

# Meat Animals, Humane Standards and Other Legal Fictions

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## Abstract

Law and food are distinct concepts, though the discipline (Law and Food) implies a relationship worthy of study. The conjunction (“and”) creates meaning. However, its absence also conveys meaning. For example, “meat animal” suggests that animals can be both meat and animal. This conflation has powerful legal implications. *National Meat Association v. Harris* (2012) makes chillingly plain the law’s indifference to whether a meat animal is alive or dead. This essay examines the way supposedly humane federal practices ignore the systematic brutalization of “food animals” as those animals get processed into marketable flesh. It concludes with some observations about why this legal blindness exists.

## Keywords

*National Meat Association v. Harris*, humane, meat animal, industrial agriculture, National Meat Inspection Act, preemption, slaughterhouse, Supreme Court

## I. Introduction

Even as it is conjunctive, the discipline of “Law and Food” is oppositional. Law and food are discrete concepts yet the presence of a conjunction (“and”) implies a relationship worthy of study. Similarly, the absence of a conjunction can also impart meaning. For example, “and” is noticeably missing from the term “meat animal.” That absence denotes a lack of separation between meat and animals. Indeed, within the term, meat functions both as a descriptive adjective and a noun. It suggests that an animal can simultaneously be meat and animal. This conflation has powerful legal implications, as evidenced in the Supreme

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Court's decision in *National Meat Association v. Harris* (2012).<sup>1</sup> *Harris* addressed the issue of whether a California law regulating the slaughter of downer animals (livestock that is either too sick, too injured, or both, to walk) was preempted by federal law. The Court's reasoning makes chillingly plain the law's indifference to whether a meat animal is alive or dead.

This essay begins with a summary of the *Harris* case. While *Harris* turns mainly on the issue of preemption (i.e. whether federal law regulating the treatment of animals at slaughterhouses conflicts with state law, in which case federal law trumps),<sup>2</sup> that is not the focus here. Instead, this essay looks at how the Court elided the manner in which supposedly humane federal practices ignore the mechanized and systematic brutalization of "food animals" (another conjunction-less term) as they get processed from living beings into marketable flesh. The essay concludes with some observations about why this willful legal blindness exists and what it portends.

## II. The Case

In many instances, animals arriving at the slaughterhouse cannot walk. The rigors of the industrial food process and subsequent transport to slaughter leave them sick, injured, or both. Because these downers represent a potential monetary loss, workers sometimes go to extraordinary lengths (often with the complicity and encouragement of management) to get the animals on to their feet and staggering toward the killing floor. In 2008, the Humane Society of the United States (HSUS) released undercover video footage showing workers at the Hallmark Meat Packing Company, a slaughterhouse in California, kicking, jabbing, using electric prods, high pressure hoses, a fork lift, and other brutal methods in order to get downed animals to walk. That video led to the largest meat recall in history. It also led California to amend Section 599 of its Penal Code to state (in relevant part):

- (a) No slaughterhouse, stockyard, auction, market agency, or dealer shall buy, sell, or receive a nonambulatory animal.
- (b) No slaughterhouse shall process, butcher, or sell meat or products of nonambulatory animals for human consumption.
- (c) No slaughterhouse shall hold a nonambulatory animal without taking immediate action to humanely euthanize the animal.<sup>3</sup>

The National Meat Association (NMA), a trade association representing packers and processors of livestock, filed suit against the State of California, claiming that the state law was preempted by the Federal Meat Inspection Act (FMIA).<sup>4</sup> The FMIA states that animal handling requirements that are "in addition to, or different than those made under

1. *National Meat Association v. Harris*, 565 U.S. \_\_\_, 132 S.Ct. 965 (2012).

2. U.S. Const. art.VI, cl. 2.

3. Cal. Penal Code Ann. § 599f.

4. 21 U.S.C. § 601 *et seq.*

this [Act] may not be imposed by any State.”<sup>5</sup> The NMA argued that this clause expressly preempts any state law that mandates different standards for downer treatment at slaughterhouses.

