

# JUDICIAL REVIEW AND THE HUMANE TREATMENT OF ANIMALS

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*Humans have a complicated relationship with animals. Animals are at the same time companions, food, subjects of research, and competitors for resources. Determining how we should treat them in these different contexts—setting the standards that capture our concern for their welfare—is difficult. Our contemporary scientific understanding of animal behavior and physiology should ultimately inform our standards for animal welfare. However, what science cannot determine is how much concern we should have in the first place.*

*This Note focuses on those laws that aim to set humane standards for the treatment and care of animals. When legislatures place the burden of setting those standards on administrative agencies, courts should ensure that the meaning of “humane” relied upon by an agency reflects more than science alone. Through examining a recent opinion of the Supreme Court of New Jersey, this Note argues that such standards must incorporate the social value that we place on mitigating animal pain and suffering and provides examples of how such value should be measured. Furthermore, judicial review of agency action can be conducted in a manner that both respects the institutional role of the court and ensures that agencies have actually made tough ethical decisions.*

## INTRODUCTION

“Humane” as a matter of law bears little resemblance to how the word is used in common parlance. The intense confinement of a breeding dog may be considered inhumane, yet the nearly identical treatment of a sow will not. If “humane” is defined strictly by reference to scientific criteria—describing physiological and behavioral responses—and if a dog and a pig share a similar capacity to experience pain and to suffer,<sup>1</sup> then what we consider humane for each

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<sup>1</sup> It is difficult to draw comparisons across species. See DONALD M. BROOM & ANDREW F. FRASER, *DOMESTIC ANIMAL BEHAVIOUR AND WELFARE* 63 (4th ed. 2007) (“Severe pain can exist without any detectable sign. . . . [S]pecies vary in the kinds of behavioural responses which are elicited by pain.”). However, pigs, like dogs, are social animals and elicit similar responses to pain, which allows for easier comparison. *Id.* Also, pigs exhibit advanced cognitive abilities. See Natalie Angier, *Pigs Prove To Be Smart, if Not Vain*, N.Y. TIMES, Nov. 10, 2009, at D1 (discussing the growing body of evidence). Whatever differences there are between pigs and dogs, they are unlikely to be so great as

should be comparable. Instead, the fact that certain treatment is potentially humane for a pig but not a dog reflects our disparate concerns with each animal's welfare.<sup>2</sup> In effect, determining what it means to treat animals humanely involves our values, not just the qualities of any given animal.

The law governing animal welfare is convoluted. Animals receive some protection from maltreatment through state anti-cruelty statutes.<sup>3</sup> These statutes typically guard only against wanton abuse that has no societally legitimate purpose. They also tend to exempt common agricultural practices, meaning that as long as a particular method is standard within the industry, it is not cruel under the statute. On the other hand, under the regulatory system at both the federal and state level, specific animals are sometimes afforded a level of "humane" protection that exceeds what would otherwise be provided under the anti-cruelty statutes.<sup>4</sup> These laws prohibit activities that would not necessarily violate anti-cruelty statutes because they are not wanton—there is a purpose behind the pain and suffering inflicted on the animal—but they are characterized as inhumane nonetheless.

Through the use of humane standards, the regulatory system provides certain limited chances to exceed the baseline protections offered under anti-cruelty statutes. However, if we are to ensure that regulations properly address relevant concerns and honestly represent our convictions and interests, courts must be willing to scrutinize agency regulations.<sup>5</sup> Though states have different approaches to promulgating humane standards of care and different standards of review, one thing should remain clear: The humane treatment of animals is as much about us as it is about them. "Humane" should not be defined without questioning the value we place on animal pain and suffering, and, consequently, judicial review of agency action should ensure that this value is actually determined.

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to make the experience of intense confinement for one significantly different than for the other.

<sup>2</sup> We tend to place a greater value on the welfare of dogs than on pigs. Humane standards reflect this by providing relatively greater protection for dogs. Cf. Roger Cohen, *Dog Days in China*, N.Y. TIMES, Feb. 4, 2010, <http://www.nytimes.com/2010/02/05/opinion/05iht-edcohen.html> (contrasting the Chinese and American appetite for dogs).

<sup>3</sup> See *infra* notes 16–25 and accompanying text (discussing criminal restrictions on animal use). Throughout this Note, I refer to unnecessary or unjustifiable pain and suffering, which I define as harmful effects experienced by animals due to human activity that can be avoided without limiting the use to which the animals are put.

<sup>4</sup> See *infra* Part I.A.2–3 (discussing regulatory restrictions).

<sup>5</sup> See *infra* Part II.B (discussing a recent case where, I argue, courts have failed to properly review agency action).

New Jersey was the first state to give an open grant of authority to an agency to create humane standards of care. The State Department of Agriculture was reluctant to act and, after significant delay, finally issued regulations that were quickly challenged. In a recent article, Professors Mariann Sullivan and David Wolfson have documented the progress of the challenged regulations up to the Appellate Division, New Jersey's intermediate appellate court.<sup>6</sup> In tracking this progress, Sullivan and Wolfson identify one of the main failures of the Appellate Division: The court allowed the agency to treat the creation of humane standards as a purely scientific exercise.<sup>7</sup>

The New Jersey Supreme Court later invalidated certain regulations, recognizing that common agricultural practices cannot be *assumed* to be humane.<sup>8</sup> Rather, the agency must individually *determine* the humaneness of each practice. While the Supreme Court acknowledged that the word "humane" incorporates more than just scientific evidence, the court appeared unwilling to incorporate social values into their understanding of "humane" when scrutinizing the regulations.

I argue that both the Supreme Court and the Appellate Division erred, but each in a slightly different way. While "humane" is an admittedly ambiguous word, the Appellate Division failed to acknowledge that all permissible interpretations imply some consideration of social values—illustrated, for example, by our greater concern with the welfare of dogs versus pigs. On the other hand, while the Supreme Court understood "humane" to always involve an ethical dimension,<sup>9</sup> it declined to ensure that the Department of Agriculture incorporated this fact into its rulemaking. Instead, the court largely saw such determinations as part of a philosophical debate beyond the purview of judicial review.

Building on Sullivan and Wolfson's article, I argue that reviewing humane standards involves two issues: (1) defining an agency's legal authority under its enabling statute; and (2) assessing the quality of the agency's decision making. I argue that a truly "humane" regula-

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<sup>6</sup> Mariann Sullivan & David J. Wolfson, *If It Looks Like a Duck . . . New Jersey, the Regulation of Common Farming Practices, and the Meaning of "Humane,"* in ANIMAL LAW AND THE COURTS: A READER 94, 115 (Taimie L. Bryant, Rebecca J. Huss & David N. Cassuto eds., 2008).

<sup>7</sup> Science can provide evidence about the treatment of animals, but it alone cannot tell us whether we should desire greater or lesser protection for them. *See id.* at 110–14 (noting unavoidable ethical questions).

<sup>8</sup> N.J. Soc'y for the Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 955 A.2d 886, 906–07 (N.J. 2008).

<sup>9</sup> *Id.* at 910 (noting that conceptions of what constitutes humane treatment for farm animals in general will affect one's view of the specific practices in question).

tion must meet a baseline of minimizing the unnecessary pain and suffering of animals—providing at a minimum the same level of protection afforded by anti-cruelty statutes. Agencies must then balance the social value of reducing that pain and suffering further with the resulting impact on the regulated activity.

To be sure, for specific standards within a larger scheme, an agency might come to the conclusion that society places no additional value on improving the welfare of animals and could issue a regulation that appears indistinguishable from the corresponding anti-cruelty statute.<sup>10</sup> The critical difference, however, is that the agency will have *decided* that the value is zero, rather than assuming it to be zero or avoiding the question altogether. By the same token, an agency could also find that society expects that animals will be treated with a greater concern for their well-being. Either way, any social costs associated with animal pain and suffering will at least have been accounted for.

This Note is written through the lens of federal judicial review—which tends to be deferential toward agencies—but I discuss state law to a great extent. The principles I identify here will apply with equal or stronger force in the states, where a significant amount of regulation related to animals occurs. I focus on livestock because they constitute the greatest number of animals with whom society interacts, and they receive the least amount of protection under humane treatment laws. Courts are understandably cautious when reviewing political and social questions, and determining appropriate standards of care for animals may raise typical concerns regarding judicial competence. Often, the unfortunate consequence of this caution is a hesitance to hold agencies accountable when tough questions are either ignored or answered in unsatisfactory ways.

Part I identifies where humane regulation of animals occurs in law. Part II argues that any humane regulation that ignores social welfare is unreasonable and discusses how this understanding would have affected a recent case in New Jersey. Finally, Part III suggests various sources of authority on which agencies may draw when trying to assess how much the pain and suffering of animals should matter and summarizes how courts can subsequently evaluate those decisions.

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<sup>10</sup> This would be a difficult position for the agency to take as most laws regulating animal welfare are passed in light of existing laws forbidding cruelty. To determine that the value is in fact zero for every standard is, in essence, to render the humane law insubstantial.

## I

## ANIMAL WELFARE AND THE REGULATORY STATE

While there are few explicit examples to draw on, there is evidence to suggest that administrative agencies are assuming a more central role in regulating animal husbandry.<sup>11</sup> The purpose of this Part is to position regulatory discretion within the larger field of animal law.

*A. The Increasing Prominence of the Regulatory State**1. Property and the Prevention of Cruelty to Animals*

Animals have historically been understood as property interests.<sup>12</sup> An owner of an animal has a common law right to bring suit against any individual who might harm, or who has harmed, the animal. The typical argument in favor of preserving the property status of animals as a means of encouraging their humane treatment stresses two interrelated points: Owners will protect their interest in the animal, and such interests complement the needs of the animal itself.<sup>13</sup> While true in many circumstances, this view ignores a significant reason why animal welfare issues arise: Maximizing production efficiency in a commercial context is often at odds with the best interests of animals.<sup>14</sup> When such conflicts arise, the legal status of animals

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<sup>11</sup> Husbandry in this context refers to the control and management of those practices used to produce animals for consumption. Cf. N.J. ADMIN. CODE § 2:8-1.2(a) (2010) (defining “[r]outine husbandry practices” as “those techniques . . . employed to raise, keep, care, treat, market and transport livestock”).

<sup>12</sup> This simple premise has generated considerable criticism from those who would advocate on behalf of animals. See Gary L. Francione, *Animals—Property or Persons?*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 108, 110–12 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) [hereinafter ANIMAL RIGHTS] (criticizing the property status of animals). Much has been written about why animals deserve greater consideration. See, e.g., TOM REGAN, THE CASE FOR ANIMAL RIGHTS 121 (1983) (setting forth an ethical argument); PETER SINGER, ANIMAL LIBERATION 1–23 (3d ed. 2002) (evoking equality principles); Steven M. Wise, *Animal Rights, One Step at a Time*, in ANIMAL RIGHTS, *supra*, at 19, 33–38 (discussing cognitive ability and autonomy). *Contra* Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in ANIMAL RIGHTS, *supra*, at 143, 148–49 (criticizing the standard objections to animals’ property status).

<sup>13</sup> See, e.g., Epstein, *supra* note 12, at 149 (“[T]here is no necessary conflict between owners and their animals.”). For example, the farmer will both guard the animal from external harms—weather, disease, or third parties—and treat the animal humanely in order to promote the production of marketable meat, minimizing the animal’s fear at the time of slaughter and creating conditions favorable to growth. See *id.* at 148 (“[Sparing] cattle . . . unnecessary anxiety [during slaughter] tends to improve the amount and quality of the meat that is left behind.”).

<sup>14</sup> E.g., PEW COMM’N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 33 (2008), available at [http://www.pewtrusts.org/our\\_work\\_report\\_detail.aspx?id=38442](http://www.pewtrusts.org/our_work_report_detail.aspx?id=38442) (“When . . . animals are confined indoors, discomfort due to weather is reduced. The downside is that animals are kept in

as property affords little protection against potentially inhumane treatment.<sup>15</sup>

Resting against the backdrop of the property status of animals are state anti-cruelty statutes. According to Professor Gary Francione, the purpose behind these laws is to promote the economic use of animal resources—that is, these laws merely extend the animals-as-property framework by labeling as “cruel” only that which frustrates the efficient use of animals.<sup>16</sup> There are elements of anti-cruelty laws, however, that suggest that the treatment of animals means more than just the promotion of their economic utility.<sup>17</sup> For example, the original justifications for these laws were often grounded in the idea that people have a duty, not to the animals that are implicated but to society or divinity, to demonstrate humanitarian behavior and uphold higher values.<sup>18</sup> Others, however, argue that anti-cruelty

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more crowded conditions, are subject to a number of chronic and production-related diseases, and are unable to exhibit natural behaviors. In addition, the animals are often physically altered or restrained to prevent injury to themselves or [industrial farm animal production] workers.”); see also Temple Grandin, *The Importance of Measurement To Improve the Welfare of Livestock, Poultry and Fish*, in *IMPROVING ANIMAL WELFARE: A PRACTICAL APPROACH* 1, 8, 13 (Temple Grandin ed., 2010) (listing examples of animals exhibiting high productivity but poor welfare); Linda J. Keeling, *Healthy and Happy: Animal Welfare as an Integral Part of Sustainable Agriculture*, 34 *AMBIO* 316, 317 (2005) (noting that the environments in which we keep domestic animals have changed at quicker rates than evolutionary and breeding processes, resulting in the need to suppress natural behaviors).

<sup>15</sup> Cf. *Avenson v. Zegart*, 577 F. Supp. 958, 960 (D. Minn. 1984) (defining puppy mills as “dog breeding operation[s] in which the health of the dogs is disregarded in order to maintain a low overhead and maximize profits”).

