

BEYOND THE LAW? INTERROGATING THE SCOPE OF COMMON FARMING EXEMPTIONS

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Most Americans believe that the animals we use for food should be treated well, and every state has a law prohibiting animal cruelty. Yet ninety-nine percent of the nearly ten billion warm-blooded animals we kill for food annually in the United States spend their short lives on factory farms where they are intensively confined without access to the outdoors or space to move around and subjected to painful mutilations without anesthesia. The almost universally accepted explanation for the vast divide between, on the one hand, what Americans deem acceptable treatment of animals and what the law appears to require and, on the other, the lived experience of these billions of animals, is that exemptions for common farming practices put farmed animals beyond the law. This Article challenges that account. It demonstrates that exemptions do not, in fact, put farmed animals beyond the law and then argues that the reason the inhumane conditions endured by billions of farmed animals go unaddressed is much more fundamental: It is our reliance on criminal laws as the primary legal mechanism governing animal welfare on factory farms.

INTRODUCTION

Every year in the United States, we raise and kill nearly ten billion warm-blooded animals for food.¹ These animals are so populous that they far outnumber all other categories of animals under human control combined: companion animals, animals used for experiments, animals in zoos, and so on.² Animals raised for food also comprise the majority of mammalian and avian biomass; that is, they outweigh all their wild counterparts combined.³

¹ ECON. RSCH. SERV., U.S. DEP'T OF AGRIC., LIVESTOCK AND MEAT DOMESTIC DATA, MEAT STATISTICS TABLES, RECENT (last updated Jan. 27, 2026), <https://www.ers.usda.gov/data-products/livestock-and-meat-domestic-data>. Because they are often excluded from cruelty laws, cold-blooded animals raised for food (most commonly aquatic animals and, increasingly, insects), though certainly worthy of attention, are beyond this Article's scope. See, e.g., ARIZ. REV. STAT. § 13-2910(I)(1) ("Animal" means a mammal, bird, reptile or amphibian.); DEL. CODE ANN. tit. 11, § 1325 ("Animal" shall not include fish, crustacea or mollusca.).

² 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, 206 (Cass R. Sunstein & Martha C. Nussbaum, eds. 2004) ("[F]armed animals represent 98% of all animals (even including companion animals and animals in zoos and circuses) with whom humans interact.").

³ Lior Greenspoon et al., *The Global Biomass of Mammals Since 1850*, 16 NATURE COMM'NS 8338 (2023); Yinon M. Bar-On, Rob Phillips, & Ron Milo, *The Biomass Distribution on Earth*, 115 PROC. OF THE NAT'L ACAD. OF SCI. 6506, 6508 (2018) ("the biomass of domesticated poultry (. . . dominated by chickens) is about threefold higher than that of wild birds").

Ninety-nine percent of animals kept for consumption in the United States are raised intensively in industrial facilities often referred to as concentrated animal feeding operations (CAFOs) or factory farms.⁴ Their short lives are spent in intensive confinement, often lacking enough space to even turn around or spread their limbs,⁵ and they are subjected to painful yet routine mutilations to reduce the injuries caused by the aggression that inevitably follows when animals are crammed together so tightly.⁶ Tails, teeth, testicles, toes, and other body parts are cut off without anesthesia as a matter of course.⁷

These conditions starkly contrast with what Americans consider acceptable and what our laws appear to mandate. As a society, we purport to care about animals. Polling consistently shows that Americans believe that animals, including those we raise for food, should be treated humanely.⁸

⁴ JACY REESE ANTHIS, SENTIENCE INST., US FACTORY FARMING ESTIMATES (Nov. 2, 2024), <https://www.sentienceinstitute.org/us-factory-farming-estimates>.

⁵ Matthew N. Hayek, *The Infectious Disease Trap of Animal Agriculture*, Sci. Advances (Nov. 2, 2022) (“[T]he intensification of animal agricultural production, in its most common forms, entails the concentration and confinement of animal bodies”); (“Intensive methods of monogastric animal production entail more marked confinement, including hen laying and pig gestation systems wherein animals are confined without enough space to spread their wings or turn around.”).

⁶ See *supra* note 7.[7]

⁷ See, e.g., AM. VET. MED. ASS’N, LITERATURE REVIEW OF THE WELFARE IMPLICATIONS OF CASTRATION IN CATTLE 1 (July 15, 2014) (“Castration of male cattle is common practice”); *id.* at “[A]ll methods of castration induce pain and physiologic stress in animals of all ages [R]esearch results suggest that application of local anesthesia and the administration of analgesics have the potential to minimize or eliminate pain and stress associated with castration.”); D. TEMPLE, E. MAINAU, & X. MANTECA, ANIMAL WELFARE EDUC. CTR., EFFECT OF CASTRATION ON PIG WELFARE (Mar. 2013) (“[C]astration in pigs . . . is generally a routine practice that is performed surgically without anaesthesia Surgical castration without anaesthesia or analgesia is considered to be a painful and stressful procedure, as evidenced by a series of physiological and behavioural changes that are clearly indicative of pain and stress. The procedure causes immediate pain which then becomes chronic, lasting for up to 5 days.”); TINA WIDOWSKI & STEPHANIE TORREY, FACTSHEET, PORK INFORMATION GATEWAY, NEONATAL MANAGEMENT PRACTICES 1 (May 6, 2003) (“Neonatal piglets are routinely processed during their first week of life. Processing may include teeth clipping, ear notching, tail docking Many routine procedures conducted on the baby piglet are coming under scrutiny from scientists and consumers on animal welfare grounds because they cause pain or distress and they are usually performed without the use of anesthesia or analgesia.”); JACQUE JACOB, POULTRY EXTENSION, TOE TRIMMING OF TURKEYS, <https://poultry.extension.org/articles/poultry-behavior/toe-trimming-of-turkeys/> (last visited Feb. 2, 2026) (“Toe trimming, also called toe clipping, is the amputation of the ends of a bird’s toes to eliminate the toenails. Turkey producers in the United States routinely practice toe trimming to reduce carcass scratching. Some egg producers also have used toe trimming [T]oe trimming causes pain”).

⁸ See, e.g., AMERICAN HUMANE, AMERICAN HUMANE FARM SURVEY 2024, at 4 (Nov. 19, 2024) (“Consumers’ concern about the welfare of animals on farms (72%) is nearly as high as their concern for the impact of food on their personal health (76%). This suggests that

Congress has enacted numerous federal laws to protect them.⁹ Every state has a law prohibiting cruelty to them.¹⁰ How, then, is it that these cruel conditions, which most Americans deem unacceptable,¹¹ are standard? How is it that millions of animals are subjected to these conditions every day—and billions every year—without legal repercussion? Why is such conduct allowed day in and day out on an unfathomably massive scale?

The widely accepted explanation is that exemptions in state cruelty laws have put farmed animals “beyond the law” by “endow[ing] agribusiness with complete authority to decide what is, and is not, cruelty to animals under their care,”¹² resulting in a total lack of “legal protection from institutionalized cruelty” on farms.¹³ This story has been told repeatedly by legal scholars, by animal advocates, in the popular media, and beyond. But is it accurate? Tellingly, these cruel practices are no less prevalent in the numerous jurisdictions that do *not* exempt common farming practices from their cruelty codes. Moreover, prosecutions have succeeded in jurisdictions that *do* have such exemptions.¹⁴

This Article demonstrates that, contrary to the prevailing narrative, exemptions do not put farmed animals beyond the law. It then argues that the persistence of routine cruelty to farmed animals is rooted in a more fundamental structural flaw—our reliance on broad, antiquated, criminal laws to oversee animal welfare on factory farms. Unlike virtually every other industry—including those that use animals, such as the biomedical industry and pet trade—no regulatory regime governs the treatment of animals in

consumers place significant value on both animal welfare and their own health when considering food choices.”); ASPCA, 2023 INDUSTRIAL ANIMAL AGRICULTURE OPINION SURVEY 1 (2024) (“79% of respondents are somewhat or very concerned about the negative impacts of industrial animal agriculture on animal welfare, second only to their concern about its impact on public and community health.”); DATA FOR PROGRESS, VOTERS DEMAND FARM ANIMAL PROTECTIONS FROM BOTH POLITICIANS AND COMPANIES (Aug. 3, 2022) (Eighty percent of respondents said that “preventing cruelty to farm animals” was a matter of personal concern to them.); NAT’L CHICKEN COUNCIL, US CHICKEN CONSUMPTION REPORT (July 2018) (Seventy-nine percent of respondents expressed concern about how chickens are raised and seventy-seven percent expressed concern about how chickens are housed.).

⁹ See, e.g., Twenty-eight Hour Law, 49 U.S.C. § 80502; Animal Welfare Act, 7 U.S.C. §§ 2131-2160; Humane Methods of Slaughter Act, 7 U.S.C. §§ 1901-1907; Horse Protection Act, 15 U.S.C. §§ 1821-1831.

¹⁰ Pamela D. Frasch et al., *State Animal Anti-Cruelty Statutes: An Overview*, 5 ANIMAL L. 69, 69 (1999) (citations omitted).

¹¹ ANDREA POLANCO & ALLISON TROY, FAUNALYTICS, PUBLIC ACCEPTABILITY OF STANDARD U.S. ANIMAL AGRICULTURE PRACTICES 3-4 (Nov. 2025), <https://faunalytics.org/public-acceptability-of-standard-u-s-animal-agriculture-practices/>.

¹² David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 123 (1996).

¹³ *Id.* at 124. [72]

¹⁴ See *infra* notes 101-110, 140-44, 218-23, 225-238, and accompanying text.

CAFOs.¹⁵ And unlike animal dealers, pet stores, research facilities, zoos, and myriad other animal-using enterprises, with rare exception,¹⁶ factory farms need not be licensed, and no government entity inspects them. That is, in a society that consistently professes concern for animals—a society that has prohibited cruelty to animals for over 150 years—we do not exercise legal oversight of the living conditions of most animals in our care. This is an omission of massive proportions—but it does not mean that farmed animal welfare is entirely beyond the law’s reach.

While cruelty laws do apply to farmed animals notwithstanding exemptions, these criminal laws are structurally incapable of providing meaningful oversight on factory farms. The near-total absence of civil laws pertaining to on-farm welfare means that there is virtually no monitoring of conditions at these facilities. Industrial animal agriculture is, effectively, a black box. And, as is generally the case with black boxes, gaining access to farms requires a warrant, which in turn requires demonstrating probable cause that a crime has been committed—a challenging thing to demonstrate without oversight in the first instance. It’s a Catch-22: Access to a farm to assess whether animals are being mistreated is conditioned on evidence of mistreatment.

This structural flaw is compounded by other aspects of criminal law. Successful criminal enforcement requires proof beyond a reasonable doubt—the highest possible evidentiary burden—not only of the cruelty, but also of the requisite mental state. The constitutional mandate that criminal laws be clear and unambiguous poses additional hurdles, given the breadth of cruelty laws. Add to this the sanctity of prosecutorial discretion and the strength of the agricultural lobby,¹⁷ and it becomes clear why criminal cruelty laws fail

¹⁵ Even the handful of states that have in recent years enacted laws targeting specific on-farm practices, typically do not inspect for compliance with those laws. *See infra* note 294.

¹⁶ *See infra* note 294.

¹⁷ As a leading environmental law scholar notes, “American farms comprise one of the most massive, self-interested, economically anti-competitive, and politically powerful industries in our nation’s history.” J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 *Ecology L. Q.* 263, 269 n.9 (2000) (citing Jim Chen, *The American Ideology*, 48 *VAN. L. REV.* 809, 810-31 (1995)). According to a report by the Union of Concerned Scientists, “Between 2019 and 2023, giant agribusinesses, food and agriculture industry associations, and other interest groups reported more than \$523 million in federal lobby expenditures on disclosure reports that listed ‘farm bill’ among the specific lobbying issues. . . . Agribusiness-linked political donors also” made “an additional \$3.4 million in campaign contributions during the same five-year period.” OMANJANA GOSWAMI & KAREN PERRY STILLERMAN, *UNION OF CONCERNED SCIENTISTS, CULTIVATING CONTROL: CORPORATE LOBBYING ON THE FOOD AND FARM BILL* 5 (May 2024), https://www.ucs.org/sites/default/files/2024-05/Cultivating%20Control_white%20paper%20final_May%2010_OG_PDF.pdf. Agribusiness spends more on “lobbying than the oil and gas industry and the defense sector,”

to address on-farm cruelty except in the rarest and most egregious of instances.

Part I.A of this Article provides an overview of common, routine practices on today's factory farms, such as overcrowding and mutilation without pain relief, to make plain the extent of suffering they cause animals. Though routine, these practices are deliberately kept out of the public eye, and it is important to have a grounding in the lived reality of most of the warm-blooded animals under human control in the United States before we can meaningfully assess the laws governing—or failing to govern—that reality.

Part I.B recounts the virtually universal—but misleading—narrative about why these conditions and practices are so ubiquitous despite widespread disapproval of them and laws in every state purporting to prohibit cruelty to animals: that common farming exemptions put farmed animals beyond the law. This Part demonstrates that over the last thirty years, scholars in dozens of law review articles as well as books have asserted this explanation, and the media and animal advocates have amplified it.

Part II challenges the notion that common farming exemptions put farmed animals beyond the law's reach. It taxonomizes and scrutinizes the

id. at 2, “and the growth of agribusiness lobbying in recent years has outpaced that of those other industries,” *id.* at 3. Though “a yawning disclosure black hole exists about state-level corporate lobbying,” ROBIN YOUNG & HEIDI WELSH, SUSTAINABLE INVESTMENTS INSTITUTE, THE CORPORATE STATE LOBBYING BLACK HOLE 6 (Dec. 2023), https://www.citizen.org/wp-content/uploads/Corporate_State_Lobbying_Black_Hole_Report_2023.pdf, as Ruhl explains, “The same political forces that operate on the federal level to impede regulation of farms no doubt operate with equal or greater force at the state and local level.” Ruhl, *supra*, 27 Ecology L. Q. at 293 n.177. Consider the example of opposition to state-level legislative farmed animal protection efforts: The egg industry “spent nearly \$10 million to oppose” a ballot initiative in California seeking to afford farmed animals enough room “to turn around freely, lie down, stand up, and fully extend their limbs.” Patrick McGreevy, *Live in California and Buy Eggs? If Voters Approve This in 2018, They’ll Need to be from Cage-free Hens*, L.A. TIMES (Aug. 29, 2017), <https://www.latimes.com/politics/la-pol-ca-cage-free-eggs-ballot-initiative-20170829-story.html>; CALIFORNIA VOTER INFORMATION GUIDE FOR 2008, General Election 82 (2008). The National Pork Producers Council also opposed the effort—and successfully killed a prior legislative effort in committee. McGreevy, *supra*. And in a “pushback led by the meat and poultry industries” in response to damning undercover investigative footage taken on factory farms, “state legislators across the country” have introduced—and sometimes passed—“laws making it harder for animal welfare advocates to investigate cruelty and food safety cases.” Associated Press, *State Bills Seek End to Farm Animal Abuse Videos*, FOX NEWS (Mar. 17, 2013). In one particularly stark demonstration of “the steamroller power of agricultural lobbying efforts” a state bill drafted by the Idaho Dairywomen’s Association was “introduced on a Monday, approved by the Senate Agricultural Affairs Committee on Tuesday, and passed the full Senate on Friday of the same week.” Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1337 (2015).

remarkably varied cruelty exemptions pertaining to on-farm conduct and then demonstrates that they do not in fact put farmed animals beyond the law.

Part III then takes a fresh look at the problem and demonstrates that its roots are much more fundamental than the common farming exemptions. Instead, the problem is structural and inherent in our reliance on criminal law as the primary—and usually sole—mechanism overseeing farmed animal welfare.

I. THE LANDSCAPE: COMMON (FACTORY) FARMING PRACTICES AND THE DOMINANT NARRATIVE AROUND THEM

This Part sets the stage for interrogating the scope of common farming exemptions factually and rhetorically. First, it summarizes the conditions of intensive confinement and routine mutilation in which most warm-blooded animals used for food in the United States spend their short lives. It then recounts the virtually universal narrative about how it is that these conditions and practices are so ubiquitous despite laws in every state prohibiting animal cruelty.

A. *Common (Factory) Farming Practices*

The vast majority of animals with whom Americans interact are farmed animals—those we raise for food.¹⁸ Meat sales in 2026 were “record-smashing”¹⁹ and are projected to climb.²⁰ More cattle and chickens are raised in the United States than in any other country, and more pigs are raised than in any country except China.²¹ Together, these three species comprise “nearly 90 percent” of global meat production.²² The United States is also the second

¹⁸ 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, 206 (Cass R. Sunstein & Martha C. Nussbaum, eds. 2004) (“[F]armed animals represent 98% of all animals (even including companion animals and animals in zoos and circuses) with whom humans interact.”).

¹⁹ Annual Meat Conference, Power of Meat, Record-Breaking Performance, <https://www.meatconference.com/power-of-meat/> (last visited July 23, 2026).

²⁰ GRACE GROSSEN, U.S. DEP’T OF AGRIC., ECONOMIC RESEARCH SERV., CHARTS OF NOTE, PER CAPITA AVAILABILITY OF RED MEAT AND POULTRY PROJECTED HIGHER IN 2025 AND 2026 (Aug. 21, 2025), <https://www.ers.usda.gov/data-products/charts-of-note/chart-detail?chartId=113119>; imarc, United States Meat Market Size, Share, Trends and Forecast by Type, Product, Distribution Channel, and Region, 2026-2034, <https://www.imarcgroup.com/united-states-meat-market> (last visited July 23, 2026).

²¹ FOOD AND AGRICULTURE ORGANIZATION OF THE UNITED NATIONS, STATISTICAL YEARBOOK: WORLD FOOD AND AGRICULTURE 16 (2025).

²² *Id.* [21]

largest milk producer²³ and third largest egg producer in the world.²⁴ All told, the United States raises and slaughters just under ten billion warm-blooded animals a year, more than 96 percent of them chickens.²⁵

Raising this unprecedentedly large number of animals is only possible because of industrial farming practices.²⁶ If we raised animals outdoors, with space to roam, in the conditions the storybooks we read our children depict, it would be impossible to approach anywhere near this volume. For that reason, roughly 99 percent of animals raised for dairy, eggs, and meat in the United States spend their lives in factory farms.²⁷

These facilities use carefully honed, highly efficient, and cost-effective systems that allow raising as many animals as quickly as possible.²⁸ Their scale is hard to fathom and comes with significant consequences for the wellbeing of these animals: Thousands, tens of thousands, or even hundreds of thousands of animals²⁹ are tightly confined at a single facility without access to the outdoors or enrichment, resulting in physical and psychological suffering.³⁰ To reduce injuries, these animals are subjected to a slew of painful mutilations.³¹ They are bred for maximum production, which causes harmful

²³ *Id.* at 17.[21]

²⁴ *Id.* at 18. [21]

²⁵ U.S. DEP'T OF AGRIC., LIVESTOCK SLAUGHTER 2024 ANNUAL SUMMARY 8 (Apr. 2025); U.S. DEP'T OF AGRIC., POULTRY SLAUGHTER 2024 ANNUAL SUMMARY 5 (Feb. 2025).

²⁶ *See* FOOD & AGRIC. ORG. OF THE UNITED NATIONS, GLOBAL LIVESTOCK PRODUCTION SYSTEMS 44 (2011) (“Intensification and, in particular, industrialization, result in an increase in the overall level of production”); PEW COMM’N ON INDUSTRIAL FARM ANIMAL PRODUCTION, PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 7 (2008) (“Animal agriculture has experienced ‘warp speed’ growth over the last 50 years, with intensification resulting in an almost logarithmic increase in numbers.”).

²⁷ JACY REESE ANTHIS, SENTIENCE INST., US FACTORY FARMING ESTIMATES (Nov. 2, 2024), <https://www.sentienceinstitute.org/us-factory-farming-estimates>.

²⁸ PEW COMM’N ON INDUSTRIAL FARM ANIMAL PRODUCTION, *supra* note 26, at 29 (“The number of farms that raise livestock has fallen dramatically while the total number of farm animals raised in the US each year has remained relatively constant. IFAP [Industrial Farm Animal Production] has made this possible with significant gains in production efficiency by most measures: on a per animal basis, today’s farm animal . . . and reaches market weight much faster than farm animals produced on the small family farm of 50 years ago.”).

²⁹ For example, to qualify as a large CAFO under the Environmental Protection Agency’s Clean Water Act regulations, a poultry producing facility that does not use a liquid manure handling system must have at least 125,000 birds. 40 C.F.R. § 122.23(a)(4)(x). USDA tracking of bird flu documents that on a single day in April 2026, more than 1.6 million birds at a single egg-laying facility by the virus as were nearly 1.5 million birds at a second facility. U.S. DEP’T OF AGRIC., ANIMAL & PLANT HEALTH INSPECTION SERV., CONFIRMATIONS OF HIGHLY PATHOGENIC AVIAN INFLUENZA IN COMMERCIAL AND BACKYARD FLOCKS, <https://www.aphis.usda.gov/livestock-poultry-disease/avian/avian-influenza/hpai-detections/commercial-backyard-flocks> (last visited July 6, 2026).

³⁰ PEW COMM’N ON INDUSTRIAL FARM ANIMAL PRODUCTION, *supra* note 26, at 33-34.

³¹ *Id.*

side effects,³² and they are killed immediately when deemed unprofitable.³³

As legal scholar Doug Kysar notes, intensive confinement is “perhaps the defining characteristic of industrial animal agriculture.”³⁴ Regardless of species or specific purpose, the vast majority of animals we raise for food live out their short lives crowded in spaces so small they can often barely move. For example, most of the hundreds of millions of hens used for egg-production spend their entire lives in a space smaller than a letter-sized piece of paper, in row upon row of stacked cages, referred to as “battery cages.”³⁵ Though egg-laying hens at “cage-free” facilities, as well as chickens and turkeys raised for meat, have a bit more room, they are still typically tightly confined to warehouses without access to the outdoors.³⁶ Most of the millions of mother pigs who produce the pigs we eat spend their short lives in an endless rotation between gestation crates and farrowing crates,³⁷ both of which significantly impair their mobility.³⁸ During most of their nearly four-

³² *Id.* at 6; Ilaria Cimadori, Alice Di Concetto, & Khara Grieger, *The Protection of Selectively Bred and Gene Edited Farm Animals under EU Law*, 16 EURO. J. RISK REG. 1098, 1100-04 (2025).

³³ See e.g., Bernard E. Rollin, *Ethical Question of the Month – October 2020*, 62 CAN. VET. J. 11, 11 (Jan. 2021) (“In the egg industry, male chicks have long been an unwanted nuisance, where they were traditionally eliminated by such brutal methods as suffocation. A few years ago, it was suggested that these chicks could be eliminated by feeding them into a wood-chipper.”); Elske N de Haas, Eva Oliemans, & Maite A A M van Gerwen, *The Need for an Alternative to Culling Day-Old Male Layer Chicks: A Survey on Awareness, Alternatives, and the Willingness to Pay for Alternatives in a Selected Population of Dutch Citizens*, 8 FRONTIERS IN VET. SCI. 662197, at *1 (Male chicks in the egg industry are “immediately culled at hatch, as male layers do not lay eggs and are deemed unqualified for the production of chicken meat.” The method used for this culling in the U.S. “a is by shredding or maceration, leading to immediate death.”); Terry W. Lehenbauer & James W. Oltjen, *Dairy Cow Culling Strategies: Making Economical Culling Decisions*, 81 J. DAIRY SCI. 264, 265-66 (1998) (“The concern for profit must serve as a foundation for culling decisions. . . . The fundamental principle is to recognize that a dairy cow is a business asset that is owned and operated for profit.”).

