

A RETURN TO DESCARTES: PROPERTY, PROFIT, AND THE CORPORATE OWNERSHIP OF ANIMALS

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We're no different from any other business. These animal rights people like to accuse us of mistreating our stock, but we believe we can be most efficient by not being emotional. We are a business, not a humane society, and our job is to sell merchandise at a profit. It's no different from selling paper-clips, or refrigerators.**

The object of producing eggs is to make money. When we forget this objective, we have forgotten what it is all about.***

I

INTRODUCTION

The conditions for farm animals in the United States are exceedingly bad. Most of the 9.5 billion farm animals we slaughter each year¹ are not owned and raised by family farmers, as in times past, but by agribusiness corporations. Likewise, most of these animals are no longer raised on the outdoor pastures of family farms, but in large sheds known as “factory farms.”² Within these four walls, animals are subjected to overcrowding, disease, darkness, mutilation, and little-to-no human contact. Egg-laying hens are forced to live four or five to a cage the size of a folded newspaper, while pregnant sows and veal calves live in

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** JOHN ROBBINS, DIET FOR A NEW AMERICA 104 (H. J. Kramer 1998) (1987) (quoting Henry Pace, livestock auctioneer).

*** Fred C. Haley, *How I Really Feel About the Egg Business*, POULTRY TRIB., Jan. 1974, at 12.

1. See David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House, Animals, Agribusiness, and the Law: A Modern American Fable*, in ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205, 206 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (“Approximately 9.5 billion animals die annually in food production in the United States.”). According to the U.S. Department of Agriculture, the annual food slaughter in 2003 included approximately 8.5 billion broilers, 274 million turkeys, 100.9 million hogs and pigs, 36.5 million cattle and calves, and 3 million sheep and lambs. NAT’L AGRIC. STATISTICS SERV., U.S. DEP’T OF AGRIC., STATISTICAL HIGHLIGHTS OF U.S. AGRICULTURE FOR 2004 AND 2005 (2005), <http://www.usda.gov/nass/pubs/stathigh/2005/stathi.txt>.

2. See GARY L. FRANCIONE, INTRODUCTION TO ANIMAL RIGHTS: YOUR CHILD OR THE DOG? 9–10 (2000) (“Most animals used for food are bred, raised, and killed on enormous mechanized farms that specialize in one species and house hundreds and thousands of animals at a time. This practice is known as ‘factory farming.’”).

crates barely bigger than their bodies.³ Most farm animals undergo painful mutilations, often just after they are born, without the provision of pain relief.⁴ And although federal law requires that many types of animals be stunned during their slaughter, slaughterhouse workers report that it is common for animals to be slaughtered while still conscious.⁵

The seventeenth-century French philosopher René Descartes claimed that animals were no different than inanimate objects: that they could not think or feel pain.⁶ Rejection of Descartes' views on animals is nearly universal,⁷ but today's factory farms are only possible by treating animals according to Cartesian principles. Because ninety-eight percent of animals in the United States are farm animals,⁸ most of which live on factory farms, it is not a stretch to say that the United States has once again embraced Descartes' views—if not in theory, then in practice.

Given our purported rejection of Descartes' views, how did factory farms become the norm over the past fifty years? This article attributes the rise of factory farms to consumer demand for low-cost meat, eggs, and dairy, as well as animals' legal classification as property, which permits their ownership by corporations. For animals, factory farms are dreadful; for corporations and consumers, they are beneficial. The efficiencies of factory farms enable both rich and poor consumers to afford meat and corporations to profit from selling more of it. This creates a chasm between what we *say* about how animals should be treated, as sentient beings, and how we actually treat them.⁹

Recently, some corporations such as the upscale grocer Whole Foods have begun to depart from the factory-farming model in an attempt to apply principles of “corporate social responsibility” to animals. Contrary to popular

3. See *infra* notes 74–77 and accompanying text.

4. See *infra* note 92 and accompanying text.

5. See *infra* notes 97–103 and accompanying text.

6. RENÉ DESCARTES, DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY 36 (David Weissman ed., Elizabeth S. Haldane & G. R. T. Ross trans., Yale Univ. Press 1996) (1637) (“[T]hat [animals] do better than [humans] do, does not prove that they are endowed with mind, for in this case they would have more reason than any of us, and would surpass us in all other things. It rather shows that they have no reason at all, and that it is nature which acts in them according to the disposition of their organs . . .”).

7. For example, scientists routinely conduct pain experiments on animals, which would be pointless if animals could not feel pain. Surprisingly, however, a small minority of modern philosophers still echo Descartes' views. See R. J. FREY, INTERESTS AND RIGHTS: THE CASE AGAINST ANIMALS 82–83 (1980) (“Just as cats and dogs need water in order to function normally, so tractors need oil in order to function normally; and just as cats and dogs will die unless their need for water is satisfied, so trees and grass and a wide variety of shrubs will die unless their need for water is satisfied.”); PETER CARRUTHERS, THE ANIMALS ISSUE: MORAL THEORY IN PRACTICE 171 (1992) (“It may be that the experiences of animals are wholly of the non-conscious variety. It is an open question whether there is anything that it feels like to be a bat, or a dog, or a monkey. If consciousness is like the turning on of a light, then it may be that their lives are nothing but darkness.”).

8. See Wolfson & Sullivan, *supra* note 1, at 206 (“From a statistician's point of view . . . farmed animals represent 98 percent of all animals (even including companion animals and animals in zoos and circuses) with whom humans interact in the United States . . .”).

9. This is a phenomenon Gary Francione describes as “moral schizophrenia.” FRANCIONE, *supra* note 2, at 1–30.

belief, however, these corporations do not signal a major departure from factory farming, or necessarily even a step in the right direction. Animal welfare is very expensive. To make meaningful improvements in animal welfare would require too high a consumer premium, and as a result, even socially responsible corporations will be enticed to cut corners and favor the *appearance* of welfare over actual welfare to placate ethically minded consumers who might otherwise eschew animal foods altogether. Therefore, even though corporate social responsibility provides some benefits to animals, it is mostly used as a branding tool to increase corporate profits and keep consumers eating meat.

When faced with the realization that animal foods can be made affordable to most consumers only through factory farming, society is left with a dichotomous choice: either we stop purchasing and consuming animal products, or animals will continue to suffer in our factory farms. Improving animal welfare in any meaningful sense requires shifting societal preference toward abolishing animal use in food production. Corporations and markets can be used to aid in this transition if consumers are enticed to “vote with their dollars” against those corporations that use animals for profit—and vote for those that do not. Accordingly, this article suggests that we redefine socially responsible corporations as those that eschew animal use altogether.

Part II of this article traces the rise of agribusiness corporations and factory farming in the United States and shows that factory farming is the direct manifestation of consumer demand for low prices and corporate demand for high profits. Part III explores the improved animal husbandry processes offered by some corporations, for some consumers, and argues that this model is not a viable alternative to factory farming. Part IV contends that, given the economic realities of animal agriculture, to make meaningful improvements in animal welfare requires shifting consumer preference toward products made without animal exploitation. Part V concludes.

II

AGRIBUSINESS CORPORATIONS, PROFIT MAXIMIZATION, AND THE FACTORY FARM

A. Corporate Persons and Animal Things

The law’s classification of corporations and animals permits the link between corporations and animal welfare. For functionalist purposes, corporations are classified as legal persons.¹⁰ An English jurist famously stated

10. See, e.g., *Santa Clara County v. S. Pac. R.R. Co.*, 118 U.S. 394, 394 (1886) (refusing to consider an argument that corporations are excluded from the protection of the equal protection clause, as the clause applies to “any person.”); see also Gregory A. Mark, Comment, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987) (discussing the three predominant theories of corporate personhood since *Santa Clara County*).

that a corporation has “no soul to be damned, and no body to be kicked.”¹¹ Yet corporations enjoy most constitutional protections afforded to natural persons,¹² including the right to own property that cannot be taken without just compensation.¹³

Animals, on the other hand, are classified as legal property.¹⁴ John Locke believed that God granted man dominion over the other animals, which created a natural right to animal property.¹⁵ Descartes believed that animals had no minds and instead were mere “automata,” or machines like ticking clocks, and therefore the same as other property for all intents and purposes.¹⁶ Descartes in the seventeenth century was followed by Immanuel Kant in the eighteenth century, who believed that animals had minds, but still warranted little moral consideration because they were not rational, and therefore were only means to human ends.¹⁷ It was only in the nineteenth century that the English philosopher Jeremy Bentham stated what we now hold obvious: animals, like humans, are sentient beings capable of experiencing pain and suffering and therefore require moral consideration commensurate with their sentience.¹⁸ “[T]he question,”

11. John C. Coffee, Jr., *“No Soul to Damn: No Body to Kick”: An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 386 & n.1 (1981) (quoting Edward, First Baron Thurlow and Lord Chancellor).

12. *E.g.*, LAWRENCE MITCHELL, *CORPORATE IRRESPONSIBILITY: AMERICA’S NEWEST EXPORT* 48 (2002) (“[D]espite the inhuman legal construct that it is, the law treats [the corporation] as a person, endowed with virtually all of the legal and constitutional rights possessed by real people”); JOEL BAKAN, *THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER* 16 (2004) (observing that the corporation is treated as a legal person by the Fourteenth Amendment “originally entrenched in the Constitution to protect freed slaves”); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 app. at 664–67 (1990) (listing the corporation’s status as a legal “person” for each article and amendment of the U.S. Constitution).

13. *E.g.*, 8 Del. C. § 122(4) (2006) (“Every corporation created under this chapter shall have power to . . . own, hold, improve, employ, use and otherwise deal in and with real or personal property, or any interest therein, wherever situated, and to sell, convey, lease, exchange, transfer or otherwise dispose of . . . all or any of its property”); Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 292 (1999) (“In the eyes of the law, filing articles of incorporation creates a new entity, separate from its promoters and shareholders. This notion of legal personality carries significant legal and economic consequences. For example, the firm can hold title to property” (citation omitted)).

14. FRANCIONE, *supra* note 2, at 50 (“In virtually all modern political and economic systems, animals are explicitly regarded as economic commodities that possess no value apart from that which is accorded to them by their owners—whether individuals, corporations, or governments. The status of animals as property is not new; it has been with us for thousands of years. Indeed, historical evidence indicates that the domestication and ownership of animals are closely related to the development of the very ideas of money and property.”).

15. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 285–302 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690). For a discussion of Locke’s ideas of property as applied to animals, see GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 38–42 (1995).

16. *See supra* note 6 and accompanying text.

17. IMMANUEL KANT, *LECTURES ON ETHICS* 212–13 (Peter Heath & J. B. Schneewind eds., Peter Heath trans., Cambridge Univ. Press 2001) (“[A]nimals exist only as means . . . whereas man is the end”).