The district court granted the NMA’s request for a preliminary injunction but the U.S. Court of Appeals for the Ninth Circuit reversed. It held that California’s law was not preempted because it regulates only the type of animal that can be slaughtered rather than the inspection or slaughtering process itself.<sup>6</sup> The NMA appealed, the Supreme Court granted *certiorari* and reversed. A unanimous Court, per Justice Kagan, held that the California statute outlawed some methods of processing downer animals that are lawful under the FMIA. Consequently, it presented a clear conflict between state and federal law and, per the U.S. Constitution’s Supremacy Clause; the state law must give way.

The preemption question (though dispositive in the case) is not the primary focus here. Rather, this essay examines the way the Court interpreted the provisions of the FMIA and other federal laws and regulations on its way to concluding that they guarantee humane handling.

### I Humane Rhetoric

Justice Kagan begins by noting that the FMIA was passed in 1906 in the wake of public outcry following publication of *The Jungle*, by Upton Sinclair. *The Jungle*, though a work of fiction, graphically depicted actual conditions in the meatpacking industry and led to widespread public dismay. According to Kagan, the FMIA sought to alleviate public concerns by establishing procedures whereby “live animals and carcasses” would be inspected “to prevent the shipment of impure, unwholesome and unfit meat and meat food products.”<sup>7</sup> She goes on to observe that subsequent amendments to the Act require slaughterhouses to comply with the standards for humane handling and slaughter as laid out in the Humane Methods of Slaughter Act of 1958 (HMSA).<sup>8</sup>

Two things about this initial paragraph are noteworthy. First, in describing the inspection standards for livestock, Kagan merges live animals and carcasses into one sentence. This establishes at the outset that the law recognizes little distinction between living and dead animals. Kagan then switches rhetorical gears to address the concerns about animal treatment raised by the Hallmark case. Slaughterhouses, she notes, must comply with federal standards for humane treatment set forth in the HMSA.<sup>9</sup> Putting aside the irony of citing a slaughter statute as the standard for humane treatment, neither the statute nor its regulations offers much in the way of animal welfare guidelines. For instance, the regulations note that when driving livestock, electric prods and other implements should be used

5. 21 U.S.C. § 678. It bears noting that the statute also contains a “Savings Clause” that expressly permits state regulation so long as it is consistent with the provisions and regulations of the FMIA.

6. *National Meat Ass’n v. Brown*, 599 F.3d 1093, 1098 (9th Cir. 2010).

7. Opinion at 967, quoting *Pittsburgh Melting Co. v. Totten*, 248 U.S. 1, 4–5 (1918).

8. 7 U.S.C. § 1901 *et seq.*

9. 7 U.S.C. § 1901 *et seq.*

“as little as possible so as minimize excitement and injury.”<sup>10</sup> However, the phrase “as little as possible” gives the driver such wide latitude that the regulation becomes all but meaningless. Furthermore, despite its name, the HMSA was primarily designed to ease the lot of slaughterhouse workers rather than the animals being slaughtered.<sup>11</sup>

In addition, though the statute requires that animals be rendered senseless before being shackled, hoisted and cut, the rapidity of the modern industrial kill line ensures that there will inevitably be some inaccurate stun blows. That means that some percentage (even 0.5% still amounts to thousands of animals) is not properly stunned. Those poorly stunned animals are often skinned alive.<sup>12</sup> And, while not relevant to this lawsuit, it is nevertheless noteworthy that the HMSA excludes birds.<sup>13</sup> Consequently, 98% of the more than ten billion animals killed annually in the United States for food lack even the small protections afforded by the law. In light of all this, the Court’s reliance on existing federal law as a guarantor of humane treatment seems misplaced.

Kagan turns next to the regulatory matrix, explaining that the United States Department of Agriculture’s (USDA) Food Safety and Inspection Service (FSIS) has over 9,000 inspectors who performed “ante mortem” inspections of over 147 million head of live-stock in 2010. If during the course of such inspections the inspector finds evidence of disease or injury, that animal is labeled “U.S. Condemned.” Those downer animals must be placed in a covered pen and cannot be dragged while conscious (although they may be moved with “suitable” equipment). They are then killed in a separate facility, with no part of the carcass sold for human consumption. The inspector may also designate animals with less severe conditions as “U.S. Suspect.” “Suspect” animals must be slaughtered separately following which the inspector performs a “post mortem” inspection to determine which parts of their carcasses are fit for human consumption.<sup>14</sup>