³⁴ Douglas A. Kysar, *Farm Until It’s Gone: Industrial Animal Agriculture and the Limits of Law*, 74 DEPAUL L. REV. 249, 280 (2025).

³⁵ UNITED EGG PRODUCERS, 2025 CAGE HOUSING, UEP ANIMAL WELFARE GUIDELINES FOR U.S. EGG LAYING FLOCKS 17 (2024) (“Usable space per bird must not be less than 67 square inches for white layers or less than 76 square inches for brown layers.”).

³⁶ See, e.g., UNITED EGG PRODUCERS, 2024 CAGE-FREE HOUSING, ANIMAL WELFARE GUIDELINES FOR U.S. EGG LAYING FLOCKS 24 (2003) (“All cage-free barns must provide at least 21.6 square inches per hen of scratch area, sometimes referred to as ‘litter area.’”).

³⁷ Irina Anta, *The Supreme Court Considers Pig Suffering*, 25 TORTSOURCE 6, 6 (2023) (“Gestation and farrowing crates are widely used across the pork industry and have been a standard agricultural practice for a long time.”).

³⁸ J. J. McGlone et al., *Review: Compilation of the Scientific Literature Comparing Housing Systems for Gestating Sows and Gilts Using Measures of Physiology, Behavior, Performance, and Health*, 20 PRO. ANIMAL SCIENTIST 105, 110 (2004); Danielle Glencors et al., *Impact of Non-Confinement Accommodation on Farrowing Performance: A Systematic*

month long pregnancies, most breeding pigs are held in gestation crates—seven-foot-by-two-foot metal enclosures.³⁹ Even “beef cattle,” who “typically start out in comparatively higher welfare grazing conditions, . . . are ‘finished’ in densely stocked feedlots”⁴⁰

Such intensive confinement inflicts myriad physical and psychological harms. Sows in gestation crates, for example, suffer “injuries such as sores, ulcers, and abrasions.”⁴¹ When movement is so severely restricted, it is impossible for animals to engage in even their most basic genetically ingrained behaviors, such as foraging, dustbathing, nesting, and perching.⁴² As a result of this deprivation, they exhibit high levels of “stereotypic behaviors”—repetitive actions that are well recognized indicators of poor welfare.⁴³ For example, sows confined to gestation crates repeatedly bite, chew, lick, and rub.⁴⁴ Unable to get away from one another, overcrowded animals also injure each other.⁴⁵

In addition, factory farms routinely subject these animals to a host of painful mutilations without anesthesia. “Many of these practices and conditions . . . are intended to prevent or solve problems inherent to industrial farming, such as difficulties with handling animals”⁴⁶ For example, cattle in both the beef and dairy industries are painfully disbudded or dehorned.⁴⁷ Other standard mutilations that “were introduced to counteract problems that

Review and Meta-Analysis of Farrowing Crates Versus Pens, 11 ANIMALS (BASEL) 957, 13 (2019).

³⁹ *Id.* [37]

⁴⁰ Kysar, *supra* note 34, [34] at 282 (citing Rebecca Eissenberg, *Like Water for the West: Why Bison Could and Should Be What’s for Dinner*, 45 WASH. U. J.L. & POL’Y 221, 222-23, 232 (2014)).

⁴¹ *Id.* at 280 [40] (quoting AM. VETERINARY MED. ASS’N, LITERATURE REVIEW ON THE WELFARE IMPLICATIONS OF GESTATION SOW HOUSING (Sept. 17, 2024)).

⁴² PEW COMM’N ON INDUSTRIAL FARM ANIMAL PRODUCTION, *supra* note 26, at 33, 85; EFSA PANEL ON ANIMAL HEALTH AND ANIMAL WELFARE, SCIENTIFIC OPINION: WELFARE OF LAYING HENS ON FARM, EFSA JOURNAL 19, 25, 89, 131 (Dec. 14, 2022), <https://efsa.onlinelibrary.wiley.com/doi/epdf/10.2903/j.efsa.2023.7789>.

⁴³ EFSA PANEL ON ANIMAL HEALTH AND ANIMAL WELFARE, *supra* note 42, at 61; Chenyang Li et al., *Stereotypic Behaviors Across Species: From Neurobiological Mechanisms to Farm Animal Welfare*, 185 NEUROSCI. BIOBEHAV. REV. 106637 (Mar. 2026).

⁴⁴ Kysar, *supra* note 34, at 280 [40] (quoting AM. VETERINARY MED. ASS’N, LITERATURE REVIEW ON THE WELFARE IMPLICATIONS OF GESTATION SOW HOUSING (Sept. 17, 2024), <https://www.avma.org/sites/default/files/resources/WelfareImplicationsOfGestationSowHousing> [<https://perma.cc/S46K-SX2H>]).

⁴⁵ PEW COMM’N ON INDUSTRIAL FARM ANIMAL PRODUCTION, *supra* note 26, at 33; EFSA PANEL ON ANIMAL HEALTH AND ANIMAL WELFARE, *supra* note 42, at 60, 105-06.

⁴⁶ Rebecca E. Nordquist et al., *Mutilating Procedures, Management Practices, and Housing Conditions That May Affect the Welfare of Farm Animals: Implications for Welfare Research*, 7 ANIMALS 12, at *2 (2017).

⁴⁷ AM. VETERINARY MED. ASS’N, BOVINE DISBUDDING AND DEHORNING (last visited Feb. 2, 2026); Am. Veterinary Med. Ass’n, *supra* note 7.

emerged when livestock farming became intensified” include “tail docking in . . . pigs in response to tail biting” and “beak trimming in response to feather pecking in laying hens.”⁴⁸ “Beak trimming,” also referred to as “debeaking,” involves cutting off part of birds’ sensitive beaks, resulting in both acute and chronic pain.⁴⁹ Mutilations are also performed to meet market demands, such as “de-toe-ing” turkeys “to reduce carcass scratching,”⁵⁰ “castration of pigs to avoid boar taint,”⁵¹ and “castration of bulls raised for beef”⁵² to improve meat quality.⁵³

Genetic manipulation for maximum production is also standard and similarly results in poor welfare.⁵⁴ Animals raised for their flesh have been genetically manipulated to grow as big as possible as fast as possible.⁵⁵ And animals raised for their excretions—dairy cows and egg-laying hens—have been genetically manipulated to produce as much milk or as many eggs as quickly as possible.⁵⁶ These breeding manipulations cause a host of pathologies. For example, today’s broilers (the industry term for chickens used for meat, rather than egg, production) suffer “adverse effects like skeletal leg disorders, heart failure, footpad dermatitis, and sudden death syndrome,” while dairy cows have “increased susceptibility to mastitis and lameness.”⁵⁷

These genetic manipulations are amplified through feed manipulation and antibiotic use.⁵⁸ For example, food deprivation is used to manipulate egg

⁴⁸ Nordquist et al., *supra* note 46, at 3.

⁴⁹ AM. VETERINARY MED. ASS’N, LITERATURE REVIEW ON THE WELFARE IMPLICATIONS OF BEAK TRIMMING (Feb. 7, 2010).

⁵⁰ Jacob, *supra* note 7. [7]

⁵¹ Nordquist et al., *supra* note 46, at 3.

⁵² PEW COMM’N ON INDUSTRIAL FARM ANIMAL PRODUCTION, *supra* note 26, at 35.

⁵³ Van-Ba Hoa et al., *Half-castration Is a Newly Effective Method for Increasing Yield and Tenderness of Male Cattle Meat*, 35 ANIMAL BIOSCI. 1258, 1258 (Aug. 2022).

⁵⁴ Cimadori, Di Concetto, & Grieger, *supra* note 32, at 1100-01.

⁵⁵ For example, “[t]oday’s broiler chickens are as much as five times the size of unselected breeds, yet they require only five to seven weeks to mature to slaughter weight.” Kysar, *supra* note 10 at 282 (citing Carys E. Bennett, Richard Thomas, Mark Williams, Jan Zalasiewicz, Matt Edgeworth et al., *The Broiler Chicken as a Signal of a Human Reconfigured Biosphere*, 5 ROYAL SOC’Y 1 (2018)).

⁵⁶ “The modern dairy herd has been genetically selected to produce several times the amount of milk needed to feed a calf . . .” Kysar, *supra* note 10 at 282–83 (citing L.F. Brito, N. Bedere, F. Douhard, H.R. Oliveira, M. Arnal et al., *Review: Genetic Selection Of High-Yielding Dairy Cattle Toward Sustainable Farming Systems In A Rapidly Changing World*, 15 ANIMAL S1, at fig. 2 (Dec. 2021) and Albert De Vries, *Symposium Review: Why Revisit Dairy Cattle Productive Lifespan?*, 103 J. DAIRY SCI. 3838, 3838 (2020); A. De Vries & M.I. Marcondes, *Overview of Factors Affecting Productive Lifespan of Dairy Cows*, 14(S1) ANIMAL S155 (2020).

⁵⁷ Cimadori, Di Concetto, & Grieger, *supra* note 32, at 1099. [54]

⁵⁸ Hayek, *supra* note 5, at 2, 4. [5]

production, which begins to wane when a hen is about a year and a half old,⁵⁹ and “administration of subtherapeutic (infection-preventing) and growth-promoting antibiotics” is routine across farmed animal species.⁶⁰

Extensively manipulating farmed animals’ bodies with singular attention to high production and economies of scale renders a significant number of individual animals unprofitable. Every year, hundreds of millions of animals in the United States never reach the slaughterhouse and are instead killed on the farm. For example, roughly half of all the chicks born at hatcheries that supply birds to the egg industry—that is, the male chicks—are considered useless: As males, they will not produce eggs, and because they are bred for maximum egg production, their flesh is not desirable.⁶¹ Standard industry practice is to kill these unprofitable animals en masse.⁶² They are sorted by sex upon hatching, females destined for egg production and males killed, typically by maceration—feeding them alive “into a wood-chipper”—“or suffocating them in a plastic bag.”⁶³ Female egg-laying hens are also discarded, but only after their level of egg production wanes.⁶⁴

Genetic manipulation to produce larger litter sizes also results in on-farm killing. For example, pigs have been bred to birth about twelve piglets but are able to wean only about ten of them.⁶⁵ That leaves two piglets per litter—or about twenty million piglets a year in the United States.⁶⁶ These animals are generally killed on-farm using a method the industry terms “thumping”: slamming them against wall or into a concrete floor.⁶⁷

Though far from comprehensive, this overview of common factory farming practices provides a sense of some of the most prevalent practices in our food system. These practices—intensive confinement, mutilations

⁵⁹ KAREN DAVIS, PRISONED CHICKENS POISONED EGGS: AN INSIDE LOOK AT THE MODERN POULTRY INDUSTRY 75 (2009).

⁶⁰ Hayek, *supra* note 5, at 2. [5]

⁶¹ Bernard E. Rollin, *Veterinary Medical Ethics*, 62 CAN VET J. 1, 11–12 (Jan. 2021).

⁶² *Id.* [61]

⁶³ *Id.*

⁶⁴ Deepak Kumar et al., *Production of Functional Spent Hen Protein Hydrolysate Powder and Its Fortification in Food Supplements: A Waste to Health Strategy*, 50 FOOD BIOSCIENCE 102193 (Dec. 2022).

⁶⁵ U.S. DEP’T OF AGRIC., NATIONAL ANIMAL HEALTH MONITORING SYSTEM (2008).

⁶⁶ Alonso-Spilsbury et al., *Piglet Survival in Early Lactation: A Review*, 6 J. ANIM. VET. ADVAN. 76 (2007).

⁶⁷ PORK INFORMATION GATEWAY, ALTERNATIVE EUTHANASIA METHODS TO MANUALLY APPLIED BLUNT FORCE TRAUMA FOR PIGLETS WEIGHING UP TO 12 POUNDS (Nov. 14, 2014); Nat’l Farm Animal Care Council, Code of Practice for the Care and Handling of Pigs 61 (2014), https://www.nfacc.ca/resources/codes-of-practice/pig/appendix_n.pdf. (Thumping—or “blunt trauma”—is permissible for pigs up to 19.8 pounds and “can be administered by grasping the hind legs of the piglet and striking the top of the cranium firmly and deliberately against a flat, hard surface. Alternatively, a sharp, firm blow with a heavy blunt instrument to the top of the head over the brain can be used.”).

without anesthesia, genetic and feed manipulation, and on-farm killing—are all considered standard within the industry. They are among a host of other practices that are problematic for animal welfare, such as invasive artificial insemination,⁶⁸ premature maternal separation,⁶⁹ and more.

These conditions and practices, which unequivocally result in poor welfare, are common even though every state has a law prohibiting cruelty to animals,⁷⁰ and even though polling consistently shows that most Americans believe that the animals we raise for food should be treated well.⁷¹ How is it this possible?

B. Beyond the Law: The Dominant Narrative

Given that Americans want animals raised for food to be well-treated and that cruelty to animals is legally prohibited in all fifty states, how is it that the conditions and practices discussed above are standard? To the surprise of many, no federal law governs on-farm treatment of the animals we raise for food in the United States. In the absence of federal law, criminal state animal cruelty laws provide the primary legal protection for animals on farms. However, most of these laws contain some type of exemption related to on-farm conduct. As this section details, the near-universal assumption is that these exemptions put farmed animals “beyond the law” and are the reason that the conditions and treatment described above are so prevalent.

Three decades ago, in the groundbreaking law review article *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production* and the subsequent book by the same name, pioneering animal lawyer David J. Wolfson drew much-needed attention to these then-emergent exemptions.⁷² The article provided an overview of the limits of our laws when it comes to protecting farmed animals, its centerpiece was a discussion of then-recent amendments to state cruelty statutes carving out exemptions for “customary farming practices.”⁷³

⁶⁸ Gabriel Rosenberg, *How Meat Changed Sex: The Law of Interspecies Intimacy after Industrial Reproduction*, 23 GLQ: A JOURNAL OF LESBIAN AND GAY STUDIES 473 (2017).

⁶⁹ Lena Lidfors, *Parental Behavior in Bovines*, 22 ADV. NEUROBIOL. 177 (2022); Emma Hvidtfeldt Jensen, *Dairy Cows Housed Both Full- and Part-time with Their Calves form Strong Maternal Bonds*, 272 APP. ANIMAL BEHAV. SCI. 106182 (Mar. 2024).

⁷⁰ Frasch et al., *supra* note 10, at 69. [10]

⁷¹ See *supra* note 8. [8]

⁷² David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123 (1996). As Justin Marceau has since provocatively highlighted, many of these exemptions were enacted in conjunction with felony anti-cruelty laws. Justin Marceau, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* 102-10 (2019).

⁷³ Wolfson, *supra* note 72, at 123, 135-39. [72]

According to Wolfson, these exemptions “endowed agribusiness with complete authority to decide what is, and is not, cruelty to animals under their care” and “granted agribusiness a ‘legal license’ to treat farm animals as they wish.”⁷⁴ In his view, these exemptions put power entirely in the hands of industry: “Legislatures have endowed the agribusiness community with complete authority to define what is, and is not, cruelty to the animals in their care,”⁷⁵ a “breathtaking” “delegation of power to the farming industry.”⁷⁶ As a result, Wolfson contended, these exemptions “place animals raised for food or food production beyond the law’s reach in the majority of states.”⁷⁷

In a subsequent book chapter, Wolfson and co-author animal law expert Mariann Sullivan similarly asserted:

the farmed-animal industry[] . . . has persuaded legislatures to amend criminal statutes that purport to protect farmed animals from cruelty so that it cannot be prosecuted for any farming practice that the industry itself determines is acceptable, with no limit whatsoever on the pain caused by such practices. As a result, in most of the United States, prosecutors, judges, and juries no longer have the power to determine whether or not farmed animals are treated in an acceptable manner. The industry alone defines the criminality of its own conduct.⁷⁸

And in a law review article they stated, “A majority of states simply exclude ‘customary’ farming practices from legal restriction, thereby handing the industry an exemption that it can simply stretch to fit itself: any practice the industry chooses to employ regularly becomes automatically exempt from the law.”⁷⁹

In the three decades since *Beyond the Law* was first published, it has become almost universally accepted, including among animal law scholars, animal advocates, and the popular media, that common farming exemptions put farmed animals beyond the law. Four dozen scholarly articles cite *Beyond the Law* for this proposition, as do numerous books.⁸⁰ For example, legal

⁷⁴ *Id.* at 123.[72]

⁷⁵ *Id.* at 138 [72]; accord David J. Wolfson, *McLibel*, 5 ANIMAL L. 21, 39 (1999).

⁷⁶ Wolfson, *supra* note 72, at 147. [72]

⁷⁷ *Id.* at 124. [72]

⁷⁸ Wolfson & Sullivan, *supra* note 2, at 206.

⁷⁹ Mariann Sullivan & David J. Wolfson, *What’s Good for the Goose . . . the Israeli Supreme Court, Foie Gras, and the Future of Farmed Animals in the United States*, 70 LAW & CONTEMP. PROBS. 139, 154–55 (2007).

⁸⁰ See, e.g., Lane K. Bogard, *An Exploration of How Laws Tend to Maintain the Oppression of Women and Animals*, 38 WHITTIER L. REV. 1, 41 (2017); Katalina Hadfield, *Holey Cow: The Legal Exploitation of Cattle in the United States*, 49 ECOL. L. CURRENTS 24, 24 (2022) (“Nearly all these practices are completely legal—and sometimes encouraged—in

scholar Taimie Bryant asserts:

[S]tates have enacted laws that create a legal realm whereby certain acts, no matter how cruel, are outside the reach of anti-cruelty statutes as long as the acts are deemed “accepted,” “common,” “customary,” or “normal” farming practices. These statutes have given the farming community the power to define cruelty to animals in its care.⁸¹

Animal law scholars David Cassuto and Kayleigh Eckhart similarly profess that, under these exemptions, “no matter how cruel a practice might be, if commonly done, it becomes legally permissible.”⁸² They add:

Because “customary” is determined by the agricultural industry, which profits from the practices, the interest of the agricultural animal is unprotected and ignored. In the aggregate, state exemptions and a lack of federal protection

U.S. law.”); Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse and Neglect: Law and Its Enforcement*, 4 J. ANIMAL L. & ETH. 63, 77–78 (2011) [hereinafter *Large-Scale Farmed Animal Abuse*] (Common farming exemptions mean “that no matter how much suffering a practice inflicts upon animals, if it is something done commonly in the industry, it is per se not cruel under the law.”); R. Jason Richards & Erica L. Richards, *Cheap Meat: How Factory Farming Is Harming Our Health, the Environment, and the Economy*, 4 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 31, 34 (2012) (“[M]ost states’ anti-cruelty statutes are equally ineffective at protecting livestock due to exemptions for ‘customary’ farming practices.”); Lesley Peterson, *Talkin’ ‘Bout A Humane Revolution: New Standards for Farming Practices and How They Could Change International Trade As We Know It*, 36 BROOK. J. INT’L L. 265, 268 (2010) (describing anticruelty statutes as “extremely ineffective due to exemptions for ‘customary’ farming practices”); Anastasia S. Stathopoulos, *You Are What Your Food Eats: How Regulation of Factory Farm Conditions Could Improve Human Health and Animal Welfare Alike*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 407, 444 n.206 (2010); Lindsay Walton & Kristen King Jaiven, *Regulating Cafos for the Well-Being of Farm Animals, Consumers, and the Environment*, 50 ENVTL. L. REP. 10485, 10491 (2020) (“Most states exclude farm animals expressly from state anti-cruelty statutes or, at a minimum, exclude cruelty in connection with normal farming practices.”); see also R. Jason Richards & Erica L. Richards, *Cheap Meat: How Factory Farming Is Harming Our Health, the Environment, and the Economy*, 4 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 31, 34 (2012) (“twenty-five states exempt farm animals from cruelty laws”); see also Jane Kotzmann & Gisela Nip, *Bringing Animal Protection Legislation into Line with Its Purported Purposes: A Proposal for Equality Amongst Non-Human Animals*, 37 PACE ENV’T L. REV. 247, 267 (2020) (“most jurisdictions exclude farm animals from protection”).

⁸¹ Taimie L. Bryant, *Trauma, Law, and Advocacy for Animals*, 1 J. ANIMAL L. & ETHICS 63, 74 n.25 (2006).

⁸² David N. Cassuto & Cayleigh Eckhardt, *Don’t Be Cruel (Anymore): A Look at the Animal Cruelty Regimes of the United States and Brazil with a Call for A New Animal Welfare Agency*, 43 B.C. ENV’T AFF. L. REV. 1, 12 (2016) (citations omitted).

have enabled the agricultural industry to determine for itself what protections should be afforded to the animals.⁸³

Unsurprisingly, such protections are virtually nonexistent.⁸⁴

In his book *Meat Market*, Erik Marcus writes that common farming exemptions “allow any method of raising farmed animals to continue, no matter how cruel, so long as it is commonly practiced within the industry.”⁸⁵ Animal Studies scholar Kathryn Gillespie claims, “What these laws mean in practice is that as long as a particular form of inhumane treatment of animals is deemed ‘common’ by the industry itself, a company cannot be prosecuted.”⁸⁶ These exemptions, she adds, “operate . . . to forgo protection of farmed animals in their daily lives. As long as enough producers agree on or conduct similar practices, these practices become routinized and normalized, and power is granted to the industry itself to define how animals are and should be treated.”⁸⁷ And in his recent book *Little Red Barns: Hiding the Truth from Farm to Fable*, award-winning investigative journalist Will Potter writes, “About 37 states have laws that exempt agriculture from animal cruelty laws for what are defined as standard industry practices. . . . That standard—what is “normal,” “common,” or “good”—is defined and regulated by the industry itself.”⁸⁸ Some go a step further and identify specific practices that, in their view, common farming exemptions affirmatively authorize. Potter asserts that “when the industry decides it is normal to cut off pieces of animals without anesthesia, or to confine them so tightly that they may never turn around or see the sun, then by definition under these laws it cannot be considered cruelty because it is business as usual.”⁸⁹ In his book *Meatonomics*, David Robinson Simon recites the now-common refrain that “[c]ustomary farming exemptions essentially remove from lawmakers the authority to decide what constitutes cruelty to farm animals, instead turning that decision over to the farmers themselves” and then proceeds a step further, listing examples of practices that, in his view, the exemptions render lawful, including “[c]rushing or severing the testicles of unanesthetized animals.”⁹⁰ Frasch et al. assert that the exemptions permit “activities such as dehorning, castrating, and branding.”⁹¹ Leading animal law scholar Justin Marceau

⁸⁴ *Id.* at 30 [82] (citing Wolfson, *supra* note 72, at 147) (additional citations omitted)

⁸⁵ ERIK MARCUS, *MEAT MARKET: ANIMALS, ETHICS, AND MONEY* 57 (2005).

⁸⁶ KATHRYN GILLESPIE, *THE COW WITH EAR TAG #1389*, at 45 (2018).

⁸⁷ *Id.* at 46. [86]

⁸⁸ WILL POTTER, *LITTLE RED BARNES: HIDING THE TRUTH FROM FARM TO FABLE* (2025).

⁸⁹ *Id.*

⁹⁰ DAVID ROBINSON SIMON, *MEATONOMICS: HOW THE RIGGED ECONOMICS OF MEAT AND DAIRY MAKE YOU CONSUME TOO MUCH* 37 (2013).