<sup>16</sup> See Gary L. Francione, *Animals, Property and Legal Welfarism: “Unnecessary” Suffering and the “Humane” Treatment of Animals*, 46 *RUTGERS L. REV.* 721, 740 (1994) (“[T]he legal treatment currently accorded to animals under the law[] is determined not by reference to any moral ideal, but by . . . what conduct is perceived to maximize the value of animal property.”).

<sup>17</sup> See DAVID J. WOLFSON, *BEYOND THE LAW: AGRIBUSINESS AND THE SYSTEMATIC ABUSE OF ANIMALS RAISED FOR FOOD OR FOOD PRODUCTION* 15 (1999) (stating that because of the unease felt about protecting animals for their own sake, anti-cruelty laws originally were “justified on the ground that acts of cruelty dulled humanitarian feelings”).

<sup>18</sup> While it may appear on the face of the statutes that they serve to prohibit offenses against the rights of animals that are protected by them, the true offense has been framed as “against the public morals, which the commission of cruel and barbarous acts tends to corrupt.” *Commonwealth v. Turner*, 14 N.E. 130, 132 (Mass. 1887); accord *State v. Porter*, 16 S.E. 915, 916 (N.C. 1893). For a background on anti-cruelty statutes, see generally Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law’s Role in Prevention*, 87 *IOWA L. REV.* 1 (2001), and David Favre & Vivien Tsang, *The Development of Anti-cruelty Laws During the 1800’s*, 1993 *DETROIT C. L. REV.* 1. The fact that these laws appear to be aimed at protecting human interests has been a source of criticism. Francione, *supra* note 16, at 756 (“[C]lose examination of . . . these statutes indicates quite clearly that they have an exclusively humanocentric focus, and the duties that they impose give . . . no corresponding rights for animals.”).

laws are grounded in an independent respect for animals themselves.<sup>19</sup>

When anti-cruelty laws fail to protect animals, they generally do so as a result of two major structural flaws.<sup>20</sup> First, violations of anti-cruelty statutes carry criminal penalties, and enforcement is discretionary. Enforcement discretion, combined with the controversial nature of criminal penalties for animal abuse, render prosecutors reluctant to pursue violators in all but the most egregious situations.<sup>21</sup> Furthermore, third parties who would advocate for animals in the face of government inaction face nearly insurmountable standing barriers that prevent cases of cruelty from ever being addressed through the legal system.<sup>22</sup> Second, state anti-cruelty laws exempt from their protection virtually all of the animals that society interacts with, namely, food animals.<sup>23</sup> As a result, billions of animals in the United States are

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<sup>19</sup> See Jerrold Tannenbaum, *Animals and the Law: Cruelty, Property, Rights . . . or How the Law Makes Up in Common Sense What It May Lack in Metaphysics*, 3 SOC. RES. 539, 564 (1995) (describing the “activist” view); see also Stephens v. State, 3 So. 458, 458 (Miss. 1888) (“[Anti-cruelty laws exist] for the benefit of animals, as creatures capable of feeling and suffering . . . [and are] intended to protect them from cruelty, without reference to their being property, or to the damages which might thereby be occasioned to their owners.”).

<sup>20</sup> See generally David J. Wolfson, *McLibel*, 5 ANIMAL L. 21, 31–32 (1999) (discussing the shortcomings of anti-cruelty statutes).

<sup>21</sup> See David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House*, in ANIMAL RIGHTS, *supra* note 12, at 205, 210 (“[T]he enforcement of anticruelty statutes, like other criminal statutes, is left primarily to the police and public prosecutors, who have substantial other obligations to which they may assign a higher priority.”); Cass R. Sunstein, *Can Animals Sue?*, in ANIMAL RIGHTS, *supra* note 12, at 251, 253 (“[P]rosecution occurs only in a subset of the most egregious cases; there is a great deal of difference between what these statutes ban and what in practice is permitted to occur.”).

<sup>22</sup> There is a considerable body of literature on animals and standing. See, e.g., Joseph Mendelson, III, *Should Animals Have Standing? A Review of Standing Under the Animal Welfare Act*, 24 B.C. ENVTL. AFF. L. REV. 795 (1997); Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1335 (2000) (arguing that Congress could grant standing to animals, but has not). For an example of the strained manner in which animal advocates get into court, see *Animal Legal Defense Fund, Inc. v. Glickman*, 154 F.3d 426 (D.C. Cir. 1998) (in banc). This case provides a rare example of animal advocates successfully establishing standing by alleging an aesthetic injury. *Id.*

<sup>23</sup> Over nine billion land animals were slaughtered for food in the United States in 2009. Food and Agric. Org. of the United Nations, Searchable Database of Livestock Statistics, FAOSTAT, <http://faostat.fao.org/site/569/DesktopDefault.aspx> (select “country: United States of America,” “year: 2009,” “item: Meat, Total > (List),” and “element: Producing Animals/Slaughtered”; then click “show data”) (last visited Sept. 21, 2011). By way of comparison, the U.S. Department of Agriculture (USDA) estimates that approximately one million animals covered under the Animal Welfare Act were used in experiments in 2009. U.S. DEP’T OF AGRIC., ANIMAL AND PLANT HEALTH INSPECTION SERVICE, ANNUAL REPORT ANIMAL USAGE BY FISCAL YEAR (2010), available at [http://www.aphis.usda.gov/animal\\_welfare/efoia/downloads/2009\\_Animals\\_Used\\_In\\_Research.pdf](http://www.aphis.usda.gov/animal_welfare/efoia/downloads/2009_Animals_Used_In_Research.pdf). Mice and rats are not covered; their number likely approaches 100 million. LARRY CARBONE,

beyond the reach of the law.<sup>24</sup> As long as they are standard within the industry, common agricultural practices typically fall outside anti-cruelty statutes.<sup>25</sup>

## 2. *Specific Legislation and Referenda*

In addition to general anti-cruelty laws, there are statutes at both the state and federal level that directly regulate how animals are to be treated by addressing particular practices. Many states have also banned specific practices through ballot initiatives.<sup>26</sup> These efforts often result in the prohibition of particular practices within general exemptions from anti-cruelty statutes for common agricultural practices.<sup>27</sup> At the federal level, Congress has on occasion directly regulated the treatment of animals.<sup>28</sup> Generally speaking, these laws are narrow and apply only to specific animals.<sup>29</sup>

## 3. *Animals and Agencies*

Finally, agencies at the state and federal level have sometimes been tasked with promulgating humane standards for certain animals,

WHAT ANIMALS WANT: EXPERTISE AND ADVOCACY IN LABORATORY ANIMAL WELFARE POLICY 26 (2004).

<sup>24</sup> WOLFSON, *supra* note 17, at 23–35 (discussing typical state law exemptions for practices that are commonly used within the industry).

<sup>25</sup> *Cf.* Commonwealth v. Barnes, 629 A.2d 123, 132 (Pa. Super. Ct. 1993) (discussing an admission by a farmer that the castration of pigs and raising of veal calves in confined quarters might be considered cruel “except for the fact they are practices within the industry”). Typical examples of controversial practices are intense confinement—such as in battery cages, veal crates, and gestation crates—and non-anesthetized physical mutilations—such as beak searing, dehorning, tail docking, ear cutting, and castration.

<sup>26</sup> See Lars Johnson, Note, *Pushing NEPA’s Boundaries: Using NEPA To Improve the Relationship Between Animal Law and Environmental Law*, 17 N.Y.U. ENVTL. L.J. 1367, 1375–76 (2009) (describing successful ballot initiatives in California, Florida, Arizona, Oregon, and Colorado).

<sup>27</sup> For example, gestation crates were allowed in California under the exemption to the anti-cruelty law but were recently banned by ballot initiative. *Id.*

<sup>28</sup> For example, the Twenty-Eight Hour Law provides that when certain animals are being transported across state lines, they may not be confined “in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest.” 49 U.S.C. § 80502 (2006). The law allows for certain exceptions; for example, under USDA regulations, poultry are not covered by the Act. 9 C.F.R. §§ 89.1–89.5 (2010). Under the Airborne Hunting Act, it is a crime to shoot or harass any animal while in an aircraft. 16 U.S.C. § 742j-1 (2006). Animal fighting ventures are expressly prohibited. 7 U.S.C. § 2156 (2006). The Secretary of Health and Human Services is required to “provide for the establishment and operation . . . of a [sanctuary] system to provide for the lifetime care of chimpanzees that have been used [in research].” The CHIMP Act, 42 U.S.C. § 287a-3a(a) (2006). See also 18 U.S.C. § 48 (2006) (prohibiting depictions of animal cruelty).

<sup>29</sup> See generally HENRY COHEN, CONG. RESEARCH SERV., 94-731, BRIEF SUMMARIES OF FEDERAL ANIMAL PROTECTION STATUTES (2008) (summarizing federal laws affecting animals).

and there is evidence to suggest that regulatory agencies are beginning to assume a more central role in farm animal welfare.

At the federal level, the Animal Welfare Act (AWA) authorizes the United States Department of Agriculture (USDA) to regulate the treatment of warm-blooded animals used for research, public exhibition, transportation in commerce, or sale in the wholesale pet trade but excludes livestock and certain genera of research animals.<sup>30</sup> “Humane” is not defined within the Act. Under the Humane Slaughter Act (HSA), Congress has defined the specific practices that constitute humane slaughter but has left it up to the agency to promulgate regulations otherwise providing for the humane handling of “downed animals” (animals incapable of moving unassisted).<sup>31</sup> Other instances of agency discretion at the federal level are less obvious and may not directly reference animal welfare, but they are relevant to it nonetheless.<sup>32</sup>

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<sup>30</sup> 7 U.S.C. §§ 2131–2159. Similarly, breeders of pets who do not qualify as “dealers” are not covered by the Animal Welfare Act (AWA). *See Doris Day Animal League v. Veneman*, 315 F.3d 297 (D.C. Cir. 2003) (exempting puppy mills operated out of private residences). The AWA does authorize the Secretary of Agriculture to “promulgate standards to govern the humane handling, care, treatment, and transportation of [covered animals].” 7 U.S.C. § 2143(a)(1). Standards are to “include minimum requirements for handling, housing, feeding, watering, sanitation, . . . shelter from extremes of weather and temperatures, adequate veterinary care, and separation by species . . . and for exercise of dogs, as determined by an attending veterinarian, . . . and for a physical environment adequate to promote the psychological well-being of primates . . . .” 7 U.S.C. § 2143(a)(2)(A)–(B).

<sup>31</sup> *See Ante-mortem Inspection*, 9 C.F.R. § 309.3(e) (2010) (governing the handling of nonambulatory cattle); *Non-ambulatory Disabled Veal Calves and Other Non-ambulatory Disabled Livestock at Slaughter*, 76 Fed. Reg. 6572 (proposed Feb. 7, 2011) (to be codified at 9 C.F.R. pt. 309) (requiring young calves, previously exempted, who are too sick or injured to walk to be promptly and humanely euthanized). There are other examples where Congress has defined certain minimum practices and vested an agency with discretion to prescribe other requirements that the agency deems necessary for the humane treatment of the animals in question. *See, e.g.*, 7 U.S.C. § 8304(a)(4) (regulating the humane treatment of animals during exportation); 49 U.S.C. § 80502(a)(3)(b) (prescribing specific rules and a general requirement that “[a]nimals being transported shall be unloaded in a humane way”).

<sup>32</sup> Under the National Organic Program, for example, the Secretary of Agriculture is tasked with issuing standards that reflect consumer expectations, “assur[ing] consumers that organically produced products meet a consistent standard.” 7 U.S.C. § 6501(2) (2006). While many expectations deal with the healthful quality and environmental impact of the products, some concern the treatment of the animals. *E.g.*, S. REP. NO. 101-357, at 302 (1990), *reprinted in* 1990 U.S.C.C.A.N. 4656, 4956 (expecting that organic standards would strike the “necessary balance between the goal of restricting livestock medications and the need to provide humane conditions for livestock rearing”). As a result, the Secretary issued regulations governing livestock living conditions, parts of which were meant to accommodate the “natural behavior of animals” and to limit confinement. *Organic Production and Handling Requirements*, 7 C.F.R. § 205.239(a) (2010); *see also* National Organic Program (NOP)—Access to Pasture (Livestock), 73 Fed. Reg. 63,584, 63,586 (proposed Oct. 24, 2008) (to be codified at 7 C.F.R. pt. 205) (“Consumers and other com-

Apart from promulgating humane standards, federal agencies have to make the occasional determination as to what constitutes a humane practice. For example, under the Marine Mammal Protection Act, it is unlawful to import a marine mammal that is “taken in a manner deemed inhumane by the Secretary.”<sup>33</sup> In other situations, agencies must act in such a way as to not contravene principles established by Congress to protect animals.<sup>34</sup>

On the state level, agencies have begun to take a more prominent role in overseeing humane standards. For example, New Jersey appears to be the first state to broadly delegate powers to the state agricultural agency, mandating the creation of regulatory standards for farm animals.<sup>35</sup> In general, legislatures are paying greater attention to commercial husbandry practices, evidenced by the recent expansion of many state-agency mandates. In 2010 alone, at least nine states adopted bills relating to the care of livestock.<sup>36</sup> Under one such

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menters . . . have expressed a clear expectation that organic ruminants graze pastures for the purpose of obtaining nutritional value as well as to accommodate their health and natural behavior.”).

<sup>33</sup> 16 U.S.C. § 1372(b)(4) (2006).

<sup>34</sup> See, e.g., *Animal Prot. Inst. v. Hodel*, 860 F.2d 920, 927 (9th Cir. 1988) (“The Secretary’s disregard for the announced future intentions of adopters undercuts Congress’ desire to insure humane treatment for wild horses and burros.”).