Precious little (a covered pen and mandated senselessness during dragging) in the Act’s language suggests humane treatment. This should not surprise. The inspecting agency is, after all, the *Food* Safety and Inspection Service. Food is what animals become once they are dead. The agency’s concern resides not with the welfare of the living animals but rather with the quality of the flesh entering the food supply. Viewed through the FSIS’s lens, living animals might best be classified as “pre-food.” The FSIS’s mission likely reflects public concerns. Most of the hue and cry following the HSUS undercover video at the Hallmark California facility was not about the treatment of the animals but

10. 9 CFR § 313.2.

11. 7 U.S.C. § 1901; Pub.L. 107–171, Title X, § 10305, May 13, 2002, 116 Stat. 493; *See also*, Jennifer L. Mariucci, “The Humane Methods of Slaughter Act: Deficiencies and Proposed Amendments,” 4 *J. Animal L.* 149, 150 (2008).

12. Jennifer L. Mariucci, “The Humane Methods of Slaughter Act: Deficiencies and Proposed Amendments,” 4 *J. Animal L.* 149, 156 (2008).

13. *Levine v. Connor*, 540 F. Supp. 2d 1113 (N.D. Cal. 2008); *Levine v. Vilsack*, 587 F.3d 986 (9th Cir. 2009). *See also*, The Poultry Production and Inspection Act, 21 U.S.C. § 451 (federal law pertaining to the inspection and slaughter of poultry which does not provide any humane slaughtering requirements).

14. 9 C.F.R. § 309 *et seq.*

rather about the fact that meat from the animals had found its way into the nation's school lunch supply.

Even on its own terms, however, the FSIS fails. Kagan notes that some 9,000 inspectors inspected 147 million animals as well as an additional 126,000 "humane handling verification procedures" and however many post-mortem inspections their 147 million inspections required. To put these responsibilities in perspective, consider for the moment only the initial inspections and assume that 2010 was an average year. We know that in 2010, 9,000 inspectors inspected 147,000,000 animals. That means that each inspector inspected an average of approximately 16,330 animals. If every inspector works forty-eight weeks a year, five days per week, eight hours per day, and if we assume that all they do is live inspect animals, then this would mean that each of them inspects slightly more than eight animals per hour. That might seem possible if ante-mortem inspections were all they did. But it is not all they do. Furthermore, even if it were all they did, this hourly inspection rate does not align with the hourly kill rate at a slaughterhouse.

Take hog slaughter, for example. Depending on the distance between inspection stations, the number of inspectors on the kill line, and whether the head is attached to the carcass, the federally set, hourly kill rate ranges from 140–253 hogs per hour. Recall that if all the FSIS inspectors are deployed doing pre-slaughter inspections, then they are each theoretically inspecting eight animals per hour prior to slaughter. If that number is accurate,<sup>15</sup> the second number seems implausible. The animals must be inspected prior to slaughter and the inspection rate is eight animals per hour; logic and basic math dictate that the hourly slaughter rate also should not exceed eight animals per inspector. But it does, unless there are upwards of twenty inspectors doing pre-slaughter inspections (in addition to those present on the kill line) at each hog slaughterhouse. And we have not even considered the aforementioned post-mortem inspections as well as all the other responsibilities that make up an inspector's typical work day. Clearly, the inspectors do many more than eight ante-mortem inspections per hour, which leads one to wonder just how much rigor and oversight such inspections provide. The opinion ignores these questions, insisting that federal law offers ample protections to animals bound for slaughter.

## 2 The Law and the Opinion Self-Contradict

The first sentence of the opinion following the traditional summary sentence states: "The FMIA regulates a broad range of activities at slaughterhouses to ensure the safety of the meat and the humane handling of animals." This sentence sets the tone of the opinion, declaring that both the law and the Court take such matters into account. A few paragraphs later, Kagan notes that "the FMIA additionally prescribe[s] methods for handling animals humanely at all stages of the slaughtering process." Shortly thereafter, having turned her attention to the preemption question, Kagan asks us to "[c]onsider what the two statutes [the FMIA and the challenged California law] tell a slaughterhouse to do

15. 9 C.F.R. § 310.1. Because inspection rates differ for cattle, the math here is not entirely accurate. However, the kill rate for cattle is also well over eight animals per hour (*see id.*) so the degree of variance does not change the overall conclusion.

when (*as not infrequently occurs*) a pig becomes injured and thus nonambulatory sometime after delivery to the slaughterhouse” (emphasis mine). So, in the space of a few paragraphs we learn that the FMIA guarantees the humane handling of animals at slaughter facilities and that those same animals are often so badly injured subsequent to arrival that they are rendered unable to walk.