⁹¹ Frasch et al., *supra* note 10, at 77 (citations omitted). [10]

“highlight[s] several examples of practices that fall outside of the animal cruelty statutes because of the exemptions for customary agricultural practices,” including confinement to “cages or crates so small that the animal cannot even turn around”; the removal of beaks, tails, and testicles without anesthetic; and starving chickens to induce a new egg-laying cycle.⁹² In a 2025 law review article, legal scholar Doug Kysar likewise asserts, “When done to thousands of chickens within a CAFO,” “starv[ing] laying hens for one week or more as their productivity declines in order to force molting and a reset of their reproductive cycles” “becomes immunized as a standard industry practice.”⁹³

The belief that common farming exemptions defer completely to industry and thereby put farmed animals beyond the law also pervades mainstream discourse. For example, in his *New York Times* best-seller *Eating Animals*, Jonathan Safran Foer writes:

Common Farming Exemptions make legal any method of raising farmed animals so long as it’s commonly practiced within the industry. In other words, farmers—*corporations* is the right word—have the power to define cruelty. If the industry adopts a practice—hacking off unwanted appendages with no painkillers for example, but you can let your imagination run wild with this—it automatically becomes legal.⁹⁴

New York Times columnist Mark Bittman echoes this perspective:

If I keep a pig as a pet, I can’t kick it. If I keep a pig I intend to sell for food, I can pretty much torture it. State laws known as “Common Farming Exemptions” allow industry—rather than lawmakers—to make any practice legal as long as it’s common.⁹⁵

⁹² MARCEAU, *supra* note 72, at 100. [72]

⁹³ Kysar, *supra* note 34, at 293. [34]

⁹⁴ JONATHAN SAFRAN FOER, *EATING ANIMALS* 50-51 (2009).

⁹⁵ Mark Bittman, *Some Animals Are More Equal Than Others*, N.Y. TIMES (Mar. 15, 2011), <https://opinionator.blogs.nytimes.com/2011/03/15/some-animals-are-more-equal-than-others/> [hereinafter Bittman, *Some Animals*]; accord MARK BITTMAN, *A BONE TO PICK: THE GOOD AND BAD NEWS ABOUT FOOD, WITH WISDOM AND ADVICE ON DIETS, FOOD SAFETY, GMOs, FARMING, AND MORE* (2015). Bittman continued, “‘In other words,’ as Jonathan Safran Foer, the author of ‘Eating Animals,’ wrote me via e-mail, ‘the industry has the power to define cruelty. It’s every bit as crazy as giving burglars the power to define trespassing.’” Bittman, *Some Animals*.

Dan Imhoff, writing for *Civil Eats*, likewise writes, “Numerous states have passed Common Farming Exemptions, which essentially allow the industry to determine animal cruelty statutes by defining them as standard practices.”⁹⁶ A 2022 *Vox* article titled “Most Animal Cruelty Is Legal on the Farm” with the subhead “The meat industry largely defines what’s animal cruelty and what isn’t” asserts, “a few [states] exempt farmed animals altogether, while most exempt what are considered ‘customary farming practices’ It doesn’t matter how inhumane those practices may appear as long as they are commonly used, year after year.”⁹⁷ And an article in *One Green Planet* avers that common farming exemptions “allow any practice, no matter how cruel, so long as it is common within the farming industry.”⁹⁸

Even animal advocates have adopted the narrative that common farming exemptions put farmed animals beyond the law. For example, on a page titled “Customary Cruelty in the Farm Industry: When Animal Abuse is Legal” the Animal Legal Defense Fund website states:

Most state criminal anti-cruelty laws that seek to prohibit unnecessary animal suffering exempt all “customary farming practices.” These customary farming practices are not defined by the legislature, but are practices that the animal agriculture industry commonly uses when raising animals as food. This means essentially that lawmakers allow the industry to police itself, by deciding what practices are common, and therefore legal.⁹⁹

An Animal Welfare Institute report asserts:

In 37 states, common or recognized animal husbandry practices—such as tail docking and castration without anesthesia—are exempt from the definition of cruelty, unless the act is specifically prohibited. A person who performed these acts on a dog or cat could be charged with animal cruelty, but because the practices are considered routine in the agriculture

⁹⁶ Dan Imhoff, *What Industry Doesn’t Want You to Know About Animal Factories*, CIVIL EATS (Apr. 21, 2011), <https://civileats.com/2011/04/21/what-industry-doesnt-want-you-to-know-about-animal-factories/>.

⁹⁷ Kenny Torrella, *Most Animal Cruelty Is Legal on the Farm*, VOX (Mar. 9, 2022), <https://www.vox.com/future-perfect/2022/3/9/22967328/animal-cruelty-laws-state-federal-exemptions-pennsylvania-martin-farms-dairy-calves-dehorning>.

⁹⁸ Elizabeth Buff, *What Rights? Examples of Animal Cruelty That Are Perfectly Legal*, ONE GREEN PLANET, <https://www.onegreenplanet.org/animalsandnature/what-rights-examples-of-animal-cruelty-that-are-perfectly-legal/> (last visited Jan. 19, 2026).

⁹⁹ ANIMAL LEGAL DEFENSE FUND, CUSTOMARY CRUELTY IN THE FARM INDUSTRY: WHEN ANIMAL ABUSE IS LEGAL (Apr. 3, 2015), <https://aldf.org/article/customary-cruelty-in-the-farm-industry-when-animal-abuse-is-legal/>.

industry they can be performed on farm animals without penalty.¹⁰⁰

According to In Defense of Animals' website, "most" state cruelty laws "have exemptions for common farming practices," pursuant to which, "regardless of how abusive a practice is, if it is a common occurrence on many farms, it is permissible according to the law."¹⁰¹ The page continues to note that such common and therefore lawful practices include mutilations (castration, debeaking, dehorning, and tail docking) without anesthetic and maceration of male chicks.¹⁰² In the same vein, a feature on the website of New Roots Institute, which trains students to lead efforts to end factory farming,¹⁰³ asserts that "common farming practice laws . . . allow what many consider animal cruelty to exist legally for the sake of meat, dairy, and fur production."¹⁰⁴ The piece elaborates, "A common farming practice is an action that, if it is common across farms, is thereby legal."¹⁰⁵ It then lists examples of "cruelty farmed animals are legally allowed to endure as common farming practices," including mutilations (debeaking, castration, and tail docking) without pain relief, intensive confinement (gestation crates), and genetic manipulations that cause rapid growth and "deformities that prohibit ambulation."¹⁰⁶ Its uncategorical conclusion is that "[a]lthough any of these common practices would be considered illegal animal cruelty or neglect for animals such as cats or dogs, farm animals are not protected."¹⁰⁷

¹⁰⁰ ANIMAL WELFARE INST., LEGAL PROTECTIONS FOR ANIMALS ON FARMS 2 (May 2022) (citation omitted).

¹⁰¹ In Defense of Animals, Current Laws, <https://www.idausa.org/campaign/farmed-animal/the-law/> (last visited July 25, 2026). The Humane State Rankings, which the Humane Society of the United States (now Humane World for Animals) published until 2018, likewise indicated that most state cruelty laws did not "[i]nclude[] protections for farm animals." HUMANE SOC'Y OF THE U.S., HUMANE STATE RANKING 2018 (ALABAMA THROUGH MISSOURI) 2 (2018), <https://blog.humanesociety.org/wp-content/uploads/2018/12/State-Rank-2018-AL-MO-1.pdf> [<https://perma.cc/KPK3-JFEA>]; HUMANE SOC'Y OF THE U.S., HUMANE STATE RANKING 2018 (MONTANA THROUGH WYOMING) 2 (2018), <https://blog.humanesociety.org/wp-content/uploads/2018/12/State-Rank-2018-MT-WY-1.pdf> [<https://perma.cc/2RMD-SFNP>].

¹⁰² In Defense of Animals, Current Laws, <https://www.idausa.org/campaign/farmed-animal/the-law/> (last visited July 25, 2026).

¹⁰³ New Roots Institute, How We Do It, <https://www.newrootsinstitute.org> (last visited July 25, 2026).

¹⁰⁴ New Roots Institute, Animal Cruelty Law Exemptions in Factory Farming (Dec. 16, 2021), <https://www.newrootsinstitute.org/articles/animal-cruelty-law-exemptions-in-factory-farming>.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* Northwest Animal Rights Network and its counsel similarly have contended that Washington state's exemption for "accepted husbandry practices used in the commercial raising . . . of livestock or poultry, or products thereof," WASH. REV. CODE §16.52.185, defers

Even after themselves documenting animal abuse at factory farms, animal protection group representatives sometimes make a point of proclaiming that abuse legal by virtue of the exemptions. For example, in discussing an investigation documenting abuse at a chicken farm in Tennessee, a representative of Mercy for Animals, an organization whose “mission is to end industrial animal agriculture by constructing a just and sustainable food system,”¹⁰⁸ stated, “Tennessee has what’s called a ‘common farming exemption’ which means that if the factory farming industry says a practice is okay, no matter how cruel it is, like mutilating animals without pain killers for example, it is automatically deemed legal.”¹⁰⁹ Similarly, in an *Atlantic* article, a former Mercy for Animals and Humane Society of the United States (now Humane World for Animals) undercover investigator recounts what he observed while investigating four Iowa egg farms: “Millions of haggard, featherless hens languished in crowded, microwave-sized wire cages. Unable to even spread their wings, many were forced to pile atop their dead and rotting cage mates as they laid their eggs.”¹¹⁰ He then asserts, “nothing I filmed was illegal (since Iowa’s anemic animal cruelty law exempts ‘customary farming practices’)”¹¹¹ Direct Action Everywhere’s Investigation Manual proclaims, “In most places, the horrific, standard practices of animal agriculture are completely legal.”¹¹²

In short, the prevailing narrative among scholars, the popular press, and even animal advocates is that cruel factory farming practices are widespread because common farming exemptions across the country put farmed animals beyond the law’s reach by completely delegating to industry. But is this

to what industry deems customary, including practices such as debeaking. Levi Pulkkinen, *Cruelty Laws Apply to Livestock, Lawsuit Says*, SEATTLE POST-INTELLIGENCER, (Feb. 20, 2009), <https://www.seattlepi.com/seattlenews/article/cruelty-laws-apply-to-livestock-lawsuit-says-1300764.php>.

¹⁰⁸ MERCY FOR ANIMALS, *About Us*, <https://mercyforanimals.org/about/> (last visited Jan. 19, 2026).

¹⁰⁹ Nicole Erwin, *TN Poultry Farm Accused of Abuse: Loses Contract*, WKMS (Aug. 31, 2015), <https://www.wkms.org/post/tn-poultry-farm-accused-abuse-loses-contract#stream/0>. Notably, the two owners of the farm that was investigated ultimately *were* charged with animal cruelty. *Tenn. Farm Owners Charged with Abusing Chickens*, AP (Sept. 10, 2015), <https://www.wbir.com/article/news/local/tenn-farm-owners-charged-with-abusing-chickens/1190759>. They pleaded guilty—and were assessed \$25 each. Ed Adamezyk, *Former McDonald’s Suppliers Get \$25 Fine for Animal Cruelty*, UPI (Oct. 30, 2015), https://www.upi.com/Top_News/US/2015/10/30/Former-McDonalds-suppliers-get-25-fine-for-animal-cruelty/1141446211454/.

¹¹⁰ Cody Carlson, *How State Ag-gag Laws Could Stop Animal-cruelty Whistleblowers*, ATLANTIC (Mar. 25, 2013), <https://www.theatlantic.com/politics/archive/2013/03/how-state-ag-gag-laws-could-stop-animal-cruelty-whistleblowers/273962>.

¹¹¹ *Id.*

¹¹² DIRECT ACTION EVERYWHERE, 2023 INVESTIGATION MANUAL: HOW TO EXPOSE ANIMAL ABUSE 42 (2023).

accurate?

II. INTERROGATING THE SCOPE OF EXEMPTIONS TO STATE CRUELTY LAWS FOR ON-FARM CONDUCT

This Part interrogates the contention that farmed animals are beyond the law's reach, scrutinizing exemptions to state cruelty laws for on-farm conduct and demonstrating that the dominant narrative is inaccurate. It taxonomizes what are in fact remarkably varied exemptions for on-farm conduct. Untangling common farming exemptions from other types of exemptions for on-farm conduct is critical because, to date, exemptions for on-farm conduct have been treated monolithically when in fact they are rather diverse. One result of this monolithic treatment has been the conflation of different types of exemptions,¹¹³ which is problematic for numerous reasons, including that it creates the misimpression that exemptions for on-farm conduct uniformly put farmed animals beyond the law. In fact, as this Part demonstrates, *no* state's exemption has such a sweeping effect.

While no two states' exemptions are identical, exemptions for on-farm conduct can be broadly taxonomized into eight categories. This taxonomy facilitates a clear-eyed assessment of the scope of and impact of the exemptions, including an interrogation of the widespread contention that they put farmed animals beyond the law.

By taxonomizing these exemptions and then examining each category of them on its own terms and in the context of successful prosecutions, this Part demonstrates the following: (1) no state exempts all on-farm conduct, (2) common farming exemptions are not as pervasive as purported, and (3) common farming exemptions do not put farmed animals beyond the law.

After an overview of exemptions to cruelty laws generally (Part II.A), the remainder of this Part taxonomizes exemptions pertaining to on-farm conduct into eight categories and analyzes each in turn, closely examining statutory text as well as prosecutions and court decisions implicating that text. Exemptions to cruelty laws for on-farm conduct are taxonomized as follows:

¹¹³ See, e.g., Animal Welfare Inst., *supra* note 100, at 2 ("In 37 states, common or recognized animal husbandry practices—such as tail docking and castration without anesthesia—are exempt from the definition of cruelty, unless the act is specifically prohibited"); *id.* at 3 (North Carolina's cruelty law, "like most cruelty laws, has an exemption for 'lawful activities conducted for purposes of . . . production of livestock, poultry, or aquatic species.'"); PEW COMM'N ON INDUSTRIAL FARM ANIMAL PRODUCTION, *supra* note 26, at 38 ("25 states specifically exempt farm animals from animal cruelty laws, and in 30 states certain 'normal' farm practices are exempted.")' POLANCO & TROY, *supra* note 11, at 3 ("In at least 37 states, anti-cruelty laws include exemptions for 'commonly accepted' animal agricultural practices."); Potter, *supra* note 88 ("About 37 states have laws that exempt agriculture from animal cruelty laws for what are defined as standard industry practices.").

categories are: (1) exemptions for lawful or permitted activities (Part II.B), (2) exemptions for fowl and commercially grown poultry (Part II.C), (3) exemptions for specific practices (Part II.D), (4) exemptions that expressly reference industry (Part II.E), (5) exemptions for good or pain-minimizing animal husbandry (Part II.F), (6) states with no such exemptions (Part II.G), (7) exemptions for accepted practices, (Part II.H), and, finally, (8) exemptions for common practices (Part II.I).

A. *Cruelty Code Exemptions Generally*

Exemptions to cruelty laws in the United States are as old as the laws themselves. State cruelty laws are largely modeled on New York’s 1867 anti-cruelty law, the first “comprehensive legislation” for animals in the United States.¹¹⁴ This law included an exemption for scientific experiments.¹¹⁵ Over the years, state legislatures have expanded the number and type of exemptions to cruelty laws.

Exemptions to state cruelty laws take various forms but commonly pertain to circumstances where harm to animals has historically been socially sanctioned, such as animal experimentation,¹¹⁶ as in New York’s 1867 law; “pest” control;¹¹⁷ and, of course, agricultural practices. In addition to exemptions pertaining to raising animals for food, many states also have exemptions pertaining to the slaughter of these animals. Because this Article focuses on on-farm conduct, slaughter for food, which typically is done at separate federally regulated facilities,¹¹⁸ is beyond its scope.

While most state cruelty laws include some sort of exemption pertaining to on-farm treatment of animals, the precise contours of these exemptions vary significantly, and some states have multiple such exemptions while others have none. Common farming exemptions are only one type of

¹¹⁴ David Favre & Vivien Tsang, *The Development of the Anti-Cruelty Laws During the 1800’s*, 1 DETROIT COLL. L. REV. 1 (1994) (“Within a few years Massachusetts, Pennsylvania, Illinois, New Hampshire, and New Jersey had adopted the same pattern of legislation as that in New York . . .”).

¹¹⁵ “Nothing in this act contained shall be construed to prohibit or interfere with any properly conducted scientific experiments or investigations, which experiments shall be performed only under the authority of the faculty of some regularly incorporated medical college or university of the state of New York.” 1867 New York Anti Cruelty Law s. 10. The same year the law was enacted, the ASPCA’s first annual report “considered in some detail the pain and suffering of dogs and other animals in medical teaching facilities,” but the organization considered itself largely precluded from taking action because of the statutory exemption. Tsang & Favre, *supra* note 48 [70](citing Report 1867 at 19-22).

¹¹⁶ See, e.g., IND. CODE ANN. § 35-46-3-5(a)(7); NEB. REV. STAT. ANN. § 28-1013(3).

¹¹⁷ See, e.g., NEB. REV. STAT. ANN. § 28-1013(7); COLO. REV. STAT. ANN. § 18-9-201.5 (1).

¹¹⁸ 21 U.S.C. §§ 601-626; *id.* §§ 451-473. [117]

exemption pertaining to on-farm conduct, and even within this category there is significant variation.

The remainder of this Part describes, taxonomizes, and analyzes state cruelty exemptions pertaining to on-farm treatment and conditions, which range from provisions that broadly exempt on-farm conduct to those that do not expressly exempt any such conduct. Some states appear in multiple categories below because their cruelty codes contain multiple exemptions pertaining to on-farm conduct.

B. Lawful or Permitted Activities

The first taxonomic category of exemptions for on-farm conduct is those that broadly—and seemingly circularly—shield otherwise permitted or lawful agricultural activities from criminal liability. Cruelty laws in five states—Arkansas, Arizona, Georgia, Illinois, and North Carolina—contain such exemptions.

This Subpart begins with a discussion of Arkansas and Georgia’s exemptions for “otherwise permitted” conduct, which neither scholars nor courts appear to have analyzed. It then turns to the exemptions in Arizona, Illinois, and North Carolina for “otherwise lawful pursuits” or “activities,” as illuminated by legislative history, scholarship, prosecutions, and case law.

Arguably only one law in this category—Arkansas’s exemption—contains a wholesale exemption for on-farm treatment on its face—and even that interpretation is questionable. Arkansas exempts “conduct that is otherwise permitted under” state or federal law, “including without limitation agricultural activities.”¹¹⁹ While it is unclear what precisely is meant by “otherwise permitted under the laws,” particularly where no state or federal permitting or standards govern on-farm treatment of animals, use of the expansive phrase “without limitation” suggests a total exemption. Yet, as discussed in Part II.H, of this a separate subsection same provision exempts “generally accepted animal husbandry practices.”¹²⁰ As Antonin Scalia and Bryan Garner explain, the rule against surplusage provides: “If possible, every word and every provision is to be given effect. . . [n]one should be ignored.”¹²¹ Interpreting Arkansas’s exemption for “otherwise permitted” conduct including “agricultural activities” as a total liability shield for on-farm conduct would improperly render the exemption for “generally accepted

¹¹⁹ ARK. CODE ANN. § 5-62-105(b). The subsequent subchapter is titled “Farm Animal and Research Facilities,” but rather than provide protections for animals at these facilities it protects the facilities themselves. *Id.* §§ 5-62-201 – 5-62-204.

¹²⁰ *Id.* § 5-62-105(a)(5). [120]

¹²¹ ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 174 (2012).

animal husbandry practices” a nullity. Thus, the rule against surplusage suggests that the “agricultural activities” exemption is not as broad as might first appear.

Though it does not use the sweeping “without limitation” phrasing, Georgia’s cruelty law similarly exempts “conduct which is otherwise permitted” under state or federal law, “including, but not limited to, agricultural, animal husbandry.”¹²² It is again unclear what exactly the phrase “otherwise permitted” means, which is undefined, as are the terms “agricultural” and “animal husbandry.” Still, this exemption appears to be broad, particularly in the absence of any more limited exemptions related to agriculture of the type Arkansas’s law contains.

In a similar vein, Arizona exempts “otherwise lawful pursuits of . . . ranching [or] farming,”¹²³ Illinois exempts from its “torture” prohibition “any . . . activity that may be lawfully done to an animal,”¹²⁴ and North Carolina exempts “lawful activities for the purposes of” “production of livestock and poultry” or “providing food for human or animal consumption.”¹²⁵ These three exemptions center on otherwise lawful pursuits or activities—but what are otherwise lawful pursuits or activities?

The terms of these exemptions are not defined, and it is hard to discern what non-tautological meaning “lawful” and “otherwise lawful” might have. It is not clear what the state legislatures intended with such seemingly circular exemptions. Do these laws simply state the obvious: that lawful activity is still lawful? Or do they do additional work, carving out new exemptions? If the latter, what are the precise contours of the new exemptions?

Animal law scholar William A. Reppy notes that “‘lawful’ creates an exemption far broader than ‘commonly accepted practices.’”¹²⁶ Indeed, he

¹²² GA. CODE ANN. § 16-12-4(g).

¹²³ ARIZ. REV. STAT. § 13-2910.05; *see also id.* [122] § 13-2910.06 (providing a defense to certain provisions of the cruelty code where “the activity charged involves the possession, training, exhibition or use of a bird or animal in . . . ranching”).

¹²⁴ 510 ILL. COMP. STAT. ANN. 70/3.03(b)(4). More specifically, the exemption is for “death, harm, or injury caused” by “any legitimate purpose, including, but not limited to: castration, culling, declawing, defanging, ear cropping, euthanasia, gelding, grooming, neutering, polling, shearing, shoeing, slaughtering, spaying, tail docking . . .” or “any other activity that may be lawfully done to an animal.” *Id.* 70/3.03(b)(3), (4) The specific practices that are declared exempt are discussed below. *See infra* Part II.D.

¹²⁵ N.C. GEN. STAT. §§ 14-360(c)(2), (2a); 19A-1.1(2), (3). In addition, Texas exempts “generally accepted and otherwise lawful . . . animal husbandry or agriculture practice involving livestock animals.” TEX. PENAL CODE ANN. § 42.09(f)(2). Because this exemption requires that conduct be “otherwise lawful” and “generally accepted,” it is discussed in the context of common farming exemptions below. *See infra* Part II.H.

¹²⁶ William A. Reppy, Jr., *Broad Exemptions in Animal-Cruelty Statutes Unconstitutionally Deny Equal Protection of the Law*, 70 LAW & CONTEMP. PROBS. 255, 267. For this reason, biomedical lobbyists successfully opposed a proposal to use “‘commonly

explains, in North Carolina, agricultural industry lobbyists successfully opposed language in a version of the bill that would have instead exempted “commonly accepted practices” instead of “lawful activities for the purposes of” “production of livestock and poultry” or “providing food for human or animal consumption.”¹²⁷ In Reppy’s view, the qualifier “lawful” “does not significantly restrict the exemptions.”¹²⁸ But it must restrict them in some way, lest the term be impermissibly read out of the statute.¹²⁹

North Carolina first used the qualifier “lawful” in an exemption to its cruelty law related to shooting animals.¹³⁰ There, the statute established what constituted unlawful shooting: hunting out of season, on posted lands, and so forth.¹³¹ Reppy contends that this reasoning suggests that the exemptions for “lawful activities” related to food production should not apply if the producer violated other laws, such as those protecting children, the environment, or workers.¹³²

Shortly after North Carolina’s exemption was enacted, workers¹³³ at a pig

accepted practices’ language” instead of otherwise lawful language in the exemptions to North Carolina’s civil cruelty law. *Id.* (citations omitted).