<sup>35</sup> See Sullivan & Wolfson, *supra* note 6, at 97–100 (discussing the novelty in New Jersey’s statute).

<sup>36</sup> See H.R. 561, 2010 Leg., Reg. Sess. (Ala. 2010) (prohibiting local governments from adopting laws and rules relating to livestock and animal husbandry on private property); S. 3604, 96th Gen. Assemb., Reg. Sess. (Ill. 2010) (requiring the Advisory Board of Livestock Commissioners to be interested in, among other things, “the well-being of domestic animals and poultry” and to evaluate regulations issued by the state agriculture department pertaining to the humane treatment of animals); H.R. 1099, 116th Gen. Assemb., 2d Reg. Sess. (Ind. 2010) (allowing the Board of Animal Health to “adopt rules to establish standards governing the care of livestock and poultry”); H.R. 398, 2010 Gen. Assemb., Reg. Sess. (Ky. 2010) (creating the Kentucky Livestock Care Standards Commission to “make recommendations to establish, maintain, or revise standards governing the care and well-being of on-farm livestock and poultry”); S. 36, 2010 Leg., 36th Reg. Sess. (La. 2010) (requiring the Louisiana Board of Animal Health to establish standards governing the care and well-being of livestock and poultry “bred, kept, maintained, raised, or used for show, profit, or for the purpose of selling or otherwise producing crops, animals, or plant or animal products for market,” and preempting local regulation of the same); H.R. 414, 128th Gen. Assemb., Reg. Sess. (Ohio 2010) (establishing the Ohio Livestock Care Standards Board, which is to “adopt rules . . . governing the care and well-being of livestock”); H.R. 155, 59th Leg., Gen. Sess. (Utah 2010) (expanding the “duties and membership of the Agricultural Advisory Board to encompass issues related to the care of livestock and poultry,” taking into consideration, *inter alia*, the humane care of livestock); S. 295, 2009–2010 Leg., Reg. Sess. (Vt. 2010) (establishing the Livestock Care Standards Advisory Council for the purposes of evaluating state laws and providing policy recommendations regarding the care, handling, and well-being of livestock); H.R. 4201, 79th Leg., Reg. Sess. (W. Va. 2010) (creating the Livestock Care Standards Board to prescribe standards for livestock care and well-being that will help to maintain food safety, encourage locally grown and raised food, and protect West Virginia farms and families).

statute, for instance, a state agency recently acted to phase out veal crates, allowing veal calves the freedom of motion to turn around.<sup>37</sup>

### B. *What Standard Applies?*

In this Note, I argue that setting humane standards involves inquiring into the value of animal pain and suffering, and that agencies tasked with setting humane standards must arrive at a sufficiently reasoned answer to this question. In practice, this will necessitate two distinct types of judicial review of agency action. The first deals with the extent to which the relevant agency has been vested by the legislature with the ability to make law. The second seeks to ensure that the determinations made by the agency can withstand a legal challenge. As will be discussed here, the principles of judicial review under federal law will apply with equal or stronger force in the states, where significant animal protection work occurs.

At the state level, judicial review of an agency's lawmaking power consists of "an array of different announced standards, ranging from strong deference to an agency interpretation to completely *de novo* review explicitly discouraging deference."<sup>38</sup> However, no standard at the state level exceeds the deference given by courts to federal agencies under the seminal case *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*<sup>39</sup> Under *Chevron*, when Congress has not provided a clear answer to a question of statutory interpretation, courts will defer to a federal agency's interpretation so long as it is based on a reasonable construction of the statute.<sup>40</sup> How agency deference operates at the state level is still an open question;<sup>41</sup> however, I argue that any interpretation of "humane" is only reasonable when considerations of social values are incorporated.<sup>42</sup> Under *Chevron*, this would prevent federal agencies that exclude such determinations from

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Generally speaking, these statutes either specifically reference humane standards or direct the committees to include representatives of humane organizations.

<sup>37</sup> Press Release, Humane Society of the United States, Ohio Livestock Care Standards Board Votes To Phase Out Veal Crates (Apr. 5, 2011), available at [http://www.humane.society.org/news/press\\_releases/2011/04/ohio\\_crates\\_04052011.html](http://www.humane.society.org/news/press_releases/2011/04/ohio_crates_04052011.html).

<sup>38</sup> Michael Pappas, *No Two-Stepping in the Laboratories: State Deference Standards and Their Implications for Improving the Chevron Doctrine*, 39 MCGEORGE L. REV. 977, 984 (2008).

<sup>39</sup> See *id.* at 985 ("[The strong deference category] seems most consistent with the announced '*Chevron* two-step' because these standards imply that deference is mandatory when a statute is ambiguous and the agency's interpretation is reasonable.").

<sup>40</sup> 467 U.S. 837 (1984).

<sup>41</sup> Catherine M. Sharkey, *Federalism in Action: FDA Regulatory Preemption in Pharmaceutical Cases in State Versus Federal Courts*, 15 J.L. & POL'Y 1013, 1036 n.76 (2007).

<sup>42</sup> See *infra* Part II.A.2 (discussing the meaning of "humane").

receiving deference, and under equal or lower levels of agency deference in the states, interpretations of “humane” should be held to that baseline as well. Of course, legislatures at both the federal and state level are free to provide their own gloss on what it means to treat animals humanely. But I argue that we should presume that the definition of “humane” will always involve a consideration of the degree of pain and suffering society is willing to impose on animals.

Courts review administrative actions or decisions under the authority of either an agency’s enabling statute or the relevant legislature’s administrative procedure act. The standards that courts apply span a “continuum from the absolute deference of no review to the complete lack of deference in *de novo* review.”<sup>43</sup> In the middle are the formulations referred to as reasonableness (or “substantial evidence”) and arbitrariness (or “arbitrary and capricious”). The majority of states use some variant of the reasonableness standard, meaning that “the record contains enough evidence that a reasonable mind might accept in support of the agency’s conclusions.”<sup>44</sup> Under a more forgiving arbitrariness standard, the focus is “on the agency explanation or justification of the decision and whether that decision can be reasonably drawn from the evidence.”<sup>45</sup> At the federal level, a decision would be arbitrary and capricious if

the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.<sup>46</sup>

When courts are concerned with whether or not an agency’s substantive decision meets the appropriate standard, they often ask if the agency took a “hard look” at all relevant factors and reasonable alternatives.<sup>47</sup> Review can thus scrutinize both the result and the agency’s

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<sup>43</sup> William A. McGrath et al., *Project: State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 721–22 (1991).

<sup>44</sup> 3 CHARLES H. KOCH, JR., ADMINISTRATIVE LAW AND PRACTICE § 9:41 (3d ed. 2010).

<sup>45</sup> McGrath et al., *supra* note 43, at 723.

<sup>46</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

<sup>47</sup> McGrath et al., *supra* note 43, at 776; *see also* 3 STEVEN ALAN CHILDRESS & MARTHA S. DAVIS, FEDERAL STANDARDS OF REVIEW § 15.09 (4th ed. 2010) (describing the “hard look” standard as a judicial assessment of whether the agency considered factual and policy issues involved in the regulation and whether the decision is rationally connected to the resultant findings).

process in reaching that result to make sure that an agency's decision making is reasoned.<sup>48</sup>

Putting the two inquiries together, we should first ask if an agency issued regulations pursuant to its lawmaking power: Was the agency's interpretation of "humane" reasonable, or was it unreasonable because the agency failed to incorporate social values? If reasonable, we should ask further if the resulting decisions themselves were reasoned: Did the agency determine and act upon those social values in a non-arbitrary manner?

## II

### THE DISTANCE BETWEEN CRUEL AND HUMANE TREATMENT

In this Part, I will attempt to prescribe some boundaries for what "humane" means in law, particularly in the context of discretionary authority vested in agencies. From an individual perspective, there will be considerable variation as the very idea of "[h]umaneness, like beauty, is in the eye of the beholder: one's individual judgment about what is or is not humane depends entirely on one's personal notions of compassion and sympathy."<sup>49</sup> From a social perspective, however, humaneness should be understood to reflect a community's collective judgment. When defining acceptable standards of care—with this meaning in mind—agencies must identify the value that society places on minimizing pain and suffering in animals. Any humane regulation that ignores this component is based on an unreasonable interpretation of the word.

#### A. *The Meaning of "Humane"*

##### 1. *Legislative Definitions of "Humane"*

Where the legislature has defined "humane," such as in the Marine Mammal Protection Act (MMPA)<sup>50</sup> and the Humane Slaughter Act (HSA),<sup>51</sup> that meaning controls within the boundaries

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<sup>48</sup> KOCH, *supra* note 44, § 9:25 ("Arbitrariness review . . . requires the court to undertake an evaluation of the substantive decision, even though within that evaluation the decisionmaking process can be an indication of soundness.").

<sup>49</sup> Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 448 (D.C. Cir. 1998) (in banc) (Sentelle, J., dissenting).

<sup>50</sup> 16 U.S.C. § 1362(4) (2006) (defining "humane" as "that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved").

<sup>51</sup> The HSA defines two specific methods of slaughtering as "humane": "(a) . . . animals are rendered insensible to pain by a single blow or gunshot . . . before being shackled, hoisted, thrown, cast, or cut; or (b) . . . slaughtering in accordance [with religious requirements] whereby the animal suffers loss of consciousness by anemia of the brain caused by the simultaneous and instantaneous severance of the carotid arteries . . . ." 7 U.S.C.

of that statute. Courts, in turn, are likely to defer to agency actions that implement putatively clear legislative definitions. For example, the meaning of “humane” under the MMPA came into dispute when humane societies challenged the Secretary’s approval of the importation of seal pups.<sup>52</sup> The court treated the Secretary’s determination strictly as a finding of fact and declined to question the agency’s statutory construction.<sup>53</sup> Similarly, when Congress directs an agency to promulgate humane standards that include certain minimum requirements—as under certain provisions of the AWA<sup>54</sup>—courts might not reach the question of humaneness but may only ask whether those minimum requirements have been satisfied.<sup>55</sup> It is only when statutory definitions of “humane” are not narrowly written that both courts and agencies are left to give effect to a legislatively expressed intent that lacks easily discernable boundaries.

## 2. *Socially Informed Definitions of “Humane” Are More Accurate*

Despite legislative attempts at definition, “humane” remains a malleable word, often requiring agency discretion in interpretation. While acknowledging the flexibility of “humane,” I nevertheless contend that all permissible agency interpretations of the term must incorporate some consideration of social values regarding animal pain and suffering. Within the *Chevron* framework, this means that a court may find “humane” to be ambiguous enough to justify deference to an agency’s interpretation of the term if it is a “reasonable” one. However, the court must still interrogate the agency’s construction of “humane” and, I argue, should find it unreasonable—and therefore not entitled to deference—if society’s interest in reducing animal pain and suffering has been ignored.

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§ 1902(a)–(b) (2006). The HSA does not apply to chickens or other birds, even though they constitute the vast majority of animals slaughtered for food. *Levine v. Conner*, 540 F. Supp. 2d 1113 (N.D. Cal. 2008).

<sup>52</sup> The plaintiffs argued that humaneness—in light of the statutory definition—required that each animal “be rendered instantly and permanently unconscious by a single blow.” *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1013 (D.C. Cir. 1977). Seal pups are hunted for their pelts and blubber and to reduce predation in fisheries.

<sup>53</sup> *Id.* (“The [agency] made a determination on the administrative record that the South African harvest [of seals] was conducted in a humane manner. Our role in reviewing this finding is limited; we can reject it only if it is not supported by substantial evidence.”).

<sup>54</sup> For example, the Secretary must promulgate standards that contain minimum requirements “for a physical environment adequate to promote the psychological well-being of primates.” 7 U.S.C. § 2143(a)(2)(B).

<sup>55</sup> *E.g.*, *Animal Legal Def. Fund, Inc. v. Glickman*, 204 F.3d 229, 231–33 (D.C. Cir. 2000) (upholding regulations containing minimum engineering requirements—such as cage size—despite also containing performance standards that left the choice of promoting the psychological well-being of primates to the research facility).

This finding of unreasonableness would draw support from both the dictionary definition of “humane” and from the way in which some legislatures, courts, and agencies have approached the treatment of animals: by avoiding the infliction of harm unless there is a legitimate purpose, and sometimes by going even further to avoid inflicting harm that would otherwise be justified.

a. The Dictionary Definition of “Humane”

When statutes contain words that are not terms of art and are not statutorily defined, courts will “construe a statutory term in accordance with its ordinary or natural meaning.”<sup>56</sup> Dictionaries can be helpful to the extent they illuminate the plain meaning of words, serving as indices of social connotation and usage.

“Humane” can be defined as “marked by compassion, sympathy, or consideration for humans or animals.”<sup>57</sup> Indeed, this is the definition relied upon by the New Jersey Department of Agriculture<sup>58</sup> and by the Court of Appeals for the District of Columbia.<sup>59</sup> In turn, “sympathy” and “compassion” involve attempting to detect, comprehend, and mitigate pain and suffering.<sup>60</sup> Therefore, any humane standard that takes into account this dictionary definition, and thus the common social meaning of “humane,” must require a good-faith, factual determination into the actual degree and duration of the pain and suffering experienced by an animal. Furthermore, “sympathy” and “compassion” also demand that, at a minimum, unnecessary infliction of pain and suffering be mitigated.

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<sup>56</sup> *FDIC v. Meyer*, 510 U.S. 471, 476 (1994).

