the hen or ripping it off and one resulting in a supervisor leaving an injured hen on a dead pile; hens stood upon; immobilized in parts of the cage system; decomposing birds in cages with live birds; and dozens of hens at a time stuffed into metal boxes and gassed, where they banged against the walls and cried out during the process.²¹⁶ PETA notes this was all documented after workers were trained in what not to do using an earlier undercover PETA investigation.²¹⁷ PETA was unable to even trigger a criminal investigation of this facility, so it took out an ad in the local

²¹³ *Id.* at 526.

²¹⁴ *Id.* at 523.

²¹⁵ Kenny Torrella, *Most Animal Cruelty Is Legal on the Farm. A Judge Is Questioning That*, VOX (Mar. 9, 2022, 7:00 AM), <https://www.vox.com/future-perfect/2022/3/9/22967328/animal-cruelty-laws-state-federal-exemptionspennsylvania-martin-farms-dairy-calves-dehorning> [<https://perma.cc/DJ3D-UDGT>]; Mariann Sullivan, *Animal Law Podcast #82: Maybe Cruelty Laws Can Protect Farmed Animals!*, OUR HEN HOUSE (Mar. 30, 2022), <https://www.ourhenhouse.org/alp82> [<https://perma.cc/DGC6-NUSE>].

²¹⁶ *Walmart Egg Supplier Exposed: Hens Left for Dead, Crudely Gassed, and Cruelly Killed*, PETA, <https://investigations.peta.org/walmart-great-value-eggs-horror> [<https://perma.cc/RQ5T-VFVN>] (last visited Sept. 14, 2022).

²¹⁷ *Id.*

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newspaper calling on the city director of law to authorize the humane officer to conduct a criminal investigation based on the video.²¹⁸

This case is yet another example of so-called “cull” birds—animals of low economic value—bearing the brunt of the neglect and abuse. This also may be the perfect fact pattern to illustrate cruelty, meeting all of the following criteria: horrific levels of suffering and death, large numbers of animals at issue, “cull” animals as the main victims, and utilizing practices revealed by other investigations to be widespread in the industry. It may be this very combination of cruelty that is widespread and mundane that all but guarantees no traction on enforcement of the law. In fact, these are nearly the identical factors at play in another PETA investigation, this time of the second-largest duck slaughterer in the U.S., which supplied Whole Foods, also did not result in enforcement of the animal cruelty law.²¹⁹

N. FAIR OAKS DAIRY FARM ADVENTURE, ANIMAL RECOVERY MISSION, INDIANA AND OTHER LOCATIONS, 2019

Animal Recovery Mission (ARM) investigated an unusual dairy operation in Indiana. This facility is both a working farm and something of a theme park to advertise the Fairlife dairy brand, which is a Coca-Cola-owned brand, marketed as high-quality both in terms of nutrition and animal care.²²⁰ The Indiana facility is open for public tours in limited portions of the facility, although ARM’s investigation covered areas not open to the public as well. The investigation included the Indiana facility and other facilities that supply Fairlife milk. It documented illness; injury; cows being beaten, kicked, and having their tails snapped in half in attempts to move them into the milking machine, pinned in and falling out of the milking machine; extreme crowding; and calves being subjected to temperature extremes including freezing to death and dying of heat stroke, otherwise dying, kicked, thrown, shoved, dragged by the ear, beaten in the face and

²¹⁸ Danny Prater, *Full-Page PETA Ad Renews Call for Criminal Investigation into Ohio Egg Farm*, PETA (Jan. 17, 2021), <https://www.peta.org/blog/newark-advocate-douglas-sassen-trillium-farms-letter> [<https://perma.cc/RQ5T-VFVN>].

²¹⁹ *Ducks Kicked, Slammed Against Walls for Meat and Down*, PETA, <https://investigations.peta.org/ducks-meat-down-culver> [<https://perma.cc/K5JR-GEZE>] (last visited Sept. 15, 2022).

²²⁰ Michelle Markelz, *From Glass to Grass*, PROFILE (Mar. 17, 2014), <https://profilemagazine.com/2014/fairlife/> [<https://perma.cc/RE35-A9SK>].

nose with bottles, stomped, suffocated, hot iron branded.²²¹ Much of the calf abuse took place during the process of moving them for transport and also during bottle feeding while the calves were housed in individual isolation-style hutches, which is standard housing in the industry.²²²

Before the investigative video was released but after they became aware the video was coming out, the owners of the facility released a video touting their support of transparency and alleging the undercover employees were misrepresenting their practices and mischaracterizing a “one-off malfunction.”²²³ The farm also triggered a private audit which it passed with flying colors, noting “a strong commitment to animal care and welfare was evident in the company’s approach to training, their policy of zero tolerance for animal abuse . . . which reflected superior management.”²²⁴ They also claimed not to send their calves to veal but the ARM investigation revealed that they did exactly that, confining them in veal crates.²²⁵

