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THE LIVES OF DAIRY CATTLE
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Jessica Eisen *

Abstract

It is widely assumed that laws governing dairy production include substantial protection of animals' interests—that in some way the state is regulating the treatment of farmed animals and protecting them against the worst excesses of their owners' self-interest. In fact, across jurisdictions in Canada and the United States, the standards governing farmed animal protection are not established by elected lawmakers or appointed regulators, but are instead primarily defined by private, interested parties, including producers themselves. As scholars of animal law have noted, this has contributed to weak and ineffectual legal protection of the interests of farmed animals. The present study will focus on a distinct, though related, difficulty arising from the *de facto* or *de jure* delegation of standard-setting authority to animal industries. Not only does this delegation result in less stringent standards, but it also works to erode crucial public law values, such as transparency, accountability and impartiality.

This limitation of public law values poses a deep structural threat to animal interests, especially in light of animals' particular dependence on public law for their protection. Animals are excluded from private law protections, and from direct access to conventional means of legal and political participation, leaving them without legal avenues to press their interests as individuals. Effective animal protection therefore requires that the human beings who advocate for animal interests have meaningful access to standard-setting processes. Such meaningful access is facilitated where public law values assure transparent, accountable and impartial decision-making. For this reason, the assignment of standard-setting authority to private producers, and the attendant diminution of public law values, is of special concern in the animal protection context. This

* Jessica Eisen is an Assistant Professor at the University of Alberta Faculty of Law. The author extends her sincerest thanks to her co-editors on this volume, Erum Sattar and Xiaoqian Hu, for their energy and enthusiasm throughout this project, and for their thoughtful comments on earlier drafts of this article. Thanks are owed also to the University of Alberta's Kule Institute for Advanced Studies and to the University of Arizona for supporting an extremely helpful workshop in connection with this volume. The author is grateful to all the participants in that workshop and, in particular, the discussants Albertina Antognini and Andrew Woods for sharing their reactions to an earlier draft.

article will chart the operation of private power in setting standards for the protection of dairy cattle and identify the damage this privatized authority does to public law values. The article will tentatively suggest in conclusion that high levels of privatization in standard-setting may reflect a public desire to be comforted by the idea of regulation, tempered by an underlying ambivalence respecting the practical consequences of meaningful legal oversight.

I. Introduction

At the heart of the Canadian and US dairy industries are cows: millions of living, feeling creatures, whose lives are shaped, from birth to death, by our collective decision to use their bodies in food production. It is widely assumed that laws governing dairy production include substantial protection of these animals' interests—that in some way the state is regulating the treatment of farmed animals and protecting them against the worst excesses of their owners' self-interest.¹ In fact, across jurisdictions in Canada and the United States, the standards governing farmed animal protection are not elaborated by elected lawmakers or appointed regulators, but are instead primarily defined by private, interested parties, including producers themselves.

As scholars of animal law have noted, this has contributed to weak and ineffectual legal protection of the interests of farmed animals.² The present study will focus on a distinct, though related, difficulty arising from the *de facto* or *de jure* delegation of standard-setting authority to animal industries. Not only does this delegation result in less stringent standards, but it also works to erode crucial public law values, such as transparency, accountability and impartiality. This limitation of public law values poses a deep structural threat to animal interests, especially in light of animals' particular dependence on public law for their protection. Animals are excluded from private law protections, and from direct access to conventional means of legal and political participation, leaving them without legal avenues to press their interests as individuals. Effective animal protection therefore requires that the human beings who advocate for animal interests have meaningful access to standard-setting processes. Such meaningful access is facilitated where public

¹ David J. Wolfson & Mariann Sullivan, *Foxes in the Henhouse: Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS, 205, 206, 226 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (describing a widespread “presumption that the law currently provides some basic legal protection for animals, even if there is skepticism about its effectiveness or enforcement”).

² See *id.*

law values assure transparent, accountable and impartial decision-making. For this reason, the assignment of standard-setting authority to private producers, and the attendant diminution of public law values, is of special concern in the animal protection context.

This article will offer a descriptive account of farmed animal protection regimes across Canada and the United States, with a particular focus on dairy cattle. The article will further advance a normative critique of privatized standard-setting in this sphere given animals' particular vulnerabilities. Part II will describe the regulatory context under consideration: the lives and well-being of dairy cattle in Canada and the United States. Part III will confront the complexity of the supposed public/private distinction in law, drawing on scholarship in feminist legal theory and comparative administrative law. Despite the instability of these categories, however, this Part will argue that the identification of public and private authority—and the related operation (or not) of public law values—remains salient in the animal protection context. In particular, animals' exclusion from private law protections and from formal access to legal and political institutions make public law and public law values (including transparency, impartiality and accountability) critical to effective animal protection.

With this framework in place, Part IV will offer a description of regulatory approaches to dairy cattle protection in the United States and Canada, with an emphasis on the role of private actors in legal standard-setting in these jurisdictions. This Part will reveal that, although a variety of regulatory mechanisms exist across jurisdictions, private standard-setting is commonly employed, supplanting crucial public law functions and values. The Conclusion will reflect on why, despite the significance of public law values to animal protection, private power over legal standard-setting persists. Tentatively, this Conclusion will suggest that the present legal landscape may reflect a public desire to be comforted by the *idea* of regulation, tempered by an underlying ambivalence respecting the practical consequences of meaningful legal oversight.

II. Milk and the Lives of Dairy Cattle

The lives of cows in the Canadian and U.S. dairy industries are controlled by human beings, from their broadest contours to their most minute details.³ The choices of cows themselves—respecting whether and how to care for their young, when and with whom to

³ Jessica Eisen, *Milked: Nature, Necessity, and American Law*, 34 BERKELEY J. GENDER L. & JUST. 71, 106–109 (2019).

have sex, and how to live in community with their herds—are highly constrained.⁴ Their bodies are surgically altered, physically restrained, and continually manipulated to facilitate the production and extraction of their nursing materials.⁵ The human actors whose decisions so thoroughly shape these animals' lives range from the farmers who own these cows as a matter of private law to participants in the dense networks of public administration that govern the production and sale of dairy products.

The calves of dairy cows are generally separated from their mothers immediately after birth.⁶ Male calves are usually auctioned to be slaughtered for veal.⁷ Female calves spend their early days isolated in individual hutches, then spend a period in group housing, before they are old enough for their first insemination.⁸ Many cows are subject to painful physical modifications designed to support their use in dairying. These include the “disbudding” or removal of horns to reduce the risk of injury arising from their confinement in close proximity;⁹ the cutting of “supernumerary” or inconveniently

⁴ *Id.* Animals, of course, retain their agency in the face of human constraints, resisting coercion and refusing instructions. See Jason C. Hribal, *Animals, Agency, and Class: Writing the History of Animals from Below*, 14 *HUM. ECOLOGY REV.* 101, 103 (2007) (observing that “[f]laking ignorance, rejection of commands . . . foot-dragging . . . breaking equipment” and other tactics constitute forms of resistance employed by animals against human beings); Catharine A. MacKinnon, *Of Mice and Men: A Feminist Fragment on Animal Rights*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 263, 270 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (“Do animals dissent from human hegemony? I think they often do. They vote with their feet by running away. They bite back, scream in alarm, withhold affection, approach warily, fly and swim off.”); cf. JOCELYNE PORCHER, *THE ETHICS OF ANIMAL LABOUR: A COLLABORATIVE UTOPIA* 116 (2017) (explaining that cattle apply their “affective and cognitive capacities to work” in order to “collaborate” in certain milking processes).

⁵ Eisen, *supra* note 3, at 106–109.

⁶ Kathrin Wagner, Daniel Seitner, Kerstin Barth, Rupert Palme, Andreas Futschik & Susanne Waiblinger, *Effects of Mother versus Artificial Rearing During the First 12 Weeks of Life on Challenge Responses of Dairy Cows*, 164 *APPLIED ANIMAL BEHAV. SCI.* 1, 2 (2015).

⁷ Kathryn Gillespie, *Sexualized Violence and the Gendered Commodification of the Animal Body in Pacific Northwest US Dairy Production*, 21 *GENDER, PLACE & CULTURE* 1321, 1327 (2014).

⁸ Eisen, *supra* note 3, at 107.

⁹ See Erin Mintline, Mairi Stewart, Andrea Rogers, Neil Cox, Gwyneth Verkerk, Joseph Stookey, James Webster & Cassandra Tucker, *Play Behavior as an Indicator of Animal Welfare: Disbudding in Dairy Calves*, 144 *APPLIED ANIMAL BEHAV. SCI.* 22, 23 (2013).

placed teats;¹⁰ and the “docking” or amputation of their tails to improve cleanliness and access to their udders.¹¹

To stimulate milk production, dairy cows are repeatedly impregnated, almost always through artificial insemination.¹² When their calves are born, they are taken away immediately to be raised for dairy or veal according to their sex.¹³ While lactating, many cows are held in “tie-stall” housing systems, in which they are closely chained at the neck in individual stalls just large enough to allow them to lie down or stand up.¹⁴ A feeding trough runs in front of the cows, and a waste trough runs behind them.¹⁵ Such tie-stall housing is often supported by the use of “electric trainers” that hover over the cows and administer a shock if they move their bodies into positions that might allow them to defecate outside the designated trough.¹⁶ When no longer considered productive, dairy cows are slaughtered, often after being transported many hours by truck without access to water or rest on their journey.¹⁷ Dairy cows are generally slaughtered between 4-6 years of age, well below their life expectancy (if not slaughtered) of 15-20 years.¹⁸

Cows are intelligent, social animals, and there is strong evidence that many of these practices cause serious physical and emotional harm. It is widely agreed, for example, that separation of these mammals from their young is a source of “distress” or “stress”

¹⁰ ROGER W. BLOWEY & A. DAVID WEAVER, COLOR ATLAS OF DISEASES AND DISORDERS OF CATTLE 203 (3rd ed. 2011) (explaining that supernumerary teats “are unsightly, may interfere with milking, and can develop mastitis” and so are “normally removed with curved scissors early in life”).

¹¹ See *Literature Review on the Welfare Implications of Tail Docking of Cattle*, AM. VETERINARY MED. ASS’N (Aug. 2014), <https://www.avma.org/resources-tools/literature-reviews/welfare-implications-tail-docking-cattle>; *Tail Docking of Dairy Cattle: Position Statement*, CAN. VETERINARY MED. ASS’N (Oct. 12, 2016), <https://www.canadianveterinarians.net/documents/tail-docking-of-dairy-cattle>; W. K. Fulwider, T. Grandin, B. E. Rollin, T. E. Engle, N. L. Dalsted & W. D. Lamm, *Survey of Dairy Management Practices on One Hundred Thirteen North Central and Northeastern United States Dairies*, 91 J. DAIRY SCI. 1686, 1688 (2008).

¹² Eisen, *supra* note 3, at 107.

¹³ See *supra* notes 6–7 and accompanying text.

¹⁴ Eisen, *supra* note 3, at 108.

¹⁵ *Id.*

¹⁶ *Id.* at 109.

¹⁷ See Wolfson & Sullivan, *supra* note 1, at 208; *Curb the Cruelty: Canada’s Farm Animal Transport System in Need of Repair*, WORLD SOCIETY FOR THE PROTECTION OF ANIMALS 4 (2010), <https://www.animalalliance.ca/wp-content/uploads/2016/04/report-WSPA-Curb-the-Cruelty-Report.pdf>.

¹⁸ Eisen, *supra* note 3, at 109.