<sup>57</sup> MERRIAM-WEBSTER’S COLLEGIATE DICTIONARY 605 (11th ed. 2003); *see also* 7 THE OXFORD ENGLISH DICTIONARY 474 (2d ed. 1989) (defining “humane” as “[m]arked by sympathy with and consideration for the needs and distresses of others; feeling or showing compassion and tenderness towards human beings and the lower animals”).

<sup>58</sup> *N.J. Soc’y for the Prevention of Cruelty to Animals v. N.J. Dep’t of Agric.*, 955 A.2d 886, 902 (N.J. 2008) (defining “humane” as “marked by compassion, sympathy, and consideration for the welfare of animals”).

<sup>59</sup> *Animal Legal Def. Fund, Inc. v. Glickman*, 154 F.3d 426, 434 n.7 (D.C. Cir. 1998) (in banc) (“[H]umane’ does convey a basic meaning of compassion, sympathy, and consideration for animals’ health, safety, and well-being . . . .”); *id.* at 448 (Sentelle, J., dissenting) (defining “humane” in a similar fashion).

<sup>60</sup> A.J.F. Webster, *Farm Animal Welfare: The Five Freedoms and the Free Market*, 161 VETERINARY J. 229, 232 (2001) (“The first necessary step is to ensure that our perception of farm animal welfare is the same as that of the animals themselves.”). In cognizing “sympathy” and “compassion” for animals, anthropomorphic projection—the attribution of human experiences to animals—may be appropriate. *See infra* note 107 and accompanying text (discussing congressional intent to protect young and nursing animals as an indication of concern for infancy, vulnerability, and helplessness).

## b. Governments and Social Norms

“[T]here can be little doubt that there is a social norm that strongly proscribes the infliction of any ‘unnecessary’ pain on animals . . . .”<sup>61</sup> This assumption has been invoked in court opinions<sup>62</sup> and agency actions.<sup>63</sup> Even when a law’s focus is on the destruction of animals and the enabling statute does not explicitly provide for humane consideration,<sup>64</sup> agencies may endeavor to “select the method that will kill the [animal] quickly, effectively, and humanely.”<sup>65</sup> However, recognizing a social norm against unnecessary pain only ensures that animals do not suffer needlessly—suffering and pain may still be inflicted if a human benefit is ascertained. What remains in question is the magnitude of the human benefit for which we are willing to sacrifice animals, delimited by our desire to protect animals from the adverse effects of our actions.

In accordance with this distinction, regulation of the treatment and care of animals can be put into two categories. In the first are regulations that reduce unnecessary pain and suffering but do not impose costs on the regulated activity.<sup>66</sup> The AWA requires this

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<sup>61</sup> Francione, *supra* note 16, at 722, *quoted in* *Farm Sanctuary, Inc. v. Dep’t of Food & Agric.*, 74 Cal. Rptr. 2d 75, 79 (Ct. App. 1998).

<sup>62</sup> *E.g.*, *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 723 F. Supp. 1467, 1486 (S.D. Fla. 1989), *rev’d*, 508 U.S. 520 (1993); *Humane Soc’y of Rochester & Monroe Cnty. for the Prevention of Cruelty to Animals, Inc. v. Lyng*, 633 F. Supp. 480, 486 (W.D.N.Y. 1986); *State v. Arnold*, 557 S.E.2d 119, 122 (N.C. Ct. App. 2001), *aff’d*, 569 S.E.2d 648 (N.C. 2002) (*per curiam*); *Peck v. Dunn*, 574 P.2d 367, 369 (Utah 1978).

<sup>63</sup> The Securities and Exchange Commission, for example, recently recognized a social norm against unnecessary cruelty when it adopted a position allowing for the inclusion of stockholder proposals aimed at reducing unnecessary cruelty to animals. *PetSmart, Inc.*, SEC No-Action Letter, 2010 WL 580965, at \*3, \*14 (Apr. 12, 2010); *see also* *PepsiCo., Inc.*, SEC No-Action Letter, 1990 WL 286195, at \*15 (Mar. 9, 1990) (“[I]t is difficult to credit the company’s contention that no other shareholders would be interested in proposal [sic] about humane treatment.”). When issuing regulations under the Federal Hazardous Substances Act, 15 U.S.C. §§ 1261–1278 (2006), the Consumer Product Safety Commission adopted a policy on animal testing “intended to reduce the number of animals tested to determine hazards associated with household products and to reduce any pain that might be associated with such testing.” *Animal Testing Policy*, 49 Fed. Reg. 22,522, 22,522 (May 30, 1984).

<sup>64</sup> Under an earlier version of the enabling statute, when implementing the Animal Damage Control Act, the Secretary of Agriculture was authorized to “conduct campaigns for the destruction” of animals injurious to human interests. 7 U.S.C. § 426 (1994). The current version, in less inflammatory language, allows the Secretary to “take any [wildlife services] action [she] considers necessary” with respect to injurious animal species. 7 U.S.C. § 426 (2006).

<sup>65</sup> U.S. GEN. ACCOUNTING OFFICE, *GAO-02-138, WILDLIFE SERVICES PROGRAM: INFORMATION ON ACTIVITIES TO MANAGE WILDLIFE DAMAGE 16–17* (2001) (discussing lethal and nonlethal means of population control).

<sup>66</sup> *E.g.*, *Public Health Service Act*, 42 U.S.C. § 289d (2006) (directing the Secretary of Health and Human Services to establish guidelines for the proper treatment and care of

approach in regard to medical research, ensuring that research can continue unimpeded while mandating measures for reducing any pain and suffering that does not promote legitimate scientific ends.<sup>67</sup> Regulations such as these may appear indistinguishable from anti-cruelty statutes, whereby a violation occurs when an animal is subjected to unjustifiable pain. The second category contains those regulations that recognize the appropriateness of curtailing human activity to some degree in order to improve standards of care for animals.<sup>68</sup> Laws governing medical research in the European Union, for example, likely increase the costs of conducting experiments in order to extend more protection to animals.<sup>69</sup> This second category of laws not only reflects the background presumption that humane standards should at least minimize pain and suffering that does not advance human interests,<sup>70</sup> but it also promotes the normative belief that the pain and suffering of animals matters intrinsically and may not always be outweighed by human needs.<sup>71</sup>

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research animals and specifying that the guidelines should not prescribe the methods of research); *see also id.* § 283e (directing the agency to produce a plan for supporting studies into alternative methods of biomedical research and experimentation in a manner that reduces the number of animals used and produces less pain and distress). *See generally* Francione, *supra* note 16 (describing the function of anti-cruelty statutes as preservation of the optimal economic use of animals but not as a meaningful inquiry into the interests of animals themselves).

<sup>67</sup> *See* 7 U.S.C. § 2143(a)(6)(A) (“[T]he Secretary [shall not] promulgate rules, regulations, or orders with regard to the design, outlines, or guidelines of actual research or experimentation by a research facility as determined by such research facility.”); *see also* Animal Legal Def. Fund, Inc. v. Glickman, 154 F.3d 426, 434 n.7 (D.C. Cir. 1998) (in banc) (“[T]he AWA does not do enough to define what it means by ‘humane,’ although the statute does indicate, in its sections focusing on animal research, a particular concern with minimizing ‘animal pain and distress.’” (quoting 7 U.S.C. § 2143(a)(3)(A) (1996))).

<sup>68</sup> *See supra* notes 26–29 and accompanying text (discussing laws that specifically regulate how activities are conducted or that forbid certain practices).

<sup>69</sup> Directive 2010/63 of the European Parliament and of the Council of 22 September 2010 on the Protection of Animals Used for Scientific Purposes, 2010 O.J. (L 276) 33, 34 (articulating the ultimate goal of eliminating the use of animals in research and respecting animals’ intrinsic value).

<sup>70</sup> The distinction I am making here is different from the question of how animals may be legitimately used. Animal fighting tends to be viewed as an illegitimate use whereas medical research is accepted. I am assuming that legitimate uses may be identified by agencies or legislatures, and I am concerned with promoting that use according to appropriate standards of humaneness.

<sup>71</sup> *Cf.* Animal Welfare; Standards, 56 Fed. Reg. 6426, 6428 (Feb. 15, 1991) (“In certain cases, based on information supplied by the public, we have made modifications to our proposal to promote better the well-being of the animals covered by the Act and the regulations.”); *id.* at 6484–86 (“[T]he Congressional mandate to promulgate more stringent animal welfare regulations reflected the increasing public demands for increased levels of humane care and treatment of animals . . . . Important tradeoffs between the welfare of animals and human welfare may occur. . . . Regulations force the regulated entity to change its production process and reduce the social implications of its actions . . . .”); DOUGLAS A.

Given these two categories, I argue that the first incorporates a necessary but insufficient condition for humaneness—truly humane regulatory standards must at least reduce unjustifiable pain and suffering, but that is not all they should do.<sup>72</sup> If regulating the use of animals is an attempt to bring social norms to bear on the regulated activity,<sup>73</sup> then agencies should recognize that society's concern is not solely with reducing unjustifiable pain and suffering but also with the social value of allowing pain and suffering to be inflicted on animals at all.

In short, the determination of when pain and suffering should be alleviated at the potential cost of human interests is what truly separates treatment that is merely not cruel from that which is humane. When a statute simply directs an agency to reduce unnecessary pain and suffering, as in the AWA's treatment of medical research, the inquiry into fully humane standards may be curtailed. However, when the legislature has not qualified the definition of "humane," an agency is obligated to reason its way to an appropriate balance.<sup>74</sup>

In sum, the elements informing humaneness are (1) factual inquiries into the experience of the animal, (2) the social interest in the use to which the animal is put, and (3) the social interest in reducing the animal's pain and suffering. Courts should ensure that humane regulations include the third consideration, which begins with

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KYSAR, REGULATING FROM NOWHERE: ENVIRONMENTAL LAW AND THE SEARCH FOR OBJECTIVITY 121–202 (2010) (arguing that willingness-to-pay metrics, upon which many environmental regulations are based, fail to account for deeper obligations to other cultures, future generations, and nonhuman life).

<sup>72</sup> *Contra* Humane Treatment of Domestic Livestock, 36 N.J. Reg. 2637, 2642 (N.J. Dep't of Agric. June 7, 2004) [hereinafter Agency Responses] ("Routine husbandry practices have been developed and are taught by animal scientists, extension agents, and veterinarians to provide for the health and well being of animals raised for agricultural purposes. The rules specify that only those practices necessary or beneficial to raise, keep, care, treat, market and transport livestock are allowed. This provides for the humane care of animals.").

<sup>73</sup> See CASS R. SUNSTEIN, LAWS OF FEAR: BEYOND THE PRECAUTIONARY PRINCIPLE 129 (2005) ("Efficiency is relevant, but it is hardly the only goal of regulation. Citizens in a democratic society might well choose to protect endangered species, or wildlife, or pristine areas, even if it is not efficient for them to do so."); Francione, *supra* note 16, at 744 ("We seek to achieve the optimal level of regulation given the value of the property and the overall social wealth that results from the regulation.").

<sup>74</sup> Uncertainty does not allow an agency to assign a zero value to a given effect—an "agency must examine the relevant data" and cannot "fail[ ] to consider an important aspect of the problem." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); see also *Ctr. for Biological Diversity v. Nat'l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008) (finding the agency's reasoning arbitrary and capricious because the known non-zero value was "nowhere accounted for in the agency's analysis"); *U.S. Air Tour Ass'n v. FAA*, 298 F.3d 997, 1018–19 (D.C. Cir. 2002) (finding that the failure to consider information that could "have a significant impact on the results" was arbitrary and capricious).

minimizing unnecessary pain and suffering but must also proceed to consideration of further protections if the regulation is to be truly humane. Tough ethical questions about how and why we value animals' welfare cannot be avoided.

### B. *The New Jersey Supreme Court Asks the Wrong Question*

I feature the recent case *New Jersey Society for the Prevention of Cruelty to Animals v. New Jersey Department of Agriculture* because it provides a clear example of a court grappling with a statute that calls for the creation of humane regulations.<sup>75</sup> By focusing on a statute that contains no direction for the agency other than to promulgate "humane" standards—a first of its kind in the United States—this case serves as an ideal subject for analysis from which more complicated statutes can be understood. In a recent article, published before the case found its way to the New Jersey Supreme Court, Sullivan and Wolfson provide an excellent critique of the regulatory process at issue as well as the intermediate appellate review.<sup>76</sup> Building on that piece, I hope to show where the New Jersey Supreme Court departed from the lower appellate court and why, despite being an improvement, the court's decision was still erroneous. Ultimately, I aim to lay out what factors courts should look to when reviewing humane standards in order to avoid similar mistakes in the future.

#### 1. *The Statutes and Holdings of the Appellate Division and Supreme Court*

New Jersey has one of the few anti-cruelty statutes that does not wholly exempt common agricultural practices. Instead, the legislature directed the State Department of Agriculture to promulgate humane standards of care that would provide a safe harbor from prosecution under the state criminal anti-cruelty statute.<sup>77</sup> Sullivan and Wolfson point out several shortcomings of the agency and the Appellate Division, most notably the failure of both to understand how the statute was meant to operate. Rather than treating the humane standards issued by the agency as merely preempting violations of the anti-cruelty statute, the agency and court saw the failure to characterize a practice as humane as an effective ban of that practice. As a

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<sup>75</sup> N.J. Soc'y for the Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 955 A.2d 886, 889, 907 (N.J. 2008).

<sup>76</sup> See Sullivan & Wolfson, *supra* note 6.

