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An Agricultural Law Research Article

Virtue Ethics and Sustainability Policies

by

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VIRTUE ETHICS AND SUSTAINABILITY POLICIES

Richard N. Morrison & Terisha D. Driggs¹

There are ample reasons to believe that behaving ethically requires substantially more than merely complying with the law, and that the law itself may lag behind what the world needs as normative behavior. A ready example is available in the context of environmental law. All fifty states now have TMDL Programs (Total Maximum Daily Load Programs) under the Clean Water Act.² Yet, according to Steve Neugeboren, Acting Associate General Counsel of EPA, there are still 60,000 waters in the U.S. that don't meet Clean Water Act standards. Of those, only 10,000 still have hope of improvement, and most shocking of all, less than five waters are better off now than ten years ago because of TMDL standards.

Ponder for a moment the fundamental ideas that society needs a higher standard of ethical conduct in American business, that one can't rely upon the law as a substitute for ethical conscience, and that lawyers have important opportunities to urge upon clients a renewed and renewable commitment to ethical behavior in the conduct of business, especially as it has consequences for the earth, for water, and for air. As agricultural lawyers, our relationship to the land promotes an integrated system of ethics that promotes a higher standard of care in our professional lives.

When discussing professional ethics in legal circles, too many times a continuing reference to the Model Rules of Professional Conduct is presented as the only referent. This paper will draw, instead, upon moral reasoning and economic justice to inform a perspective on ethical conduct in the practice of law. By reference, some of the material on professional ethics will be presented, and guidance for further hypotheticals and discussion points relevant to the theme will be provided. However, more importantly, this paper will argue that it is sometimes appropriate to assume the function of speaking with clients about this subject. In our time, the business world is challenged to conduct its business in a manner greatly exceeding mere compliance with the requirements of law. Why? The law itself will not take us where we want to go as a civilized people—happy and healthy both while alone and with others.

1. Presented at the 27th Annual Agricultural Law Symposium of the American Agricultural Law Association, October 14, 2006.

2. EPA, *Total Maximum Daily Loads: National Section 303(d) List Fact Sheet*, http://iaspub.epa.gov/waters/national_rept.control (last visited June 17, 2007).

This paper will first put up a grand vision of what ethics could mean to everyone. It will then look at some of the actual challenges and controversies now affecting agriculture, some of which do present ethical questions that are historically unprecedented, but all of which give an opportunity to test notions of what ethical conduct requires.

An introduction to the grand vision recalls the 1986 film "The Mission," which starred Jeremy Irons and Robert DeNiro. It was a film which, among other things, showed the horrible consequences of decision-making based on greed and self-interest alone. It depicted the true story of the division of land in South America between Portugal and Spain in the year 1750, a division accomplished by slaughtering indigenous people and seizing their lands. The disregard of the native peoples was a sad story already visited by Spain on our own land, especially in the history of the Pueblo Indians of the American southwest. But here is why this film is mentioned: Roland Joffé, director of the film, said something wonderful when explaining his motives for working on the film. He said, "We're a strange animal, so often destroying what we love for selfish ends, and yet tantalized by the sense that there are other choices if only we had the strength to make them."³ And indeed, where will we find that strength?

We are challenged as individuals to integrate our highest values into all aspects of life and work. It's a unity of life concept traditionally associated with a philosophical term not heard much anymore—virtue. The concept assumes an attempt to envisage each human life as a whole, as a unity, whose character is or may be virtuous. There *is* a utilitarian aspect to it. This is not virtue for virtue's sake. Rather, the goal is that people should go about their lives striving to be personally healthy and happy, and at the same time they should also be striving to help the world around them be healthy and happy. It is a difficult vision that an individual can be the same unified person all day long. This requires consideration of personal ethics when in a situation that normally invokes what is referred to as "social ethics." Social ethics work very differently than personal ethics. Social ethics often involve a lower standard, reached after significant compromise. Importantly, it is a system of social ethics that is usually operative in the context of our work lives. Virtue ethics calls on persons to be of the same mind at work that they are at home. There are obstacles to achieving this, and the social obstacles are the most obvious. With credit to Alasdair MacIntyre:

The social obstacles derive from the way in which modernity partitions each human life into a variety of segments, each with its own norms and modes of behavior. So work is divided from leisure, private life from public, the corporate from the per-

3. Quote from Roland Joffé, Director of THE MISSION, Los Angeles, Nov. 2002, <http://firestorm.net/archive/viewtopic.php?t=3316&sid=0cdc5577695761f2fc8a41446d1f42a1> (last visited June 17, 2007).

sonal. So both childhood and old age have been wrenched away from the rest of human life and made over into distinct realms. And all these separations have been achieved so that it is the distinctiveness of each and not the unity of the life of the individual who passes through those parts in terms of which we are taught to think and to feel.⁴

Admittedly, the idea of a virtuous unity of life is a huge subject, and before thought strays toward a conclusion that it's all too abstract and cannot possibly have anything to do with lawyers, we will identify a point of entry into this idea, a specific example of how it might be possible to practice virtue ethics. It is an interesting example from the point of view of an individual, a businessman, and a lawyer. The example is in environmental ethics. In fact, we will present several examples of corporate sustainability policies for consideration. There is no doubt the country is witnessing a trend of increased emphasis on sustainability. However, a little more background will be helpful to the reader.