18. JEREMY BENTHAM, *AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION* 310–11 n.1 (Clarendon Press 1823) (1780).

according to Bentham, “is not, ‘Can they *reason*? nor, Can they *talk*? but, Can they *suffer*?’”¹⁹

Although Bentham identified the philosophical defects in the positions held by Descartes and Kant, he failed to recognize the legal defect associated with those positions. That is, although Bentham recognized that on the most basic level sentience made animals the same as humans, and quite different from inanimate objects, he failed to recognize that the law still treated animals as inanimate objects by classifying them as property.²⁰ This logical disconnect has prompted Gary Francione to call for the removal of animals from the status of property as a necessary step toward implementing Bentham’s widely accepted moral thinking.²¹

B. Corporate Ownership of Farm Animals

Corporate personhood and animal thinghood allow for the corporate ownership of animals. Corporate ownership of animals exists wherever animal use has been institutionalized, but it figures most prominently in animal agriculture, which accounts for ninety-eight percent of domestic animal use in the United States.²² Corporate ownership of farm animals has become increasingly consolidated in the hands of large agribusiness corporations that engage in factory farming. This consolidation has occurred in the last fifty years through both vertical and horizontal integration.

Vertical integration occurs when one corporation comes to own or control virtually every step of production.²³ The poultry industry was the first to experience vertical integration in its production of “broilers;” that is, meat chicken, as opposed to egg-laying hens. In the early 1900s, before vertical integration occurred, chicken farming was a family affair largely devoid of a profit motive. Each family farm housed an average of only twenty-three chickens,²⁴ which provided the family with eggs and meat.²⁵ In the 1920s,

19. *Id.*

20. See FRANCIONE, *supra* note 2, at 130–50 (discussing Bentham’s views on animals in more detail).

21. *Id.* at 81–102 (explaining that applying “the principle of equal consideration” to animals requires removing them from the status of legal property and classifying them as legal persons for limited purposes).

22. Wolfson & Sullivan, *supra* note 1 and accompanying text; see also Gaverick Matheny & Cheryl Leahy, *Farm Animal Welfare, Legislation, and Trade*, 70 LAW & CONTEMP. PROBS. 325, 326 (Winter 2007) (“The ‘animal-welfare issue’ is . . . numerically reducible to the ‘farm-animal-welfare issue.’”).

23. See DeeVon Bailey et al., *The Role of Cooperative Extension in the Changing Meat Industry*, 33 J. EXTENSION (1995), <http://www.joe.org/joe/1995august/a2.html> (“Vertical integration refers to ownership across pricing points in a market channel. An example of vertical integration would be the ownership of hogs by processors from birth through processing and wholesaling.”).

24. W. O. Wilson, *Housing*, in AMERICAN POULTRY HISTORY 1823–1973 218, 218 (American Poultry Historical Society ed., 1974).

25. Harry R. Lewis, *America’s Debt to the Hen*, NAT’L GEOGRAPHIC MAG., Apr. 1927, at 453 (“Poultry was raised largely for pleasure and as a hobby, and incidentally to insure a goodly supply of fresh eggs and meat for the family table.”). However, this does not mean that “family-farmed” chickens were treated particularly well or other than as legal property. See, e.g., KAREN DAVIS, PRISONED CHICKENS, POISONED EGGS: AN INSIDE LOOK AT THE MODERN POULTRY INDUSTRY 12 (1996)

however, farmers in the Delmarva region (the eastern shore of Delaware, Maryland, and Virginia), tired of the “highly risky business of farming table vegetables, which had to be sold quickly and locally,”²⁶ began to raise thousands and then millions of broilers to sell to market.²⁷ Delmarva had the distinct advantage of being located near the major markets in the east, including Philadelphia, New York, Boston, Baltimore, and Washington, D.C., which was important at a time when broilers were transported to market alive.²⁸

At a slower rate, the beginnings of agribusiness were also taking root in the pre-World War II South, “where, in addition to the warm weather, there [was] little or no union activity, a large undereducated rural population, few or no environmental regulations, and a receptive political climate.”²⁹ During World War II, the sale and consumption of broilers boomed, thanks to the government’s rationing of beef and pork—“more ‘desirable’ sources of protein”—for soldiers.³⁰ Moreover, because the federal government commandeered all broilers coming out of Delmarva during the war for federal food programs, the southern producers became—and remain to this day—the dominant market players.³¹

As chicken farming became a business rather than a way of life, problems in the chain of production, such as an unsteady supply of baby chicks or feed, became prevalent. To remedy this, chicken farmers, including the founder of today’s agribusiness giant Tyson Foods, Inc., began to buy hatcheries and build their own feed mills.³² This integration ensured stability and provided economies of scale.³³ What these farmers did not own directly they secured through

(“[Andrew] Johnson dismisses the idea that the pre-factory farming era was idyllic for chickens and other farm animals, suggesting, rather, that factory farming is an extension of age-old attitudes and practices in regard to animals raised for food. Recalling Elizabethan England of the 16th century, he says, for example, that the modern battery-cage building is ‘little more than a many thousand times larger replica of the housewife’s kitchen hen-coop which might at that date have filled the unused space under the dresser.’”) (citation omitted)).

26. STEVE STRIFFLER, *CHICKEN: THE DANGEROUS TRANSFORMATION OF AMERICA’S FAVORITE FOOD* 34 (2005).

27. *Id.*

28. *Id.*

29. DAVIS, *supra* note 25, at 18.

30. STRIFFLER, *supra* note 26, at 43–45 (“American broiler production almost tripled during the war, increasing from 413 million pounds to 1.1 billion pounds between 1941 and 1945. And that was just the beginning.” (citation omitted)).

31. *Id.* at 44–45.

32. *Id.* at 39 (“John Tyson was not a farmer; he was a middleman, and hauling birds gave him an intimate understanding of all segments of the emerging industry. When he lacked chicks to deliver to his growers, Tyson bought a small hatchery. When he had problems accessing feed, he became a feed dealer for Ralston Purina and eventually built his own commercial mill. In this sense, the process of vertical integration, whereby previously independent facets of the emerging industry were brought under the control of a single entity, initially occurred as a response to problems encountered along the chain of production.”).

33. *Id.* at 39–40; *see also* Lewis, *supra* note 25, at 457 (“Hatched in mammoth incubators on breeding farms or at commercial hatcheries, the chicks provide the most economical and convenient method of securing one’s foundation stock, of enlarging one’s flock, and of providing future generations of layers.”).

contracts,³⁴ a practice that remains commonplace today.³⁵ Indeed, after World War II, integrated poultry companies came to own or control every part of the production cycle, including “laying flocks, incubation, grow-out, warehousing and distribution, sales and advertising, by-products, and processing.”³⁶ As early as 1963, the *Wall Street Journal* reported, “Nearly 95% of commercial broilers are now produced under the management of business organizations which own or control some combination of hatcheries, feed mills, processing plants, marketing services and research facilities”³⁷

Horizontal integration occurs when major corporations in an industry continue to grow by acquiring competitors,³⁸ and is often linked to vertical integration. In the poultry industry, for example, “[a] certain amount of horizontal integration . . . not only was an inherent part of this vertical integration, but was also necessary to survive the periodic price fluctuations that characterized the industry.”³⁹ Mergers and acquisitions in the poultry industry became commonplace after World War II.⁴⁰ Motivations included avoiding creditors, acquiring experienced managers from competitors, and increasing profit opportunities.⁴¹ Still today, dominant poultry corporations continue to expand by acquiring regional firms.⁴²

34. See, e.g., GORDON SAWYER, *THE AGRIBUSINESS POULTRY INDUSTRY 176–77* (1971) (discussing how vertical integration ended poultry auctions by eliminating the market for uncommitted birds); STRIFFLER, *supra* note 26, at 41 (discussing Gainesville, Georgia’s Jesse Jewell, who “controlled the grow-out phase through contracts with farmers, and was establishing control or ownership over baby chicks, processing, transportation, and marketing”).

35. See Bailey et al., *supra* note 23 (“In a 1990 survey by USDA, it was estimated that 92% of all broilers were raised under production contracts between processors and producers with the remaining 8% being raised on integrator-owned farms.” (citation omitted)). Under these production contracts, agribusiness corporations provide farmers with young animals and feed. The farmers then raise the animals until they reach slaughter weight, after which the corporations reclaim the animals for slaughter. Farmers must build the indoor confinement facilities, as well as provide all labor and utilities. Often, they must take out large loans to build and continually modernize the facilities, which makes them “serfs with a mortgage.” Barry Shlachter, *Cooped Up*, DALLAS-FORT WORTH STAR TELEGRAM, Mar. 27, 2005. Farmers routinely complain that agribusiness corporations take advantage of their precarious debt position to impose further unfavorable terms on them after the initial contract is signed. See *id.*; see also Edward P. Lord, Comment, *Fairness for Modern Farmers*, 33 WAKE FOREST L. REV. 1125 (1998) (detailing the problems that these production contracts create for farmers); Randi Ilyse Roth, *Contract Farming Breeds Big Problems for Growers*, FARMERS’ LEGAL ACTION REPORT (1992), available at <http://www.flaginc.com/pubs/arts/artcf002.pdf> (discussing ten types of unfairness to farmers, including underweighing of poultry and early contract termination).

36. STRIFFLER, *supra* note 26, at 41.

37. SAWYER, *supra* note 34, at 206 (quoting *Wall Street Journal* reporter Joe Western).

38. See AgricultureLaw.com, <http://www.agriculturelaw.com/links/dictionary-l.htm#I> (last visited Sept. 3, 2006).

39. STRIFFLER, *supra* note 26, at 58.

40. See SAWYER, *supra* note 34, at 205–06 (giving examples of numerous mergers and acquisitions that occurred in the early 1960s).

41. See *id.* at 206.

42. For example, Tyson Foods acquired Mallard’s Food Products in 1997 and Hudson Foods in 1998. NOTABLE CORPORATE CHRONOLOGIES. (online ed. 2005), reproduced in Business and Company Resource Center (2006), <http://galenet.galegroup.com/servlet/BCRC>. In 2001, Tyson spent \$4.4 billion to acquire IBP, Inc., and secure its status as the “leading processor and marketer of chicken, beef, and pork in the world. *Id.* Tyson’s October 10, 2005, 10K reports that this trend continued with the 2003 purchase of Choctaw Maid Farms, Inc. Similarly, in 1999 Pilgrim’s Pride acquired “a Waco,

The broiler industry set the blueprint for the vertical and horizontal integration that occurred in the egg industry in the 1960s and more recently in the pork and beef industries.⁴³ In 1956, an advisor to the agricultural industry remarked, “[It is] safe to assume that broiler production is the prototype of things to come in many other segments of farming.”⁴⁴ That prediction quickly came true in the egg industry. According to one commentator, “Whereas it took the broiler industry thirty agonizing years to go through vertical integration, agribusiness, and into industrialized farming, the commercial egg business accomplished almost the whole thing in one short decade—from 1960 to 1970.”⁴⁵

Integration in the pork industry occurred more recently, especially in North Carolina, the largest pork-producing state.⁴⁶ In 1995, two economics professors noted, “The industry has seen dramatic growth in North Carolina over the past five years, exceeding 20% annually. This growth came primarily from the highly coordinated, mega-sized producers through horizontal expansion of contract production.”⁴⁷ Vertical integration also characterizes the pork industry. For example, the largest hog processor, Smithfield Foods Inc., is also the largest hog producer.⁴⁸ According to a Smithfield executive, his corporation controls all aspects of hog production from “squeal to meal.”⁴⁹

Texas, prepared foods products plant from Plantation Foods, Inc., a subsidiary of Cargill, Inc.” NOTABLE CORPORATE CHRONOLOGIES (2003), reproduced in Business and Company Resource Center, *supra* note 42.