The investigation release garnered widespread national media attention. It is possible that one unusual factor at play here is the public affiliation between the Fair Oaks Dairy Farm Adventure facility and the Coca-Cola brand. Fair Oaks Dairy Farm Adventure is, in all respects, a theme park. In fact, it has been referred to as the “Disneyland of Dairy” by industry sources.²²⁶ Just as Disney could not disclaim Disneyland, the usual crisis PR playbook could not be used here, where the larger corporate entity immediately condemns the action of the smaller corporate entity and cuts ties, until the farm or facility level is reached, and it condemns the video as horrific and sad and blames the workers. This may have contributed to the scope and length of the media cycle in this case.

In turn, the widespread media likely contributed to the prosecution in this case. One worker was arrested and charged with felony cruelty, which was later dropped, and he ultimately plead to a misdemeanor charge and

²²¹ *Operation Fair Oaks Farm Dairy Adventure*, ANIMAL RECOVERY MISSION (June 4, 2019), <https://animalrecoverymission.org/operations/factory-farm-division/operation-fair-oaks-farms-dairy-adventure/undercover-footage/> [<https://perma.cc/7C4K-PQBY>].

²²² *Operation Fair Oaks Farm Dairy Adventure*, ANIMAL RECOVERY MISSION (June 4, 2019), <https://animalrecoverymission.org/operations/factory-farm-division/operation-fair-oaks-farms-dairy-adventure/undercover-footage/> [<https://perma.cc/7C4K-PQBY>].

²²³ *Id.*

²²⁴ *Id.*

²²⁵ *Id.*

²²⁶ Chris Torres, Opinion, *Fair Oaks Farms Talks Moving Forward from Controversy*, AM. AGRICULTURALIST (Feb. 18, 2020), <https://www.farmprogress.com/farm-life/fair-oaks-farms-talks-moving-forward-controversy> [<https://perma.cc/U639-KWBS>].

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was sentenced to one year probation.²²⁷ Two other workers were also charged but not located or arrested.²²⁸

In addition, several class action consumer lawsuits were filed based on Fairlife's advertising and public representations as contrasted with the video, which was litigated by private firms and animal protection organizations, Animal Outlook and ALDF.²²⁹ The litigation settled in 2022 for \$21 million, but the animal protection organizations withdrew from the settlement because they did not find the non-monetary portions of the settlement to be adequate to address animal welfare issues.

The following year, Fair Oaks Farms' CEO resigned and the Chief Operating Officer and Chief Strategy Officer were terminated, citing the ARM investigation and the impact of COVID-19 on the business.²³⁰

This is an unusual case, not for the extent or nature of the cruelty itself, which as we see from other dairy investigations discussed here, and not even because it garnered national media attention, since other investigations have done the same. The length of the news cycle, the inability of Coca-Cola and the business owners to truly distance themselves from the investigation, and the sheer volume of video footage (taken from multiple locations) seems to have combined to make this a particularly high-profile investigation, and these factors likely contributed to the ultimate prosecution. Unfortunately, there were elements of this that still followed the pattern we see elsewhere—the workers were the sole entities charged and ultimately the worst penalty was a year's probation. It is unclear the degree to which the investigation led to the resignation and termination of the corporate executives, but that is a unique and encouraging element here. The impact of the lawsuits remains to be determined.

O. SUMMIT CALF RANCH, ANIMAL EQUALITY, NEBRASKA, 2019

Animal Equality investigated a calf ranch in Nebraska which houses 11,000 calves as part of the dairy industry. They documented calves

²²⁷ Dave Bangert, *Felony Charge Dropped for Only Ex-Fair Oaks Farms Worker Arrested in Animal Abuse Case*, J. & COURIER (Dec. 18, 2019, 11:40 PM), <https://www.jconline.com/story/news/2019/12/18/fair-oaks-farms-animal-abuse-felony-chargedropped-formeremployee/2695688001/> [https://perma.cc/TWR4-75LB].

²²⁸ *Id.*

²²⁹ *The Year of the Vegan: Our Actions for Animals in 2019*, ANIMAL OUTLOOK (Dec. 19, 2019), <https://animaloutlook.org/the-year-of-the-vegan-coks-actions-for-animals-in-2019/> [https://perma.cc/6WU3-F5DQ].