(to use the parlance of dairy science) for both cow and calf.¹⁹ Indeed, a significant body of literature has emerged to address how the precise timing and manner of separation might improve productivity and animal well-being, since cow-calf separation often causes weight loss and injury as the pair attempt to reunite.²⁰ There is also extensive evidence demonstrating that tail docking is painful for cows, and that the practice provokes behaviors associated with discomfort or severe pain.²¹ (The amputation or “docking” of cows tails is most commonly achieved by placing a tight band or rubber ring near the base of the cow’s tail, with the tail ultimately atrophying from lack of blood flow, then falling off.²²) The practice of routine tail docking is officially opposed by both the Canadian Veterinary Medical Association²³ and the American Veterinary Medical Association.²⁴

There are sharp differences in opinion as to the morality of confining, impregnating and milking animals, and as to the acceptability of many of the specific animal use practices within the dairy sector.²⁵ Questions about the justice or fairness of laws protecting animals in agricultural contexts often, perhaps inevitably, lead to underlying questions about the importance or necessity of

¹⁹ See, e.g., Frances C. Flower & Daniel M. Weary, *The Effects of Early Separation on the Dairy Cow and Calf*, 12 ANIMAL WELFARE 339, 340 (2003) [hereinafter Flower & Weary, *Early Separation*]; Frances C. Flower & Daniel M. Weary, *Effects of Early Separation on the Dairy Cow and Calf: 2. Separation at 1 Day and 2 Weeks after Birth*, 70 APPLIED ANIMAL BEHAV. SCI. 275, 276 (2001) [hereinafter Flower & Weary, *Separation at 1 Day and 2 Weeks*]; E.O. Price, J. E. Harris, R. E. Borgward, M. L. Sween & J. M. Connor, *Fenceline Contact of Beef Calves with Their Dams at Weaning Reduces the Negative Effects of Separation on Behavior and Growth Rate*, 81 J. ANIMAL SCI. 116, 121 (2003); Wagner et al., *supra* note 6, at 2.

²⁰ See, e.g., Flower & Weary, *Early Separation*, *supra* note 19, *passim*; Flower & Weary, *Separation at 1 Day and 2 Weeks*, *supra* note 19, at 282–83; Price, *supra* note 19, at 121; Wagner et al., *supra* note 6, at 2.

²¹ See M.A. Sutherland & C.B. Tucker, *The Long and Short of It: A Review of Tail Docking in Farm Animals*, 135 APPLIED ANIMAL BEHAV. SCI. 179, 187–89 (2011); S.D. Eicher, H.W. Cheng, A.D. Sorrells & M.M. Shutz, *Short Communication: Behavioral and Physiological Indicators of Sensitivity or Chronic Pain Following Tail Docking*, 89 J. DAIRY SCI. 3047, 3047 (2006); S.D. Eicher & J.W. Dailey, *Indicators of Acute Pain and Fly Avoidance Behaviors in Holstein Calves Following Tail-docking*, 85 J. DAIRY SCI. 2850, 2850 (2002).

²² See AM. VETERINARY MED. ASS’N, *supra*, note 11; CAN. VETERINARY MED. ASS’N, *supra* note 11.

²³ CAN. VETERINARY MED. ASS’N, *supra* note 11.

²⁴ AM. VETERINARY MED. ASS’N, *supra*, note 11.

²⁵ See Jessica Eisen, Xiaojian Hu & Erum Sattar, *Dairy Tales: Global Portraits of Milk and Law*, 16 J. FOOD L. & POL’Y 1, 9 (2020).

animal products in human diets and food systems.²⁶ The analysis that follows will not endeavor to answer underlying questions as to whether or how the farming of mammals for their nursing materials might be humanely or ethically conducted. Instead, the aim is to explain how different regulatory regimes have answered questions respecting animal care as a matter of law—and how these regimes have decided *who decides*. In particular, this study will demonstrate that significant decisions respecting the permissible treatment of animals are often left to the private choices of individual producers. As the following Part will argue, high levels of regulatory privatization, and the resulting marginalization of public law values, represent serious obstacles to effective farmed animal protection.

III. Animals and Public Law

Private dairy producers currently enjoy significant authority to set standards for farmed animal care.²⁷ This Part will argue that such privatization of regulatory authority is of special concern in the sphere of farmed animal protection. Because farmed animals lack both private law rights and direct access to formal legal and political remedies, their meaningful protection requires that the humans who advocate for animal interests have adequate access to standard-setting processes. This access is best supported where decision-making is shaped by public law values such as accountability, transparency and impartiality.

A. Defining Public and Private Law

It bears mention at the outset that distinctions between public and private are rarely clean and never unproblematic—as scholars of both administrative law and feminist legal theory have long warned. In schematic terms, public law describes the legal relationship between state and citizen, while private law denotes legal relations between individuals. According to this schematic, the public sphere is defined by shared commitments and values, while the private

²⁶ See Katie Sykes, *Rethinking the Application of Canadian Criminal Law to Factory Farming*, in CANADIAN PERSPECTIVES ON ANIMALS AND THE LAW 33, 55–56 (Peter Sankoff, Vaughan Black & Katie Sykes eds., 2015) (observing that “opening up the question of what is ‘unnecessary’ in the context of food production could be a discomfiting prospect, since it unavoidably leads to questions about whether the use of animals for food is necessary at all”); Elaine L. Hughes & Christine Meyer, *Animal Welfare Law in Canada and Europe*, 6 ANIMAL L. 23, 56 (2000) (“A clear definition of necessity would require a social consensus on the legitimacy and importance of various human uses of animals; however, this is lacking.”).

²⁷ See *infra* Part IV.

sphere is characterized by pursuit of self-interest.²⁸ Within both administrative law and feminist scholarships, the terms public and private are deeply contested, subject to multiple (sometimes conflicting) definitions, and, in practice, impossibly intertwined.

Within administrative law scholarship, the conventional public/private division is increasingly understood to be complicated or collapsed by the privatization of public authority, especially respecting standard-setting.²⁹ The fraying edges of the public and private spheres identified in administrative law scholarship echo a related destabilization of these categories identified by feminist legal theorists.³⁰ In particular, feminist theory has exposed supposedly “private” spheres, including “the home” and “sexuality,” as being, in fact, fundamentally constituted by collective commitments and public power.³¹

For both feminist theorists and administrative law scholars, the complex interplay between the supposedly public and private aspects of law are matters of normative concern. Feminist theorists have emphasized that the rhetorical delineation of certain “private” spheres has allowed governments to ignore, shirk or deny “responsibility” for certain harms or inequalities.³² In a similar vein, administrative lawyers have identified the operation of private power

²⁸ See Paul Starr, *The Meaning of Privatization*, 6 YALE L. & POL’Y REV. 6, 8–10 (1988).

²⁹ Susan Rose-Ackerman, Peter L. Linseth, and Blake Emerson, *COMPARATIVE ADMINISTRATIVE LAW 2* (Susan Rose-Ackerman, Peter L. Linseth & Blake Emerson eds., 2d ed. 2017) (noting that, although “[t]he distinction between public and private is . . . essential to administrative law,” the assumption that “one can compartmentalize regulatory activities and actors into either a public or a private sphere” fails to capture “the increasingly blurred boundary between state and society” in practice).

³⁰ See Derek McKee, *The Public/Private Distinction in Roncarelli v. Duplessis*, 55 MCGILL L.J. 461, 472 (2010) (linking the public/private distinction within administrative law to the state/market divide of classical liberalism, and to related distinctions between market/family and civilization/state).

³¹ See, e.g., Carol Pateman, *Feminist Critiques of the Public/Private Divide*, in *PUBLIC AND PRIVATE IN SOCIAL LIFE* 281, 281–307 (S.I. Benn & G.F. Gaus eds., 1983); Susan B. Boyd, *Can Law Challenge the Public/Private Divide? Women, Work and Family*, 15 WINDSOR Y.B. OF ACCESS TO JUST. 161, 171–74 (1996).

³² Nicola Lacey, *Theory into Practice? Pornography and the Public/Private Dichotomy*, 20 J.L. & SOCIETY 93, 97 (1993) (asserting that the public/private distinction “allows government to clean its hands of any responsibility for the state of the ‘private’ world”); see also Frances Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1502 (1983) (describing the casting of relations of “domination” as “private matters that do not implicate the political state”).

in public administration as a possible threat to public law values such as transparency, democracy, accountability and fairness.³³

These analyses point to a common set of underlying concerns. First, the conceptual delineation of private spaces within legal regimes—even, or perhaps especially, when cloaked in the language of freedom or liberty—may in fact operate to authorize oppressive and even violent relationships in practice.³⁴ Second, there are harms and power dynamics for which governed societies rightly accept shared responsibility, and our institutions should be organized accordingly.³⁵ In other words, it is not simply that it is difficult or impossible to sort the public from the private, but rather that efforts to cast these spheres as independent often work to conceal and distort our collective obligations to one another.

The concern that public/private legal distinctions can be deployed to obscure and confuse law's role in shaping practices and relationships is apparent in the field of farmed animal protection. Elsewhere, I have suggested that the farm is analogous to the private sphere of the family within feminist theory—a space in which a particular, contestable conception of the public good is pursued using legal forms and social discourses that often reject overt public regulation in favor of such values as privacy, personal duty, and even love.³⁶ The present analysis details farmed animal protection regimes in Canada and the United States to reveal the mechanics of

³³ See, e.g., Jean-Bernard Auby, *Contracting Out and "Public Values": A Theoretical and Comparative Approach*, in *COMPARATIVE ADMINISTRATIVE LAW* 552, 552 (Susan Rose-Ackerman, Peter L. Linseth & Blake Emerson eds., 2d ed. 2017) (describing the question of how to maintain private contractors' adherence to "public values" as a "characteristically post-modern administrative law question").

³⁴ See generally JENNIFER NEDELSKY, *LAW'S RELATIONS: A RELATIONAL THEORY OF SELF, AUTONOMY AND LAW* (2011) (offering an extended argument in favor of legal analyses that focus on the relationships produced by legal rules).

³⁵ C.f. Lacey, *supra* note 32, at 97.

³⁶ See Eisen, *supra* note 3, at 98-101 (2019) (discussing "the farm" as analogous to the "private sphere" of feminist theory); Jessica Eisen, *Milk and Meaning: Puzzles in Posthumanist Method*, in *MAKING MILK: THE PAST, PRESENT AND FUTURE OF OUR PRIMARY FOOD* 237, 240 (Mathilde Cohen & Yoriko Otomo eds., 2017) (observing that regulation of the farm, like "the family" within feminist critique, "trusts private actors (farmers; husbands) to wield their power appropriately because they are well-intentioned, bound by duty, and even because they love those in their charge"); see also Dinesh Wadiwel, *Whipping to Win: Measured Violence, Delegated Sovereignty and the Privatised Domination of Non-Human Life*, in *LAW AND THE QUESTION OF THE ANIMAL: A CRITICAL JURISPRUDENCE* 116, 116-32 (Yoriko Otomo & Edward Mussawir eds., 2013) (describing the "privatised domination of non-human life"); Mathilde Cohen, *Of Milk and the Constitution*, 40 *HARV. J.L. & GENDER* 115, 152 n.238 (2017) (analogizing the private sphere of the farm to the private sphere of the family).

the public/private law interplay working to keep the treatment of farmed animals effectively unregulated by public authorities.

B. Animals and Public Law Values

Despite the identified artificiality of distinctions between public and private in legal ordering, the analysis that follows will rely on these terms to some extent. This is because, although problematic, these categories remain operative, with their operation having significant consequences for farmed animal protection. There are two critical aspects of animal protection regimes that demand continued attention to distinctions between public and private law in this context. The first is the reality that so-called private law (laws understood to govern relations between individuals) have consistently refused to recognize animals as the kinds of individuals whose relations are of legal consequence. The second is that values such as transparency, accountability and impartiality are legally cognizable only with respect to public law authority. Because these public law values are crucial to effective animal protection, the juridical positioning of animal protection as a matter of public law improves prospects for animal protection.

Animals do not hold private legal rights, even to their own lives and bodies. Instead, private law has quite durably retained a basic classification of animals as things: mere objects of the property rights of others.³⁷ In terms of private law alone, animals are objects, not subjects. They are things to be owned, traded, and extinguished at the will of those who hold rights to their bodies. In the famous formulation of property as relations amongst people (rather than relations between people and objects),³⁸ relations with animals are

³⁷ See GARY FRANCIONE, ANIMALS, PROPERTY AND THE LAW 65–115 (1995); Wendy Adams, *Human Subjects and Animal Objects: Animals as “Other” in Law*, in 3 J. ANIMAL L. & ETHICS 29, 29–30 (2009). In recent years, a number of civil law jurisdictions have formally affirmed in their civil codes that animals are not “things”; however, each of these jurisdictions has also specified that provisions pertaining to “things” also apply to animals, making the change in status merely nominal. See Sabine Brels, *The Evolution of the Legal Status of Animals: From Things to Sentient Beings*, THE CONSCIOUS LAWYER (Jan. 2016), <https://www.theconsciouslawyer.co.uk/the-evolution-of-the-legal-status-of-animals-from-things-to-sentient-beings/>.