While these two statements seem mutually exclusive, they become less incongruous as Kagan describes what humane handling means in the context of the FMIA. Under the FMIA, she explains, “a slaughterhouse may hold (without euthanizing) any nonambulatory pig that has not been condemned . . . And the slaughterhouse may process or butcher such an animal’s meat for human consumption, subject to an FSIS official’s approval at a post-mortem inspection.” Thus we learn that the FMIA, which supposedly guarantees an animal’s humane handling upon arrival at the slaughter facility, allows animals which have been seriously injured after their arrival to be butchered for human consumption. Since such animals can be butchered and sold into the food supply, there exists little disincentive for industrial meat producers and their transporters to invest in the animals’ wellbeing.

The only relevant consideration for producers is whether the animals have reached maximal slaughter weight and are free of diseases or other issues that might impact salability. These criteria can be achieved despite housing the animals under brutal conditions.<sup>16</sup> By contrast, California § 599f would have required producers and transporters to ensure that the animals were at least well enough to walk. Under § 599f, if the animals could not walk, slaughterhouses could not receive them, and the producers would have to absorb the consequent economic loss. As Justice Kagan notes, § 599f and the FMIA “require different things of a slaughterhouse confronted with a delivery truck containing nonambulatory swine. The former says ‘do not receive or buy them’; the latter does not.” Consequently, unlike the FMIA, § 599f created a de-facto financial penalty for inhumane handling. This distinction forms the heart of the Court’s holding. California sought to erect a regulatory deterrent to the trade of downer animals. The Court held that federal law explicitly enabled such trade and thus the federal and state laws were in irresolvable conflict and the state law must yield. As Kagan observes, “According to the Court of Appeals, ‘states are free to decide which animals may be turned into meat.’ We think not” (internal citations omitted).

How then should we interpret the Court’s statement that “[t]he FMIA addresses not just food safety, but humane treatment as well?” It clearly does not encompass any

16. Senator Robert Byrd, in a famous speech on the Senate floor, decried the state of agricultural animal welfare: “Our inhumane treatment of livestock is becoming widespread and more and more barbaric. Six-hundred-pound hogs – they were pigs at one time – raised in two-foot wide metal cages called gestation crates, in which the poor beasts are unable to turn around or lie down in natural positions, and this way they live for months at a time. On profit-driven factory farms, veal calves are confined to dark wooden crates so small that they are prevented from lying down or scratching themselves. These creatures feel; they know pain. They suffer pain just as we humans suffer pain. Egg-laying hens are confined to battery cages. Unable to spread their wings, they are reduced to nothing more than egg-laying machines.” 147 Cong. Rec. S7310 (daily ed., July 9, 2001) (statement of Sen. Byrd).

regulatory deterrent to animal mistreatment. Instead, humane handling means something different in the FMIA than in other contexts. Under the FMIA, the term has little to do with protecting animals from injury or treating them gently when such injuries occur. Severe, pre-slaughter injuries to animals apparently are to be expected, are not inhumane, and need not interfere with the production process. In addition, injured animals can be safely and legally processed for human consumption, thus mitigating any potential financial hardships arising from their (mis)treatment.

Accounting for the disparity between traditional notions of humane handling and the version offered by the FMIA requires careful attention to context. As noted earlier, the title of the law, the Federal *Meat* Inspection Act, offers an indication of federal regulatory priorities. In effect, as long as the animals' treatment does not undermine the food supply, it is "humane." The law seeks not to safeguard animals prior to death but to vouchsafe that whatever they endured did not impede their smooth transition into meat. Viewed thus, if a "humanely handled" pig is the signifier, a pathogen-free pork chop becomes the signified. The living animal does not merit legal consideration because it has not yet fully transformed from "meat animal" into "meat."