²³⁰ Nicole Axworthy, *Troubled Dairy Giant Fair Oaks Farms Terminates Top-Level Executives After Undercover Investigation*, VEGNEWS (May 11, 2020), <https://vegnews.com/2020/5/troubled-dairy-giant-fair-oaks-farms-terminates-top-level-executives-after-undercover-investigation> [https://perma.cc/4U5H-6SLG].

suffering in extreme cold, dropping to below twenty degrees Fahrenheit with the wind chill—including frozen waterers, frozen limbs, hooves being frozen off the body, and calves dying—in addition to illness, injury, neglect, separation from mothers within minutes of birth; hot iron disbudding/dehorning; being hit with metal rods; tails being twisted; and being bitten by dogs.²³¹ Animal Equality argued, with the assistance of the Animal Legal Defense Fund, that the video documentation establishes cruel neglect under Nebraska law, and is not a “commonly accepted” practice.²³² Still, the prosecutor declined to prosecute in this case, citing as reasons only that a Nebraska vet did not raise the same concerns regarding water access as Animal Equality had raised and that “there does not appear to be sufficient evidence that would be admissible in a court.”²³³

One interpretation of this case is that the violent cruelty such as throwing, beating, etcetera was minimal when compared to the other categories here: standard practices such as dehorning and widespread neglect. One would not expect dehorning alone to trigger a cruelty prosecution, as discussed. Yet, the neglect was so extreme it is difficult to imagine a more gruesome case of pure neglect—animals with their hooves literally freezing off their bodies seems to present an unequivocally damning case for neglect and is squarely within the traditional concept of neglect, which regularly covers fact patterns on adequate protection from the weather.

Perhaps what explains the outcome in this case is not the relative lack of violent cruelty, but rather an unwillingness to use the animal advocacy organization’s investigative video as evidence in the case. The prosecutor’s E-mail directs Animal Equality to the process of initiating complaints and requesting investigations by the sheriff’s department immediately after she states she is declining to file charges.²³⁴ This is consistent with the kinds of responses other organizations have received from prosecutors, regardless of whether the sheriff’s department is actively responsive to the advocacy groups’ complaints or not. The implication seems to be that those responsible for enforcement of the law—whether it be sheriffs, humane officers, prosecutors, etc.—view the animal charities’ investigative video as

²³¹ *Animal Equality Investigation Reveals Shocking Scenes of Neglect at US Calf Ranch*, ANIMAL EQUALITY (July 18, 2019), <https://animalequality.org/news/animal-equality-investigation-revealsshocking-scenes-of-neglect-at-uscalf-ranch/> [<https://perma.cc/G39Y3NDK>].

²³² Letter from David B. Rosengard, Senior Staff Att’y, Animal Legal Def. Fund, to Tom Dion, Sheriff, Butler Cnty., and Julie Reiter, Att’y, Butler Cnty. (Feb. 10, 2020) (on file with author).

²³³ E-mail from Sarah Hanneken, Legal Advoc. Couns., Animal Equal., to Julie Reiter, Att’y, Butler Cnty. (Apr. 21, 2021, 10:41 AM) (on file with author).

²³⁴ *Id.*

the equivalent of a casual tip or complaint by a citizen who alleges to have witnessed a crime, for them to then put aside and conduct a separate investigation on, if they so choose. The prosecutor's language in this case referring to evidence she anticipates would be "admissible in a court" supports this interpretation—that somehow, despite the extensive video evidence and no one contesting its validity—there is a presumption *ex ante* that the video itself should be put aside. It is this kind of thinking that may be preventing accountability for massive amounts of animal cruelty.

P. COOKE AQUACULTURE, ANIMAL OUTLOOK, MAINE, 2019

Animal Outlook investigated a salmon hatchery in Maine which hatches millions of fish each year, owned by Cooke Aquaculture, which is a large multinational aquaculture company.²³⁵ This was the first investigation of a U.S. aquaculture facility. The video shows fish thrown large distances into receptacles or concrete; their heads slammed against concrete or metal pipes; suffocated and crushed in dry barrels full of other fish; stomped in the face with the heel of a boot; born deformed or becoming that way due to rough handling; suffering from parasites fungal infections, sometimes eating away at their faces; vaccination procedures involving ineffective pain relief that causes injuries, refusal to eat for several days, and death; and underfed fish mistaking the pupils of other fish for food and eating their eyes.²³⁶ Interestingly, workers admit things like their uncertainty over whether massive amounts of fish will die, the fact that a fish will continue to suffer until death, and their own desensitization to the suffering.²³⁷

As of the date of this writing, we can find no instances of enforcement of animal cruelty laws for cruelty to fish based on an investigation, despite multiple investigations on this topic.²³⁸ However, Animal Outlook pursued cruelty law enforcement in this case and was cautiously optimistic about its prospects because of some unusual features of Maine law. Maine is unique in that it has two versions of its animal cruelty law: one is in the agricultural

²³⁵ *Aquaculture: A Sea of Suffering*, ANIMAL OUTLOOK, <https://animaloutlook.org/aquaculture/> [<https://perma.cc/8VA6-3NSV>] (last updated Aug. 2022).