<sup>77</sup> N.J. STAT. ANN. § 4:22-16.1(b)(1) (West 1998) ("[T]here shall exist a presumption that the . . . treatment . . . of domestic livestock in accordance with the [humane regulations] shall not constitute a violation of any provision of this title involving alleged cruelty to, or inhumane care or treatment of, domestic livestock . . .").

result, the agency was not looking for evidence of humaneness (justifying a safe harbor) but was looking for evidence of *inhumaneness* (justifying a ban). They “turned the statute on its head[ ] and vastly expanded its reach.”<sup>78</sup> Almost as if following in the footsteps of the standard state anti-cruelty statutes, the agency carved out a category of permitted practices by referring to “routine husbandry practices” as generally acceptable.<sup>79</sup> So as to avoid banning any practice by failing to call it humane—the misreading of the statute referred to above—the agency called essentially every practice humane.<sup>80</sup> The Appellate Division upheld all of the regulations, deferring to the agency’s scientific judgment.<sup>81</sup>

The Supreme Court of New Jersey departed from the lower court but not significantly. The Supreme Court invalidated the broad husbandry provision solely because the agency had not investigated what “routine practices” actually entailed: The agency failed to determine whether those practices were actually considered “humane” rather than just economically productive.<sup>82</sup> Similarly, the court invalidated a regulation allowing for the tail docking of dairy cattle because of an “absence of evidence in the record to support the practice.”<sup>83</sup> The court upheld the remaining regulations because the agency could point to support in the record for its decision.<sup>84</sup> The court deferred to

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<sup>78</sup> *Id.* at 115.

<sup>79</sup> *N.J. Soc’y for the Prevention of Cruelty to Animals*, 955 A.2d at 907.

<sup>80</sup> The agency did, however, recognize the broader social implications of how animals are treated in the first sentence of its proposed rule for the humane treatment of livestock: “Protecting the health and well-being of New Jersey’s livestock is a concern to all compassionate individuals who want to ensure farm animals are humanely treated.” *Humane Treatment of Domestic Livestock*, 35 N.J. Reg. 1873(a) (N.J. Dep’t of Agric. proposed May 5, 2003). Yet the agency undertook the rulemaking process with the express intention that the rules were “not intended to modify those routine animal agriculture practices that are performed each day by farmers in New Jersey, but rather to protect animals from only those practices that are inhumane or cruel.” *Id.* In doing so, the agency began the process unwilling to allow the concern of “compassionate individuals” to define humane agricultural practices beyond what was already prohibited by the anti-cruelty statute. *Id.*

<sup>81</sup> For example, in reviewing the agency’s determination that the tail docking of dairy cows was humane—a regulation later vacated by the Supreme Court of New Jersey—the Appellate Division noted simply that “the Department made a scientific judgment after considering arguments on both sides.” *N.J. Soc’y for the Prevention of Cruelty to Animals v. N.J. Dep’t of Agric.*, No. A-6319-03T1, 2007 WL 486764, at \*8 (N.J. Super. Ct. App. Div. Feb. 16, 2007).

<sup>82</sup> *N.J. Soc’y for the Prevention of Cruelty to Animals*, 955 A.2d at 905–06 (finding no evidence that “the Department considered whether the techniques . . . rest in any way on a concern about what practices are humane or have any focus other than expedience or maximization of productivity”).

<sup>83</sup> *Id.* at 909.

<sup>84</sup> Certain regulations were invalidated for vagueness, but not necessarily because they were unreasonable or arbitrary. *See id.* at 913 (finding certain regulations “too vague to establish a standard that is enforceable”).

the agency on what it saw as a matter of scientific expertise and found no inherent flaw in the manner in which the agency approached the problem.<sup>85</sup>

## 2. *What is the Value of Animal Pain and Suffering?*

The crucial difference between the Appellate Division's approach and that of the Supreme Court is that the latter understood that "humane" will always involve a choice about how we should treat animals. Where the Supreme Court's decision falls short, however, is that when reviewing the regulations of the New Jersey Department of Agriculture, the court asked only whether or not there was evidence in the record showing any benefit from the practice coupled with standards concerning the animals' well-being.<sup>86</sup> Stated another way, the court did not ensure that the agency considered whether the benefit of the practice outweighed the value placed on the animal's pain and suffering, instead asking only whether the given practice served some beneficial purpose and attempted to minimize pain and suffering.<sup>87</sup>

I do not intend to argue that the Supreme Court was wrong either in reviewing the agency's statutory interpretation or in determining that arbitrary and capricious was the correct standard of review.<sup>88</sup> The court understood "humane" to involve more than technical determinations and to require some reference to social mores in order to determine an appropriate balance among competing interests.<sup>89</sup>

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<sup>85</sup> *Id.* at 902 ("[B]ecause these regulations are the expression of the agency's determinations in an area within its technical expertise, in order to invalidate them in their entirety, [the court] would need to discern an inherent flaw in the very process by which they were drafted and adopted or in the record that supports them.").

<sup>86</sup> *Id.* at 909 ("[B]ecause [tail docking] finds no support at all in the record, to the extent that the regulation permits it, that aspect of the regulation is both arbitrary and capricious."). Arguably, this standard reduces "humane" to a point where it is indistinguishable from what is "cruel."

<sup>87</sup> *Id.* at 910 (finding a regulation allowing non-anesthetized amputations not to be arbitrary because "[t]he record reflects that there is evidence that demonstrates these practices confer a benefit on the animals in light of their living conditions"). This regulation was ultimately vacated for vagueness: The agency failed to provide guidance on how amputations should be carried out so as to minimize pain. *Id.* at 913.

<sup>88</sup> New Jersey courts review administrative agencies' regulatory actions "pursuant to the arbitrary or capricious standard of review." EDWARD A. ZUNZ & EDWIN F. CHOCIEY, JR., *APPELLATE PRACTICE AND PROCEDURE* § 4.17 (2d ed. 2005). Additionally, the act of promulgating regulations will be reversed if (1) "the agency's action violates the enabling act's express or implied legislative policies"; (2) "there is [not] substantial evidence in the record to support the findings on which the agency based its action"; or (3) "in applying the legislative policies to the facts the agency clearly erred by reaching a conclusion that could not reasonably have been made upon a showing of the relevant factors." *In re* Petitions for Rulemaking, N.J.A.C. 10:82-1.2 & 10:85-4.1, 566 A.2d 1154, 1161 (N.J. 1989).

<sup>89</sup> *N.J. Soc'y for the Prevention of Cruelty to Animals v. N.J. Dep't of Agric.*, 955 A.2d 886, 889 (N.J. 2008) ("[Humane regulation] requires a balancing of the interests of people

Therefore, standards having no focus but “expedience or maximization of productivity” would have been presumptively unacceptable.<sup>90</sup> This was an improvement over the tone set by the Appellate Division, which “not only failed to question whether the [agency] had made any ethical judgments about when to apply the designation of humane[;] it failed to consider how, or even whether, the studies cited by the [agency] actually did relate to humaneness.”<sup>91</sup>

In this way, the New Jersey Supreme Court stated that social values cannot be read out of the word “humane.” However, when reviewing the agricultural regulations, the court invalidated only those regulations that did not minimize unnecessary pain and suffering in animals. Instead, the court should have asked whether the agency had determined what the *value* of that pain and suffering might be and whether it then used that determination in its decision making. Without such a calculation, the evidence that forms the basis for an agency action regarding humane standards is incomplete and it cannot be known whether or not a regulation is humane.<sup>92</sup> Below, I focus on three specific examples of regulations that the New Jersey Supreme Court examined in *Society for the Prevention of Cruelty to Animals* to show how judicial review should have been undertaken: (1) tail docking (cutting off the lower portion of a dairy cow’s tail), (2) forced molting (a method of reducing the interval between egg-laying seasons), and (3) practices relating to intense confinement (in this case, non-anesthetized amputations).

With regard to tail docking, the court invalidated the regulation because the agency did not identify a benefit arising out of the practice apart from reducing the inconvenience to farmers.<sup>93</sup> Instead, the

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and organizations who would zealously safeguard the well-being of all animals, including those born and bred for eventual slaughter, with the equally significant interests of those who make their living in animal husbandry and who contribute, through their effort, to our food supply.”).

<sup>90</sup> *Id.* at 905–06.

<sup>91</sup> Sullivan & Wolfson, *supra* note 6, at 112.

<sup>92</sup> As noted in the opinion of the Supreme Court, the agency did compile a “voluminous” record. *N.J. Soc’y for the Prevention of Cruelty to Animals*, 955 A.2d at 901. *But see id.* (“[M]erely compiling a thick record, only amassing evidence, and simply responding to specific objections, will not suffice to sustain the agency’s actions if the regulations themselves fall short either in general or in particular.”). The agency itself described its approach as an “extensive review” of the scientific literature. *See Agency Responses, supra* note 72, at 2637, 2639.

<sup>93</sup> The practice was not shown to produce any benefit to the industry or human health and served only to cause distress in the animal. *N.J. Soc’y for the Prevention of Cruelty to Animals*, 955 A.2d at 909; *cf.* *Humane Soc’y of Rochester & Monroe Cnty. for the Prevention of Cruelty to Animals, Inc. v. Lyng*, 633 F. Supp. 480, 486 (W.D.N.Y. 1986) (“[T]he predominant concern of defendants with the length of time taken to freeze-brand appears to be based more on inconvenience to farmers than on inconvenience to cows.”).

practice should have been invalidated because the agency did not show that the convenience to farmers exceeded New Jersey's desire to avoid tail docking. By throwing out the regulation on the grounds that it failed to produce any economic benefit to the owner or to human health—which would justify the practice—the court treated the distinction between anti-cruelty statutes and humane regulations as meaningless.<sup>94</sup> Whether or not a practice is cruel is certainly a threshold question. But without inquiry into the value of animal pain and suffering, the record provided no way to understand the relative magnitude of the efficiency benefit to farmers, and the resulting regulation, which was made without a reasoned determination of the social value of the practice, was arbitrary. Had tail docking been shown to produce a benefit for animal owners, such as a scientifically-proven increase in milk quality, the court may not have invalidated the regulation (even though regulations having efficiency as their only focus are not “humane”).

In contrast to its permissive approach to tail docking, the New Jersey Department of Agriculture reached further than the reduction of unjustifiable pain and suffering when it limited the use of induced-molting procedures and banned full feed-removal molting techniques in poultry production<sup>95</sup>—practices which fit comfortably within routine husbandry practices.<sup>96</sup> That is, although the practice was justifiable because it increased egg production, the agency still limited its use. This contradiction can be explained by placing some unstated value on the suffering of the birds that exceeds efficiency gains in the egg industry.<sup>97</sup> In New Jersey, eliminating the additional suffering

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<sup>94</sup> The legislature ensured that husbandry practices conducted in accordance with the regulations would not constitute a violation of the anti-cruelty statute, N.J. STAT. ANN. 4:22-16.1(b)(1) (West 2011), but that does not necessarily imply that anything that is acceptable under the anti-cruelty statute also complies with the regulations. *Cf.* Sullivan & Wolfson, *supra* note 6, at 115 (“The Department’s way of undertaking its mandated duty dramatically increases the breadth of the legislative impact on the anticruelty law since it designated as humane every farming practice in the United States that, in its opinion, could not be scientifically proven to be *inhumane*. Thus, any practice as to which there was no proof, or, in the Department’s ungenerous view, insufficient proof, of inhumaneness, was nevertheless classified as humane and presumptively immune from prosecution.”).

<sup>95</sup> *N.J. Soc’y for the Prevention of Cruelty to Animals*, 955 A.2d at 892. A forced molt is a commercial practice that artificially provokes a flock of hens to molt simultaneously with the aim of shortening the period of reduced egg productivity that occurs when the birds grow a new set of feathers.

<sup>96</sup> *Id.* at 892 n.4 (“Any forced molting procedure is designed to increase egg production.”); *see also* McDonald’s Corp. v. Steel, [1997] Q.B. 366 at 486 (Eng.) (finding the practice to be cruel, under a reasonable person standard, for any duration of time, describing it as “a well-planned device for profit at the expense of suffering of the birds”).

<sup>97</sup> While it might seem inconsistent for the agency to have restricted the ability of farmers to use these molting techniques when the agency began the rulemaking process

imparted on the birds was worth the higher production costs imposed on outlier producers, who might otherwise have used more extreme (and more efficient) methods. In other words, the practice was justifiable but not humane.

Finally, when reviewing practices that industry has deemed necessary for the close confinement of animals—castration, debeaking, and toe-trimming—the court explicitly avoided the question of the desirability of confinement itself.<sup>98</sup> The agency established that such practices technically do confer a benefit on confined animals by reducing the adverse consequences of being confined and that they are therefore justified.<sup>99</sup> However, this argument once again demonstrates that the agency took into account only whether or not these practices were cruel. To fulfill a reasonable definition of “humane,” the agency still should have been required to show that the value of confining animals in a way that necessitates these procedures outweighs the social interest in protecting the animals from intense confinement in the first place. The agency never explained why confinement plus amputation is more valuable to New Jersey than lower stocking densities (or other alternatives) and no amputation in the first place.<sup>100</sup> It is hard to see how the agency’s decision was reasoned when it failed to take a “hard look” at this obvious alternative.<sup>101</sup>

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with the intention to leave in place routine husbandry practices, the agency noted that “few, if any, producers in New Jersey use the maximum feed withdrawal time period . . .” Agency Responses, *supra* note 72, at 2660. The court looked to this regulation as evidence that the agency was not captured by the industry; however, the agency amended the rule to prohibit full feed withdrawal only after the industry recommended limiting the practice on its own initiative. See Rod Smith, *UEP To End Feed Withdrawal*, FEEDSTUFFS, May 9, 2005, at 1 (“Commercial egg producers will begin inducing molts without feed withdrawal next year—reversing a practice followed for more than 100 years—according to a United Egg Producer (UEP) announcement last week.”).