In 1997 at the AALA conference in Minneapolis, John Simonett presented a wonderful talk entitled *An Ethic for Agricultural Sustainability*, a paper with a heavy emphasis on environmental ethics and specifically, what he called the land ethic. It was a greatly influencing presentation, and led to a fascination with environmental ethics at that time. In the following year the author wrote a paper entitled *The Evolution of Environmental Ethics* ultimately published by the Denver Water Law Review.⁵ That paper had a broader focus than this one because, among other things, it relied on the work of the French paleontologist Teilhard de Chardin who observed that we live our lives in the midst of an environmental continuum which ranges from the infinitely small to the infinitely large, and also ranges, as far as we can tell, from the infinitely simple to the infinitely complex.⁶ We can't really do justice to that concept today. However, the land ethic seems an appropriate concern for agricultural lawyers because, after all, most of their clients either work the land or handle products that come from it. Moreover, a land ethic is vitally important not only to producers and consumers alive today, but to unborn generations. Our practices and policies, therefore, must take care of the land, the water, and the air.

Here's the aspect of an ethical practice with respect to the environment: when we take care of the earth, we are doing so not only as business people dependent upon its bounty, but also as consumers dependent on its life-giving nutrients, and as individuals concerned about our health. So, the land ethic is a

4. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 204 (2d ed. 1984) (1981).

5. Richard N. Morrison, *The Evolution of Environmental Ethics*, 2 U. DENV. WATER L. REV. 99 (1998).

6. *Id.* at 103-04.

good illustration, albeit one of the more simple and obvious examples, of how the values we hold as individuals should inform the values we apply in our business practices. The ethic invoked in this context is starting to win significant influence in corporate sustainability policies. As we wrote before, some examples of such corporate sustainability policies will be included later in the text and will illustrate that this is being done more aggressively than ever before. But first we will write about why the environmental ethic matters.

First, our land ethic will affect our health. Certainly we all have a better understanding of health risks than we had even a few years ago, and if nothing else gets our attention, our health should. Many farmers who have been exposed to herbicides and pesticides over extended periods of time are now openly wondering if their current health problems have resulted from their own negligence and lack of knowledge in earlier times. Perhaps no one knows for sure, but whether they openly speak of it often or not, we assume all readers are more interested in finding healthy foods, clean water, and clean air than ever before.

Second, there is a concern about the possibility that the developed world is creating an environmental debt that cannot be repaid. We are reminded of the jolting phrase, "In the long run, we are all dead."⁷ This famously quoted phrase comes from the Great Depression Era, and in that context, is attributed to John Maynard Keynes. In the 1930s with many people jobless, hungry, and searching for answers, President Franklin D. Roosevelt was desperate for a solution. Keynes presented the idea that the government should take responsibility and provide employment, even if it meant accruing a large national debt.⁸ At the time, excessive government spending to provide for citizens seemed like a solution to the nation's problems. Keynes was very aware of the long-term effect of accruing this amount of public debt, but he was unconcerned about the long term effects and demonstrated his lack of concern by using the phrase, "In the long term, we are all dead." Suffice it to say, the world cannot afford that kind of attitude with respect to the long term or permanent environmental debt we may be creating, whether it is through global warming, polluted waters, or otherwise. In almost anyone's conception of things, it is one of the six primary doctrines of economic justice that consideration be given to the needs of unborn generations.