³⁸ See CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 3–4 (1994); Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 22–23 (1913).

invisible, with no real meaning in the world of legal value and exchange.³⁹

Public law, on the other hand, has long recognized some minimal legal significance in animals' own lives and experiences, most notably through prohibitions against cruelty and the regulation of certain animal-use industries. Admittedly, the longest-standing forms of public law protection of animal interests—criminal prohibitions of cruelty and bestiality—have not focused on animal well-being as much as they have attended to human property interests or community morals.⁴⁰ In both Canada and the United States, however, there is evidence of a shift in emphasis in public and judicial understandings of these laws: a growing sense that their purpose is, at least in part, to protect animals for their own sakes.⁴¹ The treatment of animals has become the subject of regulatory concern, with human use of animal property addressed as a site of ongoing risk and oversight.⁴² These regulatory interventions now commonly reference the interests of animals as being legally relevant.⁴³

In addition to providing the sole available forum for pressing animals' interests, public law is tied to values of particular significance for effective animal protection—namely transparency,

³⁹ Some have claimed that being “owned” may be beneficial to animals. *See, e.g.*, Richard A. Epstein, *Animals as Objects, or Subjects, of Rights*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 143, 148–149 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (arguing that “[b]ecause they use and value animals, owners will spend resources for their protection,” such that “[o]ver broad areas of human endeavour, the ownership of animals has worked to their advantage”). Of course, any indirect benefit that animals may experience to the extent that they hold value to their human owners does not amount to private law recognition of animals' interests. Moreover, in the case of farmed animals, especially in industrial-scale agricultural operations, relations of economic exploitation diminish the likelihood of alignment between animal and owner interests. *See* Ani B. Satz, *Animals as Vulnerable Subjects: Beyond Interest-Convergence, Hierarchy, and Property*, 16 *ANIMAL L.* 65, 79–80 (2009).

⁴⁰ *See* Margit Livingston, *Desecrating the Ark: Animal Abuse and the Law's Role in Prevention*, 87 *IOWA L. REV.* 1, 21–29 (2001) (noting that, in the United States, 19th century anti-cruelty laws were generally interpreted by courts “under the rubric of property” or as emphasizing that “cruelty was degrading to the human perpetrator, the human witnesses, and society as a whole”).

⁴¹ *See, e.g.*, *Regina v. D.L.W.*, [2016] 1 S.C.R. 402, para. 140; *see also* Jessica Eisen, *Animals in the Constitutional State*, 15 *ICON: INT'L J. CONST. L.* 909, 911–923 (2018) (offering a broader cross-jurisdictional account of legal attention to animal interests).

⁴² *See, e.g.*, The Animal Welfare Act, 7 U.S.C. § 2131.

⁴³ *See, e.g., id.* at § 2131(1).

impartiality and accountability.⁴⁴ Because animals lack access to human language, they are especially vulnerable to having their interests overlooked in legal and political processes as they are currently structured.⁴⁵ The traditional democratic mechanisms through which state power is held to account—elections and litigation—are not directly available to animals to contest inadequate or unfair conduct.⁴⁶ Elsewhere, I have argued that animals therefore experience “radical vulnerability” within contemporary legal systems: they are both subject to ongoing state-sanctioned harm, and practically excluded from both law-making and rights-enforcement.⁴⁷

Because animals are not legally empowered to press the private dimensions of their own individual interests,⁴⁸ the public character of animal protection demands heightened acknowledgment and institutional fortification. Effective protection of animal interests depends on animal advocates having meaningful access to processes that assure the sufficiency and implementation of standards. In public law terms, this requires that standard-setting

⁴⁴ See Michael Taggart, *The Province of Administrative Law Determined?*, in *THE PROVINCE OF ADMINISTRATIVE LAW* 1, 3–4 (Michael Taggart ed., 1997) (summarizing that “[t]he list of public law values includes openness, fairness, participation, impartiality, accountability, honesty and rationality”).

⁴⁵ Eisen, *supra* note 41, at 941–42. Some scholars have argued that this structural exclusion of animals from political and legal decision-making can and should be reformed. See, e.g., SUE DONALDSON & WILL KYMLICKA, *ZOOPOLIS: A POLITICAL THEORY OF ANIMAL RIGHTS* 255 (2011) (calling for recognition of “animals not just as individual subjects entitled to respect of their basic rights, but as members of communities—both ours and theirs—woven together in relations of interdependency, mutuality and responsibility”); Will Kymlicka & Sue Donaldson, *Animals and the Frontiers of Citizenship*, 34 *OXFORD J. LEGAL STUD.* 201, 207 (2014); Alasdair Cochrane, *SHOULD ANIMALS HAVE POLITICAL RIGHTS?* 90–91 (2020); Robert Garner, *Animals, Politics and Democracy*, in *THE POLITICAL TURN IN ANIMAL ETHICS* 103, 115 (Robert Garner & Siobhan O’Sullivan eds., 2016).

⁴⁶ See Eisen, *supra* note 41, at 925–29.

⁴⁷ *Id.* at 941–946. For other scholarly treatments of animal “vulnerability,” see, e.g., Maneesha Deckha, *Vulnerability, Equality, and Animals*, 27 *CANADIAN J. WOMEN & L.* 47 (2015); Satz, *supra* note 39.

⁴⁸ Scholars have debated whether legal standing for animals should be either acknowledged or expanded as a means of allowing animals, through their representatives, to enforce legal interests or rights. See, e.g., Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 *U.C.L.A. L. REV.* 1333 (2000); Kelsey Kobil, *When it Comes to Standing, Two Legs are Better than Four*, 120 *PENN. ST. L. REV.* 621 (2016). Even if such standing were recognized, however, the legal rights and interests in question would (absent dramatic transformation of animals’ legal status) remain public law protections. Moreover, the effective advancement and enforcement of legal standards by animals’ representatives would continue to require transparent, impartial and accountable institutions.

authority be entrusted to institutions that value impartiality, accountability, and transparency.⁴⁹

The first of these principles, impartiality, represents a core public law value relevant to animal protection law. Impartiality requires that decision-makers not decide matters in their own self-interest, a principle rooted in the idea that “a judge should neither judge her own cause nor have any interest in the outcome of a case before her (*nemo iudex in sua causa debet esse*).”⁵⁰ Impartiality has been a particularly fraught moral and legal concept, particularly insofar as it might seem to imply the possibility of a “view from nowhere,” concealing the standpoint of privileged speakers in the process.⁵¹ In the case of animal protection, we might think it impossible to find a truly impartial or disinterested human decision-maker, given the widespread human consumption of animal products.⁵² But a narrower conception of impartiality—foreclosing decision-making by those with a direct financial stake in the outcome—is also at stake in dairy governance. To the extent that dairy producers have economic incentives to intensify dairy operations in ways that prioritize efficiency over animal well-being, the value of impartiality weighs against granting them the authority to set standards of animal care.⁵³

⁴⁹ See Jessica Eisen, *Beyond Rights and Welfare: Democracy, Dialogue, and the Animal Welfare Act*, 51 U. MICH. J. L. REFORM 469, 481–485 (2018). See generally Eisen, *supra* note 41.

⁵⁰ Laverne A. Jacobs, *Tribunal Independence and Impartiality: Rethinking the Theory after Bell and Ocean Port Hotel—A Call for Empirical Analysis*, in DIALOGUE BETWEEN COURTS AND TRIBUNALS—ESSAYS IN ADMINISTRATIVE LAW AND JUSTICE (2001–2007) 43, 47–48 (Laverne A. Jacobs & Justice Anne L. Mactavish eds., 2008). Jacobs further notes the connection between impartiality and “the notion that decision-making requires a decision-maker to hear and listen to both sides of the case before making a decision (*audi alteram partem*).” *Id.* Some have distinguished “impartiality” from “independence,” with “impartiality” representing a “state of mind” and “independence” invoking the institutional forms that assure impartiality. *R. v. Valente*, [1985] 2 S.C.R. 673 at para. 15; see also *Gillies v. Secretary of State for Work and Pensions* [2006] 1 All E.R. 731 at para. 38 (Baroness Hale). In this article, I take “impartiality” to embrace both the personal and institutional dimensions.

⁵¹ See Kathryn Murphy and Anita Traninger, *Introduction: Instances of Impartiality*, in THE EMERGENCE OF IMPARTIALITY 1, 5–6, 20 (Kathryn Murphy & Anita Traninger eds., 2013).

⁵² See Matthew Liebman, *Who the Judge Ate for Breakfast: On the Limits of Creativity in Animal Law and the Redeeming Power of Powerlessness*, 18 ANIMAL L. 133 (2011).

⁵³ See Eisen, *supra* note 41, at 950 (“Human efforts to determine the legal and regulatory strategies that best advance the interests of animals are plagued by

The second of these values, accountability, connotes “legal oversight of public power.”⁵⁴ While accountability might embrace a broad array of values and institutions, I mean here to invoke a relatively narrow meaning: that public actors might be called upon to justify their decisions, that their justifications may be subject to review, and that there may be consequences for failed justification.⁵⁵ The principle that exercises of public power must be held to account is essential to democracy and the rule of law.⁵⁶ It is also critical to animal protection. To the extent that animal protection depends upon the oversight of human advocates for animal interests, those human advocates must have access to legal mechanisms by which to challenge decisions respecting standards of animal use and care.

Transparency is a third public law value that is critical for both animal protection and democratic governance more broadly.⁵⁷ Transparency refers to the ability of “external stakeholders to monitor the internal workings of an organization.”⁵⁸ While transparency may have costs and “trade-offs” in terms of efficiency and other values, it is generally accepted that “at very low levels of transparency, more transparency is likely to be beneficial” for good governance.⁵⁹ With respect to animal protection, transparency

conflicts of interest, and these conflicts are exacerbated when enforcement agencies lack independence from the industries they regulate.”)

⁵⁴ CRAIG FORCESE, ADAM DODEK, PHILIP BRYDEN, RICHARD HAIGH, MARY LISTON & CONSTANCE MACINTOSH, *PUBLIC LAW: CASES, COMMENTARY, AND ANALYSIS* 12 (4th ed., 2020). Such “legal oversight” (for example, by judges and administrative tribunals) is distinguishable from “political oversight” (achieved, for example, through periodic elections). *Id.* at 10–14. *See generally* THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY (Mark Bovens, Robert E. Goodin & Thomas Schillemans eds., 2014) (offering an introduction to scholarship on accountability as a legal and political value).

⁵⁵ Mark Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, 13 *EURO. L.J.* 447 (2007) (setting out the definition of accountability on which I rely here).

⁵⁶ Forcese et al., *supra* note 54, at 10. *See also* Mark E. Warren, *Accountability and Democracy*, in THE OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 39 (Mark Bovens, Robert E. Goodin & Thomas Schillemans eds., 2014).

⁵⁷ *See* Anoeska Buijze, *The Six Faces of Transparency*, 9 *UTRECHT L. REV.* 3, 5 (2013).

⁵⁸ Scott Douglas & Albert Meijer, *Transparency and Public Value—Analyzing the Transparency Practices and Value Creation of Public Utilities*, 39 *INT’L J. PUB. ADMIN.* 940, 940 (2016).

⁵⁹ David Heald, *Transparency as an Instrumental Value*, in *TRANSPARENCY: THE KEY TO BETTER GOVERNANCE?* 59, 59 (Christopher Hood & David Heald eds., 2006); *see also* Paul Daly, *Administrative Law: A Values-based Approach*, in *PUBLIC LAW ADJUDICATION IN COMMON LAW SYSTEMS: PROCESS AND SUBSTANCE* 23 (John Bell, Mark Elliott, Jason N.E. Varuhas & Philip Murray eds., 2016) (identifying transparency as “an important legal value”).