¹²⁷ *Id.* [126]

¹²⁸ *Id.* at 263. [126]

¹²⁹ See *supra* note 121 and accompanying text. [120]

¹³⁰ Reppy, *supra* note 126 [125], at 255, 256. As Reppy notes, this qualifier was added not by the legislature by the codifiers. *Id.* Though codifiers do not appear to have authority to “substantively change the statutes being codified in such a manner, . . . the General Assembly subsequently re-enacted this law with the word ‘lawful’ in the hunters’ exemption several times, thus confirming the validity of the insertion of a word at the original codification process.” *Id.* at 256 note 5. The exemption has since been amended to more broadly exempt “lawful taking of animals under the jurisdiction and regulation of the Wildlife Resources Commission.” N.C. GEN. STAT. § 14-360(c)(1).

¹³¹ Reppy, *supra* note 126 [125], at 256 (citing N.C. CODE §§ 2490, 2831, 2832, 2837, 2839 (1883)).

¹³² *Id.* at 266. [125]

¹³³ Prosecutions for on-farm cruelty “almost invariably target low-level workers, who are disproportionately people of colour and immigrants, rather than corporations or supervisors.” Winders, *supra* note 37; see also Torrella, *supra* note 97 (When farmed animal cruelty is prosecuted, “it’s usually over the more egregious, often one-off acts of cruelty conducted by stressed-out, low-paid workers” while “inhumane practices instituted by the owner—and often pervasive throughout the industry—go unexamined, even though they account for much more animal suffering.”). Although a detailed discussion is beyond the scope of this article, this exemplification of “the criminal justice system’s disparate racial and class impacts” is yet another problem with the near-sole reliance on criminal law to oversee on-farm conduct. Winders, *supra* note 37; see also Torrella, *supra* note 97 (prosecutions for cruelty to farmed animals “usually against low-level employees who are disproportionately immigrants and are labeled as “bad apple” workers while (typically white) owners and management often get off scot-free”). For a comprehensive analysis and critique of the animal protection movement’s carceral focus and its disparate impacts, see Marceau, *supra* note 72. As discussed further in Part III.E, while criminal corporate liability is available and animal advocacy organizations consistently push for it, “to date, charges still have not been filed

farm were prosecuted and convicted for cruelty.¹³⁴ Counsel for one of the workers contended in the media that “his client was ‘trying to kill the hog to put it out of its misery.’”¹³⁵ As Reppy observes, “Euthanizing severely injured animals is certainly an integral aspect of production of livestock.”¹³⁶ Yet “defense counsel did not invoke the exemption” and the “defendants pleaded guilty or no contest.”¹³⁷

A subsequent investigation of a North Carolina pig farm supplying Smithfield, the world’s largest pork producer,¹³⁸ also resulted in a cruelty prosecution.¹³⁹ After an undercover investigation documented workers dragging, beating, and gouging the eyes of pigs, prosecutors charged two workers with animal cruelty.¹⁴⁰ Cheryl Leahy notes that dragging the pigs arguably fell within the scope of the exemptions and that the prosecution “indicate[d] that it is reasonable to interpret the North Carolina law’s farming exemptions as not sweepingly broad.”¹⁴¹ (The case was never resolved as one “worker reportedly fled after being served, and” the other “was charged but was never located for service and reportedly fled the state.”¹⁴²)

On-farm conduct in North Carolina was successfully prosecuted in a subsequent case.¹⁴³ Following another undercover investigation, a worker at a facility supplying chickens for Perdue pleaded guilty to three counts of cruelty for “kill[ing] two chickens by grinding his heel on their heads and whipping one around by its neck,” hitting “[a] third chicken . . . in the head with a hammer,” and throwing a fourth against a wall.¹⁴⁴ While deplorable, this violence was not extraordinary. Leahy explains, “[T]his violent cruelty is . . . a part of commercial broiler production (and other animal agriculture . .

against a corporate actor as a result of an investigation.” *Large-Scale Farmed Animal Abuse*, *supra* note **Error! Bookmark not defined.**, at 173

¹³⁴ Reppy, *supra* note 126 [125], at 264-65.

¹³⁵ *Id.* at 265 (quoting *Two Hog Farm Workers Sentenced for Beating Injured Animals*, HERALD-SUN (DURHAM), May 18, 2000, at C7).

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ Cynthia Mersten, *America's Biggest Pork Producer Is Actually Owned by s Company in China*, MASHED (Aug. 16, 2025), <https://www.mashed.com/1937232/popular-us-food-brand-smithfield-owned-by-china-company/>.

¹³⁹ *Large-Scale Farmed Animal Abuse*, *supra* note **Error! Bookmark not defined.** [75], at 83-84.

¹⁴⁰ *Id.* [75], at 63, 77-78.

¹⁴¹ *Id.* at 63, 84.

¹⁴² *Id.*

¹⁴³ Cheryl Leahy, *Do Animal Protection Laws Address Widespread Cruelty? Unique Challenges and Potential for Addressing Institutional Abuse to Farmed Animals*, 32 S. CAL. REV. L. & SOC. JUST. 133, 165-69 (2023); ASSOCIATED PRESS, *Man Accused of ‘Maliciously’ Killing Chickens Pleads Guilty* (Jan. 5, 2016), <https://www.seattletimes.com/nation-world/man-accused-of-maliciously-killing-chickens-pleads-guilty/>.

¹⁴⁴ Associated Press, *supra* note 143. [143]

.).”¹⁴⁵ This cruelty, she continues:

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.¹⁴⁶

In other words, this cruelty was not unconnected to the standard operations of the facility but, rather, a quotidian agricultural practice, as corroborated by investigations in other facilities.¹⁴⁷ Indeed, Leahy notes that, while some “investigations reveal[] cruelty that is unrelated to a business function and appears to be merely sadistic, . . . those constitute a relatively small percentage of the violent acts revealed by investigations.”¹⁴⁸ Thus, *most* of the violence that is documented in undercover investigations—and every investigation of industrial farms has documented violence—is ordinary.

Since these convictions, however, a North Carolina Court of Appeals has expansively interpreted the exemptions for “[l]awful activities conducted . . . for purposes of production of livestock, poultry, or aquatic species” and “[l]awful activities conducted for the primary purpose of providing food for human or animal consumption.”¹⁴⁹ The court put much weight in the statute’s use of the plural “activities.” Looking to a dictionary definition of this term as “collective acts,” the court held that the law exempted “the entire process”—the “commercial poultry-production operation as a whole.”¹⁵⁰ Accordingly, the court refused to assess whether specific conduct was “either unlawful or not for the purpose of producing poultry or providing food for consumption” and instead held that the law exempts a “commercial poultry-production operation as a whole . . . provided the operation is permitted by

¹⁴⁵ Leahy, *supra* note 143 [Error! Bookmark not defined.], at 167.

¹⁴⁶ *Id.* [Error! Bookmark not defined.] Leahy emphasizes that moving and killing “cull” animals “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.” *Id.*

¹⁴⁷ *Id.* [Error! Bookmark not defined.]

¹⁴⁸ *Id.* [Error! Bookmark not defined.]

¹⁴⁹ *Legal Impact for Chickens v. Case Farms, LLC*, No. COA24-673 (N.C. Ct. App. May 21, 2025), <https://appellate.nccourts.org/opinions/?c=2&pdf=44384>. The case involved North Carolina’s unique civil cruelty law, whose exemptions mirror those in the criminal cruelty law. *Id.*; see also Reppy, *supra* note 126 [125], at 255, 267 (“The exemptions to the civil enforcement statute are qualified by ‘lawful’ in precisely the same manner that that term qualifies the criminal law exemptions.”).

¹⁵⁰ *Case Farms*, No. COA24-673, at *4 (N.C. Ct. App. May 21, 2025), at (citing BLACK’S LAW DICTIONARY (8th ed. 2004)).

law.”¹⁵¹ And, the court concluded, absent a claim that the entire poultry-production operation “is illegal or otherwise prohibited by law,” the exemption applies.¹⁵²

Still, while cruelty laws in Arkansas, Arizona, Georgia, Illinois, and North Carolina broadly exempt otherwise permitted or lawful agricultural activities, these exemptions are not limitless. Even on their face they do not exempt *all* agricultural practices. The rule against surplusage prohibits reading the phrases “otherwise lawful” and “otherwise permitted” out of the statutes and requires that they instead be given some meaning. Accordingly, the exemptions are not absolute, as further evidenced by successful prosecutions for on-farm conduct in North Carolina.

C. “Fowl” and “Commercially Grown Poultry”

Two states, South Carolina and Oregon, broadly exempt an entire category of farmed animals—birds (primarily chickens). South Carolina’s cruelty law “does not apply to fowl,”¹⁵³ and Oregon’s exempts “[c]ommercially grown poultry” unless “gross negligence can be shown.”¹⁵⁴

These exemptions are indeed expansive and alarming, particularly given the scientific evidence “that chickens are just as complex cognitively, emotionally and socially as most other birds and mammals in many areas.”¹⁵⁵ However, they still do not put all farmed animals beyond the law. To be sure, South Carolina’s law appears to put all farmed *birds* beyond the law, an expansive exclusion, but it is one that nevertheless should not be overstated so as to reach mammalian livestock. And Oregon’s exemption for commercially grown poultry is not absolute, even as to birds, because it is inapplicable if “gross negligence can be shown.”¹⁵⁶

Thus, while South Carolina’s and Oregon’s cruelty laws include broad exemptions for poultry—by far the largest category of warm-blooded animals raised for food—even these laws do not put all farmed animals beyond the law.¹⁵⁷

¹⁵¹ *Id.* [150]

¹⁵² *Id.*

¹⁵³ S.C. CODE ANN. § 47-1-40(C).

¹⁵⁴ OR. REV. STAT. § 167.335(c).

¹⁵⁵ Lori Marino, *The Inconvenient Truth About Thinking Chickens*, 17 ANIMAL SENTIENCE 1 (2017).

¹⁵⁶ OR. REV. STAT. § 167.335(c).

¹⁵⁷ Indeed, as discussed in Part II.H, South Carolina and Oregon also separately exempt accepted husbandry practices—exemptions that would be nullities, in contravention of the rule against surplusage, were the states’ bird-specific exemptions read to reach mammals.

D. Exemptions for Specific Practices

Cruelty statutes in six states—Arkansas, Illinois, Maryland, Ohio, Virginia, and Wisconsin—expressly exempt one or more specific on-farm practice while New Jersey does so through regulation and Maine does so through best management practices. Importantly, none of these exemptions are absolute—they are, by definition, limited to specific practices, leaving room to apply the cruelty laws to other on-farm conduct. Some also only exempt liability for specific provisions of the cruelty code, rather than the entire cruelty code. And in Virginia and Maine these exemptions are qualified—that is, they exempt specific practices only if certain conditions are met.

Illinois exempts from its felony prohibition on torture “death, harm, or injury caused” by “any legitimate purpose, including, but not limited to: castration, culling, declawing, defanging, ear cropping, euthanasia, gelding, grooming, neutering, polling, shearing, shoeing, slaughtering, spaying, [and] tail docking.”¹⁵⁸ By defining certain practices to be per se legitimate and therefore not torturous—even without pain mitigation—the statute appears to provide a total shield for them, notwithstanding the pain they inflict. Importantly, however, this broad exemption is to the state’s prohibition on torture only; it does not apply to its more general misdemeanor cruelty prohibition.¹⁵⁹ Indeed, “Illinois courts have long applied the” negative implication canon, which provides that *expressio unius est exclusion alterius*: “‘where a statute lists the things to which it refers, it may be inferred that all omissions therefrom should be understood as exclusions.’”¹⁶⁰ Applying that canon here underscores that the legislature’s inclusion of this exemption in the felony torture provision and exclusion from the misdemeanor cruelty provision was deliberate. To be sure, this canon “may be overcome by a strong indication of contrary legislative intent,”¹⁶¹ but here there is no such indication. Rather, only a single statutory provision is between these two laws in the code, and the two laws were both amended by the same act in 2002.¹⁶² The effect of this exemption, then, is to shield farms from felony liability for such activities, while simultaneously making clear that such conduct *is* subject to misdemeanor liability.

¹⁵⁸ 510 ILL. COMP. STAT. ANN. 70/3.03(b)(3). This is in addition to the state’s exemption for “any other activity that may be lawfully done to an animal,” *id.* 70/3.03(b)(4), discussed in Part II.B, *supra*.

¹⁵⁹ 510 ILL. COMP. STAT. ANN. 70/3.01.

¹⁶⁰ *People v. Richards*, 2021 IL App (1st) 192154, ¶ 25, 203 N.E.3d 277, 284 (citation omitted).

¹⁶¹ *Id.* at ¶ 25 (citation omitted).

¹⁶² ANIMALS—HUMANE CARE—VIOLATIONS, 2002 Ill. Legis. Serv. P.A. 92-650 (S.B. 1806).

Ohio's cruelty code exempts farmed animals, defined as "cattle, poultry or fowl, swine, sheep, [and] goats," from its "wholesome exercise and change of air" requirement only.¹⁶³ For this particular statutory requirement, the exemption is indeed broad, but Ohio does not otherwise exempt on-farm treatment from its cruelty code.

Two states' laws expressly enumerate specific practices when defining exempted "generally accepted" and "customary and normal" practices:¹⁶⁴ Arkansas exempts, "without limitation dehorning, docking, and castration,"¹⁶⁵ while Maryland exempts these three practices, as well as "limit feeding."¹⁶⁶ By exempting specific practices without qualification,¹⁶⁷ the exemptions for these specifically identified practices go further than the common farming exemptions, which, as discussed in Part II.H, could leave room for evolution over time.

On the other hand, Virginia exempts "the dehorning of cattle," but only when "conducted in a reasonable and customary manner."¹⁶⁸ Focused only on

¹⁶³ OHIO REV. CODE § 959.13(A)(4). Ohio also exempts animals "confined prior to slaughter" from the requirement for adequate shelter. *Id.* § 959.13(A)(2). Though one might perhaps argue that all animals used for food will eventually be slaughtered (including those used for dairy and eggs), and thus this exemption applies to all farmed animals, the better reading of the statutory text is that it is a slaughter-related exemption, particularly since Ohio's law does not appear to have a broader slaughter exemption the way many states do. Even if interpreted more broadly, it is still an exemption to a particular statutory requirement (adequate shelter), rather than an exemption to the cruelty law as a whole.

¹⁶⁴ This category of exemptions is the focus of Part II.H.

¹⁶⁵ ARK. CODE ANN. §§ 5-62-105(a)(5), 5-62-102.

¹⁶⁶ MD. CODE ANN., CRIM. LAW § 10-603(1). Limit feeding is "the practice of feeding cattle less dry matter (DM) than they would naturally consume on their own if given ad libitum (unlimited) access to a forage diet," which lowers costs by "result[ing] in improvements in feed efficiency" and "in less manure production." CHARLIE SASSCART, UNIV. OF MD. EXTENSION, LIMIT FEEDING GROWING CATTLE (Sept. 2, 2021).

¹⁶⁷ Exemptions for particular practices in two other states are not included here and are instead discussed below in Part I.A.8 because they are conditional. Virginia exempts "the dehorning of cattle," but only when "conducted in a reasonable and customary manner," VA. CODE ANN. § 3.2-6570(C), while Oregon exempts "the dehorning of cattle, the docking of horses, sheep or swine, and the castration or neutering of livestock, according to accepted practices of veterinary medicine or animal husbandry" "unless gross negligence can be shown," OR. REV. STAT §§ 167.335(a), (c), 167.310(6).

¹⁶⁸ VA. CODE ANN. § 3.2-6570(C). Although Virginia's cruelty code also exempts "farming activities as provided under this title or regulations adopted hereunder," it does not in fact contain any such statutory provisions; nor does it authorize the promulgation of such regulations. VA. CODE ANN. § 3.2-6570(F). Not surprisingly, then, no regulatory provisions address farming practices either. Thus, this additional exemption is effective a nullity. Indeed, it did not preclude the only cruelty prosecution and conviction for a standard industry practice: Eight workers at Tyson Foods broiler breeding facilities were convicted for conduct documented in an undercover investigation, including "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

a single specific practice, this exemption is distinct from the common farming exemptions discussed in Part II.H, though its limiting conditions are akin to common farming exemptions.¹⁶⁹

New Jersey expressly exempts numerous specific practices by regulation. The state's distinct approach requires some explanation. New Jersey's cruelty law directs "[t]he State Board of Agriculture and the Department of Agriculture, in consultation with the New Jersey Agricultural Experiment Station . . . [to] develop and adopt" "(1) standards for the humane raising, keeping, care, treatment, marketing, and sale of domestic livestock; and (2) rules and regulations governing the enforcement of those standards."¹⁷⁰ It then creates "a presumption that the raising, keeping, care, treatment, marketing, and sale of domestic livestock in accordance with the[se] standards . . . shall not constitute a violation of any provision . . . involving alleged cruelty to, or inhumane care or treatment of, domestic livestock."¹⁷¹ Thus, compliance with the regulatory standards serves as a presumptive safe haven from prosecution.

Despite the New Jersey statute's express reference to "humane" standards and lack of reference to common, standard, or specific farming practices, the regulatory standards promulgated by the New Jersey Department of Agriculture expressly exempt numerous specific standard industry practices, including branding, castration, dehorning, disbudding, tail docking, and teeth clipping, all without pain mitigation.¹⁷²

to support egg production." Leahy, *supra* note 143, at 170.

¹⁶⁹ Notably, beginning in 2024, the National Dairy Farmers Assuring Responsible Management (FARM) Program, which 99 percent of US dairy producers participate in, Farmers Assuring Responsible Management, FARM Animal Care, <https://nationaldairyfarm.com/dairy-farm-standards/animal-care/> (last visited July 7, 2026), eschews dehorning—"the excision of the horn after skull attachment"—in favor of disbudding—"destruction or excision of horn-producing cells before skull attachment"—and advises that the latter is best practice. Farmers Assuring Responsible Management, Topic Brief, Disbudding (2021), https://nationaldairyfarm.com/wp-content/uploads/2023/02/FARM_Topic-Brief_Disbudding_Sept.-2021-1.pdf. Moreover, the program "has required dairy producers to provide pain mitigation for disbudding and develop an effective pain management protocol with the farm's veterinarian for the procedure. Additionally, current program requirements are that the calves should be disbudded prior to eight weeks of age." *Id.*

¹⁷⁰ N.J. REV STAT § 4:22-16.1(1)(a).

¹⁷¹ *Id.* [170] § 4:22-16.1(1)(b)(1); *accord* N.J. ADMIN. CODE § 2:8-1.1(b).

¹⁷² N.J. ADMIN. CODE §§ 2:8-1.3, 2:8-4.7, § 2:8-7.6. The New Jersey Supreme Court struck down the agency's earlier exemptions for "routine husbandry practices" as inconsistent with the statute. *N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric.*, 955 A.2d 886, 906 (2008). Underscoring that, "[w]hereas other states have exempted routine, common, or accepted practices from their cruelty codes," the New Jersey legislature "chose not to use that language, selecting a different course," the court concluded that "[t]o suggest . . . that the Legislature meant 'routine' when it said 'humane' would 'abuse the interpretive process and . . . frustrate the announced will of the people.'" *Id.* at 906 (citations omitted).

Somewhat similarly, Maine exempts agricultural operations that are “in compliance with best management practices (BMPs) for animal husbandry as determined by the Department of Agriculture, Food and Rural Resources.”¹⁷³ The Manual of Best Management Practices for Maine Agriculture spans nearly 100 pages and addresses a wide range of issues, from erosion and sedimentation control to odor and noise control.¹⁷⁴ Only one page of the Manual is dedicated to Livestock Management.¹⁷⁵ That one page addresses only five things, three of which might bear directly on animal wellbeing: “appropriate housing for optimal productivity and health of various species,” “appropriate facilities and environment for optimal livestock productivity and health,” and “species-specific fencing for livestock and predator control, and for environmental protection.”¹⁷⁶ Though these provisions are broad, importantly they use the terms “appropriate” and “species-specific,” not terms like “accepted” or “usual,” and thus should not be conflated with common farming exemptions. The former can be read as deferential to industry practices or the status quo,¹⁷⁷ while the latter suggests a more objective, scientific standard. While the first two of these three BMPs reference “optimal productivity,” they also—and not disjunctively—reference animal health, which, contrary to frequent assertions by the industry, is often in tension with productivity, rather than aligned.¹⁷⁸ Moreover, these BMPs apply only to certain practices: housing, facilities, and fencing. Many of the practices discussed in Part I.A are not addressed by the BMPs and thus do not fall within the exemption.

Unsurprisingly, then, this exemption did not preclude prosecution of an egg production facility for ten counts of animal cruelty following an

The court further held that “in light of the direct mandate to the Department to adopt regulations that establish practices that are humane, the decision by that agency to authorize an exemption, and therefore to embrace wholesale any technique as long as it is ‘commonly taught’ at any” “veterinary schools, land grant colleges, and agricultural extension agents” “[wa]s an impermissible subdelegation.” *Id.* at 906. Though the current regulatory exemptions have not been challenged to date, under this precedent they seem vulnerable.

¹⁷³ ME. REV. STAT. ANN. TIT. 17 §§ 1031(2)(D), 1037-A, 4011(D).

¹⁷⁴ MAINE DEPARTMENT OF AGRICULTURE, FOOD & RURAL RESOURCES, DIVISION OF ANIMAL HEALTH & INDUSTRY, MANUAL OF BEST PRACTICES FOR MAINE AGRICULTURE (Jan. 2007), https://www.maine.gov/dacf/php/nutrient_management/documents/BMP-Manual-Final-January-2007.pdf.

¹⁷⁵ *Id.* [174] at 27.

¹⁷⁶ *Id.* [174] The other two are “appropriate containment structures in terms of capacity, siting and construction method for personnel safety and environmental protection;” and crop management “for optimal productivity, nutritional value and environmental protection.” *Id.*

¹⁷⁷ *But see* Part II.H, *infra* (arguing that it is not clear that it is not a foregone conclusion that “accepted” means accepted by industry).

¹⁷⁸ Bernard E. Rollin, *An Ethicist’s Commentary on Equating Productivity and Welfare*, 43 CAN. VET. J. 83 (2002).

undercover investigation that documented “dead and decomposing birds in cages with live birds, improper ‘euthanasia . . . , forty-nine documented instances of live hens left to die in piles of dead birds,” and more.¹⁷⁹ Though the state veterinarian deemed these abuses “egregious,”¹⁸⁰ Leahy observes:

The evidence of mistreatment here . . . is not particularly different from that uncovered other broiler brow investigations, indicating that this type of cruelty and neglect is not isolated or an “egregious” example of bad management relative to the way the egg industry is normally run. Rather, it seems that this sort of mistreatment may be much more typical in the egg industry than industry defenders would like to admit, and the line between so-called “egregious” cruelty and business-as-usual institutionalized cruelty is not much of a line at all. Instead, these investigations indicate that cruelty is an inherent part of industrialized farming.¹⁸¹

The facility admitted to the cruelty and agreed to pay the maximum fines, restitution, and \$100,000 for ongoing monitoring for five years.¹⁸² The facility additionally agreed to “unlimited unannounced visits to any and all stages of the production process to ensure compliance with the agreement and a waiver of double jeopardy on prosecution of the original evidence if subsequent violations are found.”¹⁸³

However, following a subsequent undercover investigation of an aquaculture facility, and despite the absence of BMPs for aquaculture, the state nevertheless declined to prosecute based on private standards, effectively elevating industry standards to legal standards, as Leahy observes.¹⁸⁴ Still, this troubling exercise of prosecutorial discretion was not because of the state’s exemption but more so *despite* it.¹⁸⁵

Thus, laws exempting specific practices vary in their comprehensiveness and scope. Arkansas, Maryland, and New Jersey absolutely exempt particular practices, while Maine and Virginia’s specific-practice exemptions are

¹⁷⁹ *Large-Scale Farmed Animal Abuse*, *supra* note **Error! Bookmark not defined.** [**Error! Bookmark not defined.**], at 111.