So, for the reasons mentioned above, environmental ethics is a hot topic, among lawyers, to be sure, but also among most Americans. For example, the July 17, 2006 Newsweek magazine featured as its front page story *Going Green*:

7. JOHN MAYNARD KEYNES, A TRACT ON MONETARY REFORM 65 (1923).

8. See DAVE BREESE, SEVEN MEN WHO RULE THE WORLD FROM THE GRAVE (Moody 1990).

*With Windmills, Low-Energy Homes, New Forms of Recycling and Fuel-Efficient Cars, Americans are Taking Conservation Into Their own Hands.*⁹

To the point of a lawyer's ethical conduct in the arena of environmental law, we will mention here that the annual ALI-ABA course of study on Environmental Law was held in February of this year. Among the excellent presentations at this course relevant to this subject was one by Pamela Esterman on *Ethical Considerations for the Environmental Lawyer*¹⁰ and another by Richard Lazarus on *The History of Environmental Law*.¹¹ Lazarus was eventually published on this subject in 2004.¹² We commend both of the papers to you for a great overview of history, policy, law, and ethical conduct in the environmental arena. The Esterman paper is particularly strong in its use of hypotheticals pertaining to compliance issues and the limits of confidentiality obligations in transactions. In particular, we want to commend Ms. Esterman's reference to those provisions of Model Rule 1.6 that require a lawyer to reveal enough information to prevent reasonably certain death or substantial bodily harm,¹³ and her mention of the fact that some states have adopted rules of professional conduct that permit disclosure of client confidences for a broader range of reasons, such as to prevent substantial injury to the financial interests or the property of another, or to prevent actions that will have serious adverse health consequences to third parties.¹⁴ We emphasize these materials because, according to ALI-ABA's web site, it is still possible to order copies of the course materials, or audio-cassettes, from that course of study.

We also recommend two full-length books for personal reading. One in particular should be in your library if you practice in the environmental law arena: *Issues of Legal Ethics in the Practice of Environmental Law*, by Irma S. Russell.¹⁵ The other does an excellent job of describing where we are now in the attempting to apply environmental policy through law. This book is entitled *Practical Guide to Environmental Management*, published by the Environmental

9. Jerry Adler et al., *Going Green: With Windmills, Low-Energy Homes, New Forms of Recycling and Fuel-Efficient Cars, Americans are Taking Conservation Into Their own Hands*, NEWSWEEK, July 17, 2006, at 42.

10. Pamela R. Esterman, *Ethical Considerations for the Environmental Lawyer*, ALI-ABA Course of Study on Environmental Law, February 16-18, 2005, available at http://www.sprlaw.com/pdf/spr_ethical_considerations_0205.pdf.

11. See generally RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (The University of Chicago Press 2004) (for an example of relevant work from this author).

12. RICHARD J. LAZARUS, *THE MAKING OF ENVIRONMENTAL LAW* (University of Chicago Press 2004).

13. Esterman, *supra* note 10, at 9.

14. *Id.* at 14.

15. IRMA S. RUSSELL, *ISSUES OF LEGAL ETHICS IN THE PRACTICE OF ENVIRONMENTAL LAW* (ABA 2003).

Law Institute.¹⁶ In it are excerpts from an article Dick MacLean and Frank B. Friedman published in November 2000 in the Environmental Forum, an article entitled *Green Arthritis*. It will be quoted at some length because Mr. Friedman offered a helpful explanation of why we cannot rely on environmental law and the EPA to protect the environment:

If the environmental movement in the United States were a person, she would be world famous and proud of her spectacular achievements that have influenced and guided the world. But the Grand Old Lady is growing old prematurely. She is not moving as fast as she once did. There are new upstarts in Europe that seem to be drawing all the attention. Her friends that were with her from the start in industry, governments, and NGO's whisper that they are frustrated with the lack of progress and the loss of leadership that she once held.

Of course, she might respond that things are different now and without the crises that were constant in her younger years, she doesn't need to be as spry. Many would shake their heads and say this is just an excuse. They are worried her unwillingness to lead comes at the worst possible time, when significant global concerns loom over the horizon. Is her arthritic condition curable?

Perhaps, but it will require a combination of leadership and courage at every level. The lack of leadership is mostly by the government, including at the presidential level, but the U.S. Congress and business also bear responsibility, as do the environmental groups. Without clear direction and in the absence of a crisis du jour there is a lack of commitment by all. People may talk about the importance of the environment, but they lack this ethic when it comes to their daily lives, particularly if it may cause them any inconvenience.¹⁷

Perceptions about advancements in environmental management have somehow been dramatically skewed to the negative, even despite progress in the area. Mr. Friedman notes that,

[s]ulfur dioxides and carbon monoxides are down by two-thirds, nitrogen oxides by almost 40 percent, ozone by 30 percent; lead is effectively banished. In the cities, unhealthy-air days are down by more than half, just since 1988. Releases of toxic materials into the environment have declined 42 percent since then; soil erosion falls by almost 40 million tons a year¹⁸

Yet he noted that 57% of adults said environmental conditions were worse today than 30 years ago, and 67% thought that despite the Clean Air and Clean Water Acts, water and air pollution have continued to worsen.¹⁹

16. FRANK M. FRIEDMAN, PRACTICAL GUIDE TO ENVIRONMENTAL MANAGEMENT (Env'tl. Law Inst. 10th ed. 2006).

17. *Id.* at 431-32.