²³⁶ *Id.*

²³⁷ *Id.*

²³⁸ *Undercover Exposé Reveals Live Lobsters, Crabs Were Torn Apart!*, PETA, <https://support.peta.org/page/1845/p%20etition/1?locale=en-US> [<https://perma.cc/9XS7-6PEM>] (last visited Sept. 15, 2022); Briana Montalvo, *Florida Men Who Dragged Shark Behind Boat Charged with Animal Cruelty*, ABC NEWS (Dec. 13, 2017, 1:44 AM), <https://abcnews.go.com/US/floridamen-dragged-shark-boat-chargedcruelty/story?id=51758418> [<https://perma.cc/F3GN-6CPV>].

code²³⁹ and one is in the criminal code.²⁴⁰ Housed within the Maine Department of Agriculture, the Animal Welfare Program (AWP) is tasked with enforcing the civil (agriculture code) version of the cruelty statute. About a decade prior, Animal Outlook had done the legal work for Mercy for Animals, which had conducted an investigation in Maine of a battery egg facility. A settlement was secured by working with AWP and the District Attorney’s office, which included numerous charges under this civil statute, remedial action, and consequences for violations.²⁴¹ Animal Outlook approached the aquaculture case with that model in mind.

The person in the head position at AWP had changed in the intervening years, and after he took our evidence and reviewed our legal arguments and requests, he ultimately declined to enforce the law. He laid out his reasoning in a detailed letter.²⁴² The letter states that after he reviewed the video and questioned Animal Outlook on the evidence, he looked into subject matter experts “that could give better insight” into what was happening on the video, and he also looked at best management practices for salmon farming.²⁴³ Note that the Maine civil animal cruelty law has a provision in its agriculture exemption that refers to best management practices, and allows those to be determined by the Department of Agriculture.²⁴⁴ In this case, the director of the AWP looked for private standards—created by and for the industry, as are similar private standards in other animal agriculture industries—and used them in such a way that elevated them to act as legal standards. In this case, he used the Global Aquaculture Alliance’s (GAA) Best Aquaculture Practices (BAPs).²⁴⁵ AWP should at least have been

²³⁹ ME. REV. STAT. ANN. tit. 7, §§ 3971- 4042 (2022).

²⁴⁰ ME. REV. STAT. ANN. tit. 17, §§ 1011-1046 (2022).

²⁴¹ Nathan Runkle, *Maine Egg Producer Pleads Guilty to 10 Counts of Cruelty to Animals*, MERCY FOR ANIMALS (June 7, 2010), <https://mercyforanimals.org/blog/maine-egg-producer-pleads-guilty-to10-counts-of-cruelty-to-animals/> [https://perma.cc/A6SM-LC65].

²⁴² Report from Liam Hughes, Director, Animal Welfare Program (on file with author).

²⁴³ *Id.*

²⁴⁴ There is an exemption for cases where “[t]he animal is kept as part of an agricultural operation and in compliance with best management practices for animal husbandry as determined by the Department.” ME. REV. STAT. ANN. tit. 7, § 4011 (2022).

²⁴⁵ Report from Liam Hughes, *supra* note 242. (“Upon reviewing the available information online about BAPs I contacted Steven Hedlund from GAA and spoke to him about the BAP review process, standards and audits. I was able to ascertain that the BAP’s are what the state would consider Best Management Practices (BMPs) for this type of farming . . . Mr. Hedlund provided me with a blank inspection form and standards that their inspectors look for . . . Upon review of these documents it was determined by AWP that the state can recognize the GAA BAPs as best management practices by the state for purposes of this investigation since the state does not currently have BMPs in place for this type of agriculture.”).

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diligent about matching the basic definition and scope of cruelty with whatever standards it chose, or else not chosen one at all.

Aside from imputing private standards as though they have color of law, it is worth noting that the substance of these standards is not consistent with the statutory definition of animal cruelty. There are several places where the private aquaculture best management practices are silent on issues which the law covers, sets forth a different standard, and/or actively conflict with the law. Most relevant in this case is the AWP's use of the GAA process and training/promises for improvement despite the statutory cruelty provision that says, "evidence of proper care of any animal shall not be admissible in the defense of alleged cruelty to other animals."²⁴⁶

AWP also relied on a second source in its review of the evidence: a fish pathologist for the state agency Inland Fisheries and Wildlife (IF&W).²⁴⁷ AWP's letter seems to indicate that the function of this expert was to identify for AWP what was and was not acceptable practice within the industry. Rather than being guided by the statutory language, again, AWP appears to be seeking a set of standard acceptable practices that identifies what is and is not cruel. Despite all of this, it seems clear that the evidence indeed *showed violations* of these industry standards. For example, the IF&W expert indicated that "a concussive blow to the head was an acceptable practice for culling fish from the tanks, but it was not being done properly on the video."²⁴⁸