<sup>98</sup> See *N.J. Soc’y for the Prevention of Cruelty to Animals*, 955 A.2d at 910 (“That debate about whether domestic livestock should be kept in close quarters or left relatively unconfined, however, is not addressed in the statute.”). I argue that this type of issue is an inherent part of humaneness.

<sup>99</sup> *Id.* (“The record reflects that there is evidence that demonstrates these practices confer a benefit on the animals in light of their living conditions.”). Beyond this, the court only looked to see whether the standards governing mutilation practices minimized pain. *Id.* at 911.

<sup>100</sup> Cf. Eur. Food Safety Auth., *Scientific Report on the Risks Associated with Tail Biting in Pigs and Possible Means To Reduce the Need for Tail Docking Considering the Different Housing and Husbandry Systems*, at 27–28 (2007) (discussing methods of amputation in light of changes in E.U. law restricting such practices).

<sup>101</sup> If “humane” were just a matter of scientific expertise, as the agency argued, it was correct for the court to defer to the agency’s decision as the science on alternative housing systems was a part of the agency’s record. See Agency Responses, *supra* note 72, at 2639 (discussing scientific literature on housing systems).

When evaluating these regulations, the court did recognize a definition of “humane” as involving a balance of social interests. Where I argue the court erred, however, was in its application of the standard of review. The court should have ensured that the agency actually balanced competing values in a reasoned way and did not stop at minimizing the adverse effects of husbandry practices. A fully-reasoned determination would have required that the New Jersey Department of Agriculture examine each individual practice in the context of animal pain and suffering as intrinsically socially costly and ensured that the agency considered the social impact of each rule, not merely the economic efficiency to the owner or scientific determinations made by experts.<sup>102</sup> Depending on how the agency approached the problem,<sup>103</sup> its regulations could have been invalidated under New Jersey law either because they were based on an unreasonable construction of the statute or because the agency did not make a reasoned decision.

### III

#### SETTING HUMANE STANDARDS

The New Jersey litigation illustrates that, while courts and agencies may take into account broader and more socially conscious definitions of “humane,” the need for further clarity remains pressing. Due to the vagaries of judicial review and the difficult nature of the underlying questions, the New Jersey Supreme Court appears to have fallen back on a standard that only looked for the minimization of pain and suffering and justifications for the methods employed. What is still

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<sup>102</sup> The standard of review is forgiving, but the agency may not disregard relevant factors that inform the decision-making process. *N.J. Soc’y for the Prevention of Cruelty to Animals*, 955 A.2d at 897–98. Additionally, New Jersey agencies are required, during notice and comment rulemaking, to include “[a] social impact statement which describes the expected social impact of the proposed rulemaking on the public.” N.J. ADMIN. CODE § 1:30-5.1(c)(2) (2010). The agriculture department’s social impact statement for the humane regulations gives no indication that the agency considered broader social concerns with the well-being of livestock, merely referencing the benefits to livestock owners and the increased quality of the products. *Humane Treatment of Domestic Livestock*, 35 N.J. Reg. 1873(a) (N.J. Dep’t of Agric. proposed May 5, 2003). The agency did, however, respond to comments that pointed to a variety of issues, including social concerns with how animals are treated. *See generally* Agency Responses, *supra* note 72. But there was no indication that the agency attempted, of its own volition, to discern how the public feels about certain practices or to allow such considerations to inform the decision-making process.

<sup>103</sup> Contrast the New Jersey Department of Agriculture’s approach, *see supra* notes 93–102 and accompanying text, with USDA’s own admission that, when conducting rulemaking under the AWA, regulations may increase in stringency as the level of public perception of animal welfare increases. *Animal Welfare; Standards*, 56 Fed. Reg. 6426, 6486 (Feb. 15, 1991).

needed is a form of scrutiny that ensures ethical decisions are being made in a reasoned way.

There is no clear method for arriving at humane standards, but many potential sources of information about relevant social values exist. It is essential that agencies engage in an appropriate process to identify and balance these values.<sup>104</sup> Of central importance to this process is transparency, as scrutiny may help guard against an agency that might otherwise “put a thumb on the scale by undervaluing the benefits and overvaluing the costs of more stringent standards.”<sup>105</sup> This Part begins by laying out an exemplary list of factors that may demonstrate how much we, as a society, value the pain and suffering of animals—that is, what sources of information can inform agency decision making—and concludes by showing how courts can subsequently evaluate that decision making.

### A. *Where Do “Humane” Values Come From?*

The underlying validity of humane standards depends on identifying some objective indicia of social consensus in order to reduce the concern that these notions are purely subjective.<sup>106</sup> In this Section, I describe a few of the many considerations that could define humane treatment—any given statute might establish its priorities from among these or others. Whenever an agency invokes a rationale, though, it must provide a reasoned basis for doing so or else risk vulnerability to judicial review.

#### 1. *Guidance from Legislatures and the Courts*

Agencies seeking insight into the social values that underlie humaneness can look at the way humane standards have been

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<sup>104</sup> See *supra* note 46 and accompanying text (discussing the arbitrary and capricious standard under *State Farm*). This review applies to both the factual basis of an agency’s action as well as the agency’s reasoning. *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 30–31 (1983). The balancing I have referred to is of course open to one substantial criticism from the animal rights perspective: The “process prescribed by animal welfare theory is defective because it requires that we balance completely dissimilar normative entities.” Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397, 435 (1996). That is, our desire to be entertained by hunting or to satisfy our palate trumps the fundamental interests of the animal not to be hunted down or slaughtered. At present, state and federal agencies are not called to question the merit of using animals to achieve human ends, only to balance against those uses the social value in treating them humanely. If society values animal interests for their own sake, then it would be appropriate to take them into account even absent any formal grant of rights. Cass R. Sunstein, *The Rights of Animals*, 70 U. CHI. L. REV. 387, 394 (2003).

<sup>105</sup> *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1198 (9th Cir. 2008).

<sup>106</sup> See *supra* note 49 and accompanying text (discussing the variation in individual concern for animals).

approached in other jurisdictions and contexts within the U.S. legal system. In the legislative context, animal laws tend to have a particular focus, suggesting that specific values or concerns motivated their passage. For example, a state or federal statute might prohibit activities that take undue advantage of vulnerabilities in specific animals or which offend voters' emotional convictions.<sup>107</sup> Ballot initiatives may also serve as barometers of social consensus, such as the recent wave of statewide initiatives that focus on reducing the intensity of food animal confinement to allow for the expression of basic evolutionary behaviors.<sup>108</sup> In general, society tends to extend specific protections to those animals with which it feels a particular connection.<sup>109</sup> Pushing in the opposite direction, states have uniformly removed hunting from the scrutiny of anti-cruelty laws, demonstrating that society generally does not express sympathy and compassion for game animals.<sup>110</sup> These legal regimes and the concerns that motivate their implementation clearly provide an indication of social values relating to animal welfare.

In certain circumstances, court decisions may highlight social sentiments in regard to specific practices. Particularly useful are those instances in which courts have found that an activity violates a standard against unjustifiable pain and suffering—under the definition of “humane” discussed above, it then also fails the baseline criteria for a humane standard.<sup>111</sup> However, when courts apply a reasonable person standard—that is, determining what the hypothetical reasonable person would consider cruel—their opinions are less valuable since they do not address broad social views or necessarily determine

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<sup>107</sup> See Tariff Suspension and Trade Act, Pub. L. No. 106-476, Title I § 1442, 114 Stat. 2101, 2163–64 (2000) (codified at 19 U.S.C. § 1308(b)(1)(A)) (prohibiting the “trade of dog and cat fur products” because it is “ethically and aesthetically abhorrent to United States citizens”); *Animal Welfare Inst. v. Kreps*, 561 F.2d 1002, 1012 (D.C. Cir. 1977) (“[I]t appears that Congress was responding to an emotional conviction that killing [seal pups] who were still nursing was intolerably cruel. . . . Nursing seems to have been used as a measure of infancy, of vulnerability and helplessness.”).

<sup>108</sup> See *supra* note 26 and accompanying text (noting state ballot initiatives). A rulemaking agency might also discern a trend across states with regard to regulation of particular practices. For example, California has recently banned tail docking of dairy cattle. S. 135, 2009-2010 Leg., Reg. Sess. (Cal. 2009). Should other states follow, it may become harder for an agency to justify allowing the practice.

<sup>109</sup> Examples of such animals include cats, dogs, horses, primates, whales, and dolphins.

<sup>110</sup> *United States v. Stevens*, 130 S. Ct. 1577 app. (2010) (Alito, J., dissenting) (listing hunting exemptions from anti-cruelty laws).

<sup>111</sup> See, e.g., *Humane Soc’y of Rochester and Monroe Cnty. for the Prevention of Cruelty to Animals, Inc. v. Lyng*, 633 F. Supp. 480, 486–87 (W.D.N.Y. 1986) (finding hot-iron branding cruel when used in place of freeze branding); see also *supra* note 93 and accompanying text (discussing the New Jersey Supreme Court’s invalidation of a regulation allowing for tail docking).

whether the practice is justified.<sup>112</sup> Such cases may still be informative, as they seek to provide an objective third-party perspective on the practice in question.

## 2. *Social Mores Outside the Legal System*

The primary means employed by USDA to assess social values when regulating under the AWA has simply been to acknowledge public comments submitted to the agency and allow them to influence decision making to some degree.<sup>113</sup> Given the nature of notice-and-comment rulemaking, the agency is obligated to do at least as much. However, there are many other sources to which an agency might look on its own initiative in order to broaden the inquiry beyond individuals who choose to participate in the rulemaking process. For example, international norms may lend legitimacy to or bolster a particular viewpoint.<sup>114</sup> Both internationally and within the United States, the increasingly hostile stance toward intense confinement systems has put pressure on producers to move toward alternatives,<sup>115</sup> even absent a legal obligation to do so.<sup>116</sup> Polling data may also give

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<sup>112</sup> Where a case is presented as something other than a violation of a criminal statute, such as in a libel suit, the court may try to evaluate how the reasonable person would understand the practice in question. *E.g.*, *McDonald's Corp. v. Steel*, [1997] Q.B. 366 at [53] (Eng.) (“The Court should give to the material complained of the natural and ordinary meaning which it would have conveyed to the ordinary, reasonable reader.”); *see also* Sullivan & Wolfson, *supra* note 6, at 103 (drawing attention to the fact that routine farming practices can be found to be cruel from a “reasonable person” standpoint and yet be legal under anti-cruelty statutes).

<sup>113</sup> *See supra* note 71.

<sup>114</sup> For example, “[r]espected international law commentators have argued that the legal right of whales to life is, after the better part of a century of development, becoming a part of binding customary international law.” STEPHEN M. WISE, *RATTLING THE CAGE* 75 (2000); *cf.* Lorraine Mitchell, *Impact of Consumer Demand for Animal Welfare on Global Trade*, in *CHANGING STRUCTURE OF GLOBAL FOOD CONSUMPTION AND TRADE* 80, 85–89 (Anita Regmi ed., 2001), available at <http://www.ers.usda.gov/publications/wrs011/wrs011k.pdf> (discussing the impact of international standards on domestic producers). The Supreme Court of Israel also considered international trends when confronted with the practice of force-feeding ducks and geese. HCJ 9232/01 Noah v. Attorney Gen. [2002-2003] IsrLR 215, 228–29, 240 [2003] (considering regulation of force-feeding and veal crates in the European Union and individual member states).

<sup>115</sup> *See* Keeling, *supra* note 14, at 319 (“There is an increasing ambition in society to offer something above [a minimum level of welfare for animals kept for production], something that is sustainable—ethically, practically, and economically.”); Mitchell, *supra* note 114, at 88 (“Concerns about animal welfare have prompted many industrialized nations to pass laws concerning animal welfare in research, commercial use, and farming. These laws seek to satisfy the desire for increased animal welfare on the part of individual consumers and societies as a whole.”).

<sup>116</sup> *See* Rita Negrete, *Polishing the Halo: The New Focus on Social Responsibility*, *FUTURE FOOD TRENDS* (Technomic Info. Servs., Chicago, Ill.), Issue No. 3, 2007, at 1–3 (describing consumer pressure for companies “to more proactively address corporate social responsibility issues”).

some indication of where public disposition toward animal treatment lies.<sup>117</sup> Comments from the public, including academics and interest groups, may also give focused insight on specific issues. In each of these examples, there is an effort to look for signals beyond the U.S. legal system regarding particular ways in which animals are treated.<sup>118</sup>

Considering that humaneness is informed by social expectations and that religion often influences those expectations, it follows that an agency might also consider religion in setting humane standards.<sup>119</sup> Legislatures have grappled with religion and animal welfare in the past, and their experiences can inform the permissible boundaries for agencies when engaging in such an exercise. More importantly, legislative accordance of religious values reinforces the notion that such values are a factor to be considered when agencies form humane standards. For instance, the Humane Slaughter Act (HSA) allows for two methods of slaughtering:<sup>120</sup> the first by rendering the animal insensible to pain before any other procedures are undertaken (such as shackling or cutting) and the second by bringing about unconsciousness through cutting the carotid arteries in accordance with ritual requirements. In the first approach, a cut can only be made after the onset of unconsciousness, but in the second, unconsciousness is brought about by the cut itself.