¹⁸⁰ *Id.* [**Error! Bookmark not defined.**] at 115.

¹⁸¹ *Id.* [**Error! Bookmark not defined.**] at 115-16.

¹⁸² *Id.* [**Error! Bookmark not defined.**] at 114.

¹⁸³ *Id.* [**Error! Bookmark not defined.**]

¹⁸⁴ Leahy, *supra* note 143 [**Error! Bookmark not defined.**], at 190. Leahy further notes that “the substance of these standards is not consistent with the statutory definition of animal cruelty.” *Id.* at 191. This case involved fishes at an aquaculture facility but is instructive nonetheless as the same “animal husbandry” exemption was invoked.

¹⁸⁵ Prosecutorial discretion is discussed in Part III.G..

conditional. In Illinois, these exemptions are not conditional but apply only to the felony torture prohibition, not the misdemeanor cruelty prohibition. Importantly, even where absolute as to specific practices, exemptions in this category are still limited to those particular practices and thus do not broadly shield on-farm conduct—that is, they do not put farmed animals entirely beyond the law’s reach, as evidenced by the successful prosecution of on-farm cruelty in Maine.

E. Express Deference to Industry

Despite repeated pronouncements that most state cruelty laws “automatically exempt” “any practice the industry chooses to employ,”¹⁸⁶ in fact only two states’ exemptions expressly refer to industry-accepted practices: Kansas exempts farmed “animal care practices common in the industry or region”¹⁸⁷ and Wyoming exempts the “use of industry accepted agricultural and livestock practices on livestock or other animal used in the practice of agriculture”¹⁸⁸ and ““Wyoming industry accepted agricultural or livestock management practices.”¹⁸⁹

These exemptions do indeed appear to, in Wolfson’s words, “endow[] agribusiness with complete authority to decide what is, and is not, cruelty to animals under their care” and “grant[] agribusiness a legal license to treat farm animals as they wish.”¹⁹⁰ These exemptions effectuate, to again use Wolfson’s words, a “breathtaking” “delegation of power to the farming industry.”¹⁹¹

Critically, however, such exemptions appear in only two states’ cruelty laws. These laws demonstrate that legislatures know full well how to specifically exempt industry standards when they want to. And yet, all other forty-eight states have chosen different tacks.

Moreover, even in these two states, what is “common” in or “accepted” by industry can evolve over time. For example, docking the tails of dairy cows has largely fallen out of favor and is no longer common in or accepted by the industry¹⁹² and, as noted above, the National Dairy FARM Program, which

¹⁸⁶ Sullivan & Wolfson, *supra* note 79, at 154–55; *see generally* Part I.B (detailing how dominant this narrative is).

¹⁸⁷ KAN. STAT. ANN. § 21-6412(c)(6) (“with respect to farm animals, normal or accepted practices of animal husbandry, including . . . the careful or thrifty management of one’s herd or animals, including animal care practices common in the industry or region”).

¹⁸⁸ WYO. STAT. ANN. § 6-3-203(m)(ii).

¹⁸⁹ *Id.* [188] § 11-29-115.

¹⁹⁰ Wolfson, *supra* note 72 [72], at 123.

¹⁹¹ *Id.* [72] at 147. In fact, this delegation may not merely be breathtaking but also an unconstitutional sub-delegation.

¹⁹² Am. Vet. Med. Soc’y, TAIL DOCKING OF CATTLE (last visited Feb. 2, 2026).

99 percent of dairy producers in the United States participate in, has disclaimed dehorning and requires pain mitigation and management for disbudding.¹⁹³

F. Exemptions for Good or Pain-Minimizing Animal Husbandry Only

While often conflated with common farming exemptions, cruelty laws in two¹⁹⁴ states—Illinois and Vermont—narrow what might at first glance appear to be broad common farming exemptions.

Illinois' cruelty law exempts "normal, good husbandry practices utilized by any person in the production of food."¹⁹⁵ Illinois does not define "normal, good husbandry practices," but the inclusion of the word "good" makes clear that a practice must be more than just "normal."¹⁹⁶ For example, teeth clipping is "normal" in the pork industry in the sense that it is not unusual, but it is not clear that it is a "good" practice. As farmed animal veterinary experts Nordquist et al. explain, "Clipping causes discomfort to the individual pig but is thought to be beneficial to the group—theoretically, it prevents mammary injuries in sows and severe injury during fights with pen mates. However, so far there is no evidence that tooth clipping provides the envisaged benefit for the group."¹⁹⁷

Vermont's cruelty code goes even further by exempting "livestock and poultry husbandry practices." These practices are defined as "the raising, management and using of animals to provide humans with food, fiber or transportation," so long as those activities conform to: "(A) husbandry practices recommended for the species by agricultural colleges and the U.S. Department of Agriculture Extension Service; (B) husbandry practices modified for the species to conform to the Vermont environment and terrain; and (C) husbandry practices that minimize pain and suffering."¹⁹⁸ Thus, a husbandry practice is exempt in Vermont only if it meets all three of these qualifications, including the mandate that it "minimize pain and suffering," a

¹⁹³ See *supra* notes 155, 157 and accompanying text.

¹⁹⁴ While Oregon's cruelty law exempts "[a]nimals subject to good animal husbandry practices" "unless gross negligence can be shown," OR. REV. STAT. § 167.335(a), (c), it provides that "[g]ood animal husbandry" "includes, but is not limited to, the dehorning of cattle, the docking of horses, sheep or swine, and the castration or neutering of livestock, according to accepted practices of veterinary medicine or animal husbandry." *Id.* § 167.310(6). Because of the use of the disjunctive "or," so long as the practice are consistent with "accepted . . . animal husbandry" they are exempted. Accordingly, this exemption is discussed alongside other exemptions for "accepted" practices below. *Infra* Part II.A.8.

¹⁹⁵ 510 ILL. COMP. STAT. ANN. 70/13.

¹⁹⁶ See *supra* note 121 [120] and accompanying text.

¹⁹⁷ Nordquist et al., *supra* note 46, at 3-4.

¹⁹⁸ VT. STAT. ANN. TIT. 13 §§ 351b(3), 351(13), 352.

meaningful limitation not seen in any other state's exemption.

Again, while these exemptions at first glance might appear to be common farming exemptions, close attention to their phrasing makes clear that they in fact have important limitations that, properly applied, ensure farm animals are not put beyond the law.

G. *No Farming Exemption*

Twelve states have no exemptions whatsoever for on-farm conduct in their cruelty laws: Alabama, California, Delaware, Hawaii, Kentucky, Massachusetts, Minnesota, Mississippi, New Hampshire, New York, Oklahoma, and Rhode Island. The District of Columbia's cruelty law also does not exempt on-farm conduct. In addition, neither Ohio nor Wisconsin exempt farmed animals in any way from their general cruelty prohibition.¹⁹⁹ And Louisiana's cruelty code exempts only the "[h]erding of domestic animals."²⁰⁰ "Herding" is not defined by statute; dictionaries define it as "gather[ing], lead[ing], or driv[ing] as if in a herd."²⁰¹ Thus, this exemption is narrow, leaving most on-farm conduct in Louisiana—including all of the practices discussed in Part I—subject to the cruelty prohibitions.

In these jurisdictions, it is decidedly not the case that exemptions put farmed animals beyond the law. While there have been a handful of prosecutions for on-farm cruelty in these states,²⁰² cruelty prosecutions pertaining to on-farm treatment appear to be as rare as in states that do have exemptions for on-farm conduct.

¹⁹⁹ These states do, however, have farmed animal exemptions from their requirements from their shelter and their exercise and fresh air requirements, respectively, as discussed in Part II.E

²⁰⁰ LA. REV. STAT. ANN. § 14:102.1. This is decidedly different from the terminology used in other states' statutes that refer much more broadly to animal husbandry practices.

Louisiana also exempts "standard . . . agricultural processing," LA. REV. STAT. ANN. § 14:102.1, which it defines tautologically as "the processing of any agricultural product and includes, but is not limited to, the slaughtering and processing of livestock and poultry," *id.* § 3:3602. "Processing" is generally understood to mean the processing of an animal carcass after slaughter into consumer products and is not a term typically used to refer to the raising of an animal for food before slaughter.

²⁰¹ The statute does not define "herding," but the dictionary definition of "to herd" is "to gather, lead, or drive as if in a herd." "Herd." MERRIAM-WEBSTER.COM DICTIONARY, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/herd>.

²⁰² See *Large-Scale Farmed Animal Abuse*, *supra* note **Error! Bookmark not defined.** [**Error! Bookmark not defined.**], at 82 (describing guilty felony cruelty plea of manager of Oklahoma pig farm); *id.* at 87-90 (describing an Ohio dairy farm worker's guilty plea to six counts of animal cruelty); *id.* at 118-19 (describing New York dairy worker's guilty plea); *Animal Abuse Video at Dairy Farm Prompts Policy Change for Great Lakes Cheese*, ONMILWAUKEE (Mar. 9, 2015), <https://onmilwaukee.com/articles/policychangegreatlakes> (noting conviction of four workers at a Wisconsin dairy farm for cruelty).

This suggests, as discussed in Part III, that the failure of our laws to protect farmed animals is due to something beyond these exemptions, which means remedying this failure will take more than overturning the exemptions.

H. “Accepted” Farming Practices

This Subpart addresses exemptions for “accepted” farming practices—the most prevalent category of exemptions for on-farm conduct. It first describes this taxonomic category and the laws that fall within it and scrutinizes the text of these laws, applying statutory interpretation principles. It next demonstrates that the best interpretative approach is a case-specific factual inquiry into acceptability and then summarizes the growing body of evidence documenting the significant divide between acceptable practices and standard industry practices. Finally, it discusses successful prosecutions for on-farm conduct in states with such exemptions for “accepted” practices.

Fourteen states exempt “acceptable” or “accepted” practices involving animals raised for food. These states are: Alaska,²⁰³ Arkansas,²⁰⁴ Colorado,²⁰⁵ Connecticut,²⁰⁶ Indiana,²⁰⁷ Montana,²⁰⁸ Nebraska,²⁰⁹ New Mexico,²¹⁰

²⁰³ ALASKA STAT. § 11.61.140(c)(3) (“accepted . . . animal husbandry practices”).

²⁰⁴ ARK. CODE ANN. §§ 5-62-105(a)(5) (“generally accepted animal husbandry practices”).

²⁰⁵ COLO. REV. STAT. § 18-9-201.5(1) (“accepted animal husbandry practices utilized by any person in the care of . . . livestock animals”).

²⁰⁶ CONN. GEN. STAT. ANN. § 53-247(b) (“generally accepted agricultural practices”).

²⁰⁷ IND. CODE § 35-46-3-5(a)(5) (“acceptable farm management practices”).

²⁰⁸ MONT. CODE ANN. § 45-8-211(4)(b) (“commonly accepted agricultural and livestock practices on livestock”).

²⁰⁹ NEB. REV. STAT. ANN. § 54-907(4), (5) (“Commonly accepted animal welfare practices with respect to livestock animals and commercial livestock operations . . .”).

²¹⁰ N.M. Stat. § 30-18-1(I)(5) (“the treatment of livestock and other animals used on farms and ranches for the production of food, fiber or other agricultural products, when the treatment is in accordance with commonly accepted agricultural animal husbandry practices”).

Oregon,²¹¹ South Carolina,²¹² Texas,²¹³ Utah,²¹⁴ Washington,²¹⁵ and West Virginia.²¹⁶

Though often conflated with exemptions for “common” farming practices, which is the subject of the next Subpart, the two categories are distinct in critically important ways, including that the former is normative while the latter is descriptive.

Though some exemptions in the former category are indeed modified by the term “commonly,”²¹⁷ there is a world of difference between a practice that is “common”—that is, widespread—and a practice that is “commonly *accepted*.” Indeed, voluminous consumer surveys and other studies make clear the vast divide between these two categories. For example, a recent survey of Americans found that most deem the use of battery cages, gestation crates, maceration of male chicks, and mutilations (including debeaking, castration, and tail docking) without pain relief to be “unacceptable.”²¹⁸ As discussed in Part I.A, all these practices are common. But that does not render

²¹¹ OR. REV. STAT. §§ 167.335(d), 167.310(6) (exempting “[a]nimals subject to good animal husbandry practices” and providing that “[g]ood animal husbandry” includes, but is not limited to, the dehorning of cattle, the docking of horses, sheep or swine, and the castration or neutering of livestock, according to accepted practices of veterinary medicine or animal husbandry.” *Id.* § 167.310(6). This exemption is inapplicable if “gross negligence can be shown.” *Id.* § 167.335(d).

²¹² S.C. CODE ANN. § 47-1-40(C) (“accepted animal husbandry practices of farm operations”).

²¹³ TEX. PENAL CODE ANN. § 42.09(f)(2) (“generally accepted and otherwise lawful . . . animal husbandry or agriculture practice involving livestock animals”).

²¹⁴ UTAH CODE ANN. § 76-9-301(1)(b)(ii)(C) (“accepted animal husbandry practices or customary farming practices”).

²¹⁵ WASH. REV. CODE § 16.52.185 (“accepted husbandry practices used in the commercial raising . . . of livestock or poultry, or products thereof”).

²¹⁶ W. VA. CODE § 61-8-19(f) (livestock and poultry “kept and maintained according to usual and accepted standards of livestock [and] poultry . . . farm production and management”). Because this exemption requires that a practice be *both* “usual” and “accepted,” it is included in this category rather than the common practices category discussed in the next Subpart.

²¹⁷ MONT. CODE ANN. § 45-8-211(4)(b); NEB. REV. STAT. ANN. § 54-907(4), (5); N.M. Stat. § 30-18-1(I)(5).

²¹⁸ Polanco & Troy, *supra* note 11, at 8; *see also, e.g.,* C. Victor Spain et al., *Are They Buying It? United States Consumers’ Changing Attitudes Toward More Humanely Raised Meat, Eggs, and Dairy*, 8 ANIMALS 5 (2018) (finding that more than three quarters (76%) of American consumers reported that it was important to them that “farms provide pain control” when conducting “beak trimming”); Press Release, World Animal Protection, The Harris Poll, Majority of Pork Buyers Show Concern for Pig Welfare, Survey Shows (Oct. 7, 2020), <https://www.prnewswire.com/news-releases/majority-of-regular-pork-buying-americans-show-concern-for-pig-welfare-hold-retailers-responsible-to-end-what-are-seen-by-many-as-objectionable-practices-a-new-harris-poll-reports-301206549.html> (seventy-five percent of Americans surveyed indicated that “they “believe retailers have a responsibility to ensure crates are not used” to confine pregnant pigs).

them commonly *accepted*.

And, unlike the two laws discussed in Part II.E, these fourteen exemptions do not cover practices accepted *by industry*. Instead, in most instances they refer simply to “accepted” or “acceptable” practices, without any adverbial modification.²¹⁹ For a court to interpolate such modification would overstep the confines of its constitutional role of interpreting, rather than creating, laws.²²⁰ Legislatures have shown themselves capable of stating when they intend deference to industry, and in the vast majority of cases, they have chosen not to do so.

The constitutional avoidance doctrine²²¹ further militates against such an interpretation because exempting only industry-approved practices would raise constitutional sub-delegation concerns.²²²

Where the exemptions in this category do contain adverbial modifications or qualifications, they specify that “commonly” or “generally” accepted practices—not industry-accepted practices—are exempt. Rather than adding unenacted language to the exemptions, the sounder approach is for courts to independently ascertain what is “acceptable”—a fact-intensive inquiry that

²¹⁹ ALASKA STAT. § 11.61.140(c)(3); ARK. CODE ANN. §§ 5-62-105(a)(5); COLO. REV. STAT. § 18-9-201.5(1); CONN. GEN. STAT. ANN. § 53-247(b); IND. CODE § 35-46-3-5(a)(5); MONT. CODE ANN. § 45-8-211(4)(b); NEB. REV. STAT. ANN. § 54-907(4), (5); N.M. Stat. § 30-18-1(I)(5); OR. REV. STAT. §§ 167.335(d), 167.310(6); S.C. CODE ANN. § 47-1-40(C); TEX. PENAL CODE ANN. § 42.09(f)(2); UTAH CODE ANN. § 76-9-301(1)(b)(ii)(C); WASH. REV. CODE § 16.52.185; W. VA. CODE § 61-8-19(f). New Mexico’s law uniquely provides, “If there is a dispute as to what constitutes commonly accepted agricultural animal husbandry practices . . . , the New Mexico livestock board shall hold a hearing to determine if the practice in question is a commonly accepted agricultural animal husbandry practice” N.M. Stat. § 30-18-1(J). Because the law directs that this board be dominated by industry, *id.* § 77-2-3(B) (“Seven of the nine members must raise and own cattle or raise and own sheep in this state and be residents of this state. . . . The majority of the members of the board at any given time shall, however, be primarily engaged in the business of raising and owning cattle in this state.”), it is likely to interpret “commonly accepted” to mean “commonly accepted by industry.” However, such an interpretation would not be entitled to judicial deference. *See* N.M. Att’y Gen. v. N.M. Pub. Regul. Comm’n, 2013-NMSC-042, ¶ 10, 309 P.3d 89, 93 (“[W]e will not defer to the agency’s . . . statutory interpretation, as this is a matter of law that we review de novo.” (cleaned up) (citation omitted)).

²²⁰ *See* *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 654–55 (2020) (“[O]nly the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own imaginations, we would risk amending statutes outside the legislative process reserved for the people’s representatives.”).

²²¹ Scalia & Garner, note 121 [120], *supra*.

²²² *See* *New Jersey Soc. for Prevention of Cruelty to Animals v. New Jersey Dep’t of Agric.*, 196 N.J. 366, 400 (2008) (exempting “commonly taught” husbandry practices “is an impermissible subdelegation”); *U.S. Telecom Ass’n v. F.C.C.*, 359 F.3d 554, 565 (D.C. Cir. 2004) (“[S]ubdelegations to outside parties are assumed to be improper absent an affirmative showing of congressional authorization.”).

the aforementioned robust and growing body of studies can help answer.

In addition to these studies, and in the face of consumer pressure, many retailers have adopted corporate policies prohibiting what had long been standard industry practices, further undermining the notion that industry practices are inherently acceptable.²²³ For example, “[o]ver 2,700 companies have committed to go 100% cage-free in their supply chains,” including “almost all of the largest American . . . retailers, fast food chains, and food service companies”²²⁴ As a result, the size of the “cage-free flock” in the United States has reached an all-time high of 45.7 percent.²²⁵ A growing number of major retailers in the country have also committed to ending other practices that were historically standard, including the use of gestation crates²²⁶ and male chick culling.²²⁷

And legislative changes over the past quarter century, such as bans in more than a quarter of states of certain confinement systems that have been industry-standard,²²⁸ suggest that what might have been acceptable when *Beyond the Law* was published three decades ago are no longer so—or at least are significantly less so.²²⁹ Indeed, most of these state bans were adopted through direct democracy—that is, by a majority of citizens—leaving no question that, at least in those states, standard industry practices are not

²²³ KAN. STAT. ANN. § 21-6412(c)(6).

²²³ *Supra* Part II.F.

²²³ KAN. STAT. ANN. § 21-6412(c)(6).

²²³ WYO. STAT. ANN. § 6-3-203(m)(ii).

²²³ *Id.* § 11-29-115.

²²³ SHANE HAMILTON, URBAN INST., THE FARM ANIMAL WELFARE MOVEMENT’S CORPORATE CAMPAIGNS (Aug. 2025).

²²⁴ Coefficient Giving, Cage-Free Reforms, <https://coefficientgiving.org/funds/farm-animal-welfare/cage-free-reforms/> (last visited July 7, 2026).

²²⁵ U.S. DEP’T OF AGRIC., EGGS MARKETS OVERVIEW 4 (June 27, 2025), https://mymarketnews.ams.usda.gov/filerepo/sites/default/files/3725/2025-06-27/1254620/ams_3725_00082.pdf.

²²⁶ Sara Shields et al., *A Decade of Progress toward Ending the Intensive Confinement of Farm Animals in the United States*, 7 ANIMALS 14 (2017), <https://pmc.ncbi.nlm.nih.gov/articles/PMC5447922/pdf/animals-07-00040.pdf>; Restaurant Brands International, Animal Welfare, <https://www.rbi.com/English/sustainability/planet/responsible-sourcing/animal-welfares/> (last visited July 7, 2026); Ahold Delhaize USA, Advancing Animal Welfare: Ahold Delhaize USA Year-End Progress Update, <https://www.adusa.com/sustainability/animal-welfare> (Mar. 2026).

²²⁷ Innovate Animal Ag, 2025 In-Ovo Sexing Yearly Recap (Jan. 4, 2026), <https://innovateanimalag.org/blog/in-ovo-sexing-2025-review>.

²²⁸ See DANIELLE J. UFER, ECON. RSCH. SERV., U.S. DEP’T OF AGRIC., FARM ANIMAL WELFARE POLICIES COVER BREEDING SOWS, VEAL CALVES, OR LAYING HENS IN 14 U.S. STATES (Apr. 24, 2023).

²²⁹ See Polanco & Troy, *supra* note 11, at 3 (“A clear majority of the U.S. public finds standard animal agriculture practices for pigs, cows, and chickens to be unacceptable . . .”).

acceptable to the public.²³⁰

What is considered “acceptable” evolves over time—very much like, as discussed in Part III.C, what constitutes “necessary” or “justifiable” cruelty varies by place and time. Thus, it should hardly be a foregone conclusion or the position of animal advocates that practices such as confinement to “cages or crates so small that the animal cannot even turn around;” starvation to induce a new egg-laying cycle; and the removal of tails, teeth, testicles, and other body parts without anesthetic are categorically exempt.²³¹

Indeed, the widespread contention that these exemptions put farmed animals beyond the law is further belied by numerous successful prosecutions of on-farm cruelty in these states with such exemptions—including successful prosecutions for conduct that could be deemed standard in the industry.²³² For example, in Indiana, which exempts “acceptable farm management practices,”²³³ a dairy worker pleaded guilty to cruelty after footage from an undercover investigation documented abuse of calves.²³⁴ Footage showed abuse that “took place during the process of moving [calves] for transport and also during bottle feeding while the calves were housed in individual isolation style hutches, which is standard housing in the industry.”²³⁵ And in Washington state, which exempts “accepted husbandry practices used in the commercial raising . . . of livestock or poultry, or products thereof,”²³⁶ an egg farmer was convicted for starving egg-laying hens.²³⁷ While starving might not initially seem like a standard industry practice, it is routine in the egg industry to starve hens.²³⁸ Indeed, “Washington State University experts indicated to the prosecuting attorney that it was common practice in the industry to starve chickens for up to 22 days and that it was acceptable to deprive them of water for up to two days.”²³⁹ The prosecutor initially refused to prosecute based on this information, but ultimately did charge the farmer,

²³⁰ See Kathryn Bowen, *Protecting Regulatory Expressions of Food Populism Through Interstate Cooperation*, 85 TENN. L. REV. 1, 12 (2017).