(respecting both the conditions of animals' lives and the processes by which those conditions are regulated) is necessary to minimize the risk of political erasure arising from animals' exclusion from traditional modes of legal engagement.⁶⁰ Because animals cannot advocate for themselves under current legal arrangements, human advocates for animal interests must have some minimal access to information in order to hold decision-makers accountable and assure adequate substantive protection.⁶¹

Commitments to impartiality, transparency, and accountability thus take on a special significance in the animal protection context. These values, however, are generally only cognizable as legal commitments where public authority is recognized as operative.⁶² Yet, despite the practical significance of public law values to effective animal protection, regulatory regimes in Canada and the United States often depend on privatized standard-setting, concealing public responsibility and minimizing or erasing the application of public law values.

IV. The Public and the Private In Dairy Governance

Across Canada and the United States, a variety of regulatory regimes govern the protection of farmed animals. This Part offers a survey of these governance approaches, organized according to a rough spectrum of legal forms, ranging from the most public (i.e., primary legislation) to the most private (i.e., unencumbered individual producer choice). As this survey will demonstrate, however, this neat organizational structure belies the messy interplay between public and private authority that in fact characterizes this

⁶⁰ See Eisen, *supra* note 41, at 951; Eisen, *supra* note 49.

⁶¹ See Albert Meijer, *Transparency*, in OXFORD HANDBOOK OF PUBLIC ACCOUNTABILITY 507 (Mark Bovens, Robert E. Goodin & Thomas Schillemans eds., 2014) (examining the relationship between transparency and accountability).

⁶² It is, of course, possible for private parties to bind themselves to such principles through private contractual obligations. The U.S. National Dairy FARM program and the Dairy Farmers of Canada ProAction Initiative are examples of this form of commitment respecting dairy cattle welfare. See Katelyn E. Mills, Katherine E. Koralesky, Daniel M. Weary & Marina A. G. von Keyserlingk, *Dairy Farmer Advising in Relation to the Development of Standard Operating Procedures*, 103 J. DAIRY SCI. 11524, 11524 (2020). Such mechanisms have become matters of increasing interest in the fields of international and comparative administrative law. See, e.g., Laura A. Dickinson, *Public Law Values in a Privatized World*, 31 YALE L.J. 383 (2006). This article has focused on standard-setting with a connection, however tenuous, to generalized legal requirements. The role of voluntary or contractual standard-setting by commodity producer associations represents a distinct but equally fascinating case study into agricultural industry self-regulation.

field of law. On closer examination, it becomes apparent that even the most ostensibly public forms of governance are structured to give substantial standard-setting power to animal use industries. This privatization of governing authority comes at the expense of public law values that are required for effective animal protection.

Various legal forms are employed to confer standard-setting authority on dairy producers. In some jurisdictions, this is achieved through judicial or statutory deference to the aggregate choices of individual producers, expressed as affirmative permission to engage in “customary farming practices.”⁶³ In other jurisdictions, private bodies comprised largely of producers and their representatives are directly or indirectly empowered to set standards for permissible conduct. The following subsections will detail these various regulatory forms. The final subsection of this Part will summarize the substantial role that private parties play across these animal protection regimes, and the threat that this privatized governance poses to public law values such as transparency, impartiality and accountability.

A. Primary Legislation

One governance tool employed to protect farmed animals is primary legislation. Farmed animal protection laws are passed either through ordinary legislative processes (i.e., by elected representatives) or through direct popular referenda in states where such lawmaking processes exist.⁶⁴ Respecting primary legislation, the connection to public law values and processes is, in principle, relatively clear: legislators are broadly accountable to the electorate (not just to any single interest group), and their laws and legislative processes are relatively transparent by constitutional design.⁶⁵ Yet, as we will see, legislative provisions protecting farmed animals often grant significant *de facto* or *de jure* authority to private actors to determine the substance of the standards imposed.

⁶³ Wolfson & Sullivan *supra* note 1, at 212.

⁶⁴ See ANIMAL WELFARE INSTITUTE, LEGAL PROTECTIONS FOR ANIMALS ON FARMS (2018) at 8–11.

⁶⁵ Of course, in practice, these values are often not well safeguarded. As public choice theorists, in particular, have elaborated, legislative processes are often not public, transparent or impartial at all. See Daniel A. Farber, *Public Choice Theory and Legal Institutions*, in THE OXFORD HANDBOOK OF LAW AND ECONOMICS, VOL. 1: METHODOLOGY AND CONCEPTS (Francesco Parisi ed., 2017). Nonetheless, the basic institutions of democratic governance are present, and legislation is among the most undeniably public forms of standard-setting.

Legislation restricting specific animal use practices on farms are exceedingly rare in Canada and the United States.⁶⁶ Respecting dairy cattle, these are limited to legislative prohibitions on routine tail docking in California⁶⁷ and Rhode Island.⁶⁸ In all other US states, and in Canada, the use of primary legislation to protect animals on farms is limited to broadly framed provisions, for example prohibiting “cruelty” or the causing of “distress” (collectively referred to here as “anti-cruelty statutes”).⁶⁹ In Canada, these include both federal criminal prohibitions on cruelty toward animals⁷⁰ and provincial quasi-criminal cruelty prohibitions.⁷¹ In the United States,

⁶⁶ See ANIMAL WELFARE INSTITUTE, *supra* note 64, at 3, 8–11. Note that the present analysis is restricted to the legal treatment of animals *on farms*. More detailed legislative and regulatory constraints apply with respect to transport and slaughter in both jurisdictions. In Canada, see Health of Animals Act, S.C. 1990, c 21 and Health of Animals Regulations, C.R.C., c 296 (regarding transport); Safe Food for Canadians Act, S.C. 2012, c 24 and Safe Food for Canadians Regulation, S.O.R./2018-108 (regarding slaughter). In the United States, see Twenty-Eight Hour Law, 49 U.S.C. § 80502 (1994) (regarding transport); Humane Methods of Slaughter Act, 7 U.S.C. § 1901 (1958) and Humane Slaughter of Livestock Regulations, 9 C.F.R. 313 (1987) (regarding slaughter). For commentary on these regimes, see Vaughan Black, *Traffic Tickets on the Last Ride*, in CANADIAN PERSPECTIVES ON ANIMALS AND THE LAW 57, 57–68, 73–79 (Peter Sankoff, Vaughan Black & Katie Sykes eds., 2015); Sophie Gaillard & Peter Sankoff, *Bringing Animal Abusers to Justice Independently: Private Prosecutions and the Enforcement of Canadian Animal Protection Legislation*, in CANADIAN PERSPECTIVES ON ANIMALS AND THE LAW 307, 313–14 (Peter Sankoff, Vaughan Black & Katie Sykes eds., 2015) (arguing that private prosecutions might also be brought under these statutes); Wolfson & Sullivan *supra* note 1, at 207–209.

⁶⁷ CAL. PENAL CODE § 597n (West 2010).

⁶⁸ 4 R.I. GEN. LAWS ANN. § 4-1-6.1 (West 2012). In addition, there are some legislated protections respecting the tethering and confinement of calves, though this more commonly impacts the related veal industry. See generally ANIMAL WELFARE INSTITUTE, *supra* note 64, at 9, 11.

⁶⁹ See ANIMAL WELFARE INSTITUTE, *supra* note 64, at 2; LESLI BISGOULD, ANIMALS AND THE LAW 57–123 (2011). As discussed above, both jurisdictions include further regulatory oversight once animals have left the farm, during transport and slaughter. See *supra* note 66.

⁷⁰ In Canada, criminal law is the exclusive jurisdiction of the federal government. Constitution Act, 1867, 30 & 31 Vict., c 3, § 91(27). The Criminal Code of Canada sets out a number of offences respecting the treatment of animals, including a general prohibition against causing unnecessary pain, suffering or injury to an animal. Criminal Code of Canada, R.S.C. 1985, c C-46, § 445.1(a).

⁷¹ Provincial governments in Canada are authorized to make law in respect of property and civil rights. Constitution Act, 1867, 30 & 31 Vict., c 3, § 92(14). Provincial authority to govern the treatment of animals is generally grounded in this power, as animals are legally classified as property. For a survey and discussion of Canadian provincial anti-cruelty laws, see BISGOULD, *supra* note 69, at 97-123.

these take the form of state-level criminal anti-cruelty laws.⁷² These general anti-cruelty statutes are often structured to exempt common agricultural practices from their purview—an exemption that has given industry actors a central role in defining the substance of the governing legal standards.

In Canada, the classic case establishing the exemption of common agricultural practices from criminal cruelty prohibitions is *Pacific Meat*.⁷³ In that case, the British Columbia County Court was called upon to construe a federal Criminal Code provision making it a criminal offence to “wilfully cause[] or, being the owner, wilfully permit[] to be caused unnecessary pain, suffering or injury to an animal or bird.”⁷⁴ At issue in that case was whether a method of slaughtering pigs—in which conscious pigs were hoisted by the leg, slammed into a wall and then stuck with a knife—caused pain, suffering or injury that was “unnecessary” and so prohibited by the criminal law.⁷⁵ The court held that, while this conduct might constitute criminal cruelty outside the slaughterhouse context, in the present case there was no “unnecessary” suffering given the “necessity of slaughtering hogs to provide food for mankind.”⁷⁶ Although the Crown adduced evidence of less-painful slaughter methods, the court was not prepared to accept that this made the method at issue “unnecessary.”⁷⁷ In particular, the court was persuaded by the fact that all other slaughter houses in Canada, and several U.S. slaughterhouses employed this same method.⁷⁸

⁷² See Wolfson & Sullivan, *supra* note 1, at 208–09. In the United States, criminal law is generally determined at the state level, rather than by the federal government.

⁷³ *Regina v. Pacific Meat Co.*, [1957] B.C.J. No. 98, para. 14 (B.C. Cty. Ct.).

⁷⁴ Criminal Code of Canada, 1953-54, c 51, § 387(1)(a). That provision has since been replaced by the identically phrased Criminal Code of Canada, R.S.C. 1985, c C-46, § 445.1(a).

⁷⁵ See *Pacific Meat*, [1957] B.C.J. at para. 1–4.

⁷⁶ *Id.* at para. 14.

⁷⁷ *Id.*

⁷⁸ *Id.* at para. 10. The court, on the evidence, was not prepared to find that these alternative methods were, in fact, less painful. *Id.* Nonetheless, the case has come to stand for the proposition that courts ought to defer to common industry practice in defining the scope of the criminal prohibition at issue. See Sykes, *supra* note 26, at 33, 38 (explaining that “an interpretation of the animal cruelty offence has . . . become entrenched whereby almost anything done to animals as part of the business of producing animal food is exempt from the *Code*’s application,” though disputing the doctrinal basis for this interpretation); see BISGOULD, *supra* note 69, at 71 (explaining that prevailing interpretations of the Criminal Code include a “*de facto* exemption” for farmed animals).

Since *Pacific Meat*, the Criminal Code has not generally been applied in prosecutions of agricultural operations.⁷⁹ Instead, prosecutions for cruelty tend to proceed under provincial quasi-criminal anti-cruelty statutes.⁸⁰ Even with respect to proceedings brought under these provincial statutes, however, the *Pacific Meat* protection of common industry practice (sometimes referred to as the “implicit farming exemption”⁸¹) has continued to operate. In many cases, such exemptions are reflected in the text of provincial anti-cruelty statutes.⁸² For example, the Ontario Society for the Prevention of Cruelty to Animals Act establishes that “[n]o person shall cause an animal to be in distress,” but then goes on to specify that this prohibition does not apply to “an activity carried out in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry.”⁸³ Similar exemptions for common agricultural practices exist in Alberta,⁸⁴

⁷⁹ See Maneesha Deckha, *Initiating a Non-Anthropocentric Jurisprudence: The Rule of Law and Animal Vulnerability under a Property Paradigm*, 50 ALBERTA L. REV. 783, 806 n. 152 (2013); Sykes, *supra* note 26, at 34–35, 40–41 n.36, 49 (explaining that the Criminal Code provision is “almost invariably” applied in cases where “pet dogs and cats” are victims of “acts of pointless sadism or spite,” with the exceptional application of the provision to farmed animals occurring only in respect of farms that have “stopped functioning as a farm” due to financial ruin); BISGOULD, *supra* note 69, at 74 (reporting that the “criminal law has not generally been invoked in the context of the actual practices by which animals are used,” including in agriculture, and that “much deference is given to those in industry to know best how to handle their animal property”); Gaillard & Sankoff, *supra* note 66, at 318 (discussing the reluctance of prosecutors to bring criminal charges against agricultural operations).