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<sup>117</sup> E.g., Sherry Morse, *Poll: NJ Residents Oppose Cruel Farm Industry Standards*, VET. COM (2003), [http://www.vet.com/rural\\_news/cruel\\_farm.html](http://www.vet.com/rural_news/cruel_farm.html) (citing a poll by Rutgers University that found most New Jersey residents did not support controversial practices which were deemed humane by the state agency). The agency said that it could “make no conclusions based on the findings of this poll” due to the poll not having been vetted by epidemiologists at USDA. Agency Responses, *supra* note 72, at 2649. The agency does not appear to have attempted to assess how New Jersey residents felt about particular practices. Cf. Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 LAW & CONTEMP. PROBS. 117, 118 & n.5 (2007) (“[A] social consensus supports the view that in deciding what to do, both private and public institutions should take animal suffering into account.” (citing polling data)).

<sup>118</sup> The act of setting humane standards itself affects social norms. For example, increasing numbers of state bans of gestation crates are both a reflection of public condemnation and a potential catalyst to enhance it. See Richard Bennett & Ralph Blaney, *Social Consensus, Moral Intensity and Willingness To Pay To Address a Farm Animal Welfare Issue*, 23 J. ECON. PSYCHOL. 501, 510 (2002) (discussing the impact of a growing social consensus on individual preferences); cf. Glynn T. Tonsor & Nicole J. Olynk, *Impacts of Animal Well-Being and Welfare Media on Meat Demand*, 62 J. AGRIC. ECON. 59, 67–72 (2011), available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1477-9552.2010.00266.x/abstract> (finding that increased media attention on animal welfare issues decreases meat demand).

<sup>119</sup> The agency would have to ensure that the standards are neither discriminating against nor creating a preference for a particular religion. Cf. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 539 (1993) (suggesting that a truly general law prohibiting cruel treatment of animals could permissibly burden religious practices).

<sup>120</sup> 7 U.S.C. § 1902 (2006) (describing two permitted methods of slaughter).

Challenged on the apparent inconsistency of requiring unconsciousness both before and after the first cut, the HSA survived—a federal district court found that both methods were in compliance with underlying humane standards.<sup>121</sup> Indeed, the HSA’s legislative history indicates that Congress may have considered the pain and suffering of the slaughtered animals to be comparable between the two methods.<sup>122</sup> Contemporary evidence suggests, however, that the experience of the animal is not the same, and that animals likely experience more pain and suffering when the cut precedes unconsciousness.<sup>123</sup> The result is that what would be an inhumane practice if conducted within the secular community becomes humane in a religious one. The input of religious values is thus a determinative factor in the question of humaneness, rendering “humane” the slaughter of conscious animals despite the general, non-religious rule’s prohibition of the practice.<sup>124</sup> In this example, adding a religious element to slaughter regulations results in imposing greater pain on animals, even though religious values may in other circumstances demand greater protections for animals.

Where an agency has made a good faith effort to ground its decision in external indicia of social values but has not uncovered any compelling information, a decision must still be made. In these instances, the agency may be forced to turn to purely ethical or moral

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<sup>121</sup> Jones v. Butz, 374 F. Supp. 1284, 1291 (S.D.N.Y. 1974) (“[E]ach [method] is supported by legislative history as a justifiable legislative determination that the stated method of slaughter is indeed humane.”); see also Farm Sanctuary, Inc. v. Dep’t of Food and Agric., 74 Cal. Rptr. 2d 75, 81–82 (Ct. App. 1998) (dismissing a challenge to a regulation that exempted ritualistic slaughter of poultry, finding the regulation was consistent with the HSA).

<sup>122</sup> See 104 CONG. REC. 15,391 (1958) (statement of Sen. Humphrey) (“Not only is [Kosher slaughter, i.e., cutting of carotid arteries] a procedure accepted as a humane method of slaughter, but it is so established by scientific research.”).

<sup>123</sup> E.g., FARM ANIMAL WELFARE COUNCIL, REPORT ON THE WELFARE OF LIVESTOCK WHEN SLAUGHTERED BY RELIGIOUS METHODS, 1985, ¶ 92 (U.K.), available at <http://www.fawc.org.uk/reports.htm> (“[R]eligious methods of slaughter, even when carried out under ideal conditions, must result in a degree of pain, suffering and distress which does not occur in the properly stunned animal.”); Andy Coghlan, *Calves Feel the Pain of Religious Slaughter*, NEW SCIENTIST, Oct. 17, 2009, at 11 (finding pain signals in the brains of ritually slaughtered animals for up to 2 minutes after incision, whereas pain signals disappear instantly upon stunning); N.G. Gregory, M. von Wenzlawowicz & K. von Holleben, *Blood in the Respiratory Tract During Slaughter with and Without Stunning in Cattle*, 82 MEAT SCI. 13, 15–16 (2008) (finding that cattle are prone to aspirate blood into their lungs during kosher and halal slaughter).

<sup>124</sup> Cf. European Convention for the Protection of Animals for Slaughter art. 17, May 10, 1979, C.E.T.S. No. 102 (allowing member states to exempt ritual slaughter from the general rule requiring stunning); Pablo Lerner & Alfredo Mordechai Rabello, *The Prohibition of Ritual Slaughtering (Kosher Shechita and Halal) and Freedom of Religion of Minorities*, 22 J.L. & RELIGION 1, 14–15 (2007) (discussing countries that ban ritual slaughter out of animal welfare concerns).

judgment calls. Even in the absence of objective data, an agency might still come to a decision that reflects what it sees as a boundary which it is unwilling to cross.<sup>125</sup> Otherwise, without a discernable social or scientific criterion, the agency may fail to make a decision at all, effectively ignoring its delegated task.

### 3. *Appeals to Experts*

Often, the reasoning that underlies humane standards is inseparable from factual evidence demonstrating the existence and subsequent mitigation of pain and suffering in animals. Balancing the social value of reducing pain and suffering implies knowledge of the degree to which it is ultimately abated—a determination for which expert opinions may be valuable. These experts may include scientists or industry and humane groups.<sup>126</sup>

One example, the gestation crate, illustrates well the manner in which setting humane standards involves the opinions of experts. Breeding sows are typically confined in cages just slightly larger than their bodies for two-thirds of their lives.<sup>127</sup> A common theme in state ballot initiatives is to limit the use of these intense confinement mechanisms, imposing requirements that, for example, would require that pigs be able to physically turn around in their cages. Imposing such requirements pushes producers toward group housing systems,<sup>128</sup> usually confinement-pen systems. In order to ascertain the humane value of such a change, the regulating agency must have knowledge of the natural behaviors and interests of the pig. Close confinement conditions raise a number of concerns for the animals' well-being, including the need for surgical modifications such as tail docking and teeth filing to reduce the risk of injury due to fighting, and the inability to express

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<sup>125</sup> For example, breeding congenitally blind layer hens may reduce some of the typical welfare concerns—the birds lack light attraction and their cannibalistic characteristics are reduced—but deciding whether to allow the practice largely turns on other ethical considerations. David Blandford & Linda Fulponi, *Emerging Public Concerns in Agriculture: Domestic Policies and International Trade Commitments*, 26 EUR. REV. AGRIC. ECON. 409, 413 (1999); see also Sullivan & Wolfson, *supra* note 6, at 123 (“There is no reason to reject intuitive understanding out of hand. Intuition can be very valuable in an area where science has not been successful in devising ways to provide more objective measures of welfare.”).

<sup>126</sup> The debate over how to evaluate animal welfare, a notion that embraces both physical and mental well-being, is far from settled. Keeling, *supra* note 14, at 317–18.

<sup>127</sup> F. Bailey Norwood & Jayson L. Lusk, *A Calibrated Auction-Conjoint Valuation Method: Valuing Pork and Eggs Produced Under Differing Animal Welfare Conditions* 7 (Okla. State Univ. Dep’t of Agric. Econ., Working Paper, 2008), available at <http://asp.okstate.edu/baileynorwood/Survey4/files/FAWpaper1.pdf>.

<sup>128</sup> *Id.* at 5, 7–8.

basic behaviors due to inadequate bedding, lack of access to the outdoors, and an absence of environmental enrichment.<sup>129</sup>

In removing the gestation crate, some of these problems are abated; for example, sows exhibit less repetitive behavior such as biting cage bars or pawing at the concrete floor.<sup>130</sup> However, close confinement within confinement-pen systems (an alternative to gestation crates) unfortunately may still increase the incidence of injury from inter-sow fighting.<sup>131</sup> At this point, an expert opinion as to which method causes more distress or suffering may be relevant.<sup>132</sup> An expert might determine that more open systems, such as shelter-pasture systems, produce considerable welfare benefits but at higher costs to producers.<sup>133</sup> Given the inherently technical nature of ascertaining the well-being of animals, science will invariably play a role as agencies weigh competing interests to arrive at a socially desirable result.

#### 4. *Cost-Benefit Analysis and Regulatory Oversight*

A promising approach, though not one without a certain amount of criticism,<sup>134</sup> is in assessing and incorporating concern for animal welfare as a factor in cost-benefit analysis of regulations.<sup>135</sup> In certain

<sup>129</sup> Lacey Seibert & F. Bailey Norwood, *An Economic Analysis of Alternatives to Confinement Pork Production* 7 (Okla. State Univ. Dep't of Agric. Econ., Working Paper), available at <http://asp.okstate.edu/baileynorwood/Survey4/files/LaceyPaperFinal.pdf>.

<sup>130</sup> *Id.* at 9–10. Sows confined in stalls also exhibit thirty percent weaker bones and a greater vulnerability to bone breaking than those in group housing systems. BROOM & FRASER, *supra* note 1, at 107.

<sup>131</sup> Norwood & Lusk, *supra* note 127, at 5, 7–8.

<sup>132</sup> Compare Seibert & Norwood, *supra* note 129, at 20–22 (finding little difference), with HUMANE SOC'Y OF THE U.S., AN HSUS REPORT: WELFARE ISSUES WITH GESTATION CRATES FOR PREGNANT SOWS 2, 5–7, available at <http://www.humanesociety.org/assets/pdfs/farm/HSUS-Report-on-Gestation-Crates-for-Pregnant-Sows.pdf> (“[G]roup-housed sows have a greater range of movement and show fewer abnormalities of bone and muscle development.”).

<sup>133</sup> Seibert & Norwood, *supra* note 129, at 20–22.

<sup>134</sup> See, e.g., FRANK ACKERMAN & LISA HEINZERLING, PRICELESS: ON KNOWING THE PRICE OF EVERYTHING AND THE VALUE OF NOTHING (2004) (arguing that cost-benefit analysis of environmental and health regulations rests on faulty assumptions and is an overly narrow approach to policy making).

<sup>135</sup> See Cass R. Sunstein, *Cognition and Cost-Benefit Analysis*, 29 J. LEGAL STUD. 1059, 1069–70 (2000) (“A virtue of cost-benefit analysis is that it tends to overcome people’s tendency to focus on parts of problems, by requiring them to look globally at the consequences of apparently isolated actions.”). In the regulatory context, it is also a subject that is unavoidable, and animal welfare advocates must be cognizant of the process. See Eric A. Posner, *Controlling Agencies with Cost-Benefit Analysis: A Positive Political Theory Perspective*, 68 U. CHI. L. REV. 1137, 1139 & n.15 (2001) (finding that “[t]he annual number of cost-benefit reports in the Federal Register has increased about sixfold” between 1980 and 1999, to over 2000 reports). When USDA issued regulations under the AWA, it declined to engage in such a process, citing difficulty and administrative costs.

situations it might be easier to monetize animal welfare benefits, such as in regard to consumer products.<sup>136</sup> This might involve determining how much more money consumers are willing to spend for greater protections for the animals used in the products they are purchasing. Under a slightly different normative justification for cost-benefit analysis, the animal-centric interest could more easily make its way into the calculus. For example, if the policy was geared toward welfare maximization and not just preference satisfaction of citizens or consumers alone, it is possible that animal welfare would fit squarely within cost-benefit analysis.<sup>137</sup> In general, though, it should not matter what the context is—cost-benefit analysis can still be conducted where values are moral and not economic.<sup>138</sup>

Apart from monetizing the social value in reducing animal pain and suffering, regulatory oversight in the form of cost-benefit analysis would encourage agencies to take a step back and note ancillary costs and benefits of the proposed action.<sup>139</sup> This might cut both ways, perhaps encouraging less protection for animals in certain circum-

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Animal Welfare; Standards, 56 Fed. Reg. 6426, 6484 (Feb. 15, 1991) (“In the absence of actual dollar figures for benefits, therefore, it was not feasible for the Department to estimate the net potential benefits from the regulations.”). A challenge to the regulation on these grounds possibly could force the agency to take a more measured approach to valuing benefits. *Cf.* *Ctr. for Biological Diversity v. Nat’l Highway Traffic Safety Admin.*, 538 F.3d 1172, 1200 (9th Cir. 2008) (finding that the agency’s refusal to monetize and include important costs and benefits in its analysis was arbitrary and capricious); *Pub. Citizen, Inc. v. Mineta*, 340 F.3d 39, 57, 58–62 (2d Cir. 2003) (finding a rule arbitrary and capricious because cost-benefit analysis was incomplete).

<sup>136</sup> It should not matter that products reflecting different welfare standards are otherwise indistinguishable. *See* Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 531 (2004) (“[C]onsumers demand process information because they wish to encourage or discourage the production practice in question through their market activity.”).

<sup>137</sup> *See generally* MATTHEW D. ADLER & ERIC A. POSNER, *NEW FOUNDATIONS OF COST-BENEFIT ANALYSIS* 6 (2006) (distinguishing welfare from preference satisfaction).

<sup>138</sup> Cass R. Sunstein, *Valuing Life: A Plea for Disaggregation*, 54 DUKE L.J. 385, 430 (2004) (“[T]he cost of the regulatory burden might play a role in deciding whether to impose it. But the underlying moral judgment is rooted in a belief in the avoidance of suffering that does not essentially turn on [willingness to pay].”); *see also* Jason J. Czarnezki & Adrienne K. Zahner, *The Utility of Non-use Values in Natural Resource Damage Assessments*, 32 B.C. ENVTL. AFF. L. REV. 509, 523 (2005) (describing non-use values as a bridge between economic value and intrinsic worth of, *inter alia*, animal suffering).