18. *Id.* at 433.

19. *Id.*

Even though the EPA has made attempts to reward those leaders of environmental management, the current system has made it difficult to provide incentives. The EPA deals with environmental groups and citizens who are uncompromising in their efforts to see their own agendas fulfilled. On the other end of the spectrum the EPA must deal with businesses who deal with the environmental issues on a quarterly basis.

In the words of Mr. Friedman:

The new global environmental dynamic remains an enigma to business. Businesses continue to deal with the environmental issues that may impact the next quarter while they talk of sustainable development. For industry executives, maintaining the status quo is the preferred 'strategy.' Environmental issues are almost always framed in the context of regulatory compliance and public relations – a cost sink. Take action – it costs money with no return on investment. If the compliance record is improving, emissions are down, the public is calm, why change?

Just as the agencies and environmental groups continue to focus on the old paradigm of the crisis de jour and punishing the culprits, companies are looking at a narrow view of compliance, outdated indicators, and public relations.²⁰

More must be said about the need for a conscious commitment to environmental ethics. It cannot be enough that we know how to talk about environmental ethics, or that as lawyers we know how to avoid disciplinary proceedings administered by our bar associations. We are writing about a vision in which lawyers and their clients will possess the internal disposition which will sustain ethical practices, and that will enable us to overcome the harms, dangers, temptations, and distractions which discourage us from ethical practices. This is the proper role of virtue. The true victim of any failure in this regard is the natural and social world that nourishes and sustains us.

It is important for us as citizens and as uniquely qualified professionals to discuss the negatives that can occur if environmental ethics are not taken into consideration in business decisions. Indeed, a rather high-minded policy statement is fundamental to our nation's approach in preserving the environment, to wit: the preamble to the National Environmental Policy Act (NEPA):

To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality.²¹

20. *Id.* at 439.

21. National Environmental Policy Act, 42 U.S.C. § 4321 (2006).

In practice, it is difficult to implement NEPA's purpose statement, and the pursuit of the goal can be extremely costly. But there have been more than a few calls in recent years for agencies to do a better job of demonstrating that they are using NEPA as a tool for better planning, and to take into account all of the real effects of planned action, including often ignored externalities ranging from the depletion of natural capital to health and other social impacts associated with a given action. There have also been calls to move the country as a whole in the direction of full cost pricing for goods and services so that all of us, government, producers, manufacturers, and handlers, have at least a theoretical mechanism for recovering the costs of protecting the environment and human health, including all necessary studies. Moreover, as we were writing this paper, the House Resources Committee was involved in efforts to update the NEPA.²²

We are also reminded of the current tendency to politicize science and of the frequent calls for sound science in this context. In this regard we recommend Al Gore's movie, "An Inconvenient Truth." There is a devastating bit in the movie showing the differences between the findings of peer reviewed journals compared to the popular press treatment of global warming. But we are suggesting that just for a moment, we should forget the politics; and we should examine the value that is placed on the environment by ourselves and by our clients.

Most people apparently tend to think of the environment as having instrumental value, in that it is a means to some other end. Take for example the Brazilian Rain Forest and the rich soil that is its support system.

The tropical forests of the Brazilian Amazon constitute 30 percent of the world's remaining tropical forests, and they are home to one-tenth of all the world's plant and animal species. Yet farmers and cattle ranchers in Brazil are burning the rain forests of the Amazon River to clear the land for crops and livestock. Brazilians [say] that they have a sovereign right to use the land as they see fit.²³

The environmental ethicist is prone to say that it is clear that a greater, intrinsic value needs to be placed on the environment. By intrinsic the environmental advocate means that the environment has value as an end in itself regardless of whether it is also useful as means to another end. Bearing in mind Teilhard's observation about the inter-relatedness of all things,²⁴ that particular definition of intrinsic may be much too narrow; but the rainforest clearly provides a diversified plant and animal mixture that cannot be recreated and that, arguably, has a value in and of itself. In the words of James White, "Because the intrinsi-

22. An interesting report of a task force generating recommendations in this regard is available by searching online at <http://resourcescommittee.house.gov>.