⁸⁰ Gaillard & Sankoff, *supra* note 66, at 318–319 (explaining that “public prosecutors have shown an unwillingness” to lay charges under federal criminal anti-cruelty laws, preferring to proceed under provincial quasi-criminal offences “even in cases of extreme mistreatment”); Peter Sankoff, *Canada’s Experiment with Industry Self-Regulation in Agriculture: Radical Innovation or Means of Insulation*, 5 CANADIAN J. COMPARATIVE & CONTEMPORARY L. 1, 10 n.19 (2019) (observing that, following an undercover investigation of a dairy in Chilliwack, British Columbia, “[n]otwithstanding what seemed like a clear case of criminal level abuse, the workers were only charged and convicted of provincial offences”).

⁸¹ Sykes, *supra* note 26, at 33.

⁸² See Hughes and Meyer, *supra* note 26, at 63.

⁸³ Ontario Society for the Prevention of Cruelty to Animals Act, R.S.O. 1990, c O.36, §§ 11.2(1), 11.2(6)(c). In theory, the term “reasonable” could be interpreted to carry a meaning independent of “generally accepted,” but in practice courts have construed these terms together as providing a blanket exemption for common agricultural practices. See Sankoff, *supra* note 80, at 13–14.

⁸⁴ Animal Protection Act, R.S.A. 2000, c A-41, §§ 2(1)(1.1), 2(1)(2) (providing that “[n]o person shall cause an animal to be in distress,” then specifying that “[t]his section does not apply if the distress results from an activity carried on in accordance with. . . reasonable and generally accepted practices of animal care, management, husbandry . . . or slaughter”).

British Columbia,⁸⁵ Nova Scotia,⁸⁶ and Quebec.⁸⁷ Consequently, the aggregate choices of individual producers become part of the law—defining through common use which practices are immune from prosecution regardless of how harmful they may be to animals.

In the United States, a similar picture emerges: general anti-cruelty statutes have been drafted or construed to exempt common agricultural practices. As a result, the collective private choices of individual producers effectively become legal standards. In their critique of farmed animal protection in the United States, David Wolfson and Mariann Sullivan describe this dynamic as it arose in the case of *Commonwealth v. Barnes*:⁸⁸

In Pennsylvania, individuals accused of starving horses argued that the practice of denying nutrition to horses who were no longer wanted and were to be sold for meat was a “normal agricultural operation” Such horses, the defendants argued, are commonly denied veterinary care and sufficient nutrition, and are placed in so-called killer pens While the court did convict the defendants of cruelty, it decided to do so only because the defendants failed to offer sufficient testimony as to the pervasiveness of the practice, and no testimony [that they were in fact raising the horses for meat].

The case highlights the ramifications of the exclusion of customary farming practices from criminal anticruelty statutes The defendants’

⁸⁵ Prevention of Cruelty to Animals Act, R.S.B.C. 1996, c 372, § 24.02(c) (providing that “[a] person must not be convicted of an offence under this Act in relation to an animal in distress if . . . the distress results from an activity that is carried out in accordance with reasonable and generally accepted practices of animal management . . .”). Note that British Columbia has additionally incorporated the NFACC Codes into its legislative scheme. See Animal Care Codes of Practice Regulation, B.C. Reg. 34/2019, § 4; see also *infra* note 142 and accompanying text.

⁸⁶ Animal Protection Act, S.N.S. 2008, c 33, §§ 21(1), 21(4) (establishing that “[n]o person shall cause an animal to be in distress,” then specifying that this prohibition does not apply “if the distress, pain suffering or injury results from an activity carried on . . . in accordance with reasonable and generally accepted practices of animal management, husbandry or slaughter”).

⁸⁷ Animal Welfare and Safety Act, C.Q.L.R., c B-3.1, §§ 6, 7 (establishing that “[a] person may not, by an act or omission, cause an animal to be in distress,” then stating that this prohibition does not apply in respect of “agricultural activities . . . carried on in accordance with generally recognized rules”).

⁸⁸ 629 A.2d 123 (Pa. Super. Ct. 1993).

problem was not that they starved horses, but that they could not prove that enough people were doing the same thing.⁸⁹

Since the time of Wolfson and Sullivan's writing, the practice of codifying explicit customary agricultural practice exemptions has only expanded in the United States.⁹⁰ As a result, primary legislation, despite its formal anchoring in public law, places significant authority to set legal standards in the hands of private actors.

B. Regulation and Delegated Legislation

Regulations, or “delegated legislation,” represent another public law tool governing the lives of farmed animals. Regulations arise where primary legislation has expressly delegated to an agency or public body the authority to set precise regulatory standards. The formal role of public law standards and values remains relatively clear in cases of regulation or delegated legislation. Under such arrangements, public bodies are bound by enabling legislation, which is in turn passed through democratic means. Although the shape and content of public engagement respecting rule-making and standard-setting differs significantly between Canada and the United States, both jurisdictions include some basic procedural requirements that are followed in the creation of regulations, and some minimal opportunities for judicial and appellate review through which citizens might hold public actors accountable to their statutory grants of authority.⁹¹

As is the case with primary legislation in both Canada and the United States, regulatory prohibitions respecting specific farmed animal use practices are extremely rare. In Canada, provincial farmed animal protection regulations are either highly general in form or explicitly import standards set by non-governmental entities

⁸⁹ Wolfson & Sullivan, *supra* note 1, at 214–215.

⁹⁰ See JUSTIN MARCEAU, *BEYOND CAGES: ANIMAL LAW AND CRIMINAL PUNISHMENT* 98–110 (2019) (surveying common agricultural practice exemptions in the United States and explaining that, “[i]f a practice becomes generally accepted or customary, no matter how cruel, it cannot, as a matter of law, serve as the basis for an animal cruelty prosecution in forty states”).

⁹¹ For a discussion of regulatory oversight in Canada, see Linda Reid, *Oversight of Regulations by Parliamentarians*, 33 *CANADIAN PARLIAMENTARY REV.* 7, 7–10 (2010); Lorne Neudorf, *Rule by Regulation: Revitalizing Parliament's Supervisory Role in the Making of Subordinate Legislation*, 39 *CANADIAN PARLIAMENTARY REV.* 29, 29–31 (2016). For a discussion of ‘rulemaking’ in U.S. administrative law, including a discussion of differences from select parliamentary systems, see PETER CANE, *CONTROLLING ADMINISTRATIVE POWER: AN HISTORICAL COMPARISON* ch. 8 (2016).

(as discussed in the following subsection). In the United States, however, a small minority of states have delegated law-making authority to a public body which has in turn established detailed regulations respecting specific agricultural practices.⁹² These rare instances of detailed regulatory protection of animal interests arguably represent the strongest importation of enforceable public law values into farmed animal protection regimes in Canada and the United States.

New Jersey's experience with detailed regulation of farmed animal protection provides a useful example. In 1996, the New Jersey Legislature amended its anti-cruelty statute to delegate standard-setting authority to the New Jersey Department of Agriculture (NJDA) and the state Board of Agriculture.⁹³ In particular, the amended statute prohibited "cruelty" toward animals while also enabling the NJDA and Board of Agriculture to establish "safe harbor" provisions that would insulate certain practices from legal action under the statute and its regulations.⁹⁴ In that context, the NJDA attempted to create, *inter alia*, a broad "safe harbor" exemption for common agricultural practices and a narrower "safe harbor" for tail docking.⁹⁵ Because the NJDA was bound by a substantive statutory mandate, to which it was accountable as a matter of public law, the regulatory process and resulting standards reflected public law values.

Consider the impact of public law values on the common agricultural practices "safe harbor."⁹⁶ First, a relatively transparent

⁹² See ANIMAL WELFARE INSTITUTE, *supra* note 64, at 3, 5, 6, 14 (discussing delegated authority to set binding standards for the protection of farmed animals in New Jersey, Alaska, Arizona and Ohio).

⁹³ N.J. STAT. ANN. § 4:22-16.1(a) (1996) ("The State Board of Agriculture and the Department of Agriculture, in consultation with the New Jersey Agricultural Experiment Station and within six months of the date of enactment of this act, shall develop and adopt, pursuant to the 'Administrative Procedure Act,' P.L.1968, c.410 (C. 52:14B-1 et seq.): (1) standards for the humane raising, keeping, care, treatment, marketing, and sale of domestic livestock; and (2) rules and regulations governing the enforcement of those standards.").

⁹⁴ N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 955 A.2d 886, 900 (N.J. 2008); see N.J. STAT. ANN. § 4:22-16.1(b) (1996) ("[T]here shall exist a presumption that the raising, keeping, care, treatment, marketing, and sale of domestic livestock in accordance with the standards developed and adopted therefor pursuant to subsection a. of this section shall not constitute a violation of any provision of this title involving alleged cruelty to, or inhumane care or treatment of, domestic livestock.").

⁹⁵ See N.J. Soc'y for Prevention of Cruelty to Animals v. N.J. Dep't of Agric., 955 A.2d 886, 903-909 (N.J. 2008).

⁹⁶ *Id.*

and accountable process was followed in the development and adoption of regulatory standards. Second, the standards themselves were subject to judicial review, creating a further layer of accountability and transparency, and introducing the courts as relatively impartial adjudicators. Third, the courts' ultimate decision respecting the safe harbor constrained the role of private producers, in part out of concern that producers' economic incentives made them ill-suited to impartial standard-setting respecting animal care.

First, the process by which regulatory standards were adopted was relatively transparent and accountable, resulting in a final regulation that was somewhat more protective of animal interests. The regulations as originally proposed had defined exempted "routine husbandry practices" broadly, as "techniques commonly employed and accepted as necessary or beneficial to raise, keep, care, treat, market, and transport livestock."⁹⁷ This would have had the effect of conferring substantive standard-setting authority on producers, essentially re-inscribing the common agricultural practice exemption found in the anti-cruelty provisions discussed in the previous subsection. In accordance with the New Jersey Administrative Procedures Act, however, this initial proposal was subject to a public comment period, in which over 6,500 written comments were received and various witnesses appeared at a public hearing.⁹⁸ Following extensive criticism of the proposed definition of "routine husbandry practices" as both vague and inclusive of inhumane practices,⁹⁹ the definition of "routine husbandry practices" was redefined in the promulgated regulation as "techniques commonly taught by veterinary schools, land grant colleges, and agricultural extension agents."¹⁰⁰ This public process therefore resulted in a regulatory definition of prohibited conduct that was a degree removed from a direct conferral of authority on the collective choices of individual producers. The process itself, moreover, was relatively transparent and accountable to the public.

Second, the standards adopted by the regulators were subject to judicial review, further demonstrating and bolstering the presence of public law values in the New Jersey scheme. The conferral of authority on "veterinary schools, land grant colleges, and agricultural extension agents" to define acceptable "routine husbandry practices," although narrower than the initially proposed definition,

⁹⁷ 35 N.J. Reg. 1877 (May 5, 2003).

⁹⁸ 36 N.J. Reg. 2586(a) (June 7, 2004).

⁹⁹ *Society for Prevention of Cruelty to Animals*, 955 A.2d at 905.