43. See Joan Fulton & Jeffrey Gillespie, *Emerging Business Organizations in a Rapidly Changing Pork Industry*, 77 AM. J. AGRIC. ECON. 1219, 1219 (1995) (“The current evolution of the North American pork industry is often compared with the path trekked by the U.S. poultry industry several decades ago, when vertical integration emerged along with a limited set of contractual arrangements for producers.”).

44. SAWYER, *supra* note 34, at 172 (quoting Earl F. Crouse, Vice-President and General Manager of the Economic Division of Doane Agricultural Service).

45. *Id.* at 219.

46. See *Hearing on Monopsony Issues in Agriculture Before the S. Comm. on the Judiciary*, 108th Cong. (2003) (statement of Michael C. Stumo, General Counsel, Organization for Competitive Markets) (noting that the pork industry is almost fully integrated).

47. James B. Kliebenstein & John D. Lawrence, *Contracting and Vertical Coordination in the United States Pork Industry*, 77 AM. J. AGRIC. ECON. 1213, 1217 (1995); see also MATTHEW SCULLY, DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY 252 (2002) (“In one recent year, reports our Department of Agriculture, 25,280 independent farms either phased out hog production or shut down altogether.”).

48. *Antitrust Enforcement Improvement Act of 2000: Hearing on H.R. 4321 Before the H. Comm. on the Judiciary*, 106th Cong. 57 (2000) [hereinafter *House Antitrust Hearing*] (statement of Leland Swenson, President, National Farmers Union); *Smithfield to Buy Hog Farmer Premium Standard*, WALL ST. J., Sept. 19, 2006, at A12 (“Smithfield Foods Inc., speeding the consolidation of the meat industry, agreed to buy No. 2 U.S. hog-farm operator Premium Standard Farms Inc. for \$652 million in stock and cash. The move by the biggest U.S. pork slaughterer . . . reflects an increasing trend by big meat companies to vertically integrate, or kill their own livestock instead of buying from independent farmers.”).

49. North Carolina in the Global Economy: Hog Farming: Corporations, http://www.soc.duke.edu/NC_GlobalEconomy/hog/corporations.php (last visited Sept. 3, 2006). (quoting Lewis Little, president of the Smithfield Packing Company). Smithfield’s CEO, Joseph Luter, has said essentially the same thing: “What we did in the pork industry is what Perdue and Tyson did in the poultry business. . . . Vertical integration gives you high quality, consistent products with consistent genetics. And the only way to do that is to control the process from the farm to the packing plant.” David Barboz, *Goliath of the Hog World: Fast Rise of Smithfield Makes Regulators Wary*, N. Y. TIMES, Apr. 7, 2000, at C1.

A similar pattern of integration unfolded in the beef industry.⁵⁰ In the early 1980s, for instance, the four largest beef corporations slaughtered approximately thirty-three percent of all cattle.⁵¹ By 1990 that figure had risen dramatically to seventy percent,⁵² and by 2000 it had reached eighty-one percent.⁵³ “[B]etween 1984 and 1994, a few large, high-speed slaughter operations had driven roughly 2,000 small to mid-sized packers out of business—one-third of all packers in the United States.”⁵⁴ In sum, vertical and horizontal integration has left a system of industrial agriculture controlled by a shrinking number of national agribusiness corporations, with family farmers all but phased out of operation.⁵⁵

C. Maximizing Corporate Profits Through Factory Farming

1. Legal and Market Pressures to Maximize Corporate Profits

Corporate ownership of an enterprise allows that enterprise to operate on a larger and more efficient scale, and corporate ownership of property has the potential to change the use of that property in response to corporate motivations and pressures. Indeed, operating in the corporate form directs, to a considerable degree, the decisions that directors and officers make regarding the use of their property, including their animal property. Specifically, both law and markets direct corporate managers, particularly managers of publicly traded corporations, to make the most productive use of their animal property to maximize profits.

First, the laws of Delaware (where most large corporations are incorporated) and other states impose fiduciary duties on corporate managers to act in the best interests of the corporations they serve. Under the traditional view of corporate law, acting in the best interests of the corporation means

50. See Bailey et al., *supra* note 23.

51. *Id.*

52. *Id.*

53. *House Antitrust Hearing, supra* note 48, at 61.

54. GAIL A. EISNITZ, *SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLECT, AND INHUMAN TREATMENT INSIDE THE U.S. MEAT INDUSTRY* 62 (1997).

55. These corporations include household names such as: Tyson Foods Inc. (first in broiler production, first in beef packing, second in pork packing); ConAgra Foods Inc. (third in beef feedlots; third in turkey production); Smithfield Foods Inc. (first in pork packing, first in pork production); Pilgrim's Pride Corp. (second in broiler production); and Hormel Foods Corp. (fourth in pork packing, fourth in turkey production). Mary Hendrickson & William Heffernan, *Concentration of Agricultural Markets*, Jan. 2005, <http://www.foodcircles.missouri.edu/CRJanuary05.pdf> (last visited Feb. 19, 2006). Each of these corporations made the most recent Fortune 500 list of highest grossing corporations in the United States. Tyson Foods Inc. is number seventy-two with 2004 revenues of \$26.4 million, ConAgra Foods Inc. is number 121 with 2004 revenues of \$18.2 million, Smithfield Foods Inc. is number 222 with 2004 revenues of \$10.1 million, Pilgrim's Pride Corp. is number 364 with 2004 revenues of \$5.3 million, and Hormel Foods Corp. is number 402 with 2004 revenues of \$4.8 million. *The Fortune 500*, FORTUNE, Apr. 17, 2006, at 192, available at <http://money.cnn.com/magazines/fortune/fortune500/>.

acting with a myopic focus on the shareholders.⁵⁶ Because the vast majority of shareholders invest to earn a profit, acting in their best interests means maximizing corporate profits.⁵⁷ The relinquishment of operational control by shareholders in publicly traded corporations creates the typical agency problem of ensuring that corporate managers do in fact act in the best interests of shareholders.⁵⁸ The threat of legal liability is thought to be one way to reduce agency costs and induce profit-maximizing behavior.

Second, and more importantly, there are non-legal pressures on corporate managers to maximize shareholder profits. Corporations constantly compete for investors. If managers do not produce sufficient gains for shareholders, shareholders will respond by moving their investments elsewhere. Public corporations must report their earnings each quarter, so both managerial success and shareholder appeasement are defined by meeting market expectations in the short-term.⁵⁹ Given the paucity of management rights retained by shareholders of public corporations, the ability to sell their stock at any time is an important form of market sanction. Managers who lose existing investments or cannot attract new ones experience a decline in job security and reputation.⁶⁰ Also, the portion of a manager's compensation that is paid in company stock is often substantial, which is meant to align the financial interests of managers and shareholders.⁶¹ So, to a considerable extent, "market

56. The foundational case for this traditional view of corporate law is *Dodge v. Ford Motor Co.*, 170 N.W. 688 (Mich. 1919) (ordering Ford Motor Company to pay dividends to shareholders rather than reinvest profits in the business). The court stated, "The discretion of directors is to be exercised in the choice of means to attain [profits for stockholders] and does not extend to a change in the end itself, to the reduction of profits or to the nondistribution of profits among stockholders in order to devote them to other purposes." *Id.* at 684.

57. *E.g.*, FRANKLIN A. GEVURTZ, CORPORATION LAW 304 (2000) ("[D]irectors owing a duty to the corporation. . . [e]ssentially . . . means . . . that the directors should be seeking to maximize the profits of the corporation.") (citation omitted); ROBERTA ROMANO, THE GENIUS OF AMERICAN CORPORATE LAW 2 (1993) ("Profit maximization (in a world where cash flows are uncertain, this is equivalent to maximizing equity share prices) is the goal."); Bernard Black & Reinier Kraakman, *A Self-Enforcing Model of Corporate Law*, 109 HARV. L. REV. 1911, 1921 (1996) ("The efficiency goal of maximizing the company's value to investors remains, in our view, the principal function of corporate law.").

58. See ROMANO, *supra* note 57, at 1–2 ("[T]he separation of ownership from control in the modern public corporation . . . creates an agency problem, in which the managers' operation of a firm may deviate from the shareholders' wishes to maximize the firm's value."). This observation, of course, was first made by Berle and Means. See generally ADOLPH A. BERLE & GARDINER C. MEANS, THE MODERN CORPORATION AND PRIVATE PROPERTY (1932).

59. MITCHELL, *supra* note 12, at 59 ("The structure of American corporate law encourages most managers to focus on the short term."); Lawrence E. Mitchell & Theresa A. Gabaldon, *What are the Ways of Achieving Corporate Social Responsibility?: If I Only Had a Heart: Or, How Can We Identify a Corporate Morality*, 76 TUL. L. REV. 1645, 1667 (2002) ("[T]he market (that is, the shareholders) punish managers for incurring short-term expenses, even if they are expected to pay off in the long term.").

60. Stephen M. Bainbridge, *Director Primacy: The Means and Ends of Corporate Governance*, 97 NW. U. L. REV. 547, 580 (2003).