23. JAMES E. WHITE, CONTEMPORARY MORAL PROBLEMS 603 (6th ed. 2000).

24. Morrison, *supra* note 5, at 104

cally valuable is that which is good as an end in itself, it is commonly agreed that something's possession of intrinsic value generates a *prima facie* direct moral duty on the part of moral agents to protect it or at least refrain from damaging it."²⁵

There is no easy solution to the problems that Brazil is facing. If Brazilians stop burning the rain forests they face economic hardships or certainly loss of valuable business opportunities, while the continuation of current practices may lead to the extinction of some species of plants and animals. What can anyone do about situations like this that call for a difficult decision to be made? Begin to think in terms of intrinsic values. If Brazil were to afford the same intrinsic value to the plants and animals of the rain forest as it does to its citizens, burning the forest would not be an option. It is not easy to find an alternate solution to environmental issues, it will cost more money, it will take greater efforts, but doing the right thing is often more difficult.

One thing we can do is to educate ourselves, our clients, and the public about the ideals of environmental ethics, which was one of the calls to action being issued by John Simonett to us in 1997. Simonett seemed especially fond of Aldo Leopold and his views on environmental preservation. Leopold certainly created a greater public awareness of the potential in a land ethic. Many of you will know that Leopold worked for the U.S. Forest Service and was a professor at the University of Wisconsin when he wrote *A Sand County Almanac* in 1947.²⁶ The Almanac outlines his ideals of how man should interact with the land. In what he calls The Land Ethic, Leopold describes the land as being soils, waters, plants and animals; a community. Within this community, humans do not have dominion over the land, but are charged with the care of the land and the responsibility to preserve the land's integrity, stability, and beauty. However, in practice, the choices to be made can be very difficult and controversial, and often the issues extend beyond land, air, and water to other parts of nature. We'll give you a couple of examples. Our examples will demonstrate that we actually operate more from the perspective of the producer, but we are certainly aware of the ethical questions and the opposing views of powerful interest groups. So another thing we can endeavor to do is to educate such groups about the practical limits of ethical reasoning. For agriculturalists, most would probably agree that somewhere between the extremes of a grand, but expensive, vision and unethical conduct is an appropriate balance. It is hard to know where to strike that balance, and consequentialists all know that the weakness in their particular ethical stance is in its inability to perfectly predict the consequences of our choices.

25. Andrew Brennan & Yeuk-Sze Lo, *Environmental Ethics*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (June 2002), available at <http://plato.stanford.edu/entries/ethics-environmental/>.

26. WHITE, *supra* note 23, at 542.

So, let us consider several business cases involving current challenges and responses invoking a sense of environmental ethics. Let us first consider an example of how producers have tried to skirt the ethical vision and the intent of existing regulations to benefit from consumer preference for natural products. The example is based on the fact that many people see grass-fed beef or organic farming as a better alternative to factory farming. Unfortunately, there can be loop-holes in the regulatory system, and labels on a package are not an assurance of the background of the product. So, our example relates to the National Organic Program and the much debated regulations on ruminant access to pasture. Title 7 Code of Federal Regulation § 205.239 (livestock living conditions) states that a producer of organic livestock must allow the animals: “(1) Access to the outdoors, shade, shelter, exercise areas, fresh air, and direct sunlight suitable to the species, its stage of production, the climate, and the environment; (2) Access to pasture for ruminants”²⁷

The USDA does not specify what “access” means, nor do the regulations identify a specific amount of time in which animals should be put out to pasture. So, we know a dairy producer who has pasture and claims his animals have access to it, when in fact, the animals are seldom turned out into the pasture. He wants to think he qualifies for an organic label. Naturally, groups like the Organic Consumers Association are now petitioning the USDA to amend the regulation in order to assure animals are given time to graze.²⁸ Suffice it to say, individuals who engage in organic production should not be looking for loopholes in the regulations, but should be trying to uphold the spirit of the regulations. The producer who sees this issue purely as a personal decision with no larger implication is not thinking ethically, and if this practice comes to your attention in your capacity as his lawyer, you should tell him so.

Concentrated Animal Feeding Operations (“CAFOs”) have a great responsibility to the environment in the way they maintain the land and dispose of waste because, as we all know, unmanaged waste can contaminate nearby sources of surface and ground water. So, a fact sheet published by the Livestock and Poultry Environmental Stewardship Organization summarizes the regulations for handling of manure and its application to the land as follows:

The new U.S. Environmental Protection Agency (EPA) regulation for concentrated animal feeding operations (CAFOs) requires CAFO operators to develop and implement a Nutrient Management Plan to be granted a National Pollutant Discharge Elimination System (NPDES) permit . . . [I]n addition, the Effluent Limitation

27. 7 C.F.R. § 205.239(a)(1)-(2) (2007).

28. See Press Release, Organic Consumers Association, Group Files Complaint to USDA on “Factory-Style Dairy Farms” Certified as Organic (Jan. 10, 2005), <http://www.organicconsumers.org/organic/cornucopia011205.cfm> (last visited June 17, 2007).