¹⁰⁰ *Id.* at 904.

was nonetheless challenged in judicial review proceedings.¹⁰¹ The petitioners, including several animal advocacy groups, argued that the safe harbor provisions for routine husbandry practices impermissibly delegated authority to private parties (in particular, veterinary schools, land grant colleges and agricultural extension agents), despite the legislative mandate that the NJDA and Board of Agriculture were to determine the content of the “humane” practices that would be authorized by the regulations.¹⁰² In arguing that the regulations impermissibly delegated standard-setting authority to these private parties, the petitioners noted that there was no evidence that the NJDA scrutinized these entities, individually or as a whole, for example through independent assessment of their texts, curricula, course offerings or personnel.¹⁰³ The NJDA, it was argued, thus had no evidentiary basis for assuming that the practices taught by these entities were “humane,” as required by the enabling legislation, and in accordance with the NJDA’s own regulatory definition of “humane” as “marked by compassion, sympathy, and consideration for the welfare of animals.”¹⁰⁴

The New Jersey Supreme Court agreed.¹⁰⁵ The court described the regulations as “plac[ing] into the hands of this wide-ranging and ill-defined group of presumed experts the power to determine what is humane.”¹⁰⁶ The agency’s failure to conduct any substantive inquiry into the practices endorsed by these entities left the NJDA “without any basis in the record” for their apparent

¹⁰¹ *Id.* at 903–904. The legal challenge took the form of an “appeal” to the Appellate Division. *Id.* at 888. Appeals to the Appellate division may be made as of right “to review final decisions or actions of any state administrative agency or officer, and to review the validity of any rule promulgated by such agency or officer” with specified exceptions, none of which applied in this case. See N.J. CT. R. 2:2-3(a)(2). An earlier appeal, launched prior to the promulgation of the amended regulations, had been dismissed without prejudice to allow the parties to pursue the matter after the regulations had been promulgated. See *Soc’y for Prevention of Cruelty to Animals*, 955 A.2d at 917 n.6.

¹⁰² *Soc’y for Prevention of Cruelty to Animals*, 955 A.2d at 904.

¹⁰³ *Id.* at 904–05. The NJDA countered that it had in fact reviewed some such curricular materials, though the New Jersey Supreme Court concluded that this review did not take place until after the regulations had been promulgated and litigation was underway. *Id.* at 905–06.

¹⁰⁴ N.J. ADMIN. CODE § 2:8-1.2(a) (2004); see *Soc’y for Prevention of Cruelty to Animals*, 955 A.2d at 904.

¹⁰⁵ *Soc’y for Prevention of Cruelty to Animals*, 955 A.2d at 904–07. The petitioners were initially unsuccessful before the New Jersey Appellate Division. *N.J. Soc’y for Prevention of Cruelty to Animals v. N.J. Dep’t of Agric.*, No. A-6319-03T1, 2007 WL 486764, at *20 (N.J. Super. Ct. App. Div. Feb. 16, 2007).

¹⁰⁶ *Soc’y for Prevention of Cruelty to Animals*, 955 A.2d at 905.

presumption that the practices endorsed by these entities were in fact humane.¹⁰⁷

The New Jersey Supreme Court emphasized two distinct but interrelated flaws in the routine practices safe harbor exemptions: first, that they failed to follow the legislature's directive that the agency authorize only "humane" practices; and, second, that they amounted to an impermissible delegation of statutory authority.¹⁰⁸ The court observed that many other jurisdictions have adopted welfare laws that exempt routine agricultural practices,¹⁰⁹ and that the New Jersey legislature explicitly chose a different "specific goal," namely to exempt "humane," rather than merely "routine" practices.¹¹⁰ In the court's view, "[t]o suggest, as the Department's 'routine husbandry practices' definition implies, that the Legislature meant 'routine' when it said 'humane' would 'abuse the interpretive process and . . . frustrate the announced will of the people.'"¹¹¹ In other words, the public law value of accountability was engaged and, because of the regulatory structure in place, enforceable through judicial review.

Third, the public law value of impartiality was relevant to the New Jersey Supreme Court's assessment. The court was particularly troubled by the fact that the "impermissible subdelegation" in this instance transferred power to "some entities that might also be described as private interests."¹¹² Dr. Bernard E. Rollin, an expert in animal welfare, had filed an amicus brief with the court explaining that the private entities in question in fact endorsed practices on the basis of their economic productivity, rather than on the basis of compassion or concern for animal well-being.¹¹³ The New Jersey Supreme Court concluded that "there is no evidence that [the NJDA] considered the intersection between the interests of those who attended these institutions or are taught by them and those

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 906–07.

¹⁰⁹ *Id.*; see, e.g., 18 PA. CONS. STAT. ANN. § 5511(c)(3) (repealed 2015); COLO. REV. STAT. § 18-9-201.5(1). For an overview of customary agricultural practice exemptions in the United States, see Wolfson & Sullivan, *supra* note 1, at 212–16.

¹¹⁰ *Soc'y for Prevention of Cruelty to Animals*, 955 A.2d at 906.

¹¹¹ *Id.* (quoting *Serv. Armament Co. v. Hyland*, 362 A.2d 13, 17 (N.J. 1976)).

¹¹² *Soc'y for Prevention of Cruelty to Animals*, 955 A.2d at 906. The New Jersey Supreme Court relied on the established principle that agencies may not subdelegate their statutory powers unless the legislature intends that they may do so. *Id.* The court also relied on caselaw demonstrating particular skepticism of unauthorized subdelegations to interested parties. *Id.*

¹¹³ *Soc'y for Prevention of Cruelty to Animals*, 955 A.2d at 896–97, 904.

who are concerned with the welfare of animals.”¹¹⁴ The court remarked that it would have been possible for the NJDA to incorporate external standards through more deliberate reference to specific institutions that the agency determined to be reliable arbiters of “humane” treatment.¹¹⁵ As it stood though, the agency “accepted, without analysis, the practices that are taught in every veterinary school, land grant college, and agricultural extension agent not only in this state, but in the rest of the country and, it would appear, wherever they might be found around the globe . . . [although] nothing in the record suggests that all of them will meet the standard set by our Legislature.”¹¹⁶

In light of this broad, unauthorized, and unaccountable delegation of authority, the court struck down the safe harbor exemptions for routine husbandry practices as representing “arbitrary and capricious” agency action.¹¹⁷ Following this ruling, the agency passed a revised regulation, prescribing an open list of specific “science-based” sources and standards, which “may be found to be humane.”¹¹⁸ By specifically identifying particular “science-based” sources, the agency narrowed its reliance on private parties as arbiters of “humane” conduct, and assigned this role to actors defined by their supposed impartiality.¹¹⁹ Moreover, these actors’ assessments of “humane” practices no longer gave rise to definite “safe harbors,” but were instead merely persuasive (i.e. “may

¹¹⁴ *Id.* at 906.

¹¹⁵ *Id.* at 906–07.

¹¹⁶ *Id.* at 907.

¹¹⁷ *Id.*

¹¹⁸ N.J. ADMIN. CODE § 2:8-1.1(b) (2012) (establishing a presumption that “the raising, keeping, care, treatment, marketing and sale of domestic livestock” does not constitute “cruelty” or “inhumane care” where it includes practices that “may be found to be humane, based upon techniques for necessary livestock management and producers included in the following science-based sources or other sources, which may be shown to incorporate similar science-based standards,” including the Handbook of Livestock Management, (Battaglia, 4th ed., 2007), and particular publications of the Federation of Animal Science Societies, the American Veterinary Medical Association, the American Association of Equine Practitioners, the Rutgers School of Environmental and Biological Sciences, and the New Jersey Agricultural Experiment Station.

¹¹⁹ The presumed independence and impartiality of “science-based” sources is contested. *See generally* SHEILA JASANOFF, SCIENCE AT THE BAR: LAW, SCIENCE, AND TECHNOLOGY IN AMERICA (1995) (arguing that scientific and legal knowledge are interconnected and co-constituting). Nonetheless, this appeal to “science” undeniably represents an embrace of impartiality as a public law value, particularly in comparison to the prior scheme’s delegation of authority to parties with more direct financial self-interest in lax regulatory standards. *See supra* notes 112–113 and accompanying text.

be found to be humane”); the ultimate decision as to whether a practice qualified as “humane” was now more clearly in the hands of public authorities.

In addition to challenging the NJDA’s routine agricultural practice exemption, the petitioners also challenged a number of more particular safe harbor exemptions, including the “tail docking” of dairy cows.¹²⁰ The petitioners argued that the practice of tail docking was not “humane” as required by the governing statute, and so its inclusion within a safe harbor was beyond the scope of the regulator’s authority.¹²¹ The NJDA defended its decision on the basis that it had responded appropriately to concerns about animal pain raised in public comment and that there was some (albeit conflicting) evidence to support the view that tail docking might improve milk quality and udder health and reduce the spread of disease.¹²² The NJDA further noted that it does in fact “discourage[]” tail docking, and intends to monitor the practice with the possibility of banning it in the future if it later concludes the practice to be “inhumane.”¹²³ The NJDA was thus required in the course of judicial review proceedings to account for both its decision-making process and its ultimate choice as a regulator. Such transparency and accountability exceed that required of producers empowered to set standards through the common agricultural practice exemptions to anti-cruelty legislation, as discussed in the previous subsection.

Ultimately, the New Jersey Supreme Court rejected the NJDA’s arguments. The reviewing court recognized the “considerable expertise that the [NJDA] brought to bear in reaching its decision to include tail docking within its list of permitted practices,” and the very high standard of review that applies to agency decisions of this kind.¹²⁴ Nonetheless, the court concluded that the decision to list routine tail docking as a permissible (i.e. “humane”) practice was “both arbitrary and capricious,” and so outside the scope of the regulator’s authority.¹²⁵ The court was swayed not only by the evidence of the pain and suffering caused by the practice, but also by the fact that both the American Veterinary Medical Association and the Canadian Veterinary Medical Association have “specifically disparaged” the practice “as having

¹²⁰ *Soc’y for Prevention of Cruelty to Animals*, 955 A.2d at 908.

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 908–09.

¹²⁴ *Id.*

¹²⁵ *Id.*

no benefit and as leading to distress.”¹²⁶ The ambiguity of the evidence of any benefit associated with routine tail docking, and the fact that the practice was “discourage[d]” by the NJDA, supported the court’s finding that shielding tail docking from penalty was contrary to the statutory mandate.¹²⁷ The statutory directive that the agency must define “humane” practices required that decisions respecting tail docking not be left to the “individual conscience of each dairy farmer.”¹²⁸ Further to this judicial ruling, the governing regulation was modified to provide that tail docking of cattle be permitted only in individual cases (i.e. not as a routine matter), and “only upon determination by a veterinarian for individual animals.”¹²⁹ Again, we see that the regulator was required to be transparent about its reasons for setting particular standards, and was accountable to an impartial judiciary. This public law oversight, moreover, substantively elevated the governing standards for the care of dairy cattle.

New Jersey’s experience of regulation and review is highly unusual in the context of farmed animal protection in Canada and the United States, representing a relatively remarkable level of protection for public law values. It is not my intention to suggest that dairy cows in New Jersey have good lives, or that the legal regime governing producers in that state is acceptable. It is important to emphasize that dairy industries across Canadian and U.S. jurisdictions are characterized by extensive social and physical control of animals.¹³⁰ The NJDA and reviewing court were each engaged in welfare balancing wherein considerable attention was given to whether impugned practices were in fact useful to dairy production.¹³¹ Tail docking was ultimately impermissible as a routine practice because there was no persuasive evidence that it benefited dairying.¹³² Harmful practices that are perceived as necessary to industrial dairying—most notably calf separation—are not disrupted or even threatened by the New Jersey scheme.¹³³ While public law values are necessary for effective farmed animal

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ N.J. ADMIN. CODE § 2:8-2.6(f) (2012); see ANIMAL WELFARE INSTITUTE, *supra* note 64, at 3.

¹³⁰ See *supra* Part II.

¹³¹ See *supra* notes 126-127 and accompanying text.

¹³² See *supra* notes 126-127 and accompanying text.

¹³³ For a discussion of calf separation, see *supra* notes 19-20 and accompanying text.

protection, they are certainly not sufficient, especially absent substantial democratic commitment to animal interests.¹³⁴

Nonetheless, the presence of public law values—impartiality, transparency and accountability—are remarkable in this scheme relative to other forms of farmed animal protection across Canada and the United States. Concerned citizens in New Jersey believed that a regulatory body was failing to adhere to its statutory mandate in defining “humane” practices. These citizens were able to file suit, bring evidence, and convince a reviewing court that it was “arbitrary and capricious” to conclude that routine tail docking was “humane,” and that it was similarly “arbitrary and capricious” to assume that the practices endorsed by “veterinary schools, land grant colleges, and agricultural extension agents” ought to be trusted as necessarily “humane.”¹³⁵ The litigation and ensuing judicial reasons engaged with themes of bias, transparency, adequacy of reasons, and substantive conformity with legal requirements. In short, the governing regime was legible as an operation of public power, and, as such, public law values were understood by all involved to be both relevant and operative.