61. *Id.* On February 21, 2006, the *Wall Street Journal* noted that "an increasing number of corporate boards are imposing performance targets on the stock and stock options they include in their CEOs' pay packages. Such targets are the latest strategy in a decades-long effort to tighten the link between top executives' bank accounts and their employers' success." *Boards Tie CEO Pay More*

constraints—product markets, capital markets, the market for corporate control, and so forth—keep directors focused on maximizing profits and share value.”⁶² As discussed below, market pressures eclipse fiduciary duty requirements in explaining profit-maximizing behavior given the ubiquitous nature of corporate law’s business judgment rule, which effectively insulates managers from legal liability so long as their decisions are made on an informed basis, in good faith, and without self-dealing.⁶³

2. Consumer Demand for Affordable Meat and the Factory Farm

For agribusiness corporations, the pressure to maximize profits has led to a remarkable reshaping of traditional farming. The vast majority of Americans have indicated, through their purchasing habits, that they want their animal foods to be as affordable as possible. Agribusiness corporations, beginning with poultry corporations, abandoned family farming in favor of factory farming to increase efficiencies and lower costs to consumers. Consumers have overwhelmingly opted for factory-farmed products over family-farmed products for this very reason. According to a 1993 *Wall Street Journal* editorial, “As fondly as family farms are recalled, the simple fact is that mass production and integration of processes in the modern agricultural corporation is lowering prices and boosting choices to consumers.”⁶⁴ The editorial further noted, “From 1960 to 1990, retail prices of broilers and turkeys fell in real terms by 3% annually, and consumption rose by more than 3% a year.”⁶⁵ Factory-farmed meat now enjoys an approximately *ninety-seven percent market share*.⁶⁶ James Rachels concludes that this was inevitable, as factory farming is the only means of producing affordable meat on a large scale:

[I]t would be impossible to treat the animals decently and still produce meat in sufficient quantities to make it a normal part of our diets. . . . [C]ruel methods are used in the meat-production industry because such methods are economical Humanely

Tightly to Performance, WALL ST. J., Feb. 21, 2006, at A1. The article notes that in 2005, “30 out of 100 major U.S. corporations . . . based a portion of the equity granted to their CEOs on performance targets, up from 23 in 2004 and 17 in 2003 . . .” *Id.*

62. Blair & Stout, *supra* note 13, at 252.

63. See Einer Elhauge, *Sacrificing Corporate Profits in the Public Interest*, 80 N.Y.U. L. REV. 733, 745 (2005) (“[T]he meaningful boundaries [on corporate managers] are set not by law but by . . . market constraints . . .”); see also *infra* notes 109–12 and accompanying text.

64. Editorial, *Animal Farms*, WALL ST. J., June 14, 1993, at A14.

65. *Id.*

66. See Patricia Cobe, *The Organic Connection*, FOOD SERVICE DIRECTOR, Mar. 15, 2006, at S6(1) (“Organic foods comprise about 2 percent of all foodservice [sic] sales.”); Amanda Paulson, *As “Organic” Goes Mainstream, Will Standards Suffer?*, CHRISTIAN SCI. MONITOR, May 17, 2006, available at <http://www.csmonitor.com/2006/0517/p13s01-lifo.html> (“The organic industry is still relatively tiny—2.5 percent of all retail food sales in 2005 . . .”); *Wal-Mart Goes Crunchy; Natural Foods*, ECONOMIST, June 10, 2006, at 74 (“[The organic market] accounts for less than 3% of America’s retail-food sales . . .”); FARM SANCTUARY, FARM ANIMAL WELFARE: AN ASSESSMENT OF PRODUCT LABELING CLAIMS, INDUSTRY QUALITY ASSURANCE GUIDELINES AND THIRD PARTY CERTIFICATION STANDARDS (2005), http://www.farmsanctuary.org/campaign/FAWS_Report.pdf (“Specialty markets, like organic and ‘humane’ foods, may help lessen animal suffering, but they affect only a very small percent, about 2%, of the billions of animals exploited for food each year in the U.S. . . .”).

produced chicken, beef, and pork would be so expensive that only the very rich could afford them.⁶⁷

In short, consumer demand works in tandem with the corporate model to ensure that profit-making outranks animal welfare on the corporate agenda.

Factory farming is efficient because it increases output and reduces overhead costs, which combine to increase corporate profit margin.⁶⁸ Another name for factory farming, “intensive livestock production,” is defined as “[t]he keeping of certain livestock (e.g. beef, pigs, poultry, etc.) mainly indoors, often in relatively large numbers, with the aim of maximising efficiency by reducing per capita costs (e.g. labour, equipment, feed, etc.) and the area required.”⁶⁹ In factory farms, “[a]nimals are treated like machines that convert low-priced fodder into high-priced flesh, and any innovation will be used if it results in a cheaper ‘conversion ratio.’”⁷⁰

The details of factory-farm production fulfill the Cartesian promise of these definitions. As an initial matter, factory farming is characterized by indoor intensive confinement of animals, or in the case of beef cows, outdoor intensive confinement on feedlots, where cattle stand shoulder-to-shoulder in large, outdoor dirt enclosures.⁷¹ Large, windowless sheds are likely to house several thousand chickens, pigs, ducks, or turkeys. For example, it is common for more than 20,000 broiler chickens to line the floor of one shed,⁷² with each broiler having less than one square foot of space to himself.⁷³ In most cases, inside the building, confinement is into even smaller spaces. Egg-producing facilities are filled with rows of battery cages stacked several stories high. Laying hens are confined four to five per one battery cage about the size of a folded newspaper, which prevents the hens from so much as spreading their wings.⁷⁴ Non-breeding or “grower” pigs are confined in large sheds or in smaller metal cages stacked

67. James Rachels, *Vegetarianism and ‘the Other Weight Problem,’* in *WORLD HUNGER AND MORAL OBLIGATION* (William Aiken & Hugh LaFollette eds., 1977), reprinted in JAMES E. WHITE, *CONTEMPORARY MORAL PROBLEMS* 496, 503 (7th ed. 2003); see also PETER SINGER, *ANIMAL LIBERATION* 160 (2d ed. 1990) (“It is not practically possible to rear animals for food on a large scale without inflicting considerable suffering. Even if intensive methods are not used, traditional farming involves castration, separation of mother and young, breaking up social groups, branding, transportation to the slaughterhouse, and finally slaughter itself.”).

68. See, e.g., John Lincoln, Letter to the Editor, *Farms, Rivers, Lakes and People*, N.Y. TIMES, Aug. 22, 2005, at A12 (“The economics of dairy farming have forced our farms to grow larger to achieve economies of scale necessary to make a profit on hair-thin milk margins.”).

69. BLACK’S AGRICULTURAL DICTIONARY 206 (D. B. Dalal-Clayton ed., 1985).

70. SINGER, *supra* note 67, at 97.

71. FRANCIONE, *supra* note 2, at 10. For an early study of the economics of feedlot confinement, see CARL L. PHERSON ET AL., UNIV. OF MINNESOTA DEP’T OF AGRIC. & APPLIED ECON., *BEEF HOUSING ECONOMICS FOR FARM-FEEDLOTS* (1977).

72. *Contract Broiler Production: Questions and Answers*, COOPERATIVE EXTENSION SERVICE, (Univ. of Georgia Coll. of Agric. & Envtl. Sciences, Athens, G.A.), May 1999, at 3, available at <http://pubs.caes.uga.edu/caespubs/pubs/PDF/L423.pdf>.

73. James R. Simpson & Bernard E. Rollin, *Economic Consequences of Animal Rights Programs*, 3 J. BUS. ETHICS 215, 222 (1984).

74. FRANCIONE, *supra* note 2, at 10.

on top of each other,⁷⁵ while breeding sows live in gestation and farrowing crates barely bigger than their bodies.⁷⁶ Many veal calves live tethered in small crates that prevent the calves from even turning around.⁷⁷

Intensive confinement of animals is simple economics, saving on corporate overhead costs by reducing the amount spent on land, feed, and labor. Moving operations indoors and further confining animals in tighter quarters once inside allows more animals to be packed into a given space, which reduces the amount of land a corporation must own for production. In the case of layer hens, for instance, it is “more economically efficient to put a greater number of birds into each cage.”⁷⁸ In addition, intensive confinement can have the added benefit of reducing feed costs by ensuring that animals cannot exercise and burn calories, which causes them to reach slaughter weight faster while consuming less feed.⁷⁹

Intensive confinement also reduces labor costs because it allows for easier monitoring by factory-farm personnel. To further reduce labor costs, automated machinery dispenses all food and water, and even milks dairy cows.⁸⁰ Veterinary care on factory farms is almost nonexistent, as it is often more economical to let sick animals die than pay to treat them.⁸¹ Some veterinary students do not

75. ANDREW JOHNSON, *FACTORY FARMING* 35 (1991) (“The young growing pigs are usually kept indoors, where they can most efficiently convert feed into lean meat without putting on layers of fat to keep them warm.”).

76. FRANCIONE, *supra* note 2, at 10.

77. JOHNSON, *supra* note 75, at 37 (“Veal calves are separated from their mothers in the first few days of their lives, and put into the slatted wooden crates where they will spend the rest of their lives.”). For pictures of animal confinement on factory farms, visit [FactoryFarming.com Photo Gallery](http://www.factoryfarming.com/photo_gallery.htm), <http://www.factoryfarming.com/gallery.htm> (last visited Nov. 13, 2006).

78. BERNARD E. ROLLIN, *FARM ANIMAL WELFARE: SOCIAL, BIOETHICAL, AND RESEARCH ISSUES* 119 (1995); *see also* JOHNSON, *supra* note 75, at 27–30 (describing typical battery cage confinement); Ghouse Mohiuddin, *Debeaking—The Profit Booster*, *POULTRY GUIDE*, Apr. 1972, at 40 (“The current trend is to house as many birds as possible in the limited space available and to get the maximum profits by applying [the] latest technical know-how and better and improved managerial methods.”); P. van Horne, *More Space Per Hen Increases Production Costs*, 7 *WORLD POULTRY* 16 (1991).

79. SINGER, *supra* note 67, at 134 (“To make animals grow quickly they must take in as much food as possible, and they must use up as little of this food as possible in their daily life.”); G. Tom Tabler & A.M. Mendenhall, *Broiler Nutrition, Feed Intake and Grower Economics*, 5 *AVIAN ADVICE* 8 (2003) (“Feed is by far the single largest cost involved in producing broilers. Therefore it is important that growers manage feeding programs to improve efficiency and reduce waste.”).

80. JULIUS J. CSORBA & GORDON G. BUTLER, U.S. DEP’T OF AGRIC., *DAIRY COWS: HOUSING AND METHODS OF MILKING* 3 (1961) (“With improved management practices, annual milk production per cow in the United States increased from an average of 4,600 pounds in 1940 to 6,800 pounds in 1959. This was an 11-percent increase in total milk production despite a decline of 24 percent in the number of cows on farms. In addition to the increase in milk production, the use of man labor in handling cows has improved. By using modern milking machines, a dairyman can now milk 4 to 5 times as many cows in an hour as the fastest hand milkers a score of years ago. Consequently, with fewer cows and with a great deal less labor, the American dairy farmer has been able to produce abundant supplies of milk.”).