Guidelines for large CAFOs require that manure, litter, and process wastewater (hereafter called “manure”) be applied using rates and methods that

- “Ensure appropriate agricultural utilization of nutrients.”
 - “Minimize phosphorus and nitrogen transport from the field to surface waters.”
- Thus, the goal is to apply manure at rates that meet crop needs while avoiding over-applications that could lead to water quality impairment.²⁹

But now that CAFOs are expected to have nutrient management plans approved by next year, some dairymen are, as we speak, making one last aggressive effort to apply stockpiled manure on nearby farm fields, some at the rate of 250 tons per acre—much, much more than needed to supply the nutrient uptake requirements for the crops planned on those parcels for next year.

One of the interesting aspects of life on the farm currently is that agricultural operations are being challenged in ways that Leopold might not have imagined, and in ways that undoubtedly attempt to co-opt some of the environmental sensitivities we have been advocating. In other words, we believe the environmental ethic has spawned some unanticipated consequences or morphed into debates about issues whose relationship with the environment is more tenuous. Take, for example, the animal rights movement. The Farm Sanctuary and the Humane Society of the U.S. have begun a statewide initiative in our home state of Arizona called “Arizonans for Humane Farms.”³⁰ This ballot initiative would restrict hog confinement, and prohibit sow gestation and farrowing crates. A similar initiative was passed in 2002 in Florida,³¹ and the groups hope to spread the reform across the nation. Is this movement fostered by environmental ethics? Maybe not, but we believe it garners support from persons who have a highly developed sense of environmental ethics. We submit there is, and should be, a distinction between animal rights and the land ethic, but the initiative is going to be a serious challenge to agriculture.

In response to the initiative “The Campaign for Arizona Farmers and Ranchers” was established.³² The ag-sponsored campaign signs are everywhere, featuring one word: “Hogwash.” More substantively, the ag campaign explains that: “The facilities are designed to isolate herds to protect their health and safety. This provides a controlled environment where each animal’s health can be monitored. The facilities also help protect them from weather extremes and

29. Jessica Davis, *Livestock and Poultry Envtl. Stewardship, Fact Sheet #25: Making Decisions About Application Rates* (July 2003), http://www.lpes.org/cafo/25FS_Rates.pdf.

30. Press Release, Farm Sanctuary, *Arizona Humane Groups Launch Statewide Ballot Campaign to Halt the Suffering of Farm Animals on Factory Farms*, http://www.farmsanctuary.org/media/pr_AZ.htm (last visited June 17, 2007).

31. *Id.*

32. See Campaign for Arizona Farmers & Ranchers, *What is Prop 204?*, <http://www.azfarmersranchers.com/> (last visited June 17, 2007).

wild prey.”³³ Further, “[s]ows normally are kept in stalls to protect them through their pregnancies. The stalls also prevent sows from rolling on top of their piglets and injuring them.”³⁴ Opponents of the initiative expressed grave concerns that in the long run virtually all livestock operations will be targeted by animal rights advocates, particularly if the initial, more narrowly-focused efforts prove effective, as they have in Arizona and Florida.

Indeed, the quality of life that food animals lead has become a popular topic in many circles, with very different opinions on what should be done. For example, author Frank Bruni wrote an article in the June 25, 2006 issue of *The New York Times* about the environmental and ethical implications of the American diet, in which he somewhat surprisingly pointed out the arbitrary way in which people pick and choose which issues to protest. In discussing the preference of some individuals he wrote:

They prefer that their beef carry the tag ‘grass fed,’ which evokes a verdant pasture rather than a squalid feed lot, and that their poultry knew the glories of a ‘free range,’ a less sturdy assurance than many people believe.

But these concerns are riddled with intellectual inconsistencies and prompt infinite questions. Are the calls for fundamental changes in the mass production of food simply elitist, the privilege of people wealthy enough to pay more at the checkout counter?³⁵

With grocery stores focusing on organically grown food and free range livestock, we are compelled to notice a trend, a trend that often requires consumers to pay more for food. And here’s part of the ethical dilemma: according to the U.S. Census Bureau, 37.0 million Americans were living in poverty in 2004.³⁶ These are people who probably cannot afford to pay more for the food they eat, and rely on producers to keep costs down, even if it means not abiding by the best practice standards or not pursuing an organic standard.

One does wish the animal liberation movement would make the distinction between what is ethical and what is unrealistic. For a somewhat humorous example, Frank Bruni’s article references a 2002 *New York Times* article by Michael Pollan, in which Mr. Pollan described how he purchased and

33. Campaign for Arizona Farmers & Ranchers, *Why Oppose Prop 204?*, <http://www.azfarmersranchers.com/index.php?p=3> (last visited June 17, 2007).