AWP then toured the facility and was shown the plant's health management plan, which is proprietary, and apparently another private industry standard. AWP gave "recommendations" on how to improve their health plan, which included better training, better euthanasia techniques and equipment, and disease protocol.²⁴⁹ AWP then told the production manager that they would be returning for a follow up visit in a month. In the meantime, the CEO of Cooke Aquaculture issued a statement admitting the behavior on the video was unacceptable and did not meet their standards of care, and said they would retrain the staff in BMPs and update their health management plan.²⁵⁰ On the follow-up visit, AWP talked with Cooke about the trainings and updated plan, and got further admission from one of the staff that the "ways he was shown in the past were not the best way to do things."²⁵¹

²⁴⁶ ME. REV. STAT. ANN. tit. 7, § 4011 (2022).

²⁴⁷ Report from Liam Hughes, *supra* note 242.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

The AWP letter then lays out its legal analysis, which indicates that an affirmative defense is best practice and determines that the mens rea required to rise to the level of cruelty was not present among the workers, because in AWP's determination, it was the result of poor training and management, rather than intent to cause the fish suffering. It then says apart from one follow-up visit, it will be closing the complaint. Animal Outlook disputes the legal analysis of mens rea and the use of industry-authored Best Aquaculture Practices and agency-sanctioned Best Management Practices. It also argues that the violations in the video constitute animal cruelty under the law. Animal Outlook sought prosecution from the District Attorney's office, but after initially showing interest, they ultimately deferred to AWP's non-enforcement (and non-binding recommendations). Animal Outlook also sued Cooke Aquaculture for false advertising on environmental sustainability and animal welfare claims that it alleges are inconsistent with what was documented in the investigation, which was dismissed for procedural reasons.²⁵² Animal Outlook then filed a petition with the Maine Department of Agriculture under a provision that mandates rulemaking if certain requirements are met. The petition asks the Department to accept its responsibility for humane treatment of fish and to initiate rulemaking on best management practices for fish welfare.²⁵³ This initiative is ongoing at the time of this writing.

In this case, we see a number of procedural missteps and extreme deference to the industry. The enforcement agency misreads basic actus reus and mens rea elements in the statute. It analyzes the case based on internal company changes meant to generally reduce issues in the future rather than tracking with the categories of documented cruelty, and does not analyze whether crimes were committed in the past based on the documented evidence. It then improperly defers to the industry to set its own standard of cruel behavior that waters down the legal duty of care to these animals and avoids the statutory definition of cruelty. The agency treats the case as though those private industry standards are law. Despite all of this it finds violations. The CEO of the company admits that there are violations. Yet the way to address this is merely to make vague and unenforceable commitments to retrain and do better in the future.

²⁵² See Complaint, *Animal Outlook v. Cooke Aquaculture, Inc.*, No. 2020 CA 002908 B, 2021 D.C. Super. LEXIS 100 (D.C. Super. Ct. June 24, 2020) <https://animaloutlook.org/wp-content/uploads/2020/06/true-north.pdf> [<https://perma.cc/6DAW-DFWV>].

²⁵³ *Legal Advocacy: Maine Aquaculture Petition*, ANIMAL OUTLOOK <https://animaloutlook.org/legal-advocacy/> [<https://perma.cc/KZ6C-A3W3>] (last visited Jan. 30, 2023).

Ultimately, the enforcement agency still elects not to enforce the law.²⁵⁴ And any other agency with enforcement authority defers to that decision. While there is more transparency on the process here than in other cases, these same dynamics seem to be at play in other cases. We are seeing abdication and deference to private industry to write their own rules, both in substance and in process.

Q. BRAVO PACKING SLAUGHTER, ANIMAL OUTLOOK, NEW JERSEY, 2021

In 2021, Animal Outlook recorded a downed cow being dropped off and slaughtered for a pet and exotic animal food manufacturer called Bravo Packing, in New Jersey.²⁵⁵ This facility also slaughters horses for exotic animal feed. Despite the fact that horse slaughter is no longer allowed in the U.S., places like Bravo are regulated differently. Animal Outlook's video is of a cow being slaughtered, which Bravo uses for its high-end line of dog food.²⁵⁶ The video documentation shows a cow that appears conscious for over ten minutes after the first shot with a captive bolt pistol.²⁵⁷ After this first shot to the head, the cow is still conscious but is dragged off the trailer with a chain. The second shot happens about 2 minutes and 50 seconds after the first. Then there is a third shot at 4 minutes, 19 seconds, the cow continues to move, and a final fourth shot is made at 9 minutes and 55 seconds. She still moves well after the 10-minute mark.²⁵⁸

Multiple shots to the head, ineffective stunning/killing with a captive bolt pistol, extended time between shots, and dragging animals are all clear violations of the Humane Methods of Slaughter Act (HMSA) and its regulations.²⁵⁹ New Jersey law also applies here, under its criminal animal cruelty law and its agriculture code.²⁶⁰

Shortly before this investigation, in 2021, Animal Outlook's testing and complaint on Bravo's dog food led to the FDA issuing a recall because

²⁵⁴ Report from Liam Hughes, *supra* note 242.