81. *See* Matheny & Leahy, *supra* note 22, at 329 (“[W]hen animals are no longer productive— that is, when animals are sick, injured, or ‘spent’— there is no economic incentive for producers to care for them. It is typically cheaper to let these animals die than to provide treatment. Most farm animals receive no individual veterinary attention during their lives.”). In addition, the design of broiler sheds (where 20,000 chickens line the floor of one shed) can make it difficult to tend to the needs of any individual chicken, even if the intention was to provide veterinary care rather than let the animal die.

pursue a farm-animal specialty due to ethical concerns about agribusiness,⁸² and a shortage of farm-animal veterinarians is becoming a concern for the American Veterinary Medical Association.⁸³ When asked why animals rarely receive veterinary care, even though its absence can lead them to develop serious deformities, one producer stated, “We don’t get paid for producing animals with good posture around here. We get paid by the pound!”⁸⁴

As much as agribusiness benefits economically from factory farming, it is not without its drawbacks. Although the lighting inside factory farms is dimmed to keep animals immobile and reduce the stress caused by overcrowding,⁸⁵ stress from these conditions is inevitable. This stress, along with the lack of physical and psychological stimulation, causes some animals to attack each other. The result is bad for business: according to one poultry producer, “It’s a damn shame when they kill each other. It means we wasted all the feed that went into the damn thing.”⁸⁶

Rather than give the animals more space, which would be inefficient, the animals are mutilated in an attempt to prevent them from harming each other. In a procedure known as “debeaking,” farmers use hot metal to slice off the beaks of young broiler chickens and layer hens in an effort to render their pecks harmless to other chickens.⁸⁷ Several studies have linked debeaking to profit maximization.⁸⁸ These articles note the importance of debeaking “correctly” so that the chicken is still able to eat and drink—otherwise, the chicken dies and

See ROBERT GARNER, *ANIMALS, POLITICS AND MORALITY* 104 (2d ed. 2004) (“There may be as little space for [broiler] birds to move about as there is for battery hens, but in addition it is much more difficult, if not impossible, to locate and treat sick birds . . .”).

82. See Kevin P. Gwinner et al., *Attracting Students into Careers in Food Supply Veterinary Medicine*, 228 J. AM. VETERINARY MED. ASS’N 1693, 1697 (2006) (“A small group of student participants [in a survey] mentioned that animal welfare influenced their career choice. These students expressed a strong interest in repairing ‘broken’ animals, which they believed was at odds with the bottom-line, production orientation that is necessary for food animal veterinarians. One student declared, ‘That’s completely why I couldn’t do [large animal medicine]. Hands down. Because you have 2,000 head of cattle and 1 doesn’t matter, but it matters to me.’”).

83. Press Release, American Veterinary Medical Association, Projected Serious Food Supply Veterinarian Shortage Poses Threat to Industry, Society (June 2, 2006), http://www.avma.org/press/releases/060602_food_supply_veterinarians.asp.

84. ROBBINS, *supra* note **, at 84 (quoting J. Messersmith).

85. JOHNSON, *supra* note 75, at 31 (“[Broiler] sheds are brightly lit when the chickens are small, to encourage them to move about and find food and water, but as they grow larger the lights are dimmed to discourage aggression.”); *id.* at 33 (“While profitability demands high stocking rates . . . [this] can cause health and welfare problems. Overcrowding may lead to feather-pecking and cannibalism unless illumination is kept very low, and the birds may be severely stressed by the difficulties they face in getting access to feeders and drinkers.”).

86. SentientBeings.org: Industry’s Attitude, <http://www.sentientbeings.org/industry.htm> (last visited Sept. 4, 2006) (quoting Herbert Reed, poultry producer).

87. DAVIS, *supra* note 25, at 67–71.

88. See, e.g., Donald Bell, *Can Egg Producers Afford to Not Beak Trim Their Flocks?*, *Proceedings of the Forty-Fifth Western Poultry Disease Conference*, 45 ASOCIACIÓN NACIONAL DE ESPECIALISTAS EN CIENCIAS AVICOLAS DE MÉXICO, A.C., at 93 (1996) (considering a number of factors and calculating a “\$0.24 per hen housed advantage over the non-trimmed birds”); Shabbir A. Khan, *Debeaking Gives You Extra Profit*, *POULTRY GUIDE*, Dec. 1971, at 46; Mohiuddin, *supra* note 78.

the “losses make the farmer lose his profits.”⁸⁹ In a procedure known as “tail docking,” pliers are used to amputate the tails of piglets to make them more sensitive to bites from other pigs.⁹⁰ The theory is that the docked pig will fight back and prevent further injury caused by other pigs, while the undocked pig will not.⁹¹ These and other painful mutilations are commonplace on the factory farm, and, for the most part, all are done without anesthesia or analgesia (local anesthetic).⁹² Corporations are now doing genetic research designed to create animals with more “efficient” traits; for example, by growing chickens with no feathers and animals with no legs.⁹³ Given the conditions inside factory farms, disease is also a serious problem, and most animals are fed a constant stream of antibiotics. Despite medication, estimates have placed the number of pigs with pneumonia at the time of slaughter at around seventy percent.⁹⁴

Like animal husbandry, animal slaughter is designed for maximum efficiency. U.S. agribusiness corporations slaughter 9.5 billion animals per year, which is over 300 animals per *second*.⁹⁵ They are shackled by the leg and hoisted upside down, after which they are stabbed in the jugular (cows and pigs) or decapitated (chickens and turkeys) to bleed out on their way to be skinned or dunked in a tank of scalding hot water.⁹⁶ Federal law requires that animals be stunned to lose consciousness during this process, but the law does not apply to

89. Mohiuddin, *supra* note 78, at 42.

90. See SCULLY, *supra* note 47, at 276.

91. See *id.* (“Termed in the field a ‘short-term stressor,’ docking doesn’t remove the target: The idea is to leave each tail more sensitive, so that the pain of a bite is sharper and the pigs will therefore try harder to avoid attack. Otherwise the pigs . . . just give up, their tails get chewed and infected, the infection spreads, and they die an unauthorized death.”). Evidence suggests that tail docking, in addition to being very painful for the animals, does not serve its intended purpose. Carolyn L. Stull et al., *Evaluation of the Scientific Justification for Tail Docking in Dairy Cattle*, 220 J. AM. VETERINARY MED. ASS’N 1298, 1301–02 (2002) (reviewing various scientific studies on tail docking of cattle and concluding that “there are no apparent animal health, welfare, or human health justifications to support this practice.”).

92. Wendy J. Underwood, *Pain and Distress in Agricultural Animals*, 221 J. AM. VETERINARY MED. ASS’N 208, 210 (outlining a number of painful situations for agricultural animals and noting “few anesthetics or analgesics are labeled for use in food animals.”); FRANCIONE, *supra* note 2, at 11 (describing these and other painful mutilations that are routine on factory farms, and noting that “[f]or the most part, these mutilations are performed without pain relief.”).

93. As the director of the Animal Research Institute said at a Livestock Intensive Methods of Production Conference in 1978, “At the Animal Research Institute, we are trying to breed animals without legs, and chickens without feathers.” *Naked Chick Gets Serious Attention*, BROILER INDUSTRY, Jan. 1979, at 98. This research continues today with the aim to reduce feather pecking and to increase succulence. See, e.g., A. Cahaner et al., *Improving Broiler Meat Production, Especially in Hot Climates, by Genes that Reduce or Eliminate Feather Coverage*, 44 BRIT. POULTRY SCI. S22 (Supp. 2003).

94. NAT’L ANIMAL HEALTH MONITORING SYS., U.S. DEP’T OF AGRIC., SWINE SLAUGHTER SURVEILLANCE PROJECT (1996).

95. See Wolfson & Sullivan, *supra* note 1.

96. See EISNITZ, *supra* note 54, at 22–23, 64–65 (illustrating the steps of cattle and hog slaughter); FRANCIONE, *supra* note 2, at 12–13.

poultry⁹⁷ and therefore ninety percent of the animals slaughtered.⁹⁸ There is also an exception for kosher slaughter.⁹⁹

Many animals are stunned improperly, as proper training and use of electronic stunning equipment requires a skill and care incompatible with the cost-cutting objectives of mass production.¹⁰⁰ Yet the large number of animals that must be slaughtered each day means that the production line is not stopped because an animal is improperly stunned, and firsthand accounts from slaughterhouse workers reveal that animals are often scalded or skinned while still conscious.¹⁰¹ According to one slaughterhouse worker who cuts the hooves off cattle: “They blink. They make noises. The head moves, the eyes are open and still looking around. They die piece by piece.”¹⁰² A hog-slaughterhouse worker offers a similar observation: “By the time they hit the scalding tank, they’re still fully conscious and squealing. Happens all the time.”¹⁰³

As evident from this brief glimpse into factory farming, efficiency reasons cause agribusiness corporations to treat animals according to Cartesian principles. “Factory farmers are all Cartesians . . . [who view] animals [as] no more than machines—milk machines, piglet machines, egg machines—production units converting themselves into profits.”¹⁰⁴ To visit a factory farm

is to enter a world that, for all its technological sophistication, is still designed according to Cartesian principles: animals are machines incapable of feeling pain. Since no thinking person can possibly believe this any more, industrial animal agriculture depends on a suspension of disbelief on the part of the people who operate it and a willingness to avert your eyes on the part of everyone else.¹⁰⁵

97. See Stephanie J. Engelsman, “World Leader”—At What Price? *A Look at Lagging American Animal Protection Laws*, 22 PACE ENVTL. L. REV. 329, 335 (2005) (“[T]he phrase ‘and other livestock’ in the [Humane Methods of Slaughter Act (HAS)] is a point of much dispute. The U.S. Department of Agriculture (‘USDA’) promulgated regulations implementing the Act, but those provisions, adopted in 1979 and amended in 1994, neither discuss which animals are covered by the HSA nor interpret what the phrase ‘and other livestock’ means practically. The phrase is defined in the USDA regulations implementing the federal Meat Inspection Act, and the term ‘livestock’ includes only ‘cattle, sheep, swine, goat, horse, mule, or other equine.’” (citations omitted)).

98. Wolfson & Sullivan, *supra* note 1, at 208 (noting that about 8.5 billion of the 9.5 billion animals slaughtered annually are poultry).

99. 7 U.S.C. § 1902(b) (2006); see also Donald G. McNeil Jr., *Inquiry Finds Lax Federal Inspections at Kosher Meat Plant*, N.Y. TIMES, Mar. 10, 2006, at A16.

100. See SCULLY, *supra* note 47, at 282–85.

101. EISNITZ, *supra* note 54, at 28–29 (citing statements from slaughterhouse workers at Kaplan Industries in Florida about how common it is to skin still-conscious cattle); *id.* at 69 (quoting a hog-slaughterhouse worker for John Morrell & Company in Iowa as stating, “There was basic incompetence among the stun operators . . . One guy would set the stunner on the hog’s back, then instead of holding the wand down for the three-second stun, he’d let it go and watch it ride up the hog’s back and shock the hog. He enjoyed watching the hog jump in the air when it was shocked.”).

102. SCULLY, *supra* note 47, at 284.

103. EISNITZ, *supra* note 54, at 71.

104. Joy Williams, *The Inhumanity of the Animal People: Do Creatures Have the Same Rights That We Do?*, HARPER’S MAG., Aug. 1997, at 60.

105. Michael Pollan, *An Animal’s Place*, N.Y. TIMES MAG., Nov. 10, 2002, at 58, 63.

Therefore, although virtually everyone rejects the Cartesian view that animals are robots who cannot feel pain, the vast majority of meat bought by U.S. consumers comes from animals treated according to Cartesian principles.