C. Private or Quasi-Private Standards

Canada’s National Farm Animal Care Council (NFACC) represents a step further along the rough public-to-private spectrum of farmed animal protection tools: formal but private (or quasi-private) standard-setting bodies. Such bodies may be recognized through statute, regulation or judicial assessment as setting persuasive or authoritative standards for animal care. But these bodies themselves are not legally bound to public law values. As the NFACC case study demonstrates, such entities may choose to adopt processes that have elements of transparency, accountability or impartiality, but these choices are not subject to public law enforcement.

NFACC is wholly funded by government, but not created or constrained by statute or regulations.¹³⁶ NFACC is comprised of

¹³⁴ See *infra* Part V. See also Eisen, *supra* note 49 (arguing that democratic engagement is necessary to enforcing and strengthening animal protection standards).

¹³⁵ See *Soc’y for Prevention of Cruelty to Animals*, 955 A.2d at 903–07.

¹³⁶ See Sankoff, *supra* note 80, at 17 (“From the start, the endeavour has been funded by Agriculture Canada, a federal agency, though the government has no voting seat at the table, and no official role in the direction of the coalition. It funds the project and has observer status – nothing more. Other provincial

commodity producers (including Dairy Farmers of Canada, Dairy Processors Association of Canada, and Dairy Farmers of Ontario), animal protection groups, the Canadian Veterinary Medical Association, and other interested parties, including restaurants and retailers, and manufacturers of animal feed.¹³⁷ The primary function of NFACC is the development of “Codes of Practice” (Codes) setting out guidelines for the care of farmed animals.¹³⁸

Although NFACC Codes use some language suggestive of legal compulsion (i.e. “standards” and “requirements”),¹³⁹ the Codes have no independent legal force.¹⁴⁰ Their juridical role varies from province to province depending on the extent, if any, of legislative incorporation. In some provinces, where no legislative or regulatory reference is made to the Codes, they may be relied upon by courts as evidence of the “reasonable and generally accepted” practices that are routinely exempted from the ordinary operation of anti-cruelty statutes.¹⁴¹ In other provinces, the Codes are referentially incorporated to provide “safe harbors,” such that compliance with the Codes constitutes an absolute defense to a cruelty prosecution.¹⁴² The Codes are not generally incorporated as establishing mandatory regulatory standards, although such incorporation is certainly possible.¹⁴³

agriculture ministries have also been involved, though government agencies are not permitted to vote on NFACC matters.”).

¹³⁷ *Id.* at 16–17.

¹³⁸ *See id.* at 18.

¹³⁹ *Id.* at 18, 32–33, 48–49; *see also Implementing Codes of Practice*, NFACC.CA (2013), http://www.nfacc.ca/resources/assessment/animal_care_assessment_framework.pdf.

¹⁴⁰ Sankoff, *supra* note 80, at 18–19.

¹⁴¹ *See* Sankoff, *supra* note 84, at 35, 37 n.122 (discussing *R. v. Dondale*, 2017 SKPC 58 as a case in which “failing to follow the code of practice, in conjunction with other evidence, established that the animals were in distress for the purposes of the Act”); *id.* at 35 n.118 (discussing *R. v. Kowalik*, 2010 SKPC 58 and *R. v. Tomalin*, 2011 NBPC 29 as cases that demonstrate that courts are strongly influenced by NFACC Codes). *But see id.* at 35 n.118 (discussing *R. v. Van Dongen*, 2004 BCPC 479 and *R. v. Hurley*, 2017 ONCJ 263 as emphasizing NFACC compliance is neither mandatory nor determinative of compliance with the law).

¹⁴² *See* Sankoff, *supra* note 80, at 19; *see, e.g.*, Animal Care Codes of Practice Regulation, B.C. Reg. 34/2019, § 4 (establishing that “the requirements and recommendations contained in a [listed] code of practice [including the 2009 NFACC Code of Practice for the Care and Handling of Dairy Cattle] are recognized as reasonable and generally accepted” for the purposes of the statutory customary agricultural practices exemption).

¹⁴³ *See* Sankoff, *supra* note 80, at 20. For examples of mandatory incorporation of Codes, *see* Animal Protection Standards Regulations, Nfld. Reg. 36/12, §§ 2(2) &

The NFACC “Code development process” sets out a number of procedural and substantive requirements for Codes.¹⁴⁴ These include, for example, that Codes “should meet or exceed [World Organisation for Animal Health] standards,” should be based on “the best available science and other acceptable knowledge sources,” and, wherever possible, should include reasons for standards imposed.¹⁴⁵ The Code process is initiated by commodity groups themselves, for example the Dairy Farmers of Canada.¹⁴⁶ An expert scientific report is first prepared, setting out major animal welfare concerns in a given industry.¹⁴⁷ A draft Code is then developed by a Code Committee with a specified composition, and made available for a 60-day public consultation period.¹⁴⁸ If that process is “appropriately followed,” the NFACC Executive “will support the Code,” and a final Code will be issued.¹⁴⁹ There is, however, no mechanism by which to hold the NFACC process accountable to these requirements, through judicial review or otherwise.¹⁵⁰

NFACC’s treatment of calf separation and tail docking demonstrate the limits of this regulatory model. First, the Code’s approach to tail docking illustrates the weakness of Code “requirements.” Second, the Code’s approach to calf separation demonstrates the strength of producer interests in defining Codes that

5 (establishing that a “code or standard adopted in these regulations may be considered a requirement” where the code contains mandatory language, and “adopt[ing]” aspects of the NFACC *Code of Practice for the Care and Handling of Dairy Cattle*); Animal Welfare Regulations, P.E.I. Reg. EC194/17, § 26, sched. B (requiring out that “[e]very owner of a commercial animal shall comply with the codes of practice listed in Schedule B,” including the *Code of Practice for the Care and Handling of Dairy Cattle*). NFACC specifies that Code requirements “may be enforceable under federal and provincial legislation” and that producers “may be compelled by industry associations to undertake corrective measures or risk a loss of market options.” *Codes of Practice for the Care and Handling of Farm Animals*, NFACC.CA (2020), <https://www.nfacc.ca/code-development-process>. Such possible incorporation into legislative or voluntary standards are, however, not intrinsic to the Codes themselves. See Sankoff, *supra* note 84, at 23.
¹⁴⁴ *Development Process for Codes of Practice for the Care and Handling of Farm Animals*, NFACC.CA (2020), <https://www.nfacc.ca/code-development-process> [hereinafter *Development Process for Codes*]; see also Sankoff, *supra* note 80, at 22–23.

¹⁴⁵ *Development Process for Codes*, *supra* note 144.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ See Sankoff, *supra* note 80 at 4–5 (observing that NFACC is “a major player on the Canadian law-making scene” despite “an organizational framework that lacks many of the traditional checks and balances of a legislative body, and the fact that what the group produces is not actually law, in the strict sense of the word”).

prioritize industry imperatives over animal well-being—and the absence of protection for public law values in spite of this predictable outcome.

The Dairy Code of Practice (2009) takes preambular note of the lack of evidence supporting tail docking as a hygiene measure, and the research demonstrating that “[d]ocked heifers show signs of chronic pain,” among other possible complications.¹⁵¹ The Code sets out as a “requirement” that “[d]airy cattle must not be tail docked unless medically necessary,”¹⁵² and sets out a number of alternative “recommended best practices,” including “switch trimming” (i.e. trimming the hair on cows’ tails) and maintenance of a clean housing environment.¹⁵³ As noted above, however, the language of “requirement” should not be taken to define a mandatory legal standard in the absence of formal incorporation into a provincial regulation.¹⁵⁴ The Code’s use of the word “requirement” carries no independent legal force.¹⁵⁵

The Dairy Code of Practice further acknowledges calf separation as a source of “stress,” but does not provide for any “requirements” in relation to this practice.¹⁵⁶ The Code’s preambular statement on “Calves” explains:

Generally, dairy calves are separated from their mothers shortly after birth. There are benefits to both calf and dam by allowing the pair to bond. Allowing the calf to spend a longer period of time with the dam may result in lowered morbidity and mortality in the calf; however, separation stress to both the cow and calf will be higher the longer they are together. Cow health is generally improved by allowing the calf to suckle (related to oxytocin effects on the post partum uterus). Whether the calf is removed immediately or allowed to suckle the cow, it is important to ensure that the calf receives adequate colostrum.¹⁵⁷

¹⁵¹ *Code of Practice for the Handling of Dairy Cattle*, NFACC.CA § 4.6 (2009), <https://www.nfacc.ca/codes-of-practice/dairy-cattle/code#Section4> [hereinafter *Dairy Code of Practice*].

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ See *supra* notes 139–143 and accompanying text.

¹⁵⁵ See *supra* notes 139–143 and accompanying text.

¹⁵⁶ *Dairy Code of Practice*, *supra* note 151, at § 3.8.

¹⁵⁷ *Id.* (citations omitted).

The “recommended” practices that follow include monitoring the calf for signs of illness during its early days, and the recommendation that farmers “reduce separation distress by either removing the calf shortly after birth or by using a two-step weaning process.”¹⁵⁸

The notional (but not generally legal) force that “required” practices may have do not apply to such recommended practices.¹⁵⁹ In fact two-step weaning processes remain rare, with most dairy calves separated immediately from their mothers despite the associated “stress.”¹⁶⁰ The sole social “requirement” set out for calves is that they “have visual contact with other calves.”¹⁶¹ It is further recommended that their “motivation to suck” be satisfied with an artificial teat.¹⁶² The acknowledged scientific consensus on the stress of separation, and the lack of associated “requirements” (even in the diminished form represented by the Code), reflects the interests of producers and production imperatives in the Code process.

However, unlike under the New Jersey regime, the NFACC delegation of authority to producers is not legible as a public law concern amenable to judicial oversight. NFACC, although funded entirely by government, and created for the purpose of setting standards contemplated to have legal effect, thus represents a step away from the public law values evident in the New Jersey scheme. Because NFACC does not operate pursuant to statutory authority, it cannot be made accountable as the NJDA was in respect of its decision to allow routine tail docking. Arguments that NFACC is biased, lacks transparency, or makes unreasonable decisions are not cognizable as justiciable questions of public law. Formally, NFACC is merely a private body, making private choices, unaccountable to the mechanisms that constrain public power. This is true despite the fact that NFACC is created to, and does in fact, generate Canada’s only detailed articulation of standards for legally permissible treatment of farmed animals.¹⁶³

There is no legal basis on which to demand adherence to public law values—such as transparency, accountability and impartiality—in NFACC standard-setting. These values do,

¹⁵⁸ *Id.*

¹⁵⁹ See *supra* notes 139–143 and accompanying text.

¹⁶⁰ Emillie M. Bassi, Ellen Goddard & John R. Parkins, “*That’s the Way We’ve Always Done It*”: A Social Practice Analysis of Farm Animal Welfare in Alberta, 32 J. AGRIC. & ENVTL. ETHICS 335, 346–47 (2019).

¹⁶¹ *Dairy Code of Practice*, *supra* note 151, at § 1.1.1.

¹⁶² See *id.* at § 2.2.1.

¹⁶³ Sankoff, *supra* note 80, at 4–5.

however, arguably remain operative in an attenuated form. Because NFACC is designed to have many of the trappings of a conventional administrative body, NFACC offers some assurances of transparency, structured decision-making, and reason-giving—albeit assurances that are not subject to judicial or administrative supervision. NFACC, for example, promises to follow a specific process for developing its Codes,¹⁶⁴ binds itself to consider some kinds of evidence,¹⁶⁵ includes requirements for the composition of Code Committees,¹⁶⁶ commits to the regular review of Codes,¹⁶⁷ and publishes draft Codes for comment before ultimately making its final Codes transparently available to the public.¹⁶⁸ The fact that judicial review is unavailable, however, limits the confidence that might reasonably be placed in these voluntary processes and commitments.