34. *Id.*

35. Frank Bruni, *It Died for Us*, *N.Y. TIMES*, June 25, 2006, section 4.

36. Press Release, U.S. Census Bureau, *Income Climbs, Poverty Stabilizes, Uninsured Rate Increases* (Aug. 29, 2006), http://www.census.gov/Press-Release/www/releases/archives/income_wealth/007419.html (explaining that the poverty numbers in 2005 were statistically no different from those in 2004).

raised a steer in order to gain an in-depth look at the cattle industry and the challenges of raising a steer. We are told:

After the article appeared, Mr. Pollan received appeals from readers willing to pay large sums of money to buy and save the steer. One reader, he recalled, was a Hollywood producer who wanted to let the animal graze on his lawn in Beverly Hills, Calif.

“He kept coming after me,” Mr. Pollan said, describing a crusade that culminated in an offer of a meal at a famous emporium of porterhouses in Brooklyn. “He finally said, ‘I’m coming to New York, we’re going to have dinner at Peter Luger to discuss this.’ I’m like, ‘Excuse me, we’re going to have a steak dinner to discuss the rescue of this steer?’ How disconnected can we be?”³⁷

Well, back to the big picture, and specifically, to the importance of corporate policies. Suffice it to say, with respect to environmental matters generally, we do not believe that greater government regulation alone is sufficient to protect the environment to the degree we desire. Even if regulations are stated as clearly as possible, with exacting standards and no means of misinterpretation, there are those who are content to simply comply with the letter of the regulations, never mind the spirit of the law. Thus, in the realm of environmental ethics we must confess that it is no longer enough, nor is it acceptable, to do only what is necessary to meet legal requirements.

One of the most difficult aspects of moving forward will be in convincing companies that they are part of the problem. As long as simple compliance and public relations are at the top of their environmental agenda, it will be difficult to implement reform. As companies envision their future they need to be more keenly aware of the potential value of environmental sustainability policies. Mr. Friedman points out that “[e]nvironmental issues can be the killer issue or the defining competitive advantage. The sustainable corporation is all about enlightened self-interest in emerging markets.”³⁸

At this point, recall certain historical observations about enlightened self-interest. Many of you will remember that in his book “Democracy in America,” Alexis de Tocqueville traced the way that America accepts self-interest as a prime motivation in people’s lives, yet so revitalizes engagement in common endeavors that people come to appreciate and commit themselves to social institutions that transcend their private worlds. Thus, “enlightened self-interest” represented for Alexis the key for understanding the flourishing of American democracy: “Yet Tocqueville cautioned that the American self-reliance also could lead people to pursue only their own private interests, and he coined a new term,

37. Bruni, *supra* note 35.

38. FREIDMAN, *supra* note 16, at 446.

individualism, for this tendency. He cautioned that individualism ultimately could lead to such an erosion of common concern that it would undermine democratic life.”³⁹

While businesses are driven by profit, and this often leads to a more individualistic approach, not all companies take the compliance-only approach in tackling environmental problems. Perhaps enlightened self interest explains the many progressive companies described in Friedman’s “Practical Guide to Environmental Management.” And these companies are seeking to curry public favor by telling their stories of corporate environmentalism:

Former DuPont Chairman and Chief Executive Officer, Edgar Woolard, who was also DuPont’s Chief Environmental Officer, called for an ethic of ‘corporate environmentalism.’ Woolard did not ‘hesitate to describe what he sees as the shortcomings of industry’s historic approach to environmental issues’ and indicated ‘that improved performance was the only way that industry could hope to earn and keep public good will on environmental matters.’

Former Chevron Chairman George Kellogg noted in 1987:

‘At Chevron, we’re very proud of a corporate environmental policy that says we comply fully with the letter and spirit of all laws affecting our operations. But as long as our environmental philosophy is framed by the concept of compliance, we won’t get much credit for our positive actions. Compliance means that the moral initiative lies elsewhere outside of industry.’

The time had come, he added, for the industry to move beyond regulations.

‘There are many examples of companies moving beyond compliance, such as ARCO’s innovations in producing less polluting fuels; widespread reductions in reported releases under the Toxics Release Inventory (TRI); [and]waste-reduction programs of Dow, 3M and Chevron...’⁴⁰

Maybe you’ve heard of General Electric’s Ecoimagination program. The program was launched in May 2005. On the GE website you can read the 2005 report on the progress of the Ecoimagination project. The mission states that:

Ecoimagination is a business strategy to help meet customers’ demand for more energy-efficient, less emissive products and to drive growth for GE—**growth that will greatly reward investors**. Ecoimagination puts into practice GE’s belief that finan-

39. Richard L. Wood, *Tocqueville, Alexis De*, Content Pages of The Encyclopedia of Religion and Society, <http://hrr.hartsem.edu/ency/Tocqueville.htm> (last visited June 17, 2007).