III

CORPORATE SOCIAL RESPONSIBILITY AND ANIMALS: LEAVING THE FACTORY FARM BEHIND?

A. Socially Responsible Decisionmaking and the Business Judgment Rule

The traditional view of corporate law that led to factory farming—profit-maximization at all costs—has come under attack from progressive corporate law scholars, who make two primary arguments. First, even if the law mandates that corporate managers pursue the sole end of profit maximization,¹⁰⁶ it does not require that profits be maximized in the short term.¹⁰⁷ As a result, corporate managers may take a long-term view of the decisions that will maximize profits, which, according to progressives, will be socially responsible decisions that engender goodwill from consumers.¹⁰⁸

The second argument is that corporate law's business judgment rule protects virtually any decision made by corporate managers to act in a socially responsible manner regardless of whether it actually maximizes profits.¹⁰⁹ Technically, the business judgment rule insulates from judicial review the decisions of corporate managers who act on an informed basis, in good faith, and without self-dealing. So long as the board employs a rational *process* in deciding on a course of action, and so long as that process is not tainted by bad faith or self-dealing, the *substance* of that decision is not subject to second-

106. See *supra* notes 56–57 and accompanying text.

107. See MITCHELL, *supra* note 12, at 75 n.b (“The law has never demanded, except in one rare circumstance, that the corporation maximize *stock price*.”).

108. See William H. Simon, *What Difference Does it Make Whether Corporate Managers Have Public Responsibilities?*, 50 WASH. & LEE L. REV. 1697, 1699 (1993) (“[B]ecause business success depends heavily on good relations and reputation with governments, customers, suppliers, workers, and the general public, one can always describe a corporate decision that benefits nonshareholder constituencies as serving the shareholders’ long run interest in good corporate relations and reputation.”). *But see* RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 462 (5th ed. 1998) (“In competitive markets, a sustained commitment to any goal other than profitability will result in the firm’s shrinking, quite possibly to nothing.”); David Vogel, *The Low Value of Virtue*, HARV. BUS. REV., June 1, 2005, at 26 (noting that evidence does not show that corporate social responsibility systematically pays off financially).

109. See FRANK H. EASTERBROOK & DANIEL R. FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 2 (1991) (“The handiwork of managers is final in all but exceptional or trivial instances. Courts apply the ‘business judgment rule,’ a hands-off approach that judges would not dream of applying to the decisions of administrative agencies.”); MITCHELL, *supra* note 12, at 68 (“Because [the business judgment rule] is a presumption which is very difficult to rebut, it gives the board a great deal of latitude in deciding how to pursue the goal of profit maximization.”); Blair & Stout, *supra* note 13, at 299–300 (“[I]n practice the duty of care is all but eviscerated by a legal doctrine known as the ‘business judgment rule.’”); Elhauge, *supra* note 63, at 739 (“[T]he profit-sacrificing discretion created by business judgment deference suffices to cover the lion’s share of profit-sacrificing discretion that exists.”).

guessing by courts.¹¹⁰ To overturn informed managerial decisions would “expose directors to substantive second guessing by ill-equipped judges or juries, which would, in the long-run, be injurious to investor interests.”¹¹¹

For the socially oriented manager, the business judgment rule provides some room to maneuver. So long as there is a rational decisionmaking process for acting in a socially responsible manner—again, that the actions will engender goodwill from consumers and increase profits in the long term—the decision is not appropriate for judicial review. The practical consequences are that “corporate law does not require managers to estimate precisely the dollar costs and dollar benefits of every action they take; courts have accepted virtually every argument that socially or ethically motivated conduct should be upheld as ‘good for business.’”¹¹²

In light of the legal immunity offered by the business judgment rule, the main restraints on socially responsible decisionmaking are non-legal pressures. If managers adopt an ethical business model that fails to increase profits, market pressures will take effect. Corporate earnings will not meet Wall Street expectations, shareholders will move their investments elsewhere, and managers will be targeted for removal. Also, managers will see a personal financial loss as the value of their stock options decline. These market pressures direct even well-intentioned managers to engage primarily in socially responsible behavior whose costs can be passed along to consumers in the form of higher product prices. This cost shifting enables corporations, at least in theory, to “do good while doing well.”

The danger of this structure, however, is that to engender consumer goodwill, corporations will brand themselves as being more socially responsible than they actually are. That is, they will not significantly increase their level of social responsibility, but will suggest that they have in their advertising.

Business leaders today say their companies care about more than profit and loss, that they feel responsible to society as a whole, not just to their shareholders. Corporate social responsibility is their new creed, a self-conscious corrective to earlier greed-inspired visions of the corporation. Despite this shift, the corporation itself has not changed.¹¹³

This skeptical view of corporate social responsibility is supported in the context of animal welfare and corporate farming practices.

110. See, e.g., *In re Caremark Int'l, Inc. Derivative Litig.*, 698 A.2d 959, 968 (1996) (“[T]he business judgment rule is process oriented . . .”); Blair & Stout, *supra* note 13, at 300 (“To earn the protection of the business judgment rule, directors must show that a challenged decision satisfied three requirements: (1) The decision was made ‘on an informed basis’; (2) the directors acted ‘in good faith’; and (3) the directors acted ‘in the honest belief that the action taken was in the best interests of the company.’”).

111. *In re Caremark*, 698 A.2d at 968.

112. Elliott J. Weiss, *Economic Analysis, Corporate Law, and the ALI Corporate Governance Project*, 70 CORNELL L. REV. 1, 35 (1984).

113. BAKAN, *supra* note 12, at 28.

B. The Prohibitive Cost of Meaningfully Improved Farming Practices

A very small subset of U.S. consumers—less than three percent of the market for meat¹¹⁴—has shown a willingness to pay for some improvements to animal welfare. To capture this market share, some corporations have begun to offer animal-husbandry processes thought to be more socially responsible than those involved in factory farming. The business judgment rule protects a manager's decision to offer these improvements, but, since they are costly, market pressures will restrict improvements to those for which consumers are willing to pay in the form of higher product prices.

Animal welfare is very expensive, which is precisely the reason that agribusiness managers cut it.¹¹⁵ It may be that making even one improvement in animal welfare, leaving in place the other harmful mechanisms of the factory farm, can raise the cost of animal products significantly. For instance, organic meat, which simply denotes the absence of antibiotics, can cost thirty to forty percent more than factory-farmed meat.¹¹⁶ “Natural” beef costs twenty to fifty percent more than factory-farmed beef.¹¹⁷ And when the improvements become more significant, so does the product's cost. “Free-range” meat is sold at two to three times the price of factory-farmed meat.¹¹⁸ In the United States, free-range turkeys sell for \$3.50 to \$10 per pound, while Butterball-brand factory-farmed turkeys sell for only \$1.50 per pound.¹¹⁹ Free-range eggs are twenty-six to fifty-nine percent more costly to produce than battery-cage eggs.¹²⁰ Although some changes may represent no appreciable increase in operating costs to producers, they require a substantial initial investment.¹²¹ Some animal advocates have

114. See *supra* note 66 and accompanying text.

115. J. P. McInerney, *The Economics of Welfare, in ETHICS, WELFARE, LAW AND MARKET FORCES: THE VETERINARY INTERFACE 125* (A. R. Mitchell & R. Ewbank eds., 1998).

116. See *id.* at 125 (“There is an inevitable economic cost in terms of higher food prices associated with higher welfare standards.”); see also Paul Tharp, *Whole Foods Kills Them Softly*, N.Y. POST, Jan. 19, 2005, at 35 (quoting food analyst Scott Van Winkle of Adams Harkness Inc. for the thirty to forty percent figure). Furthermore, the term “organic” may say little about animal welfare. For instance, the *New York Times* reported that in a survey of organic dairies, only eighteen of sixty-five obtained the highest rating, and that “[t]here are producers selling organic products from cows that live with as many as 6,000 other animals and that seldom see pasture, which fits the definition of a factory farm. There are farms where nonorganic cows are brought in as replacements and where antibiotics and hormones are used.” Marian Burros, *Survey Ranks ‘Organic-ness’ at Dairies*, N.Y. TIMES, Mar. 22, 2006, at F8 (emphasis added).

117. *Natural Beef: The Original*, SUPERMARKET NEWS, Jan. 20, 2003 (“According to industry experts, retail prices on natural beef products can be 20% to 50% higher than prices on the same conventional products.”). Like the organic label, the “natural” label may say little about animal welfare. See Melanie Warner, *When it Comes to Meat, ‘Natural’ is a Vague Term*, N.Y. TIMES, June 10, 2006, at C4 (noting that the “natural” label attached to meat “could mean almost nothing”).

118. Matheny & Leahy, *supra* note 22, at 346.

119. *How to Buy a Turkey: Holiday Food Guide 2005*, N.Y. MAG., Nov. 14, 2005, available at <http://nymag.com/nymetro/food/homeent/14995/index.html>.

120. HUMANE SOC'Y OF THE U.S., AN HSUS REPORT: THE ECONOMIC CONSEQUENCES OF ADOPTING ALTERNATIVE PRODUCTION SYSTEMS TO BATTERY CAGES, http://www.hsus.org/web-files/PDF/farm/econ_battery_1.pdf (last visited Feb. 2, 2007) (comparing the results of nine studies).

121. See, e.g., HUMANE SOC'Y OF THE U.S., AN HSUS REPORT: THE ECONOMIC CONSEQUENCES OF ADOPTING ALTERNATIVE PRODUCTION SYSTEMS TO CONVENTIONAL MANUAL CATCHING OF

contended that the costs of improved husbandry processes are exaggerated, but they admit that there is at least some cost that must be passed along to consumers.¹²²

An example from Switzerland may also shed light on what meaningful improvements in animal welfare would cost U.S. consumers. In October 2005, National Public Radio's *Morning Edition* reported that Swiss agriculture, which is said to ascribe more weight to animal welfare, requires government subsidies of up to ninety percent of a farmer's income to be sustainable.¹²³ Even with these subsidies, Swiss pork chops cost 600 percent more (about twenty dollars per pound) than pork chops from neighboring Germany, which does not have the same animal welfare standards.¹²⁴ Although the Swiss take pride in their farming as a way of life and the animal welfare it affords, the Swiss consumer often crosses the border into Germany to purchase the cheaper pork chops.¹²⁵ Similarly, the Swiss ban on battery-cage production brought about a drop in domestic production and exports, and an increase in imports and neighbors' production, suggesting that eggs, too, were purchased across the border.¹²⁶

These data do not bode well for a move toward significantly improved processes in the United States. Rather, they suggest that even if more U.S. consumers could be enticed to pay a premium for *some* improvements—which itself is a questionable proposition given the overwhelming preference for factory-farmed products—the processes could not be meaningfully improved unless consumers were to pay *substantially* more. Because this is unlikely, market pressures will cause corporations to offer only limited improvements; otherwise, they risk pricing their products out of the market.¹²⁷ Even though it could be said that any improvement in animal welfare is a positive step, the danger is that corporations will brand these offerings as significant improvements to engender consumer goodwill, which can mislead consumers

POULTRY, http://www.hsus.org/web-files/PDF/farm/econ_catching.pdf (last visited Feb. 2, 2007) (explaining that after paying for a mechanical poultry catcher at a price of \$150,000 to \$200,000, there is no significant increase in production costs over manual catching).