²⁵⁵ *Bravo Packing Investigation*, ANIMAL OUTLOOK, <https://animaloutlook.org/investigations/bp/> [<https://perma.cc/PAB8-MQLV>] (last visited Sept. 15, 2022).

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ *Id.*

²⁵⁹ PHV Intern, *Humane Handling of Livestock and Good Commercial Practices of Poultry*, FSIS 14 (Aug. 8, 2018), https://www.fsis.usda.gov/sites/default/files/media_file/2020-08/PHVt-Humane_Handling.pdf.

²⁶⁰ N.J. ADMIN. CODE § 2:8-2.6 (2022).

of salmonella and listeria contamination.²⁶¹ However, all attempts Animal Outlook has made to get enforcement at the state and federal level of the humane slaughter laws have failed. Animal Outlook argues that both federal and state humane slaughter laws apply to Bravo, despite the fact that it does not slaughter for human consumption. However, the way FSIS interprets rules on inspection of slaughterhouses that are not producing human-grade products complicates this case. FSIS does not inspect this kind of slaughter even though the statute arguably gives it jurisdiction.²⁶² New Jersey did investigate based on the footage but ultimately declined to prosecute because their expert did not agree that the animal was showing sensibility, and because the worker made attempts to stun the cow and did not intentionally allow her to remain un-stunned.²⁶³ Their reasoning ultimately went further, appearing to use a mens rea standard much higher than what is in the law. The police investigation used the words “merciless” and “heartless” twice each in explaining its reasoning for not enforcing the law, and the phrases, “there did not appear to be a merciless intent to allow the cow to suffer” and that the employee was not “so careless or heartless in their work.”²⁶⁴ This is a particularly extreme example of a trend we see in these cases for the enforcement entities to impute a level of intent that is much higher than what is written in the statute,²⁶⁵ and in this case, by using

²⁶¹ Letter from Will Lowrey, Couns. for Animal Outlook to Jessica Weber, Compliance Officer at FDA and Loel Muetter, Program Manager at the New Jersey Department of Health (July 21, 2021), <https://animaloutlook.org/wp-content/uploads/2021/07/BP-FDA-NJDH-Complaint-Redacted-.pdf> [<https://perma.cc/L4T9-LHYG>]; Tim Wall, *Bravo Packing Expands Recall to All Pet Foods and Bones*, PET FOOD INDUS. (Mar. 17, 2021), <https://www.petfoodindustry.com/articles/10104-bravopacking-expands-recall-to-all-pet-foods-and-bones?v=preview> [<https://perma.cc/Y3LK-PP22>].

²⁶² Letter from Will Lowrey, *supra* note 261.

²⁶³ Carney’s Point Police Department Investigation Report (Dec. 30, 2021) (on file with author).

²⁶⁴ *Id.*

²⁶⁵ For example, Animal Outlook investigated a Case Farms broiler hatchery in 2021, which revealed chicks caught in and mangled on machinery, rough handling, thrown, having plastic trays dragged over them and crushing their throats. *Case Farms Hatchery*, ANIMAL OUTLOOK (2021) <https://animaloutlook.org/investigations/case-farms-hatchery/> [<https://perma.cc/M9TM-CTDU>]. Other “cull” animals were left to languish for hours and chicks were gassed and/or macerated to death. *Id.* Animal Outlook sought prosecution in the case, but the DA declined to prosecute, citing three reasons. Letter from Scott Reilly, Burke County District Attorney to Will Lowrey, Couns. for Animal Outlook (Mar. 14, 2022) (on file with author). First, they disagreed with Animal Outlook’s legal analysis of the term “intentionally.” *Id.* The DA argued that the example Animal Outlook gave was for kicking, stomping, and bashing heads in, which the DA saw as the definition of intentional, as opposed to birds in this case “who are unfortunately injured or killed by machine or equipment accident.” *Id.* Second, the DA made the assumption that the activity on the video fit into the standard practice exemption in North Carolina. *Id.* Third, the DA argued that the N.C. Dept. of Agric. should have been the agency handling this, not the DA. *Id.* Note that the N.C. Dept. of Agric. does not appear to have any jurisdiction over

adjectives that have no legal meaning. This undermines the ability for evidence like Animal Outlook's investigation to be evaluated in any fair way, and there are limited avenues to addressing this erroneous legal reasoning. However, there is a workaround in New Jersey. The investigation material was used to file a citizen's complaint and ultimately resulted in the owner and president of the slaughterhouse pleading guilty to a criminal charge in December 2022 and ordered to pay the maximum fine for the violation.