²³¹ Scalia & Garner, note 121 [120], *supra*.

²³² Leahy, *supra* note 143 [Error! Bookmark not defined.], at 186; *Large-Scale Farmed Animal Abuse*, *supra* note Error! Bookmark not defined. [Error! Bookmark not defined.], at 93-94.

²³³ IND. CODE § 35-46-3-5(a)(5).

²³⁴ Leahy, *supra* note 143 [Error! Bookmark not defined.], at 186.

²³⁵ Leahy, *supra* note 143 [Error! Bookmark not defined.], at 186.

²³⁶ WASH. REV. CODE §16.52.185.

²³⁷ The farmer had shuttered his facility, leaving tens of thousands of hens to starve. *Large-Scale Farmed Animal Abuse*, *supra* note Error! Bookmark not defined. [Error! Bookmark not defined.], at 93.

²³⁸ See *supra* note 59 [59] and accompanying text.

²³⁹ *Large-Scale Farmed Animal Abuse*, *supra* note Error! Bookmark not defined. [Error! Bookmark not defined.], at 93.

who then pleaded guilty.²⁴⁰ As Leahy notes, “This case indicates that even when factory farm neglect affects a large number of animals—and even may be considered part of a commonly accepted practice—it can and should be the basis of successful criminal prosecution.”²⁴¹ At the same time, this case illustrates the deterrent effect the mere existence of the exemptions might have on prosecution.²⁴²

To be sure, such prosecutions are exceedingly rare, especially when considered in the context of the scale of the industry. Nevertheless, the point stands that there have been multiple convictions for on-farm cruelty in states with these exemptions, suggesting that, at a minimum, the situation is more nuanced than the dominant narrative admits. And the paucity of prosecutions is likely more attributable to the structural issues with criminal cruelty laws discussed in Part III, than to the exemptions specifically.

I. “Common” Farming Practices

The final category of exemptions is for “common” farming practices. This Subpart delineates that category, distinguishing it from exemptions for “accepted” practices and the other categories of exemptions. This parsing is critical, as it demonstrates that true common farming exemptions are not in fact ubiquitous, as the dominant narrative suggests. After introducing the taxonomic category, this Subpart analyzes the case law interpreting exemptions for common farming practices. This jurisprudence, albeit limited, corroborates the notion that these exemptions largely defer to standard industry practices. Notably, however, it also demonstrates that courts do not reflexively assume the applicability of common farming exemptions. Rather, they require a showing that a practice is indeed common. As a result, the decisions to date have consistently rejected attempts to invoke such exemptions and prosecutions for on-farm conduct have succeeded in numerous states.

Ten states exempt agricultural practices that are “customary,” “established,” or “normal” from their cruelty prohibitions. These states are

²⁴⁰ *Id.* [Error! Bookmark not defined.] at 94.

²⁴¹ *Id.* [Error! Bookmark not defined.]

²⁴² *See infra* Part III.G.

Idaho,²⁴³ Iowa,²⁴⁴ Kansas,²⁴⁵ Maryland,²⁴⁶ Missouri,²⁴⁷ Nevada,²⁴⁸ North Dakota,²⁴⁹ Pennsylvania,²⁵⁰ Tennessee,²⁵¹ and Wyoming.²⁵² In addition, Florida exempts “recognized livestock husbandry practices or techniques,” without indicating who is supposed to be doing the recognition.²⁵³

Though these exemptions do not expressly reference industry, by making the pervasiveness of a practice dispositive, the statutes appear likely to broadly exempt standard industry practices. Importantly, however, they do not exempt *all* industry practices.

Two published court decisions from Pennsylvania are illustrative. The state exempts “activity undertaken in normal agricultural operations,” which is defined as “normal activities, practices and procedures that farmers adopt, use, or engage in year after year in the production and preparation for market of poultry, livestock and their products in the production and harvesting of agricultural . . . crops and commodities.”²⁵⁴

In *Commonwealth v. Barnes*, the court rejected an attempt to invoke this exemption because it concluded that the practice at issue was not “normal” in

²⁴³ IDAHO CODE ANN. § 25-3514 (“normal or accepted practices of animal identification and animal husbandry”).

²⁴⁴ IOWA CODE ANN. § 717.2 (“care consistent with customary animal husbandry practices”).

²⁴⁵ KAN. STAT. ANN. § 21-6412(c)(6) (“with respect to farm animals, normal or accepted practices of animal husbandry, including the normal and accepted practices for the slaughter of such animals for food or by-products and the careful or thrifty management of one’s herd or animals, including animal care practices common in the industry or region”).

²⁴⁶ MD. CODE ANN., CRIM. LAW § 10-603(1) (“customary and normal veterinary and agricultural husbandry practices including dehorning, castration, tail docking, and limit feeding”).

²⁴⁷ MO. ANN. STAT. § 578.007(8) (“with respect to farm animals, normal or accepted practices of animal husbandry”).

²⁴⁸ NEV. REV. STAT. § 574.200(f) (“established methods of animal husbandry, including the raising, handling, feeding, housing and transporting of livestock or farm animals”).

²⁴⁹ N.D. CENT. CODE ANN. § 36-21.2-02(3)(a)(1) (“Any usual and customary practice in” “[t]he production of food, feed, fiber, or ornament, including all aspects of the livestock industry”).

²⁵⁰ 18 PA. CONS. STAT. ANN. §§ 5560 (“activity undertaken in normal agricultural operation”).

²⁵¹ TENN. CODE ANN. § 39-14-202(f)(1) (“usual and customary practices which are accepted by colleges of agriculture or veterinary medicine with respect to that animal”).

²⁵² WYO. STAT. ANN. § 11-29-115(a)(1) (exempting “[t]he use of Wyoming industry accepted agricultural or livestock management practices or any other commonly practiced animal husbandry procedure” (emphasis added)). The state’s exemptions for “Wyoming industry accepted,” *id.*, and “industry accepted agricultural and livestock practices,” *id.* § 6-3-203(m)(ii), are discussed in Part II.E.. The focus here is on the exemption for common practices.

²⁵³ FLA. STAT. § 828.125(5).

²⁵⁴ 18 PA. CONS. STAT. ANN. §§ 5560, 5531.

the industry.²⁵⁵ Killer-buyers who purchased unwanted horses for slaughter were convicted of cruelty after undernourished, unhealthy, and dead horses were found on their property.²⁵⁶ These defendants contended that “it [was] a normal practice in the horse farming business to neglect horses who [were] no longer wanted and [were] going to be sent to ‘killer pens’ at the livestock auction and then sold for dog food” and that their conduct therefore fell within the cruelty law’s exemption for “activity undertaken in normal agricultural operations.”²⁵⁷

To assess the applicability of the exemption, the court heard testimony on the normalcy of this practice.²⁵⁸ Multiple witnesses testified in support of the contention that it was common industry practice to neglect horses destined for slaughter, including by depriving them of food, water, and veterinary care.²⁵⁹ However, the court independently assessed this testimony and found it insufficient to support a finding that the exemption applied upheld the conviction, stating, “we have only the testimony of two witnesses, and their testimony is somewhat inconsistent with regard to both the severity and the prevalence of the practice.”²⁶⁰

Thus, the court did not simply assume that the exemption applied because the cruelty involved agriculture, nor did it uncritically accept the killer-buyers’ contention that their conduct fell within the scope of the exemption. To the contrary, the court rejected the attempt to invoke the exemption, even in the face of testimony from multiple witnesses that the practices were common in the industry, and absent contradictory testimony.

To be sure, the court’s analysis was decidedly industry-focused. Ultimately, the court said, the question was whether the killer-buyers’ activities were “normal” for “farmers.”²⁶¹ As Wolfson notes, had they:

successfully shown, with additional testimony, that the practice was a normal practice, the anticruelty statute would not have applied to the act of starving [their] horses, and the court would not have found [them] criminally liable. The . . . problem was not that [they] starved

²⁵⁵ *Commonwealth v. Barnes*, 629 A.2d 123, 129 (Pa. Super. Ct. 1993).

²⁵⁶ *Id.* at 125 (Pa. Super. Ct. 1993).

²⁵⁷ *Id.* at 128-29.

²⁵⁸ *Id.* at 132.

²⁵⁹ *Id.* at 130-33.

²⁶⁰ *Id.* at 132-33. The court also rested its decision on inadequate evidence that appellants were, in fact, “in the business of raising horses to be sold for dog food or that they had formed the definite intention of sending the horses in question to “killer pens” for that purpose.” *Id.*; *see also* *Commonwealth v. Balog*, 448 Pa. Super. 480, 490, 672 A.2d 319, 323-24 (1996) (holding that this exemption did not apply to a cockfighter where there was no evidence that defendant raised birds “for market”).

²⁶¹ 18 PA. CONS. STAT. ANN. §§ 5560, 5531.

[the] horses, but that [they] could not prove that enough people were doing the same thing.²⁶²

Applying *Barnes*, another Pennsylvania appeals court rejected an attempt to invoke the state's common farming exemption.²⁶³ *In re Animal Outlook* involved a challenge to a district attorney's decision not to prosecute workers at a dairy farm supplying Nestlé. At the farm, an undercover investigation documented dragging, excessively shocking, punching, and twisting the tails of cows.²⁶⁴ A unique procedural mechanism in Pennsylvania allows judicial review of decisions not to prosecute,²⁶⁵ a rare exception to the general rule, discussed in Part III.G, that prosecutorial discretion is sacrosanct.²⁶⁶

The district attorney cited the same exemption invoked in *Barnes* to defend his decision not to prosecute.²⁶⁷ Reviewing that application of the exemption and quoting *Barnes*, the appellate court noted, "Normal means 'conforming with or constituting an accepted standard, model, or pattern; natural; standard; regular.'" ²⁶⁸ "The court continued and stated that "the 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."²⁶⁹ "Thus," the court concluded:

our legislature has made the policy determination that torture and other acts of cruelty that constitute animal abuse when done by laypersons are not subject to prosecution if the acts are (1) done by farmers and (2) are established practices accepted throughout the relevant farming industry for the production of food.²⁷⁰

²⁶² Wolfson, *supra* note 72 [72], at 138.

²⁶³ *In re Animal Outlook*, 2022 PA Super 37, 271 A.3d 516 (2022), appeal granted, order vacated, 298 A.3d 37 (Pa. 2023).

²⁶⁴ *Id.* at 518-19.

²⁶⁵ PA. R. CRIM. P. 506.

²⁶⁶ *In re Animal Outlook*, 2022 PA Super 37, 271 A.3d 516 (2022), appeal granted, order vacated, 298 A.3d 37 (Pa. 2023).

²⁶⁷ *Id.* at 523.

²⁶⁸ *Id.* at 523 (quoting *Barnes*, 629 A.2d at 129). The court further noted "a dearth of authority on the interpretation and application of the normal agricultural operations exception." *Id.* at 523 n.6.

²⁶⁹ *Id.* [268] at 523 (citing *Barnes*, 629 A.2d at 132).

²⁷⁰ *Id.* [268]; *see also id.* [268] at 528 n.10 (stating than an expert's opinion "that Martin Farms' 'neglect, abuse, and rough handling of their bovine stock rises to the level of cruelty in many instances, and claiming that such practices are standard in dairy production does not absolve them from being cruel and in violation of humane treatment laws'" was "an incorrect statement of the law, as any cruel practice that is standard in dairy production is as a matter of law expressly absolved by the normal agricultural operations exemption").

Applying this framework, the court rejected the district attorney's contention that showing that a practice was "regular and standard" on a particular farm would suffice.²⁷¹ Instead, the court held that the proper scope of inquiry was "what is considered standard and accepted within the dairy farming industry."²⁷² After considering industry standards and expert opinions, the court ruled that the district attorney's decision not to prosecute was based on a "legally incorrect" application of the exemption, and it remanded to the trial court for an order directing the district attorney to prosecute.²⁷³

While indicating that an exemption for "normal" agricultural practices appears to defer to industry, these cases also underscore that even these exemptions do not necessarily put farmed animals entirely beyond the law.

Indeed, this exemption was also unsuccessfully invoked by a Pennsylvania egg farm in a cruelty prosecution.²⁷⁴ An undercover investigation documented the following:

Severely decomposed birds in cages with live birds (expert testimony at trial indicated that some of these birds had likely been dead for 6-8 weeks), birds immobilized or impaled by cage wires, unable to access food or water, birds left in aisles without access to food or water, and dead birds impaled and hung by their beaks on protruding wires near the water delivery system.²⁷⁵

The defense invoked the cruelty law's exemption for "activity undertaken in normal agricultural operations."²⁷⁶ As Leahy explains, "The defense argued

²⁷¹ *Id.* at 528.

²⁷² *Id.* [268]

²⁷³ *Id.* [268] at 530; *see also id.* [268] at 529 ("We conclude that this evidence was sufficient at this nascent stage to render the disapproval of the complaints based upon the normal agricultural operations exception legally incorrect."). While the remand order was pending, the Pennsylvania Supreme Court held in an unrelated case that a reviewing court can overturn a prosecutor's decision to disapprove a private criminal complaint only "if the private complainant demonstrates that the disapproval decision amounted to bad faith, occurred due to fraud, or was unconstitutional." *In re Ajaj*, 288 A.3d 94, 97 (Pa. 2023). The Pennsylvania Supreme Court then vacated the appellate court's decision in *Martin Farms* and remanded it to the trial court directing it to apply the newly articulated standard. *In re Animal Outlook*, 298 A.3d 37 (Pa. 2023). On remand, the trial court found no fraud or bad faith under *Ajaj* standard. *In re Priv. Crim. Complaint Filed by Animal Outlook*, 2025 PA Super 270 (2025), reargument denied (Feb. 3, 2026).

²⁷⁴ *Large Scale Animal Cruelty*, *supra* note **Error! Bookmark not defined.** [**Error! Bookmark not defined.**], at 102.

²⁷⁵ *Large Scale Animal Cruelty*, *supra* note **Error! Bookmark not defined.** [**Error! Bookmark not defined.**], at 102.

²⁷⁶ 18 PA. CONS. STAT. ANN. §§ 5560, 5531.

essentially that some of the practices were normal over time and space. In particular, they argued that the number of dead birds in cages with live birds did not exceed what is considered acceptable according to industry standards”²⁷⁷ “In response, the prosecution argued that the normal agricultural operations defense has to be raised with respect to the specific practice and specific animals at issue . . .” and that the exemption did not apply to the conduct at issue.²⁷⁸ Ultimately the judge acquitted, not because of the exemption, but rather “because she felt there was no guidance in the law relating to the cruelty standard for industrial or commercial operations.”²⁷⁹ This decision highlights that, as discussed in the next Part, structural challenges with reliance on criminal cruelty laws are more of an issue than exemptions to those laws.

In another Pennsylvania case, a dairy worker pleaded guilty to cruelty after an undercover investigation documented cows, including “downers”—cows who are too sick or injured to move, a common occurrence in the dairy industry—being violently moved.²⁸⁰

In Missouri, which exempts, “with respect to farm animals, normal or accepted practices of animal husbandry,”²⁸¹ an industrial egg facility was similarly prosecuted for cruelty. In that case, an activist videotaped live spent hens being thrown into a dumpster.²⁸² While the company did not contend that discarding live animals in this way was a normal practice, it did invoke the exemption, contending that the independent contractors discarding the hens had been “told to kill the animals by gassing before putting them in the dumpster,” which, it asserted, “was a common practice and therefore exempt.”²⁸³ Ultimately, however, the company agreed to pay \$100,000 in

²⁷⁷ *Large Scale Animal Cruelty*, *supra* note **Error! Bookmark not defined.** [**Error! Bookmark not defined.**], at 103. “[A]lthough they never claimed that normal agricultural practices include leaving dead birds there for weeks,” the defense

also argued that the facility should fall under the normal agricultural practices exemption because their inspector came onto the facility three months after the investigation ended, rolled a die and decided to go into a building that was not the subject of any of the charges, spent a half an hour in that building, and concluded that it looked like it was run normally.

Id.

²⁷⁸ *Id.* [**Error! Bookmark not defined.**]

²⁷⁹ *Id.* [**Error! Bookmark not defined.**] As Leahy notes, “In essence, she imagined a standard outside the substantive cruelty law and the exemption for common practices, presuming with no legal basis that there was some other standard of cruelty for factory farmers, and then presuming that these facts did not meet it.” *Id.*

²⁸⁰ Leahy, *supra* note 143 [**Error! Bookmark not defined.**], at 177-78.

²⁸¹ MO. ANN. STAT. § 578.007(8).

²⁸² Leahy, *supra* note 143 [**Error! Bookmark not defined.**], at 177-78

²⁸³ *Large Scale Animal Cruelty*, *supra* note 47 [**Error! Bookmark not defined.**], at 100.

exchange for the charges being dropped.²⁸⁴

In Idaho, which exempts “normal or accepted practices of animal identification and animal husbandry,”²⁸⁵ a worker was convicted for cruelty to cows on a dairy farm.²⁸⁶ As Leahy notes:

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.²⁸⁷

Prosecutions have also succeeded in other states with similar exemptions. For example, in Iowa, which exempts “care consistent with customary animal husbandry practices,”²⁸⁸ six workers at a pig farm were convicted of criminal cruelty.²⁸⁹ And in West Virginia, which exempts livestock and poultry “kept and maintained according to usual and accepted standards of livestock [and] poultry . . . farm production and management,”²⁹⁰ workers at turkey farms in two separate counties were convicted of cruelty.²⁹¹

Thus, as Leahy notes, even in states with common farming exemptions, “it is possible to make significant gains for the protection of farmed animals by using [cruelty] laws, and it is important to use them to the greatest extent possible, notwithstanding their flaws.”²⁹² Indeed, Leahy details numerous prosecutions involving farmed animals in which the exemptions were not even been invoked, evidence “that these exemptions do not operate as a complete bar to any chance of success in a cruelty case, even if the cruelty is institutionalized cruelty that is ostensibly committed for the production of food and profits.”²⁹³

²⁸⁴ Press Release, Humane Soc’y of the U.S., *MOARK Must Pay \$100,000 and Overhaul Its Spent Hen Procedures to Settle Animal Cruelty Charges* (Oct. 25 2005).

²⁸⁵ IDAHO CODE ANN. § 25-3514.

²⁸⁶ Leahy, *supra* note 143, at 153-55.

²⁸⁷ *Id.* at 155.

²⁸⁸ IOWA CODE ANN. § 717.2.

²⁸⁹ *Large Scale Animal Cruelty*, *supra* note **Error! Bookmark not defined.** [109], at 84-85.

²⁹⁰ W. VA. CODE § 61-8-19(f).

²⁹¹ *Large Scale Animal Cruelty*, *supra* note **Error! Bookmark not defined.** [109], at 85-86.

²⁹² *Id.* [109] at 127.

²⁹³ *Id.* [109] at 131.

This Part has demonstrated that the dominant narrative that common farming exemptions put farmed animals beyond the law is wrong. The reality of exemptions to cruelty codes for on-farm conduct is much more complex than this narrative suggests. Common farming exemptions are just one category of such exemptions. Not a single state's exemptions put farmed animals entirely beyond the law. Only two states' exemptions expressly reference industry. Many so-called common farming exemptions refer not to common or standard practices but, rather, to accepted or acceptable practices, without indicating *who* is to do the accepting. Prosecutions for on-farm conduct have succeeded in numerous states with common farming exemptions—including for conduct that is standard in the relevant industry. And prosecutions are no more common in those jurisdictions whose cruelty codes contain no exemptions for on-farm conduct.

Thus, common farming exemptions are not the sole or even primary reason that the types of cruel practices described in Part I.A—intensive confinement, mutilations without painkillers, harmful breeding practices, and on-farm killing—are widespread in the United States. If common farming exemptions do not explain the prevalence of these practices, what does?

III. RE-EVALUATION: IF NOT COMMON FARMING EXEMPTIONS, THEN WHAT?

If common farming exemptions are not the reason that billions of farmed animals are subjected to cruel practices without any legal response every year in the United States, then what is? This Part argues that the problem is much more fundamental than the common farming exemptions—it is our reliance on criminal law as the sole legal oversight of this industry.

Unlike other institutionalized uses of animals, on-farm treatment of the animals in our food system is generally not subject to regulatory oversight.²⁹⁴

²⁹⁴ See Winders, *supra* note 140, at 2-3; Sullivan & Wolfson, *supra* note 2, at 591-92. The limited exception is the handful of states that have enacted laws addressing specific confinement systems, *see supra* note 228 and accompanying text, that include inspection provisions, *see, e.g.*, CAL. CODE REGS. tit. 3, §§ 1320.5(a)(1), 1320.6, 1321.6, 1322.6. Often even these laws do not require or even authorize inspections. *See, e.g.*, ARIZ. REV. STAT. ANN. § 13-2910.07; COLO. REV. STAT. ANN. § 35-50.5-102; FLA. CONST. ART. X, § 21; *see also* OHIO REV. CODE ANN. § 904.04(B) (requiring consent or a judicial search warrant). And even statutorily mandated inspections are not necessarily occurring. *Compare, e.g.*, OR. REV. STAT. § 632.840 (requiring inspections), *with* ANIMAL WELFARE INSTITUTE, ENFORCEMENT OF STATE FARMED ANIMAL WELFARE LAWS 10-11 (2024) (Oregon Department of Agriculture stated that rather than conduct inspections, it “was relying on

Instead, criminal law ostensibly oversees the treatment of animals raised for food, but this is an ill-suited tool. After describing regulatory oversight of other large, animal-using industries, this Part delineates numerous overlapping issues with criminal cruelty laws that render them wholly inadequate to meaningfully protect animals: a lack of inspections; broad, general prohibitions on “unnecessary” or “unjustifiable” cruelty; the rule of lenity and vagueness doctrine; *mens rea* requirements; a high burden of proof; and prosecutorial discretion.

A. Regulatory Oversight of Other Large Animal-Using Industries

The near-total absence of regulatory oversight of animal welfare on farms stands in contrast to numerous other animal-using industries—including animal experimentation, exhibition, sales, and even slaughter.

The federal Animal Welfare Act (AWA) provides regulatory oversight of the research, exhibition, wholesale trade, and transport of (some) animals.²⁹⁵ To engage in these activities, one must register with or be licensed by the U.S. Department of Agriculture (USDA) and submit to routine, unannounced inspections for compliance with minimum animal welfare standards.²⁹⁶ Failure to comply with those standards can result in a range of consequences, such as monetary fines, removal of animals, license suspension, permanent license revocation, and more.²⁹⁷ A narrow category of violations is subject to criminal penalties under the AWA²⁹⁸ and these activities are also subject to criminal prosecution under state cruelty laws.²⁹⁹ The AWA, though, is first and foremost a civil regulatory law, not a criminal regime.

To be sure, AWA problematically excludes a great many animals, including all cold-blooded animals as well as rats, mice, and birds bred for use in research.³⁰⁰ But farmed animals are perhaps the AWA’s most glaring carve-out, and the law excludes them not once, but twice. First, on-farm conduct does not fall within the ambit of activities covered by the AWA.³⁰¹ Then, just to be absolutely sure farmed animals are not regulated, the AWA expressly excludes them from its very definition of animal.³⁰²

The AWA is fraught with other issues as well, including longstanding

complaints to expose noncompliance”—and that it “had no records of complaints within [a multi-year] timeframe.”).