122. See, e.g., PETER STEVENSON, *COMPASSION IN WORLD FARMING TRUST, FACTORY FARMING AND THE MYTH OF CHEAP FOOD: THE ECONOMIC IMPLICATIONS OF INTENSIVE ANIMAL HUSBANDRY SYSTEMS* (1997).

123. *Morning Edition: Farm Subsidies Debated in Global Trade Talks* (NPR radio broadcast Oct. 11, 2005), available at <http://www.npr.org/templates/story/story.php?storyId=4953604>.

124. *Id.*

125. *Id.*

126. RAY TREWIN, *RURAL INDUS. RESEARCH & DEV. CORP., THE ECONOMIC IMPACT OF CHANGING AUSTRALIAN EGG PRODUCTION SYSTEMS* 15 (2002).

127. For example, Starkist Tuna voluntarily adopted a dolphin-safe standard. Although customer approval of the company increased, ultimately consumers “were not willing to pay more” for the more humane product. DAVID VOGEL, *THE MARKET FOR VIRTUE: THE POTENTIAL AND LIMITS OF CORPORATE SOCIAL RESPONSIBILITY* 135 (2005) (quoting J. W. Connolly, president of Heinz, USA, Starkist's parent company). It could be that the demand for some animal foods is price inelastic, and consumers will still buy these products if their price increases. See G. JOHN BENSON & BERNARD E. ROLLIN, *THE WELL-BEING OF FARM ANIMALS: CHALLENGES AND SOLUTIONS* 345 (2004) (“[T]he demand for eggs is inelastic: eggs are not readily interchangeable with other items in the diet, and people tend to buy a set number whatever the price.”).

into thinking that their purchases represent a significant departure from the factory farm. Another danger is that as traditional companies expand into niche markets, what minimal standards of improvement exist might erode due to economic pressures and lobbying.¹²⁸

C. Whole Foods and the Deceptiveness of Corporate Branding

Whole Foods, Inc., an Austin, Texas-based grocery chain, is indicative of the misleading effects of corporate branding. Whole Foods has become a Fortune 500 company in part by selling itself as a socially responsible corporation in its treatment of animals. Specifically, Whole Foods has established an “animal compassion foundation” and has developed standards for animal welfare designed to distinguish itself from grocers that sell factory-farmed products.¹²⁹ The founder and CEO of Whole Foods, John Mackey, is an ethical vegan, a fact frequently mentioned in connection with Whole Foods’ animal-friendly reputation.¹³⁰ Mackey has spoken about the inevitable demise of factory farming in America,¹³¹ and animal advocates have touted Whole Foods and Mackey as heroes of the movement.¹³²

Yet Whole Foods may be branding itself as providing a higher level of animal welfare than it actually delivers.¹³³ An examination of its animal welfare standards reveals certain positive changes for animals, but also a significant omission; namely, that Whole Foods has no standards for slaughter. Animal science expert Ian Duncan notes that the last twenty-four hours, including slaughter, are the most stressful time for farm animals and have the greatest

128. See Paulson, *supra* note 66 (citing a report that found that two major organic milk producers source out to feedlots); Michael Pollan, *Mass Natural*, N.Y. TIMES MAG., June 4, 2006, at 15 (citing a recent legislative change allowing organic chicken growers to replace organic feed with conventional feed when prices of organic feed exceed a certain level). This is of particular concern now that Wal-Mart, the largest grocery in the United States, will begin selling organic foods. Pollan asks, “With Wal-Mart going organic, where will organic go?” *Id.*

129. See Whole Foods Market: Issues & Actions: Animal Welfare, <http://www.wholefoodsmarket.com/issues/animalwelfare/index.html> (last visited Nov. 13, 2006).

130. See, e.g., John Mackey et al., *The CEO as Animal Activist: John Mackey and Whole Foods* 207, in IN DEFENSE OF ANIMALS: THE SECOND WAVE (Peter Singer ed., 2006); Amanda Griscom Little, *The Whole Foods Shebang: An Interview with John Mackey, Founder of Whole Foods*, GRIST MAG., Dec. 17, 2004, <http://www.grist.org/news/maindish/2004/12/17/little-mackey/index.html>.

131. See, e.g., PETER SINGER & JIM MASON, THE WAY WE EAT: WHY OUR FOOD CHOICES MATTER 181 (2006) (noting that Whole Foods CEO Mackey predicts that factory farming will be illegal in twenty years); *Whole Foods CEO Predicts Demise of “Factory Farms,”* FACTORYFARMING.COM CURRENT ISSUES: PORK ALERT, June 29, 2004, http://www.factoryfarming.com/issues_wholefoods.htm.

132. See PETA Names Whole Foods Best Animal-Friendly Retailer, AUSTIN BUS. J., Dec. 30, 2004, <http://austin.bizjournals.com/austin/stories/2004/12/27/daily22.html> (quoting PETA president Ingrid Newkirk stating, “Whole Foods’ commitment to a humane lifestyle and improved standards of animal welfare places it at the leading edge of the retail food industry.”).

133. See Field Maloney, *Is Whole Foods Wholesome?: The Dark Secrets of the Organic-Food Movement*, SLATE, Mar. 17, 2006, <http://www.slate.com/id/2138176> (posing the question, “Is [Whole Foods] really as virtuous as it appears to be?”).

impact on animal welfare.¹³⁴ That Whole Foods adopts no standards for slaughter means that animals may be slaughtered under the conditions described earlier—still conscious while being skinned or dismembered.¹³⁵ In addition, the Whole Foods standards still allow for some intensive confinement similar to that found on factory farms.¹³⁶

Where Whole Foods' standards do provide a benefit to animals, it is unclear whether they will prove cost-effective for Whole Foods. Mackey admits that the standards are "highly participatory" among suppliers¹³⁷ and that he does not know whether they will prove economically viable. When asked how much the standards will cost to implement, Mackey replied, "Everybody is asking us that, but we won't know until it's done. Getting our farmers to produce to those standards means they have to retool their production facilities for us, so we don't exactly know how much more it's going to cost."¹³⁸ Mackey has indicated that animal welfare must ultimately be subjugated to bottom-line concerns, stating, "The animals have to flourish, *but in such a way that it'll be cheap enough for the customers to buy it.*"¹³⁹ Given the data cited above on the high costs of improved animal welfare, it is hard to see how animals can "flourish" in any meaningful way if Whole Foods is to earn a profit selling them.

That Whole Foods may provide less of a departure from the factory farm than advertised is unsurprising given the combined effect of market pressures on corporate managers to maximize profits and the high cost of animal welfare. Mackey is thinking as corporate managers must when he states, "We're in business not to fulfill some type of ideology, but to service our customers,"¹⁴⁰ and, "if we were to become a vegan store, we'd go out of business . . . [and] I would be removed as CEO."¹⁴¹ (Ironically, Whole Foods *did* begin as a vegetarian store, but it began to sell animal products to increase corporate profits.¹⁴²) Market pressures encourage Whole Foods and similar corporations to provide enough improvements in animal welfare to allow animal-friendly

134. See *Animal Welfare: The Last 24 Hours Are The Most Stressful*, BETTER FARMING, Oct. 2005, <http://www.betterfarming.com/2005/bf-oct05/cover.htm> (quoting Duncan as stating: "[O]f all the things we do to our agricultural animals, what we do to them in the 24 hours before they are slaughtered, reduces their welfare the most. During this period, animals are mixed socially, exposed to strange stimuli, rounded up or actually caught and placed in a transport truck. While on the truck, they are deprived of food and water, can be exposed to extremes of weather, generally do not have sufficient room to adopt a good resting position, often exposed to exhaust fumes, subjected to accelerating and braking forces, etc. At the slaughterhouse, they are exposed to strange noises and smells, more social mixing and rough handling. Then the slaughtering process itself is not always humane.").

135. See *supra* notes 96–103 and accompanying text.

136. See Whole Foods Market Natural Meat Program and Animal Compassionate Standards for Beef Cattle, at 5, <http://www.wholefoodsmarket.com/issues/animalwelfare/cattle.pdf> (last visited Nov. 13, 2006) ("No animal raised for the Whole Foods Market Natural Meat Program can be kept on a feedlot *for more than 1/3 of its life.*" (emphasis added)).

137. Griscom Little, *supra* note 130.

138. *Id.*

139. *Id.* (emphasis added).

140. *Id.*

141. *Id.*

142. *Id.*

branding and thus generate consumer goodwill, but stop short of incurring the substantially higher costs required for meaningful improvements in animal welfare.¹⁴³ Michael Pollan suggests that Whole Foods and similar corporations can brand themselves as animal-friendly because they control the information flow about the level of animal welfare they offer:

Whole Foods, they're brilliant storytellers. You walk into that store, and it just looks like a beautiful garden . . . [with] little labels that describe how the cow lived that became your milk or your beef, and the cage-free vegetarian hens that got to free range. They're creating in your minds an image of a farm very much like the ones in the books you read as children—with a diversity of happy animals wandering around the farmyard. It's very cleverly designed, but unfortunately like a lot of pastoral forms of art, it's based on illusions. Not entirely, but if you go to the farm depicted on those labels, you find that in fact, things look a bit different. Organic milk might be coming from a dry organic feedlot where 500 cows are milling around and never get to eat a blade of grass. I have a feeling that's not what the consumer thinks they're getting.¹⁴⁴

Even if Whole Foods' changes leave something to be desired, it might be argued that given the dominance of factory farming, any improvements are a step in the right direction. But this argument rests on two debatable assumptions. First, that further steps will follow, which is doubtful given the economics of animal welfare; and second, that without these improved processes, all ethically minded consumers would continue to purchase factory-farmed products. Regarding the second assumption, it may well be that the very consumers who may be enticed to shop at Whole Foods are also those consumers who may be most likely to eschew animal products altogether after learning about factory farming. Whole Foods and similar corporations provide an "out" for these consumers, who may see products made by improved processes as a middle ground option that allows them to continue eating animals without guilt, when in reality the animals they continue to eat suffer greatly.

Pollan himself, despite his insightful observations about Whole Foods, has fallen prey to similar illusions in the past. In a 2002 article in the *New York Times Magazine*, Pollan first described factory farming as "evil" and appeared to conclude that vegetarianism was the correct response, asking, "Who would want to be made complicit in the agony of these animals by eating them?"¹⁴⁵ But then he visited a small, "animal-friendly" farm, where he became convinced that eating either factory-farmed meat or no meat at all are not "the only two

143. See Tharp, *supra* note 116 ("Wall Street tends to like [Whole Foods] because its gross margins are usually double that of ordinary grocery chains, or about 6 percent."). But see Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice*, 118 HARV. L. REV. 525, 613 (2004) ("If individuals came to regard the process representations of manufacturers with substantial cynicism and distrust, such that their willingness to pay premiums for process-labeled goods diminished, then the economic motivation for manufacturers . . . to disclose process information would diminish as well.").