40. FREIDMAN, *supra* note 16, at 81.

cial and environmental performance can be integrated to accelerate profitable growth for the Company, while taking on some of the world's biggest challenges.⁴¹

GE hopes to prove that progress has been made by attempting to keep its goals and growth transparent through the publication of annual reports, and press releases, and by engaging customers in two-way communication. The cost of going beyond compliance is great for companies like GE, which hopes to double its research and development budget to \$1.5 billion.⁴²

Progressive companies are defining what it means to be environmentally ethical. They have answered the call of the public for better and more environmentally friendly technology. However, there are still more incentives to adopt corporate sustainability policies, an example of which includes the fact that Dow Jones Sustainability Indexes are being published to rate companies in the way they integrate economic, environmental, and social criteria into their business plans.⁴³ The Dow Jones Sustainability Index was launched on September 15, 2001, and as of August 31, 2005, the assets managed in portfolios rated by the index amounted to 3.3 billion EUR.

Agricultural companies are also increasingly following the call to sustainability. There are many examples, but one that is freely available is Tyson Food's 2005 Sustainability Report released to the general public on February 14, 2006.⁴⁴ Similarly, Danisco, one of the world's leading food and feed ingredient specialists, has sounded a wake-up call by declaring that the majority of businesses in the food chain do not adequately recognize the importance of sustainability.⁴⁵ Danisco was rated last year by the Dow Jones Sustainability Index as number 6 out of 55 companies in the global food and beverage field.⁴⁶ Then, of course, there is the example set by Atlanta based Interface, Inc. and its founder,

41. General Electric, *Taking on Big Challenges 3*, available at http://www.ge.com/ecoreport/files/ge_2005_ecomagination_report.pdf.

42. *Id.* at 5.

43. SAM Indexes GmbH, *Dow Jones Sustainability Indexes: Corporate Sustainability Assessment*, http://www.sustainability-indexes.com/06_html/assessment/overview.html (last visited June 17, 2007).

44. Press Release, Tyson Foods, Tyson Issues First Sustainability Report; Document Outlines Corporate Responsibility Efforts (Feb. 14, 2006), <http://www.tyson.com/Corporate/PressRoom/ViewArticle.aspx?id=2100>; see also Tyson Foods, *Living our Core Values* (2005), available at <http://www.tyson.com/Corporate/PressRoom/docs/SR2005.pdf>.

45. Press Release, Danisco, Food Chain Businesses Must Focus on Sustainability, says Danisco (Sept. 29, 2005), http://www.danisco.com/cms/connect/corporate/media%20relations/news/archive/2005/september/businessupdate_34_en.htm.

46. *Id.*

Ray Anderson, who aims for the company to have a zero impact on the environment—no waste returned.⁴⁷

Hopefully, everyone reading this will have an opportunity, at some point, to offer a word of ethical insight to clients as they make decisions about environmental law compliance. It is important that one share with clients not only what the law requires, but also what the spirit of the law is attempting to accomplish and what competitors are doing to demonstrate environmental responsibility. Ethical conduct can thus become a stronger part of the culture, part of a tradition that links us to our past, sustains the present, and supports the future. It is a way of transcending excessive or radical individualism, and this is important because there are, of course, individuals who deny responsibility for the effects of the system in which they live and operate. For example, using illustrations offered by MacIntyre, it is commonplace for modern Americans to deny responsibility for the effects of slavery upon black Americans, or for Englishmen to say, "I never did any wrong to Ireland; why bring up that old history as though it had something to do with me?" Likewise, young Germans believe that being born after 1945 means that what Nazis did to Jews had no moral relevance to their relationship to Jewish contemporaries.

All of these exhibit an attitude, according to which the self is detachable from its social and historical roles and statuses. But individual and social identities do coincide, and a comprehensive system of ethics will take this into account. For our purposes, there are persons who deny responsibility for ethical transgressions in business, especially a business operated by someone else. But the culture of business is a mindset, and the effects of business are not confined to business. Until the culture or the tradition values ethical reasoning as highly as it values profits, our business practices have the potential to poison our wells.

Seriously reflect on the vision, including the limits of the vision, presented in this paper. We must remember: while in the long run we are all dead, future generations are dependent upon us to steward the health and nurturing capacity of the earth they will inherit.

47. See Interface, Inc., *Interface Sustainability: Vision*, <http://www.interfacesustainability.com/visi.html> (last visited June 17, 2007).