²⁹⁵ 7 U.S.C. §§ 2131-2160.

²⁹⁶ *Id.* [295]

²⁹⁷ *Id.* [295]

²⁹⁸ *Id.* § 2149(d). [295]

²⁹⁹ 7 U.S.C. § 2143(a)(8) (providing that the AWA does not preempt state or local enforcement, including of heightened standards).

³⁰⁰ *Id.* [299] § 2132(g).

³⁰¹ 7 U.S.C. §§ 2131-2160.

³⁰² *Id.* [301] § 2132(g).

enforcement issues.³⁰³ But the fact remains that it provides at least a minimal level of oversight of the treatment of (certain) animals in the industries it applies to. And, importantly, the USDA is statutorily mandated to make publicly available its enforcement actions and inspection reports.³⁰⁴ Thus, the comparison between the AWA and the criminal law regime is made not to show that the AWA is delivering on animal protection. As the record amply demonstrates, it very often does not. Rather, the argument is that the regulatory model offers the structural preconditions for oversight (licensing authority, inspection authority, public reporting) that criminal law does not. Whether this oversight authority is exercised effectively is a separate question.

Slaughter and handling of animals at slaughter is also subject to regulatory oversight.³⁰⁵ Neither birds nor mammals can be slaughtered for food to be sold in interstate commerce unless a USDA inspector is present.³⁰⁶ While principally focused on food safety, these inspectors are also tasked with monitoring both slaughter and handling at the slaughterhouse for humane treatment³⁰⁷ and authorized to halt operations until any issues are addressed.³⁰⁸ Like AWA enforcement, these laws have long been plagued with enforcement and other issues.³⁰⁹ Nevertheless, they provide a basic level of regulatory oversight, transparency, and accountability. As with the AWA, records related to these inspections and enforcement are publicly posted online.³¹⁰

B. Lack of Inspections

Without regulatory oversight, government bodies do not inspect on-farm welfare.³¹¹ Absent inspections, because farmed animals are on private

³⁰³ Delcianna J. Winders, *Administrative Law Enforcement, Warnings, and Transparency*, 79 OHIO ST. L. J. 451 (2018).

³⁰⁴ 7 U.S.C. § 2146a.

³⁰⁵ See Winders, *supra* note 133.

³⁰⁶ 21 U.S.C. §§ 601-626; *id.* §§ 451-473.

³⁰⁷ 7 U.S.C. § 1902.

³⁰⁸ FOOD SAFETY INSPECTION SERV., U.S. DEP'T OF AGRIC., VERIFICATION OF POULTRY GOOD COMMERCIAL PRACTICES, DIRECTIVE 6110.1, at 3 (July 3, 2018).

³⁰⁹ See, e.g., OFFICE OF INSPECTOR GENERAL, U.S. DEP'T OF AGRIC., FOOD SAFETY AND INSPECTION SERVICE FOLLOWUP ON THE 2007 AND 2008 AUDIT INITIATIVES, AUDIT REPORT 24016-0001-23 (June 2017).

³¹⁰ FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., HUMANE HANDLING ENFORCEMENT, <https://www.fsis.usda.gov/inspection/regulatory-enforcement/humane-handling-enforcement>; FOOD SAFETY & INSPECTION SERV., U.S. DEP'T OF AGRIC., FSIS FOIA READING ROOM, <https://www.fsis.usda.gov/about-fsis/freedom-information-act-foia/fsis-foia-reading-room>.

³¹¹ See *supra* note 294.

property, the government only has access to observe their conditions and treatment with a warrant, which requires a showing of probable cause that a crime was committed.³¹² Thus, government access is limited to situations in which evidence of criminal treatment of animals has already somehow come to light, which is highly unlikely.³¹³

Unlike the farms of yore, on which animals and their conditions were often visible to neighbors and passersby, today's factory farms are shrouded in secrecy.³¹⁴ Animals generally lack access to the outdoors and thus are not typically visible to neighbors or passersby.³¹⁵ They are instead locked inside windowless warehouses, behind multiple layers of security, invisible to most of the world.³¹⁶

Without government inspections and with limited public visibility, it generally takes an insider—a whistleblower or an undercover investigator—coming forward with evidence of criminal cruelty sufficient to support a conviction or a finding of probable cause to support a search warrant. Indeed, every single case mentioned in this Article was the result of an undercover investigation, with the sole exception of the Missouri egg farm case, which was the result of footage taken from the road by an activist.³¹⁷

This is exceedingly unlikely to occur for numerous reasons. Some major agricultural states have enacted laws that effectively criminalize undercover investigations and/or otherwise make them difficult.³¹⁸ Even where ultimately found unconstitutional, such laws can have a chilling effect, deterring First-Amendment-protected conduct through fear.³¹⁹ Undercover investigations are also resource-intensive and risky. Non-undercover workers are unlikely to come forward, not because they are not concerned about what they witness or directed to take part in, instructed to do, but because of their extremely vulnerable status.³²⁰ Indeed, such workers are often reluctant to even report

³¹² Sullivan & Wolfson, *supra* note 2, at 210.

³¹³ Winders, *supra* note 140, at 3, 7.

³¹⁴ Pamela Fiber-Ostrow & Jarret S. Lovell, *Behind a Veil of Secrecy: Animal Abuse, Factory Farms, and Ag-Gag Legislation*, 19 CONTEMP. JUST. REV. 230, 234 (2016).

³¹⁵ Courtney G. Lee, *Racist Animal Agriculture*, 25 CUNY L. REV. 199, 203 (2022).

³¹⁶ WILL POTTER, *LITTLE RED BARNS: HIDING THE TRUTH FROM FARM TO FABLE* (2025); Ani B. Satz, *Animals As Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 ANIMAL L. 65, 70 (2009).

³¹⁷ See *supra* note 282 [281] and accompanying text.

³¹⁸ IDAHO CODE § 18-7042; IOWA CODE § 717A.3A; MO. REV. STAT. § 578.013; S.C. CODE ANN. § 47-21; MONT. CODE ANN. § 81-30-101-105; KAN. STAT. ANN. § 47-1827; N.D. CENT. CODE § 12.1-21.1-02; see generally ALAN K. CHEN & JUSTIN MARCEAU, *TRUTH AND TRANSPARENCY: UNDERCOVER INVESTIGATIONS IN THE TWENTY-FIRST CENTURY* (2023).

³¹⁹ See Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1332 (2015).

³²⁰ See Phillip Summers et al., *Hidden Farmworker Labor Camps in North Carolina: An Indicator of Structural Vulnerability*, 105 AM. J. PUB. HEALTH 2570, 2570 (Dec. 2015)

injuries to themselves or safety violations, even if they understand their rights for fear of retaliation.³²¹

Remarkably, despite these myriad hurdles, undercover investigations are still conducted—and, critically, they document cruelty every single time.³²² Even still, in the majority of cases, charges are not filed, for reasons discussed below.

C. Justifiable Cruelty

State cruelty laws are written very broadly, and courts have interpreted their terms inconsistently. As noted above, they are largely modeled on New York’s 1867 anti-cruelty law.³²³ Over a century and a half has passed since 1867, during which time our relationships with animals and our food system have radically transformed, yet these laws are largely unchanged.³²⁴

The centerpiece of these laws is a broad prohibition on “unnecessary” or “unjustifiable” cruelty.³²⁵ This raises the question of exactly what cruelty is

(“Farmworkers are a vulnerable population. They are predominantly Latino immigrants and often do not have lawful documentation or speak adequate English; in addition, most have little formal education and limited incomes. . . . Political and economic forces that act on farmworkers increase their vulnerability by imposing physical or emotional suffering in patterned ways. . . . When faced with workplace hazards, they are often reluctant to complain for fear of losing a needed job.”).

³²¹ Caitlin Kelly, *Exploited: The Unexpected Victims of Animal Agriculture*, 30 *ANIMAL L.* 103, 117 (2024).

³²² See Sarah Von Alt, Mercy for Animals 14 Times MFA’s Undercover Investigations Changed the World for Animals (Aug. 26, 2014), <https://mercyforanimals.org/blog/7-mfa-investigations-that-shook-us-to-our-core/> (“Each time Mercy For Animals sends someone undercover into a factory farm, slaughterhouse, or hatchery, the investigator uncovers horrific animal cruelty.”); Organizzazione Internazionale Protezione Animali, Undercover Investigations (May 18, 2016), <https://www.oipa.org/international/veg-investigations/> (“In addition to routine abuses, every time investigators enter farms and slaughterhouses, they unearth shocking cruelty that’s outside the realm of normal practices for raising and killing animals for food.”); see also Jordi Casmitjana, Investigation Exposes Cruelty in a Facility That Raised Chickens for Tyson, UNCHAINEDTV (July 11, 2023), <https://unchainedtv.com/2023/07/11/investigation-exposes-cruelty-in-a-facility-that-raised-chickens-for-tyson/> (“‘What we know from dozens of investigations over the years, including this one, is that animal cruelty is what the industry relies upon to exist.’— Cheryl Leahy, Animal Outlook’s Exec Director”); Animal Equality, Exposing Animal Cruelty, <https://animalequality.org/investigations/> (last visited July 8, 2026) (“Wired with the latest devices, we have repeatedly uncovered that there is no such thing as humane factory farming anywhere in the world.”).

³²³ Favre & Tsang, *supra* note 114 (“Within a few years Massachusetts, Pennsylvania, Illinois, New Hampshire, and New Jersey had adopted the same pattern of legislation as that in New York . . .”).

³²⁴ *Id.* [323]

³²⁵ See, e.g., DEL. CODE ANN. tit. 11, § 1325 (“‘Cruelty to animals’ includes mistreatment

“necessary” or “justifiable”? The cruelty statutes offer little guidance on this question, and courts have long struggled with it.³²⁶ The question is especially salient in the context of animals raised for food. Though humans are omnivores who can live perfectly healthy lives on an entirely plant-based diet,³²⁷ many might deem at least some of the harm inflicted on animals in the name of food production “necessary” or “justifiable.” If so, is there any limit to this harm? Where does one draw the line? Does it matter if alternatives are available?

As animal law scholar Gary Francione explains, courts have generally taken a proportionality approach to this question.³²⁸ Thus, as one New York court explained, an act is considered justifiable “where its purpose or object is reasonable and adequate, and the pain and suffering caused is not disproportionate to the end sought to be attained.”³²⁹ Importantly, the court suggested that this line is not fixed—cruelty may be “justifiable” in one place and time but not another.³³⁰

In another New York case, the defendant challenged the sufficiency of a criminal complaint for cruelty for “cut[ing] off the heads of three live conscious iguanas ‘without justification.’”³³¹ The defendant contended that unjustifiability was an essential element of the cruelty statute and that the complaint’s allegation that the beheadings were “‘without justification’” was “conclusory and insufficient.”³³² The defendant further argued “that killing the animals in this case was justified and necessary and that any pain or

of any animal or neglect of any animal under the care and control of the neglecter, whereby unnecessary or unjustifiable physical pain or suffering is caused.”); OHIO REV. CODE ANN. § 1717.01(B) (“‘Cruelty,’ ‘torment,’ and ‘torture’ include every act, omission, or neglect by which unnecessary or unjustifiable pain or suffering is caused, permitted, or allowed to continue, when there is a reasonable remedy or relief . . .”); N.Y. AG. & MKTS. LAW § 350(2) (“‘Torture’ or ‘cruelty’ includes every act, omission, or neglect, whereby unjustifiable physical pain, suffering or death is caused or permitted.”).

³²⁶ See, e.g., *infra* notes 331-354 and accompanying text; see also *People v. Arroyo*, 3 Misc. 3d 668, 676–77, 777 N.Y.S.2d 836, 843 (Crim. Ct. 2004) (“[C]ourts across the nation are split on the issue of whether the term ‘unjustifiable’ is a vague term, incapable of conveying a proscription.”).

³²⁷ Timothy Key et al., *Plant-based Diets and Long-Term Health: Findings from the EPIC-Oxford Study*, 81 PROC. NUTRITION SOC’Y 190 (2021).

³²⁸ GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* (1995); see, e.g., *People v. Arroyo*, 3 Misc. 3d 668, 676 (Crim. Ct. 2004) (“[A]n act is considered justifiable, ‘where its purpose or object is reasonable and adequate, and the pain and suffering caused is not disproportionate to the end sought to be attained.’” (quoting 4 AM JUR 2D, ANIMALS § 29, at 370)).

³²⁹ *People v. Curcio*, 22 Misc. 3d 907, 911, 874 N.Y.S.2d 723, 728 (Crim. Ct. 2008) (citing 4 AM.JUR.2D ANIMALS § 29, at 370).

³³⁰ *Id.* [329]

³³¹ *People v. Voelker*, 172 Misc. 2d 564, 565 (1997).

³³² *Id.* [331] at 566.

suffering was temporary, unavoidable and without criminal intent.”³³³ This argument seems to have been rooted, at least in part, in that, after the beheadings, he “allegedly cooked and consumed these animals.”³³⁴

“‘The question as to whether the pain caused to such creatures . . . is ‘justifiable’ or not, cannot be easily answered,’” the court observed, quoting another New York court’s decision involving animals used for food from nearly a century prior.³³⁵

Despite its vintage, that case, *Freel v. Downs*, appears to remain the most thorough examination of what constitutes “justifiable” or “necessary” cruelty in the context of food production. *Downs* involved a motion to quash cruelty complaints for conduct involving turtles slated to be used for food.³³⁶ At the time, turtle soup “was among the most sought-after and popular dishes.”³³⁷

It was undisputed that defendant Captain Cleveland H. Downs had transported dozens of turtles on their backs “with their fins or flippers perforated and tied together.”³³⁸ “[S]ome of the flippers had been torn away from the cord.”³³⁹ Other turtles had “blood under the flippers and under the carapace.”³⁴⁰ One turtle was dead.³⁴¹ A zoologist testified that turtles’ flippers are sensitive and that it would have been more humane to transport them in tanks.³⁴²

Upon arrival in New York City, the turtles were consigned to the second defendant, Walter T. Smith, who requested the removal of the rope binding the turtles and then had them transported five blocks “stacked breast to back, one against the other, and each resting on the tail end of its carapace” “in inclement March weather to a warehouse.”³⁴³

Both Downs and Smith were charged with violating the state’s prohibition on “‘carr[ying] or caus[ing] to be carried in or upon any vessel or vehicle or otherwise any animal in a cruel or inhuman manner, or so as to produce

³³³ *Id.* [331]

³³⁴ *Id.* [331]

³³⁵ *Id.* [331] at 568.

³³⁶ *Freel v. Downs*, 136 N.Y.S. 440 (1911).

³³⁷ Jack Hitt, *What Ever Happened to Turtle Soup?*, *SAVEUR* (Oct. 134, 2015), <https://www.saveur.com/history-of-turtle-soup-hunting/>; see also David A. Steen, *Why Don’t People Eat Turtle Soup Anymore?*, *SLATE* (Jan. 4, 2016), <https://slate.com/technology/2016/01/turtle-soup-disappeared-because-people-ate-too-many-turtles.html> (“Not so long ago you could find Campbell’s turtle soup sitting alongside minestrone and tomato in grocery stores throughout the country.”).

³³⁸ *Downs*, 136 N.Y.S. at 442.

³³⁹ *Id.* [338] at 445.

³⁴⁰ *Id.* [338]

³⁴¹ *Id.* [338]

³⁴² *Id.* [338] at 445-46.

³⁴³ *Id.* [338] at 443, 446-47.

torture.”³⁴⁴ The law defined “torture” or “cruelty” to “include[] every act, omission, or neglect whereby unjustifiable physical pain, suffering or death is caused or permitted.”³⁴⁵

Defendants moved to quash the cruelty complaints, contending that “no evidence show[ed] that there [wa]s any unjustifiable pain or torment.”³⁴⁶ Thus, the question of justifiability was front and center. The court explained:

I attach considerable importance to the use of the word “unjustifiable” in connection with the legislative definition of torture or cruelty. It clearly indicates legislative intent and shows that the Legislature had in mind that while in certain cases there may be physical pain and suffering, even to the extent of causing death, no criminal proceeding can be sustained unless the pain or cruelty was unnecessary, unjustifiable, and willful. The infliction of pain alone is insufficient for the purpose of such a prosecution as this; but the question is: Was unjustifiable pain inflicted?³⁴⁷

The court proceeded to explain that when animals are used for food, “[m]any . . . means [are] employ[ed] for such purpose, and in such cases the incidental pain and suffering is treated as necessary and justifiable.”³⁴⁸ After observing that “[i]t must have come to the attention of many that the treatment of ‘animals’ to be used for food while in transit to a stockyard or to a market is sometimes not short of cruel and, in some instances, torturable,”³⁴⁹ the court then described numerous common farming practices of the day—perforating the noses of pigs and ears of calves, crowded and uncomfortable transport, selling live fish on ice, and cooking crabs eels, lobsters, and snails alive.³⁵⁰ Noting that “no one has raised a voice in protest” of these cruel practices, the court concluded, “These practices have been tolerated on the theory, I assume, that, in the cases where these” animals are destined “food consumption, the pain, if any, would be classed as ‘justifiable’ and necessary.”³⁵¹ This conclusion suggests that whether an animal is raised and killed for food determines whether cruelty to them is justifiable—and thus lawful. But this cannot be the whole story, else the fact that the beheaded iguanas discussed above were cooked and consumed would have carried more weight—and

³⁴⁴ *Id.* [338] at 442.

³⁴⁵ *Id.* [338] at 443.

³⁴⁶ *Id.* [338]

³⁴⁷ *Id.* [338]

³⁴⁸ *Id.* [338]

³⁴⁹ *Id.* [338]

³⁵⁰ *Id.* [338]

³⁵¹ *Id.* [338]

none of the prosecutions discussed in Part II would have succeeded.

Indeed, the *Downs* court proceeded to observe that the question of whether cruelty is “justifiable” “cannot be easily answered,”³⁵² that the question is a factual one to be resolved on a case-by-case basis,³⁵³ and that the answer could vary over time and place, because “juries and magistrates of different localities, races, or education, with varying ideas of taste and cuisine, may hold widely divergent ideas as to whether the improved flavor of lobster boiled alive makes such torture ‘justifiable.’”³⁵⁴

Ultimately, the court found Captain Downs guilty of cruelty while dismissing the complaint against Smith, seemingly because Smith’s method of transport was common,³⁵⁵ suggesting that even without common farming exemptions the commonness of a practice can pose challenges to successful prosecution. The court additionally relied on Smith’s steps to reduce the turtles’ pain and suffering, and, relatedly, his *mens rea*,³⁵⁶ a topic discussed below.³⁵⁷

The court’s discussion illustrates the fundamental tensions inherent in deeming some cruelty to animals to be impermissible and other cruelty acceptable. Where is the line to be drawn? Very few judicial decisions grapple with this question in the context of animals used for food because very few cases have been brought involving farmed animals.³⁵⁸ The fact that cruelty

³⁵² *Id.* [338] at 444-45.

³⁵³ *Id.* [338] at 446 (citing *People v. Tinsdale*, 10 Abb. Prac. (N.S.) 374); *see also id.* at 445 (“The Emperor Augustus nearly exterminated peacocks to regale himself in Rome with their brains. To-day the world would hold their death unjustifiable. Then, again, juries and magistrates of different localities, races, or education, with varying ideas of taste and cuisine, may hold widely divergent ideas as to whether the improved flavor of lobster boiled alive makes such torture ‘justifiable.’”).

³⁵⁴ *Id.* [338] at 445.

³⁵⁵ *Id.* [338] at 446 (“Smith admitted having been in the business of receiving turtles in the same manner as here described for 25 years, and that it has been a custom or common way to receive them in practically the same condition all during that time . . .”).

³⁵⁶ *Id.* [338] at 446-47 (noting that “[t]he cutting of the strings or thongs which held the turtles’ flippers was done at” at Smith’s behest upon arrival at the dock and that Smith had the turtles “immediate[ly]” transported to a warehouse “where the turtles would be properly kept and sustained,” actions that were “indicative, if, of anything, that the defendant Smith did not intend to inflict such pain and cruelty upon these turtles as is prohibited by statute, but as soon as possible relieved them of whatever pain and suffering” was caused by having their flippers tied together).

³⁵⁷ *See infra* Part III.E.

³⁵⁸ *See Leahy, supra* note 143, at 147 (“While animal cruelty prosecutions in other areas may be increasing . . . institutionalized cruelty is left largely untouched by the law and its processes and enforcement . . .”); *see also id.* at 195-96 (“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 Counterintuitively, it also seems clear that the more widespread the

laws generally prohibit only “unjustifiable” or “unnecessary” cruelty likely serves as a deterrent to bringing such cases in the first instance, particularly given the rule of lenity and vagueness doctrine, as discussed in the next Subpart.

D. The Rule of Lenity and Vagueness Doctrine

Because cruelty statutes are broadly worded criminal laws, they implicate the rule of lenity and the vagueness doctrine, both of which make convictions challenging.

The rule of lenity, also referred to as the rule of strict construction, provides that when a criminal law is unclear or ambiguous it should be strictly construed in favor of the defendant and against the state.³⁵⁹ Importantly in the cruelty law context, included within this is the principle that “ambiguities about the breadth of a criminal statute should be resolved in the defendant’s favor.”³⁶⁰ Though state legislatures have attempted to override the rule of lenity, courts have largely resisted these attempts and the rule is alive and well.³⁶¹

The vagueness doctrine, also called the void-for-vagueness doctrine, is a close cousin of the rule of lenity and provides that a law that “is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case” “fails to meet the requirements of the Due Process Clause.”³⁶² Such a law is deemed void for

cruelty is, the less likely prosecution is. This seems to be doubly true for neglect, ...”); Justin Marceau, *Palliative Animal Law: The War on Animal Cruelty*, 134 Harv. L. Rev. F. 250, 256-57 (2021) (“[M]any of the [animal protection] movement’s lawyers have been surprisingly quiet when it comes to pressing for the prosecution of corporate animal abuse, even when the abuse seems to meet the statutory definition of cruelty. When it is not a broken window such as an attack on a single animal, but a broken system such as factory farms filled with abuse, the public outreach and prosecutorial pressure are considerably muted. . . . Corporate prosecutions are vanishingly rare, and the focus of carceral animal law has been on individual actors as opposed to systemic accountability. One might worry that in the criminal realm, the amount of focus and fury surrounding a case is inversely linked to the amount of animal suffering that actually occurred.”).

³⁵⁹ Samuel A. Thumma, *State Anti-Lenity Statutes and Judicial Resistance: “What A Long Strange Trip It’s Been,”* 28 GEO. MASON L. REV. 49, 51-54 (2020). While derived from English common law, as Justice Gorsuch has explained, the rule of lenity serves to further two core constitutional principles: the fair notice component of Due Process, *Bittner v. United States*, 598 U.S. 85, 102 (2023), and separation of powers, *Wooden v. United States*, 595 U.S. 360, 391 (2022) (Gorsuch, J. concurring).

³⁶⁰ *United States v. Davis*, 588 U.S. 445, 464 (2019).