In the case of Bravo, the food safety approach turned out to potentially have the biggest impact. In March of 2022, the Department of Justice filed a complaint on behalf of the FDA for unsanitary conditions at Bravo, with FDA having done a more extensive food safety inspection following Animal Outlook's previous food safety complaint.²⁶⁶ A week later, they entered into a consent decree with Bravo.²⁶⁷ It remains to be seen whether Bravo will be able to comply with the consent decree, which it must do as a condition of being allowed to continue to operate. Despite the difficulty with addressing the direct animal handling issues in this case—compounded by the relative no-man's land of pet food slaughter regulation and enforcement—the food safety avenue may prove to achieve a positive outcome for the animals.

IV. ADDITIONAL TAKEAWAYS

In addition to the specific takeaways the above cases present, there are some general principles these cases offer us in the aggregate. It seems clear that the strength of the evidence is not what determines whether an animal cruelty case will be prosecuted. There seems to be many more cases with evidence of cruelty and neglect that is unequivocally clear than there are cases that yield enforcement, and fewer still that yield enforcement for systemic cruelty or against high-level actors or corporations.

There are certain areas of the animal agriculture industry that seem to lend themselves to regular cruelty, some of which is artificially seen as bad-

animal cruelty issues, and the other two rationales assume a much stricter standard for what counts as intent and cruelty than what is reflected in the law.

²⁶⁶ Jim Walsh, *FDA Seeks Injunction Against South Jersey Firm that Makes Tiger Food*, COURIER-POST (Mar. 22, 2022, 5:00 PM),

<https://www.courierpostonline.com/story/news/2022/03/21/fda-bravo-packing-rawanimal-food-salmonella-nj-news/7083396001/> [<https://perma.cc/C9SG-LK7A>].

²⁶⁷ *Bravo Packing: The Dirty Business of Pet Food Slaughterhouses*, ANIMAL OUTLOOK (Mar. 29, 2022), <https://animaloutlook.org/bravopacking-the-dirty-business-of-pet-food-slaughterhouses/> [<https://perma.cc/63BG-6W2U>].

actor sadism or “egregious” cruelty, but that is in fact predictably and integrally part of the industry. Two major categories under this heading are the treatment of cull animals (sick, small, deformed, or injured and therefore unprofitable) and the process of moving animals.

Counterintuitively, it also seems clear that the more widespread the cruelty is, the less likely prosecution is. This seems to be doubly true for neglect, which may be less likely to be prosecuted because it cannot be framed in a scapegoat-friendly way as an aberrant act of a low-level worker or workers and because it is often widespread across a given facility.

It is also worth looking at the issue of institutionalized cruelty to farmed animals through the lens of intersectionality and how to best prevent ancillary harm. The narrative of individual low-level workers (often racial or ethnic minorities, immigrants, and/or poor people) being punished through incarceration is harmful in two ways—first, because of the truth in it. There is a lot of pressure to scapegoat downward, as discussed in the cases in this Article, and unfortunately that can mean that people with the least power, status, and money are left carrying a disproportionate amount of blame. Notably, however, it is vanishingly rare for workers deemed responsible to spend time in prison as a result of a prosecution from an NGO investigation. Second, it is a problem to accept that narrative at face value and use it as reason to walk away from efforts to enforce animal protective laws. As attorneys and as advocates, animal lawyers have a responsibility to understand the whole story and the challenges and opportunities it presents. As illustrated by the cases above, the public relations efforts of the industry have been effective in disclaiming accountability for large, resourced corporations. They often successfully redirect public scrutiny away from themselves and downward towards workers. This, added to the tendency for law enforcement and prosecutors to defer to the industry and to avoid applying legal analysis in a fair way, allows the industry to dictate a process whereby it gets exactly what it wants: avoidance of any accountability at the corporate level and the theater of justice presented to the public, which gets its “bad guy.”²⁶⁸ There are also structural issues such as the concentration of power in the hands of a few individual prosecutors and law enforcement entities, added to the pattern of extreme deference to the industry we see in these cases. These dynamics are valuable to understand, and it is our responsibility to find a strategy to effectively use the law to address institutional animal cruelty. Our legal system needs a better solution tailored to address the animal cruelty inherent in animal

²⁶⁸ See generally Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 HARV. L. REV. F. 250 (2021) (discussing trends in the law that make it falsely appear as though animal cruelty is being addressed).

agriculture and to communicate to the courts and the public the systemic nature of the animals' plight, and the unjust power structures this system relies upon to exist. Creating better enforcement mechanisms and more tailored remedies to address the animal agriculture cruelty issue would go a long way. The building blocks are available, and notable advancements have come from NGO efforts, but in a fundamental sense, the legal system has not been working to prevent animal cruelty.