D. Private Choices of Individual Actors

In the absence of express legal requirements to the contrary (which, as we have seen, are rare), individual producers may decide to dock the tails of cattle on their farms, or separate calves from their mothers, or otherwise engage in common agricultural practices despite their harm to dairy animals.¹⁶⁹ At first blush, these may appear to be purely private choices. In legal terms, we might think of these as producers' private decisions as to how to dispose of their own property. But, as we have seen, even these purest of private actions carry a law-making function in the context of animal protection as it is structured in most jurisdictions. This is because, as discussed above, almost every jurisdiction has incorporated "customary agricultural practices" as the governing legal standard for defining exemptions to criminal and quasi-criminal anti-cruelty laws—including in jurisdictions where those laws are the only ones governing the treatment of animals on farms.¹⁷⁰ In most jurisdictions, therefore, dairy producers' private, profit-seeking decisions carry a double valence for the lives of farmed animals. These private producer choices not only shape the experiences of the animals they own themselves, but they also contribute to setting the

¹⁶⁴ *Development Process for Codes*, *supra* note 144.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; see also Sankoff, *supra* note 80, at 28 (arguing that this establishment of periodic review enhances public deliberation on the legal treatment of farmed animals).

¹⁶⁸ *Development Process for Codes*, *supra* note 144.

¹⁶⁹ See *supra* Part II for a review of harmful dairy industry practices.

¹⁷⁰ See Wolfson & Sullivan, *supra* note 1, at 212–216; *supra* notes 64–90 and accompanying text.

legal standards that govern the treatment of farmed animals more generally.

Because this form of standard-setting power is so diffuse and indirect, the force of public law values is negligible. There is no expectation that individual dairy producers will be transparent with respect to how they treat their herds, let alone how they arrive at decisions respecting animal care. In fact, across jurisdictions, the proliferation of “ag gag” laws affirmatively protect producers’ ability to shield their operations from public scrutiny.¹⁷¹ There is further no expectation that they will be impartial when making choices respecting animal care. Producers are not bound, even notionally, to any public obligation to weigh competing values in setting standards for animal care. They are, instead, legally authorized and expected to maximize their own interests in dairy productivity, with their resulting choices elevated to the level of *de facto* legal standards. Finally, with no public obligations to impartiality or transparency, there are no substantive commitments to which they might be made accountable, and no mechanism for public law accountability.

E. Dairy Cow Protection and Public Law Values

The foregoing survey elaborates the various forms of legal oversight engaged by Canadian and U.S. jurisdictions to protect the interests of dairy cows. Although organized around the formality of lawmaking authority involved (beginning with legislation and ending in practice or custom), this survey has demonstrated that, in reality, there are significant interactions and overlaps between these forms of governance. These regulatory environments represent, in Jody Freeman’s terms, case studies of “regulatory regimes,” in which the classical administrative law distinction between “public” and “private” seems to blur, with private actors directly or indirectly engaged in public or quasi-public functions.¹⁷² In particular, we have seen that, across jurisdictions, the aggregate choices of individual agricultural producers have a significant impact on the substance of legal standards respecting the treatment of farmed animals.

Scholars and animal advocates have long argued that this state of affairs gives farmers effectively unrestricted control over the

¹⁷¹ See Jodi Lazare, *Ag-Gag Laws, Animal Rights Activism, and the Constitution: What is Protected Speech?* 58 ALBERTA L. REV. 83 (2020); Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317 (2015).

¹⁷² See Jody Freeman, *Private Parties, Public Functions and the New Administrative Law*, 52 ADMIN. L. REV. 813, 816–19 (2000).

lives of the animals in their care.¹⁷³ Such criticisms often emphasize that, given producers' incentives to prioritize economic efficiency over animal well-being, this amounts to putting the proverbial "foxes" in charge of the "henhouse."¹⁷⁴

I suggest here that this fox-in-charge-of-the-henhouse problem is one instance of a broader set of concerns respecting farmed animal protection: that public law values are inadequately guarded in this context. Deficits of public law values such as impartiality, transparency and accountability are particularly problematic where animals are an affected constituency. Animal experience lacks even the most basic recognition as a matter of private law.¹⁷⁵ And public law, which has so far been the sole forum for legal recognition of animal interests, is only capable of providing robust protection where animals' particular vulnerabilities are taken into account.¹⁷⁶ Animals—who do not vote or hold office or instruct counsel—are likely to have their interests protected only where interested human voters, litigators and activists have the information and legal tools necessary to assure that protection. In other words, effective animal protection is possible only in settings where decision-making is relatively impartial, transparent and accountable.¹⁷⁷

Yet despite the importance of public law values to effective animal protection, legal regulation of farmed animal use has not generally nourished these values. Exceptionally, in New Jersey, a generalized regulatory reliance on the judgments of "veterinary schools, land grant colleges, and agricultural extension agents" was justiciable, and ultimately found to be an impermissible delegation of authority to define standards of animal care, in part because of these parties' interest in the economic exploitation of animals.¹⁷⁸ But this lack of impartiality was only visible as a legal "problem" because of the structure of the particular statutory regime, the United States' more developed judicial constraints on rulemaking processes,¹⁷⁹ and because of the legislature's choice to bring animal protection out of

¹⁷³ See BISGOULD, *supra* note 69, at 173–74; Wolfson & Sullivan, *supra* note 1, at 226.

¹⁷⁴ Wolfson & Sullivan, *supra* note 1, at 212–219.

¹⁷⁵ See *supra* Part III.

¹⁷⁶ See *supra* Part III.

¹⁷⁷ See *supra* Part III.

¹⁷⁸ See *Society for Prevention of Cruelty to Animals*, 955 A.2d at 903–07; *supra* Part IV.B.

¹⁷⁹ See sources cited *supra* note 91.

the sphere of broad criminal or quasi-criminal prohibition,¹⁸⁰ and into the realm of more detailed public regulation.¹⁸¹

More commonly, standard-setting respecting the treatment and use of farmed animals is left in the hands of entities like NFACC,¹⁸² or even the aggregate choices of individual producers, who are not bound to public law values.¹⁸³ Although the NFACC process is entirely publicly funded, governments play no substantive role in establishing Code standards.¹⁸⁴ The Code development process includes many of the trappings of a regulatory process (procedural requirements, public comment periods, substantive parameters, etc.), but these ostensible requirements are not subject to oversight or enforcement through judicial review proceedings.¹⁸⁵ The resulting process is unlike a statutory delegation of legislative authority, for example to professional associations: there is no delegating statute constraining the exercise of rulemaking or standard-setting, and no judicial oversight, despite the fact that the NFACC process does, and is contemplated to, generate standards with legal force.¹⁸⁶

¹⁸⁰ See *supra* Part IV.A. For a broader critique of criminal and carceral approaches to animal protection, see generally MARCEAU, *supra* note 90.

¹⁸¹ See *supra* Part IV.B.

¹⁸² See *supra* Part IV.C.

¹⁸³ See *supra* Part IV.D.

¹⁸⁴ See *supra* Part IV.C.

¹⁸⁵ See *supra* Part IV.C. Such unenforceable methods of implementing public law values in privatized regulatory regimes have been scrutinized in administrative law scholarship. See, e.g., MICHAEL TAGGART, *THE PROVINCE OF ADMINISTRATIVE LAW* 2 (1997); Steven Bernstein, *When is Non-State Global Governance Really Governance?*, 1 UTAH L. REV. 91, 91, 93 (2010) (arguing that many forms of non-state government do not function as “meaningful governance”); Francesca Bignami, *From Expert Administration to Accountability Network: A New Paradigm for Comparative Administrative Law*, 59 AM. J. COMP. L. 859, 860–61 (2011); Cary Coglianese & Evan Mendelson, *Meta-Regulation and Self-Regulation*, in *THE OXFORD HANDBOOK OF REGULATION* 146, 146–68 (Robert Baldwin, Martin Cave & Martin Lodge eds., 2010); Freeman, *supra* note 177, at 816–19; Lesley K. McAllister, *Harnessing Private Regulation*, 3 MICH. J. ENVTL. & ADMIN. L. 291, 298–326 (2014); Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1374 (2003) (assessing whether and how private delegations might remain constitutionally accountable in the absence of judicial oversight); Jodi L. Short & Michael W. Toffel, *Making Self-Regulation More than Merely Symbolic: The Critical Role of the Legal Environment*, 55 ADMIN. SCI. QUARTERLY 361, 361 (2010) (describing conditions under which self-regulation is more or less effective, and concluding that self-regulation cannot fully replace direct legal enforcement mechanisms).

¹⁸⁶ Sankoff, *supra* note 80, at 4–5, 24 n.82 (referring to NFACC as a “body performing a government function of setting standards”).

Even more starkly, the prevalence of common agricultural practice exemptions to cruelty provisions across Canada and the United States effectively endows producers themselves with the authority to set standards of animal care.¹⁸⁷ It may be the case that these farmers are effectively defining the substance of farmed animal protection law, but they are not subject in this function to any structured public oversight whatsoever. Unlike primary legislation, these choices are not made by elected representatives. Unlike regulation, they are not legally bound to follow any substantive or procedural requirements. Unlike private or quasi-private standard-setting, there is not even a voluntary or implied commitment to embrace any public purposes whatsoever—or to articulate and defend decisions made.¹⁸⁸

In sum, standard-setting in the sphere of farmed animal protection is often left in the hands of actors who are legally welcome and expected to act in their own self-interest, rather than in the interests of animals, or in accordance with any other public-regarding interests; who are not required to explain or even publicly reveal their choices in any systematic way; and who are not generally accountable to any statute or public body. Under this common model of standard-setting in the farmed animal protection context, the operation of public law values—including transparency, accountability, and impartiality—dwindles and effectively disappears.

V. Conclusion

Dairy cows are radically vulnerable beings.¹⁸⁹ They are subject to routinized, large-scale and deeply intimate harms in every area of their lives.¹⁹⁰ Their sex, birth, and nursing are, in particular, meticulously controlled as the engines of vast economic and political machines constructed and directed by human beings.¹⁹¹ Like other farmed animals, they are particularly vulnerable to the private authority that their legal owners exercise over their lives and bodies, and to public law institutions, which they have no direct power to shape.

¹⁸⁷ See *supra* Part IV.A. and Part IV.D.

¹⁸⁸ The sole minimal exception would appear to be that some farmers may choose, on an individual basis, to bring their practices into the judicial and public-law spotlight by testifying as to their own practices in order to assist in the defence of another farmer charged with cruelty for a similar practice.

¹⁸⁹ Eisen, *supra* note 41, at 941–42; see *supra* note 47 and accompanying text.

¹⁹⁰ See *supra* Part II.

¹⁹¹ See *supra* Part II.

Meaningful legal protection of animal interests requires recognition of public law values. Impartiality, transparency, and accountability facilitate public engagement on the part of democratic and litigation constituencies beyond those who have a direct financial interest in the unencumbered exploitation of animals. Yet, as we have seen, significant regulatory and standard-setting authority across Canada and the United States has been effectively ceded to producers, with exemptions for common agricultural practices serving as only the most extreme (and most common) example. These privatized modes of standard-setting leave vanishingly little role for the public law values necessary to effective farmed animal protection.

The choice across jurisdictions to establish some veneer of constraint on industry, while at the same time allowing industry to substantially determine governing standards, raises questions. Why are farmed animals regulated in this way, despite the apparent importance of transparency, impartiality and accountability to effective protection? One possibility is that governments and democratic majorities feel a moral imperative to protect animals, but this imperative is significantly tempered by an ambivalence as to the consequences of more interventionist regulation. The price and availability of agricultural products, including perhaps especially dairy,¹⁹² is weighted heavily in the policy balance. If, however, we wish to take seriously the experiences of the animals whose lives are so thoroughly determined by their positions as farmed animals, the public law dimensions of our commitments must be more consciously and more consistently defended.

¹⁹² See Mathilde Cohen, *Of Milk and the Constitution*, 40 HARV. J. L. & GENDER 115, 119–21 (2017).