³⁶¹ *Id.* [360]

³⁶² *Giaccio v. State of Pa.*, 382 U.S. 399, 402–03 (1966) (citations omitted). Like the rule of lenity, the vagueness doctrine also protects separation of powers. *Sessions v. Dimaya*, 584

vagueness and inapplicable.³⁶³

Courts use a two-part test to assess vagueness challenges. First, they examine “whether the statute ‘gives a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.’”³⁶⁴ Second, they examine “whether the statute provides the state with clear standards for enforcement, or whether it provides police, judge and juries with too much discretion.”³⁶⁵

Not surprisingly, given the paucity of prosecutions, no case law addresses the rule of lenity or the vagueness doctrine in the context of standard farming practices. Cruelty cases arising in other contexts implicating these doctrines, however, are illuminating. For example, where a defendant docked a puppy’s tail using a rubber band, which he contended was a “common practice[,]” resulting in an infection and, ultimately, euthanasia, the court held the following:

The words “unjustifiably” and “unjustifiable” as applied to the conduct of the defendant in this case based on the facts of this case are in violation of the Due Process Clause due to vagueness because a reasonable person in the defendant’s circumstances would not have notice his conduct placed him at risk of violating the law ³⁶⁶

In another case, confronted with the argument that that the phrase “unjustifiable physical pain” was “not specific enough to provide notice that an owner must provide medical care to a terminally ill animal,”³⁶⁷ the court described its job as “determin[ing] whether, when measured by common understanding and practice, as well as society’s sense of morality, the language of the statute, and specifically, the term ‘unjustifiable,’ conveys sufficient notice to a person that his or her decision not to provide a pet with medical care is a crime.”³⁶⁸ The court stated, “an act is considered justifiable, ‘where its purpose or object is reasonable and adequate, and the pain and suffering caused is not disproportionate to the end sought to be attained.’”³⁶⁹ Without citation, the court proceeded to identify practices it deemed justifiable despite the pain and suffering they cause—hunting, fishing, killing

U.S. 148, 156 (2018) (citations omitted). Though also applicable in the civil law context, the vagueness doctrine is especially strong in the criminal law context because “the consequences of imprecision” are more severe. *Id.*

³⁶³ *Giaccio*, 382 U.S. at 402–03.

³⁶⁴ *People v. Curcio*, 22 Misc. 3d 907, 916 (Crim. Ct. 2008) (citations omitted).

³⁶⁵ *Id.* [364] (citation omitted).

³⁶⁶ *People v. Rogers*, 183 Misc. 2d 538, 544 (City Ct. 2000).

³⁶⁷ *People v. Arroyo*, 3 Misc. 3d 668, 670 (Crim. Ct. 2004).

³⁶⁸ *Id.* [367] at 675–76.

³⁶⁹ *Id.* [367] at 676 (quoting 4 AM JUR 2D, ANIMALS § 29, at 370).

for fur, and “branding,” which, the court said, is “justified by the owner’s need to enjoy his or her property.”³⁷⁰

In short, because they are criminal laws, the breadth of cruelty codes and their use of limiting terms like “unjustifiable” or “unnecessary” make these laws vulnerable to rule of lenity and vagueness challenges, particularly in the context of animals used for food—a vulnerability that exemptions for on-farm conduct can exacerbate.

E. Mens Rea Requirements

If one can overcome vagueness and rule of lenity challenges, it is still necessary to establish not only that the cruelty occurred but that it was committed with the requisite *mens rea*. Broadly worded statutes, the sticky question of when cruelty is justifiable, and the exemptions all make doing so particularly challenging.

For example, as Wolfson notes, “most states require the failure to provide shelter to be proven to be intentional or cruel” and “nearly half the states have laws which stipulate that cruelty to animals is an offense only if committed ‘willfully,’ ‘maliciously’ or ‘cruelly.’”³⁷¹

Malice—“[t]he intent, without justification or excuse, to commit a wrongful act”³⁷²—can be particularly difficult to prove, especially in the context of animals used for food. As discussed in Part III.C, the question of when cruelty to an animal used for food is justifiable has proved mystifying, and malice implicates that same question, with the added complication that it “requires the reading of an individual’s mind.”³⁷³ For example, if I believe that my conduct is not prohibited by the cruelty code, perhaps because I believe it is justifiable or necessary or perhaps because it is common, that may well preclude a finding of malice. As Favre and Tsang explain:

If one were to whip the back of a horse to make it move a wagon to which it was attached, it would not normally be considered malicious. Such an act may not be done out of feeling of ill will toward the horse, rather it is out of a desire to get on with a job. So long as some excuse could be presented to the court, it was difficult to prove malice.³⁷⁴

Much conduct on farms—even conduct that might seem egregious—could

³⁷⁰ *Id.* [367]

³⁷¹ Wolfson, *supra* note 72 [72], at 128–29 (quoting ANIMALS AND THEIR LEGAL RIGHTS: A SUMMARY OF AMERICAN LAWS FROM 1641-1990, at 50 (1990)).

³⁷² MALICE, BLACK’S LAW DICTIONARY (12th ed. 2024)

³⁷³ Favre & Tsang, *supra* note 114.

³⁷⁴ *Id.* [114].

readily be deemed as arising “out of a desire to get on with a job.”³⁷⁵

Exemptions for on-farm conduct can confound this even further: If I believe my conduct falls within the scope of an exemption and thus is immune from liability, how can it be shown that my intent was to do something unlawful?

In addition, as Cassuto and Eckhardt note, if “an industrial facility houses hundreds of thousands of animals, it becomes very difficult to prove that the neglect and consequent suffering of specific animals in the facility was deliberate rather than the result of ignorance or simple negligence.”³⁷⁶ Indeed, defendants in the case involving discarding live “spent hens” discussed above were acquitted not because of an exemption, but because the court found that the requisite *mens rea* was not shown.³⁷⁷

Mens rea also seemed to inform the court’s acquittal of Smith in *Freel v. Downs* discussed in Part III.C. The court emphasized that the strings holding the turtles’ flippers were cut “at the behest of the defendant Smith on the deck of the steamer, at the dock, and before the transfer of the turtles from the steamer to the transporting vehicle,”³⁷⁸ and that Smith had the turtles “immediate[ly]” transported to a warehouse “where the turtles would be properly kept and sustained.”³⁷⁹ These actions, the court concluded, were “indicative, if, of anything, that the defendant Smith did not intend to inflict such pain and cruelty upon these turtles as is prohibited by statute, but as soon as possible relieved them of whatever pain and suffering” caused by having their flippers tied together.³⁸⁰

Proving the requisite *mens rea* can seem to be an even greater hurdle as one moves up the chain—that is, beyond the low-level worker who may have been the one most immediately responsible for the cruelty but who is just a cog in machine of systemic cruelty and overseen by the supervisor or owner of the facility.³⁸¹ Indeed, as Leahy explains, in the wake of damning undercover investigations, corporate officials often “disclaim[] the abuse and put[] all the responsibility on the employees.”³⁸² This playbook has been successfully deployed to “allow[] the industry to dictate a process whereby it

³⁷⁵ See, e.g., *supra* notes 141 [Error! Bookmark not defined.], 147-148, 181, and accompanying text.

³⁷⁶ Cassuto & Eckhardt, *supra* note 82 [82], at 13 (noting that “many state statutes require that the prosecution demonstrate a mental state of the defendant that may be hard to prove” (citing Wolfson, *supra* note 72 [72], at 131)).

³⁷⁷ *Large Scale Animal Abuse*, *supra* note Error! Bookmark not defined. [Error! Bookmark not defined.], at 96.

³⁷⁸ *Downs*, 136 N.Y.S. at 446-47.

³⁷⁹ *Id.* [378] at 447.

³⁸⁰ *Id.* [378]

³⁸¹ See Leahy, *supra* note 143, at 160-61.

³⁸² *Id.* at 160.

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.’”³⁸³ For example, in the case of the dairy facility supplying Nestlé discussed in Part II.I, “[t]he prosecutor declined to file charges because he recommended the owner of the farm instead be ‘informed’ of the issues and fire or retrain employees.”³⁸⁴ In fact, despite animal protection organizations routinely urging—and laying out the case for—corporate liability, “to date, charges still have not been filed against a corporate actor as a result of an investigation.”³⁸⁵

But this is “contrary to basic principles of law.”³⁸⁶ In fact, “the management, ownership, and corporation are all equally legally culpable.”³⁸⁷ As Mary Maerz explains, in other contexts “[c]ourts have been willing to impute to a corporation the knowledge and ‘careless disregard’ of its employees on a theory much like respondeat superior” and “have consistently held that the knowledge gained by corporate employees acting within the scope of their employment, as well as the employees’ intent when acting within the scope of employment, will be imputed to the corporation for purposes of ascribing to the corporation the requisite criminal culpability.”³⁸⁸ Under these doctrines, “the *mens rea* requirements necessary to hold corporations criminally liable for animal cruelty in factory farms could be readily established.”³⁸⁹

In short, to establish a cruelty violation, one must show not only that cruel conduct occurred but also that it was done with the requisite state of mind. The particularities of cruelty laws can complicate this, but the challenge should not be overstated. Nonetheless, as discussed next, both the substantive violation and the *mens rea* must be established beyond a reasonable doubt.

F. High Burden of Proof

As with any criminal law, violations of cruelty laws must be established beyond a reasonable doubt—the highest burden of proof in our legal system.³⁹⁰ Satisfying this burden can be challenging. As discussed above,

³⁸³ *Id.* at 196.

³⁸⁴ *Id.* at 161.

³⁸⁵ *Id.* at 173.

³⁸⁶ *Id.* at 160.

³⁸⁷ *Id.*

³⁸⁸ Mary Maerz, *Corporate Cruelty: Holding Factory Farms Accountable for Animal Cruelty Crimes to Encourage Systemic Reform*, 16 ANIMAL & NAT. RESOURCE L. REV. 137, 166 (2020).

³⁸⁹ *Id.* at 168.

³⁹⁰ Michael D. Cicchini, *Reasonable Doubt and Relativity*, 76 WASH. & LEE L. REV. 1443, 1499 n.112 (2019) (“Few things are uncontroversial in the legal arena, but there are

typically a prosecutor must show not only that the alleged conduct occurred, but also that it was “unnecessary” or “unjustifiable,” and that it was done with the requisite *mens rea*—all beyond a reasonable doubt, and all without inspections or other ready access to observe conduct or conditions on farms.³⁹¹ Exemptions can exacerbate this challenge, particularly where their inapplicability must be shown as part of the state’s affirmative case, beyond a reasonable doubt.³⁹²

Although case law does not appear to address the sufficiency of evidence in the context of the types of farmed animal cruelty this article focuses on—likely because of the sheer paucity of such prosecutions³⁹³ and the other structural challenges discussed above—animal cruelty cases in other contexts are illustrative.

In a case that demonstrates the interplay of *mens rea* requirements and the burden of proof, a court reversed a cruelty conviction for shooting two cows who were found “lying on the ground,” one with an obvious “wound on its head” and the other “moaning and unresponsive.”³⁹⁴ Though it found that the evidence sufficed to prove that the appellant shot the animals with the knowledge that they might not die instantly, the court reversed the cruelty conviction because the evidence was not enough to prove beyond a reasonable doubt that appellant’s “objective in shooting the cattle was to increase or prolong their pain” where the state cruelty law required such an intent.³⁹⁵

Given the paucity of farmed-animal-cruelty prosecutions, an example from another context helps further illustrate the challenges of meeting this high burden of proof, even in a situation where the animal’s conditions were on full view: A court overturned a cruelty conviction after a dog was undisputedly left in a car for more than an hour on a ninety-eight degree day for insufficient evidence to meet the burden of proof.³⁹⁶ The dog was “barking

countless legal authorities asserting the fundamental principle that proof beyond a reasonable doubt is the highest burden of proof. This principle is to criminal law what offer and acceptance are to contract law.”).

³⁹¹ See Part III.B *supra*.

³⁹² See Marceau, *supra* note 358 at 254; 8 TEX. PRAC., CRIMINAL FORMS AND TRIAL MANUAL § 129.8, CRUELTY TO LIVESTOCK ANIMALS (11th ed.) (“The State must prove beyond a reasonable doubt that the defendant or defendant’s conduct does not fall within th[e] exception” for “[a]nimal husbandry or agriculture practice involving livestock animals.”). *But see, e.g.* Commonwealth v. Barnes, 629 A.2d 123, 130 (1993) (“Under our case law, the burden is not upon the Commonwealth to prove a negative, i.e., that appellants do not fall within this exception. Rather, ‘where the defendant comes forward with some evidence that he [fell within the exception], the burden shifts to the Commonwealth to prove [that he did not] beyond a reasonable doubt.’” (citation omitted)).

³⁹³ See *supra* note 358 and accompanying text.

³⁹⁴ A.J.R. v. State, 3 N.E.3d 1000, 1002 (Ind. Ct. App. 2014).

³⁹⁵ *Id.* at 1007-08.

³⁹⁶ Ross v. United States, 331 A.3d 220, 221 (D.C. 2025)

incessantly”; her tongue was sticking out, “suggesting that [she] was panting”; and the responding animal control officer, who had dealt with more than fifty similar incidents, testified that the dog could have died absent intervention.³⁹⁷ Nonetheless, the court held that this evidence was insufficient because it did not establish “the actual temperature inside the car” or “the presence of symptoms of heat-related distress.”³⁹⁸ If the standard was not met when an animal’s condition is on full view in a public parking lot with multiple witnesses, imagine how difficult it is to establish when an animal is entirely out of view.

G. Prosecutorial Discretion

For all the reasons discussed above—and not merely because of the common farming exemptions—establishing cruelty to farmed animals is challenging, especially in the context of animals used for food, and especially when practices at issue are common. These are, in brief, not easy cases. As a result, even where there might be sufficient evidence to convict, a prosecutor may decline to pursue a case.³⁹⁹

Because prosecutors have limited resources, only a fraction of cases are prosecuted.⁴⁰⁰ For example, studies and data indicate that “only about 60 percent of murders” are prosecuted.⁴⁰¹ The rates are even lower for sexual assaults and rapes— “about 20 to 40 percent.”⁴⁰²

Commentators have long bemoaned animal cruelty prosecution rates as particularly inadequate, suggesting that “animal abuse is in the same posture as child abuse was in the 1980s; largely misunderstood while under-investigated and under-prosecuted”⁴⁰³ and that it is “too often viewed as a

³⁹⁷ *Id.* at 223.

³⁹⁸ *Id.* at 225.

³⁹⁹ See, e.g., Leahy, *supra* note 143 [Error! Bookmark not defined.], at 161 (where undercover footage from a Wisconsin dairy investigation showed “kicking, punching, and dragging cows” “[t]he prosecutor declined to file charges because he recommended the owner of the farm instead be ‘informed’ of the issues and fire or retrain employees”); *id.* at 188-89 (where undercover footage from a Nebraska calf ranch “documented calves 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,” “the prosecutor declined to prosecute”).

⁴⁰⁰ See Marceau, *supra* note 72 [72], at 79.

⁴⁰¹ *Id.*

⁴⁰² *Id.*

⁴⁰³ ALLIE PHILLIPS & RANDALL LOCKWOOD, NAT’L DISTRICT ATT’YS ASS’N, INVESTIGATING & PROSECUTING ANIMAL ABUSE: A GUIDEBOOK ON SAFER COMMUNITIES, SAFER FAMILIES & BEING AN EFFECTIVE VOICE FOR ANIMAL VICTIMS 2 (2013).

secondary offense, with many cases never even reaching the courts.”⁴⁰⁴ Prosecution rate data for this category of crimes is hard to come by, but an empirical analysis in Connecticut found that “[b]etween 2008 and 2018, only one in five of those charged with animal cruelty in Connecticut had their cases prosecuted to a conclusion.”⁴⁰⁵

Prosecutors generally pursue the strongest cases—the ones they are likely to win, and the compounding structural challenges in applying cruelty laws to on-farm conduct discussed above may well dissuade prosecution—or provide cover for not bringing a case.

Political factors can play a significant role in deterring prosecutions. Prosecutors in most U.S. jurisdictions are elected.⁴⁰⁶ Nonhuman animals cannot vote. Nor can they donate to political campaigns. CAFOs, on the other hand, can and do contribute to political campaigns.⁴⁰⁷ And the individuals who own, operate, and work for these facilities can (at least sometimes) vote. A CAFO might also be considered economically important to a jurisdiction, thus making prosecuting them politically risky.⁴⁰⁸

For all these reasons, it would not be unusual for a prosecutor to decline to bring a case involving farmed animals.

In fact, political factors sometimes influence prosecutors to instead target marginalized animal advocates seeking to expose corporate animal abuse. For example, laws intended to address terrorism have long been deployed against nonviolent animal activists.⁴⁰⁹ In a particularly extreme example, an

⁴⁰⁴ HUMANE SOC’Y OF THE U.S., *FIRST STRIKE: THE VIOLENCE CONNECTION* 9 (2008).

⁴⁰⁵ Jessica Rubin, *Desmond’s Law: Early Impressions of Connecticut’s Court Advocate Program for Animal Cruelty Cases*, 134 HARV. L. REV. F 263, 263 (2021). Marceau notes, however, that this data “further shows that about 80% or more of the cases that were dismissed were set aside only after the accused had ‘successfully completed a diversionary program.’” Justin Marceau, *Animal Rights and the Victimhood Trap*, 63 ARIZ. L. REV. 731, 775 (2021).

⁴⁰⁶ Carissa Byrne Hessick & Michael Morse, *Picking Prosecutors*, 105 IOWA L. REV. 1537, 1548 (2020) (“the vast majority of states elect their attorney general and hold separate elections for local prosecutors”).

⁴⁰⁷ See Warren A. Braunig, *Reflexive Law Solutions for Factory Farm Pollution*, 80 N.Y.U. L. REV. 1505, 1513 (2005) (CAFOs “are powerful corporations that invest heavily in lobbying and political campaigns, skewing the discourse in state capitols . . .”); e.g., Karly Zande, *Raising A Stink: Why Michigan CAFO Regulations Fail to Protect the State’s Air and Great Lakes and Are in Need of Revision*, 16 BUFF. ENVT’L L.J. 1, 37 (2009) (“CAFOs have garnered significant political capital and backing in Michigan, largely due to campaign donations from the Michigan Farm Bureau, a CAFO supporter.”).

⁴⁰⁸ See Braunig, *supra* note 407, at 1513; Zande, *supra* note 407, at 37; Ruhl, *supra* note 17, at 269 n.9, 293 n.177; GOSWAMI & STILLERMAN, *supra* note 17, at 2-5.

⁴⁰⁹ See WILL POTTER, *GREEN IS THE NEW RED: AN INSIDER’S ACCOUNT OF A SOCIAL MOVEMENT UNDER SIEGE* (2011); Gabriella Sotelo, *FBI Records Reveal Accusations Against Animal Activists*, SENTIENT (Aug. 22, 2024), <https://sentientmedia.org/fbi-accusations-animal-activists/>.

undercover investigator was charged with animal cruelty.⁴¹⁰ In recent years, activists in multiple states have been prosecuted—and acquitted by juries—for open rescues of sick farmed animals.⁴¹¹

When a prosecutor declines to bring an animal cruelty case, that is usually the end of the road. As with all crimes, with rare exception, the state has a monopoly on prosecuting cruelty cases. Moreover, prosecutorial discretion is generally sacrosanct in our legal system.⁴¹² Accordingly, exercises of prosecutorial discretion are not typically challengeable.⁴¹³ Thus, in the vast majority of jurisdictions, no matter how strong a case might be, if a prosecutor declines to pursue it for any reason—or for no reason at all—that is the end of the road. Such is not the case in the context of crimes against humans. There, civil causes of action are typically available to the individual alleged victim(s) regardless of criminal prosecution. For example, whether the state chooses to bring a murder prosecution (and regardless of the outcome of any such case), a decedent’s family can bring a civil manslaughter action. And the burden of proof in such a case is lower than that in a criminal case: a preponderance of the evidence rather than beyond a reasonable doubt.⁴¹⁴

⁴¹⁰ Leahy, *supra* note 143, at 155-56.

⁴¹¹ Marina Bolotnikova, *The Fight Against Factory Farming Is Winning Criminal Trials*, VOX (Mar. 21, 2023), <https://www.vox.com/future-perfect/23647682/factory-farming-dxe-criminal-trial-rescue>; Wayne Hsiung, *I Did Not Steal Two Piglets. I Saved Them. A Jury Agreed*, N.Y. TIMES (Oct. 18, 2022), <https://www.nytimes.com/2022/10/18/opinion/animal-rights-factory-farming.html>.

⁴¹² See, e.g., *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) (“This Court has recognized on several occasions over many years that an agency’s decision not to prosecute or enforce, whether through civil or criminal process, is a decision generally committed to an agency’s absolute discretion.”). But see, e.g., *supra* notes 265-266 and accompanying text (describing unique Pennsylvania mechanism providing for judicial review of prosecutorial decisions); Delcianna J. Winders, *U.S. Animal Law De Jure and De Facto: Bridging the Enforcement Gap*, in THE INTERNATIONAL HANDBOOK OF LEGAL LANGUAGE AND COMMUNICATION (Deborah Cao, ed., forthcoming 2026) (discussing animal advocates’ successful use of the Pennsylvania provision and a similar Wisconsin provision).

⁴¹³ *Id.* [412] (“This recognition of the existence of discretion is attributable in no small part to the general unsuitability for judicial review of agency decisions to refuse enforcement.”); *Wayte v. United States*, 470 U.S. 598, 607 (1985) (“In our criminal justice system, the Government retains ‘broad discretion’ as to whom to prosecute. . . . This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review.” (citation omitted)); Matthew James Hannon Redavid Jr., *Revamping Procedural Due Process for Illegal Aliens: Applying A Categorical Approach to Prosecutorial Discretion in Removal Proceedings*, 28 GEO. J. LEGAL ETHICS 891, 899 (2015) (“Historically, courts have generally not reviewed or questioned discretionary prosecutorial decisions, and are unwilling to ‘coerce’ the executive branch into making particular prosecutorial decisions.”).

⁴¹⁴ John Leubsdorf, *The Surprising History of the Preponderance Standard of Civil Proof*, 67 FLA. L. REV. 1569, 1570 (2015).

Legally property, animals currently lack standing to bring suit.⁴¹⁵

As the foregoing discussion makes clear, multiple confounding layers of challenges make criminal law ill-suited to providing oversight of conduct toward or conditions for animals on farms. Exemptions pertaining to on-farm conduct can certainly exacerbate these challenges, but they are by no means the only, or even the primary, consideration. Thus, even if we were to eradicate cruelty code exemptions for on-farm conduct, not much would change. Indeed, this is borne out by the paucity of farmed animal cruelty cases even in the nearly quarter of states with no such exemptions whatsoever.⁴¹⁶

This fundamental lack of oversight is contrary to what most Americans say they want, and it largely leaves a massive, highly profitable, highly concentrated industry that uses billions of animals a year to its own cruel devices.

CONCLUSION

While most Americans believe that the animals we use for food should be treated well and all fifty states prohibit animal cruelty, every year in the United States we kill nearly ten billion warm-blooded animals for food, 99 percent of whom spend their short lives on factory farms where they are intensively confined without access to the outdoors or space to move around and subjected to painful mutilations without anesthesia. Animal law scholars, animal advocates, and the popular media have almost universally contended that exemptions in state cruelty laws for common farming practices are the reason for this vast discrepancy. This Article has shown that that prevailing narrative is wrong: Common farming exemptions do not, in fact, put farmed animals beyond the law. Instead, the problem is much more fundamental: It is our sole reliance on criminal law to regulate industrial animal agriculture.

⁴¹⁵ See Delcianna J. Winders, *Access to Court: Legal Standing*, in ELGAR CONCISE ENCYCLOPEDIA OF ANIMAL LAW 239, 239-40 (ed. Joan Schaffner 2025).

⁴¹⁶ See *supra* note 202 [201] and accompanying text.