<sup>139</sup> Unlike anti-cruelty statutes, humane standards should impose burdens on regulated entities up to the point where additional marginal social benefits will equal the marginal costs to the animal owner. *See* Exec. Order No. 12,866, 58 Fed. Reg. 51,735 (Sept. 30, 1993) (requiring federal regulations to maximize net social welfare). The normative principle behind welfare maximization is the aspiration toward what is conceivably achievable through the market. Nicholas Kaldor, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 ECON. J. 549, 550–51 & 551 n.1 (1939). This view was embraced by USDA when regulating under the AWA. Animal Welfare; Standards, 56

stances<sup>140</sup> and more stringent regulation in others.<sup>141</sup> Alternative regulatory approaches may also be useful, like mandating greater informational disclosures.<sup>142</sup> A significant appeal of considering animal welfare through regulatory oversight is the ability of federal regulators to influence the treatment of animals outside of animal-specific statutes. For example, the decision about how to properly regulate many activities—such as pollution,<sup>143</sup> antibiotics<sup>144</sup> and other production-enhancing drugs,<sup>145</sup> or research<sup>146</sup>—could impact the well-

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Fed. Reg. at 6485–86 (“The crucial economic question is whether the social costs imposed by this final rule are adequately balanced with the social benefits at the margin.”).

<sup>140</sup> Cass R. Sunstein, *The Rights of Animals: A Very Short Primer* 7 (Univ. of Chi. Law Sch., John M. Olin Law & Econ. Working Paper No. 157, 2002), available at [http://www.law.uchicago.edu/files/files/157.crs.\\_animals.pdf](http://www.law.uchicago.edu/files/files/157.crs._animals.pdf) (“I believe that it is excessive to ban experiments that impose a degree of suffering on rats or mice if the consequence of those experiments would to [sic] produce significant medical advances for human beings.”).

<sup>141</sup> Cf. Brief Amicus Curiae of Animal Legal Defense Fund in Support of Petitioner at 17–18, *United States v. Stevens*, 130 S. Ct. 1577 (2010) (No. 08-769) (discussing the impact of the treatment of animals on human violence).

<sup>142</sup> See, e.g., Leslie & Sunstein, *supra* note 117, at 130–36 (arguing that information disclosures empower consumers “to make food choices that take into account their preferences for different levels of animal welfare”).

<sup>143</sup> Reducing the intensity of confinement, for example, may produce gains in animal welfare in addition to environmental and human health benefits. See *Ass’n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1028 (D.C. Cir. 2007) (noting animal feeding operations’ adverse impact on health and property value). The management of manure from confined animal feeding operations implicates air quality, food pathogens, and the integrity of water bodies. Henry Fountain, *Down on the Farm, an Endless Cycle of Waste*, N.Y. TIMES, Dec. 29, 2009, at D1.

<sup>144</sup> Antibiotics are administered to animals to control lung, skin, or blood infections and promote faster growth, and they can reduce feed costs. Margie Mason & Martha Mendoza, *Drug-Resistant Infections Lurk in Meat We Eat*, MSNBC.COM (Dec. 29, 2009), [http://www.msnbc.msn.com/id/34614380/ns/health-infectious\\_diseases/](http://www.msnbc.msn.com/id/34614380/ns/health-infectious_diseases/). Limitations on non-therapeutic antibiotics would have many economic impacts—on public health, production costs, and environmental safety. But also relevant is the impact on the quality of life for the affected animals. See Erik Eckholm, *Meat Farmers Brace for Limits on Antibiotics*, N.Y. TIMES, Sept. 15, 2010, at A14 (“[F]armers in Denmark have learned to hold down illness in young pigs by extending the weaning period, altering feeds and providing more space and veterinary scrutiny of the animals.”).

<sup>145</sup> FDA regulates the administration of production-enhancing drugs to food animals. The agency allows, for example, the use of ractopamine—a drug used to boost feed-to-muscle conversion rates and banned in many countries—in cattle, pigs, and turkeys. See Grandin, *supra* note 14, at 10, 13 (noting a greater incidence of downed animals, biting, heat stress, lameness, and hoof lesions in animals fed ractopamine); Temple Grandin, *Improving Livestock, Poultry and Fish Welfare in Slaughter Plants with Auditing Programmes*, in *IMPROVING ANIMAL WELFARE*, *supra* note 14, at 160, 179 (similar); Temple Grandin, *Welfare During Transport of Livestock and Poultry*, in *IMPROVING ANIMAL WELFARE*, *supra* note 14, at 115, 117–18 (similar). A growth hormone used in dairy production, rBST, also raises both human health and animal welfare concerns. The Canadian government “refused to authorize the use of rBST on animal welfare grounds alone, citing potentially increased levels of lameness and infection among treated cows, as well as reduced livestock lifespans due to increased herd culling.” Kysar, *supra* note 136, at 591 (citing Press Release, Health Canada, Health Canada Rejects Bovine Growth

being of animals, a factor that could be introduced through cost-benefit analysis.<sup>147</sup>

### B. *When Are Humane Regulations Reasonable?*

The fact that “humane” implies ethics and social values should not render judicial review meaningless. As a matter of statutory interpretation, the concept of treating animals humanely involves inquiring into the value of animal pain and suffering.<sup>148</sup> The lawmaking power of agricultural agencies is contingent on this question being asked. Once posed, the answer arrived at by the agency must be reasoned.<sup>149</sup> Under this view, I have argued that the Supreme Court of New Jersey erred when it took ethical questions off the table, calling the controversial standards part of a “philosophical debate” that the court had neither “the right or the obligation to weigh in on.”<sup>150</sup> In doing so, the court reduced the inquiry into one that looks little different from a review of regulations that simply ban cruel practices, rather than regulations establishing humane ones.<sup>151</sup> I attempt below to describe judicial review in a manner that illustrates exactly where the philosophical debate occurs and how a court should ensure that the debate is robust.

As a question of statutory interpretation, under *Chevron* or any state standard, the humane treatment of animals always involves social values. Once the court has found that an agency is engaging in this debate (to the extent the legislature did not already weigh in), sources such as those described in Part III.A can tell us how well reasoned the agency’s decision-making process was. The goal is to avoid

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Hormone in Canada (Jan. 14, 1999), available at [http://web.archive.org/web/20080110050349/http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/1999/1999\\_03\\_e.html](http://web.archive.org/web/20080110050349/http://www.hc-sc.gc.ca/ahc-asc/media/nr-cp/1999/1999_03_e.html).

<sup>146</sup> The New Zealand agricultural research agency, for example, recently abandoned its animal cloning trials due to animal welfare concerns. Kiran Chug, *Animal Death Toll Ends Cloning Trials*, THE DOMINION POST (Feb. 21, 2011), available at <http://www.stuff.co.nz/national/4681283/Animal-death-toll-ends-cloning-trials>.

<sup>147</sup> For example, downed animals raise food safety risks, but the prevalence of downed animals can be reduced through levying fees on producers transporting such animals to slaughter. This has the added benefit of increasing animal welfare. Cf. Temple Grandin, *The Effect of Economic Factors on the Welfare of Livestock and Poultry*, in IMPROVING ANIMAL WELFARE, *supra* note 14, at 214, 215 (noting a significant reduction in bruising on slaughter cattle when producers and transporters were fined); Grandin, *Welfare During Transport*, *supra* note 145, at 131 (“To reduce problems caused by poor producers, a system of economic penalties and rewards should be implemented.”).

<sup>148</sup> See *supra* Part II.B.2 (arguing that “humane” requires determining what are appropriate amounts of pain).

<sup>149</sup> See *supra* Part I.B (describing standards of review concerning the bounds of an agency’s lawmaking power).

<sup>150</sup> N.J. Soc’y for the Prevention of Cruelty to Animals v. N.J. Dep’t of Agric., 955 A.2d 886, 910 (N.J. 2008).

<sup>151</sup> See generally Part II (noting the difference between unnecessary pain versus appropriate amounts of pain).

standards that simply reduce unnecessary pain and suffering without asking whether we should expect greater protections. Those standards would hide from view what should be a contributive and deliberative process and mask ethical questions as objective scientific determinations. In the worst case, as in the Appellate Division decision discussed by Sullivan and Wolfson, the agency may be allowed simply to defer to whatever is commonly practiced in the industry, cruel or otherwise. Of course, it is possible that the social value assigned to animal welfare beyond the baseline provided for in anti-cruelty statutes may be zero,<sup>152</sup> but that determination should be a product of reasoned judgment, rather than just a simple assumption.

As a threshold matter, regulations can only be humane when the level of protection they provide is equal to or exceeds what would be provided under anti-cruelty statutes. This will usually be satisfied by a showing that the practice produces a benefit to human health and safety or economic productivity. Otherwise, the practice can never be said to be humane under any circumstance. This is the line drawn by the New Jersey Supreme Court, where the court invalidated only those regulations that did not meet this floor (for instance, tail docking). At this point, the agency has shown only that the practice is not egregious. Without more, the regulations are unreasonable in that the agency has not yet determined the level of pain and suffering that is considered acceptable, and the result is unfounded.

As a conceptual matter, the difference between what is cruel and what is humane addresses two distinct inquiries. In the former, we want to know if there is any benefit to the practice, whereas in the latter, we want to know if that benefit exceeds the costs that society is willing to bear. There exists some middle ground between what practices serve only to cause wanton cruelty—having no purpose other than cruelty itself—and what practices maximize social welfare—balancing the competing interests of using animals efficiently and protecting them from harm.<sup>153</sup> “[H]umane cannot turn only on the identi-

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<sup>152</sup> Assigning a zero value and reducing the law to a cruelty standard does raise the question of what effect the humane law has or why it was passed in the first place. Rather, the more likely scenario is that technological innovations will push the cruelty standard upwards to meet the humane one. Cf. Jeremy P. Jacobs, *Agencies Hope Robot Can Speed Toxics Evaluations, End Animal Testing*, N.Y. TIMES, May 13, 2011, <http://www.nytimes.com/gwire/2011/05/13/13greenwire-agencies-hope-robot-can-speed-toxics-evaluatio-92625.html> (discussing how robotics may reduce toxicology testing costs and remove the need for animal testing).

<sup>153</sup> For instance, the New Jersey Department of Agriculture regulations require giving layer hens enough room to spread their wings. N.J. ADMIN. CODE § 2:8-4.4(d) (2011). This exceeds what is acceptable under anti-cruelty statutes (standard battery cages). Currently, then, producers in New Jersey using typical battery cages would not be violating the anti-cruelty statute, yet their methods could not be said to be humane.

fication of some benefit to the animals without any consideration of concomitant harm and alternatives, as well as the costs to humans.”<sup>154</sup> This was implied in the New Jersey regulations that limited forced molting and intensity of confinement, requiring room for birds to spread their wings. The agency determined that, while justifiable, contrary practices could not be said to be humane.

Each statute and each industry or practice will be unique. Courts can, at the very least, look to two areas for signals as to how well the agency has honored its mandate. First, courts should ensure that agencies have relied on appropriate external sources. They can identify themes in methodology adopted by the agency or in public comments and agency responses. Even where an agency has not explicitly referenced external sources, it is still possible that such sources informed the agency’s understanding of “humane.” In the New Jersey case, the Department of Agriculture repeatedly responded to comments with either unsupported assumptions or references to scientific studies that said little about the *desirability* of particular practices, and only recited the *implications* of those practices.<sup>155</sup> This approach is problematic when there is no attempt to look to external sources of authority (such as those discussed above) in order to ground assumptions about the acceptability of given practices. A scientific study will show how animals are affected—such as their stress levels, physiological responses, or behavioral changes—but will tell us little about whether we should demand greater or lesser protections. The magnitude of physiological responses is only meaningful when placed in context.

Second, after finding that an agency has issued humane regulations based upon a permissible construction of a humane statute—that is, questions of social values are on the table—courts should turn their inquiry to the quality of agency decision making and whether or not the regulations can survive an arbitrary and capricious (or substantial evidence) challenge. Once the court has identified the external sources that form the basis of the agency’s reasoning, the court should decrease its level of scrutiny of the agency regulation as the number (or strength) of external social factors relied upon by the agency increases. Where the agency rests its determination on intuition alone—or simply does not state a basis—the court should exhibit the

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<sup>154</sup> Sullivan & Wolfson, *supra* note 6, at 112.

<sup>155</sup> *Id.* at 113 (“The Department . . . did not compare animal welfare in different systems and then decide, by balancing animal suffering with the economic and perhaps other advantages or costs of industrial farming, what was tolerable in New Jersey. Instead the Department simply acted as if the existence of [a] study entirely resolved an issue that the study itself clearly proclaimed it did not, and could not, address.”).

greatest willingness to find the humane regulation to be arbitrary. As it becomes more evident that the agency has engaged in a hard look at the relevant factors, the agency should be rewarded with a greater regard for its rulemaking process.

#### CONCLUSION

Restricting the use of animals beyond the floor set by anti-cruelty statutes is an appropriate use of regulatory authority and may be required in certain circumstances. When legislatures mandate that agencies concern themselves with the humane treatment of animals, agencies must give reasons why permitted levels of pain and suffering inflicted on animals are acceptable. Courts can and must look to several factors to ensure that agencies have reached a reasoned result. Without such oversight, difficult questions may go unanswered. The risk, apart from sacrificing accountability, is that animals may be subjected to levels of pain and suffering from which society would otherwise like to see them protected.