144. Blair Golson, *America's Eating Disorder*, ALTERNET, Apr. 19, 2006, <http://www.alternet.org/module/printversion/35084>.

145. Pollan, *supra* note 105, at 63.

options.”¹⁴⁶ He concluded that it is morally acceptable to eat meat raised by the practices he witnessed on the small farm, which he believed was signified by retail labels such as “Free Farmed.”¹⁴⁷ But faith in these labels is misplaced, as they are often industry branding tools lacking any regulatory definition.¹⁴⁸ The Free Farmed program of which Pollan speaks, for instance, is managed by a former lobbyist for the pork industry;¹⁴⁹ it has “no formal process for the routine review/revision of standards”¹⁵⁰ and only one animal welfare expert on its advisory committee.¹⁵¹

Improved labeling of animal foods, as suggested by Jeff Leslie and Cass Sunstein,¹⁵² is an enticing option for combating the corporate tendency to oversell its level of social responsibility. However, the labeling programs that corporations might be enticed to undertake voluntarily are those that present their current practices in the most favorable light; for instance, by using words and phrases with positive connotations such as “free range” or “free farmed.”¹⁵³ A move toward mandatory labeling of factual information, such as how many animals were sent to slaughter with broken bones, would certainly be resisted by the agribusiness lobby. The strong political power of this lobby is evidenced by the exclusion of factory-farming practices from state anticruelty statutes.¹⁵⁴ Similarly, federal animal protection laws either exclude farm animals from coverage altogether¹⁵⁵ or carry insignificant penalties and are only laxly enforced.¹⁵⁶ Even former Secretary of Agriculture Dan Glickman declared the organic designation “a marketing tool” rather than “a value judgment about nutrition or quality.”¹⁵⁷ Finally, verifying the authenticity of labels has been a

146. *Id.* at 110.

147. *Id.* at 111.

148. *See, e.g.*, FARM SANCTUARY, *supra* note 66, at 18–28.

149. *Id.* at 8 (“American Humane has hired a former executive director of the Colorado Pork Producers Council to manage the [Free Farmed] program.”).

150. *Id.*

151. *Id.*

152. Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 LAW & CONTEMP. PROBS. 115, 117 (Winter 2007).

153. Such voluntary labels are subject to ambiguity, and therefore can be inconsistent and misleading. *See* Herb Weisbaum, *When Grocery Shopping, Read the Fine Print*, MSNBC.COM, May 15, 2006, <http://www.msnbc.msn.com/id/12803309> (noting that labels are often misleading); Liz Neufeld, AGRIC. MARKETING RESOURCE CTR., CONSUMER PREFERENCES FOR ORGANIC/FREE RANGE CHICKEN 24 (2002) (“[T]here is an apparent lack of knowledge about free-range chicken and its availability.”).

154. Wolfson & Sullivan, *supra* note 1, at 206 (observing that the agribusiness lobby has “persuaded legislatures to amend criminal statutes . . . so that [they] cannot be prosecuted for any farming practice that the industry itself determines is acceptable . . .”).

155. 7 U.S.C. § 2132(g) (2000).

156. *See* EISNITZ, *supra* note 54, at 24 (“[V]iolations of the Humane Slaughter Act carry no penalties at all.”); Wolfson & Sullivan, *supra* note 1, at 208 (“There can be little doubt that the [Humane Slaughter Act] is not being effectively enforced.”). The Humane Slaughter Act does not even apply to poultry, which constitutes 8.5 billion of the 9.5 billion farm animals slaughtered in the United States each year. *See supra* notes 97–98 and accompanying text.

157. Dan Glickman, Press Release, U.S. Dep’t of Agric., Release of Final National Organic Standards (Dec. 20, 2000), <http://www.usda.gov/news/releases/2000/12/0426.htm>.

problem in European Union countries that have more rigorous regulations for animal welfare.¹⁵⁸

IV

A DICHOTOMOUS CHOICE

Because the vast majority of our animal use is for food, and because animal foods can only be made affordable for most consumers through factory farming, society is left with a dichotomous choice: either we stop purchasing and consuming animals, or they will continue to suffer in our factory farms. A systematic return to family farming is not economically feasible, especially given the increasing ability of agribusiness corporations to move factory farming operations globally. Improving animal welfare in any meaningful sense requires shifting societal preference away from animal use altogether—a move that could begin to eradicate the property status of animals.

Corporations and markets can be used to aid in this transition if consumers are enticed to “vote with their dollars” against those corporations that use animals for profit, and vote for those that do not. Social education, as undertaken by animal advocates, should focus on the benefits to animals, humans, and the environment that result from adopting a diet free from animal foods.¹⁵⁹ As more consumers begin to purchase alternatives to animal foods, corporations will respond by selling the alternatives to capture market share.¹⁶⁰

Consumer-based change has the distinct advantage of requiring no compromise with legislatures or corporations to be effective; instead, each person who wishes to stop animal suffering can simply choose to stop eating animal products and buy alternative foods.¹⁶¹ This change is much more than

158. See, e.g., Mette Wier et al., *Consumer Preferences for Organic Foods*, in ORGANIC AGRICULTURE: SUSTAINABILITY, MARKETS AND POLICIES 257, 262 (2003).

159. For studies on the human health benefits of a meat-free diet, see Paul N. Appleby et al., *The Oxford Vegetarian Study: An Overview*, 70 AM. J. CLINICAL NUTRITION 525S (1999) (finding in a sixteen-year study of 6,000 vegetarians and 5,000 non-vegetarians in the U.K. that the vegetarians generally had lower LDL cholesterol levels and lower death rates for each of the mortality endpoints studied); Joan Sabaté, *The Contribution of Vegetarian Diets to Health and Disease: A Paradigm Shift?*, 78 AM. J. CLINICAL NUTRITION 502S (2003) (concluding that well-balanced vegetarian diets could best prevent nutrient deficiencies as well as diet-related chronic diseases); M. Segasothy & P.A. Phillips, *Vegetarian Diet: Panacea for Modern Lifestyle Diseases?*, 92 Q. J. MED. 531 (1999) (reviewing the beneficial effects of vegetarian diets, including lower risks of diabetes, coronary heart disease, ocular macular degeneration, and colon and breast cancers). For a discussion of the environmental impact of animal agriculture, see David Pimentel, *Livestock Production and Energy Use*, in 3 ENCYCLOPEDIA OF ENERGY 671–74 (Cutler J. Cleveland ed., 2004) (discussing the adverse environmental impact of livestock production in terms of wasteful use of water resources, depletion of soil, and inefficient levels of plant production).

160. For evidence that such a market is beginning to develop, see Alicia Barney, *Sweets: Junk Food, Vegan Style*, NEWSWEEK, May 29, 2006, at 9 (noting the many animal-free junk food options now available, and observing, “It’s just not as hard to be a vegan these days.”), and Levi J. Long, *Veganism Creates \$2.8B Market*, ARIZ. DAILY STAR, May 15, 2006, <http://www.azstarnet.com/business/129192>.

161. See Kysar, *supra* note 143, at 637 (“In an era of substantial skepticism regarding the effectiveness of political action . . . individuals may now regard the market as a more promising route to public-regarding change than the government.”).

symbolic given that “[the] average North American or European eats somewhere between 1,500 to 2,500 factory-farmed animals in his or her lifetime.”¹⁶²

Another form of consumer-based change, socially responsible investing, is rising in popularity¹⁶³ but is not yet a particularly viable option for improving animal welfare. Although certain socially responsible investment funds purport to screen for animal welfare, most only exclude corporations that test consumer products on animals. Yet the whole of animal experimentation, which includes product testing and biomedical research, is a very small subset of animal use, numerically speaking, compared to food production.¹⁶⁴ Very few socially responsible investment funds exclude agribusiness corporations. Perhaps progressive ideas such as corporate social disclosure¹⁶⁵ and the use of shareholder proposals¹⁶⁶ can be used to educate investors about the current state of animal welfare. But given the dearth of investment options for concerned investors, change must begin in the consumer marketplace.

V

CONCLUSION

“Forget the pig is an animal. Treat him just like a machine in a factory. Schedule treatments like you would lubrication. Breeding season like the first step in an assembly line. And marketing like the delivery of finished goods.”¹⁶⁷ Although this admonition from an American pig farmer conflicts with our widespread belief that animals differ from inanimate objects, it is this type of Cartesian thinking that allows agribusiness corporations to offer low-cost animal foods to consumers. The corporate ownership of animals has had a devastating impact on animal welfare, particularly through factory farming.

162. Gaverick Matheny, *Utilitarianism and Animals*, in IN DEFENSE OF ANIMALS: THE SECOND WAVE, *supra* note 130, at 21.

163. See Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1287 (1999) (“[T]he number of mutual funds using social or environmental screens increased from 55 in 1995 to 144 in 1997”); see also Michael S. Knoll, *Ethical Screening in Modern Financial Markets: The Conflicting Claims Underlying Socially Responsible Investment*, 57 BUS. LAW. 681 (2002); Maria O’Brien Hylton, “Socially Responsible” Investing: *Doing Good Versus Doing Well in an Inefficient Market*, 42 AM. U. L. REV. 1 (1992).

164. According to the Office of Technology Assessment of the U.S. Congress, between 10 million and 100 million animals are used in research in the U.S. each year. FRANCIONE, *supra* note 2, at 34. This number, while significant, is quite small compared to the 9.5 billion farm animals killed each year for food. See Wolfson & Sullivan, *supra* note 1.

165. See generally Williams, *supra* note 163.

166. See generally Thomas A. Decapo, Note, *Challenging Objectionable Animal Treatment with the Shareholder Proxy Proposal Rule*, 1988 U. ILL. L. REV. 119 (suggesting ways in which shareholder proposals seeking to benefit animals may be crafted for inclusion in corporate proxy materials); Kate Fodor, *When the Protesters are Shareholders: From Animal Rights to Religion, Groups are Trying to Force Corporate Change via the Shareholder Vote*, THE SCIENTIST, May 23, 2005, at 38.

167. SentientBeings.org: Industry’s Attitude, *supra* note 86 (quoting J. Byrnes, *Raising Pigs by the Calendar at Maplewood Farm*, HOG FARM MGMT., 1976).

Improved farming practices are inefficient and thus cannot replace factory farming. Only a societal decision to stop eating animals will meaningfully improve animal welfare. Educating consumers about the benefits of such a change can entice them to use the marketplace to benefit animals. Only when consumers take this step will animals be treated as more than Cartesian machines.