V. LESSONS FOR FUTURE STRATEGY AND REFORM

In order to address the systemic large-scale industrialized cruelty that is an inherent and defining characteristic of the animal agriculture industry, animal advocates should look at opportunities the existing legal structure presents and find ways to overcome barriers we have faced heretofore. Strategies here are likely to need a multi-step and multi-tactical approach. One such approach is the intersection of criminal law and litigation strategy. There have been notable successes in litigation that is designed to address animal cruelty through civil—often facially neutral—causes of action. It is worth further analysis to identify the most successful and promising routes there and continue forward in that vein.

Alongside this, it is worth maximizing the use of and building additional routes for alternative (partial) routes to prosecution. Many of these have their own inherent limitations, and not all of these procedures have even been tested in the farmed animal law context, but it is worth continuing down that path, identifying the best structures to apply to institutionalized animal cruelty, moving forward with test cases, and crafting model legislation through amalgamation of existing frameworks and new ideas, and pushing for those reforms.²⁶⁹ These private or pseudo-private prosecution structures also contain pitfalls to avoid. For example, private prosecution is a concept that is very narrow or eliminated in many jurisdictions. An ideal solution here would have to be something meaningfully different. There is a legislative trend for “committees” or other bodies to define welfare standards and be a gatekeeper for legislation and its enforcement. This has amounted to deference to the industry which blocks the enforcement and enactment of any new laws. This is something animal advocates must avoid. Similarly, as discussed *supra*, the issue of

²⁶⁹ See ME. REV. STAT. tit. 17, § 1031 (West 2019); CONN. GEN. STAT. § 54-86n (2016); N.C. GEN. STAT. § 19A-45 (1979); see MINN. STAT. ANN. § 343.22 (West 2022); MD. CODE ANN., CRIM. LAW § 10-609 (LexisNexis 2022); see Second Order as to Disposition and Appointing Guardian/Special Master, United States v. Approximately 53 Pit Bull Dogs, Civil Action, No. 3:07 CV397, 2007 U.S. Dist. LEXIS 119100, at *2 (E.D. Va. 2007); see N.J. STAT. ANN. § 4:22-14.2 (West 2022); see 3 PA. STAT. AND CONS. STAT. ANN. § 459-102 (West 2022).

deference and delegation to private industry standards or experts is a major impediment. The industry has become savvier in its use of these private third-party standards as a shield against any kind of scrutiny. Meanwhile, the standards themselves create a race to the bottom and are rarely enforced even when violated. This trend must be reversed. It has taken over the basic process and function of criminal law by focusing on vague, unenforceable future action rather than on whether a crime has been committed. It also allows the industry to operate outside the scope of the law by writing its own rules and oversight process. This also provides a safe harbor for certain cruel but standard practices. We must avoid enforcement routes that allow or exacerbate this problem, ensuring they do not codify deference to the industry, even ambiguously (such as in Maine's Animal Welfare Program).

There are also likely worthwhile routes to pursue vis-à-vis prosecutors. Educating prosecutors on the law and facts of these cases may be valuable, so they have some confidence and expertise when this kind of case is brought to them, but the pressure from their local, often rural communities and the major corporations at issue may well override the impact of this. Specialty prosecutors like the director of the Animal Law Unit in Virginia appear to yield extremely successful results, and this kind of setup may be worth expanding. Going further, deputizing private attorneys and/or nonprofit organizations to enforce and/or prosecute animal cruelty laws may have an even bigger impact.

Finally, a high priority goal is to build on the existing foundation and advance the prosecution of institutionalized cruelty so that corporations are charged. Ultimately, if corporations were prosecuted for cruel yet widely prevalent cruelty and neglect—under whatever criminal or civil scheme one could use or design—this could have the strongest deterrent effect and constitute our best chance at addressing major animal cruelty and neglect. Of all the potential defendants, corporations are best positioned to change their practices—or divest into non-animal agriculture related business if they consider animal agriculture to be too much of an inherent legal risk. This is the appropriate placement of burdens and internalization of harms. While this would be the biggest departure from what has been achieved in this space so far, it seems to be the most important goal to pursue.

VI. CONCLUSION

Human-inflicted animal cruelty and neglect is a massive problem, and nearly all of it is taking place in institutional settings in animal agriculture. Both our substantive laws and our societal values recognize animals' interests in not being mistreated, yet the legal processes and enforcement mechanisms in place to address this widespread cruelty and neglect have

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largely failed to touch this. We can draw lessons and strategies for enforcement and reform from the facts revealed and successes and barriers encountered during NGO investigations. Ultimately, animal protective laws present a uniquely valuable opportunity to realize their purpose, so long as we can employ strategies and legal reforms to bring true accountability for the abuse to the corporate actors who rely on it to exist.