### 3 Treating Meat Humanely

The FMIA's interpretation of humane treatment forms part of a larger regulatory vacuum with respect to the welfare of farmed animals. When Justice Kagan notes that the FMIA regulates behavior once animals arrive at slaughter (they are treated humanely, we're told, despite their frequently becoming nonambulatory), she omits any discussion of the animals' treatment prior to arrival. This omission is understandable since the challenged statute dealt with slaughterhouse regulation. Nevertheless, the condition of downer animals has much more to do with their treatment prior to arrival at the slaughterhouse than with where their last few hours get spent.

Consider the Twenty-Eight Hour Law,<sup>17</sup> for example. The Twenty-Eight Hour Law requires that animals not be confined for more than twenty-eight continuous hours when being transported across state lines in a "rail carrier, express carrier, or common carrier (except by air or water)" without at least five hours of rest, watering and feeding.<sup>18</sup> Putting aside the fact that for years and until only recently, the USDA maintained that the law did not apply to trucks despite trucks forming the principal means of animal transport,<sup>19</sup> basic logic again reveals the extent of the law's indifference to animal welfare.

17. Livestock Transportation Act, 49 U.S.C. § 80502.

18. 45 U.S.C. § 71 (1906); *See also* David J. Wolfson, "Beyond the Law," 2 *Animal L.* 123, 125 (1996).

19. *See* USDA, "Cattle and Swine Trucking Guide for Exporters" (stating "Federal law requires that livestock in interstate commerce be in transit for no more than 28 hours without food, water, and rest. However, this law applies only to rail shipments.") Available at: <http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3008268>; *See also*, "USDA to Start Regulating the Transport of Farmed Animals on Trucks," *Compassion Over Killing*, 2005. Available at: [http://www.cok.net/feat/28\\_hour\\_law/](http://www.cok.net/feat/28_hour_law/)



The law states that animals may not be confined for more than twenty-eight consecutive hours without being given a rest, food and water. Phrased in the positive, that means that animals *can* be confined in small cages stacked on trucks, trains, or other transport without food and water for up to twenty-eight hours without any respite. Furthermore, the law is almost never enforced and even if it were, the \$500 fine for offenders is an easily absorbed cost of doing business.<sup>20</sup> Clearly, such a law was not designed with animal wellbeing in mind (something the legislative history bears out).<sup>21</sup>

As further evidence of federal regulatory disregard, one need venture no further than the Animal Welfare Act (AWA). The AWA is the only federal law that directly addresses animal welfare yet it specifically excludes agricultural animals from its ambit.<sup>22</sup> This leaves exactly no laws governing the treatment of animals used in agriculture. This lack epitomizes what J.B. Ruhl has called the “vast anti-law”<sup>23</sup> of industrial agriculture. It is not that Congress is indifferent to the issues raised by factory-farming. It is rather that Congress has deliberately chosen to ignore them. The tailoring of the AWA, the impotence of the Twenty-Eight Hour Law, and the disingenuous language of the FMIA form part of the larger phenomenon of deliberate legislative and juridical exclusion of animals *qua* animals (rather than animals *qua* meat) from the regulatory process. This exclusion results partly from the continued potency of Jeffersonian agrarian myths and their (mis)use by modern agro-industry and partly from the conflation of mass production with efficient production.

From “Right to Farm” laws at the local level to water and crop subsidies at the federal level, the industry has successfully parleyed its image as a group of small farmers working the land against all odds and for very little money into a very potent political tool and enormous economic gain. Agriculture enjoys significant governmental protections and subsidies. Those gains, however, came at a cost.

### III. How the Meat Animal Came About

#### *I Agriculture → Agribusiness: “Get Big or Get Out”*

In the 1970s, Earl Butz, President Nixon’s Secretary of Agriculture exhorted farmers to “get big or get out” and to regard themselves as “agribusinessmen” rather than farmers.<sup>24</sup>

20. See Robyn Mallon, “The Deplorable Standard of Living Faced by Farm Animals in America’s Meat Industry and How to Improve Conditions by Eliminating the Corporate Farm,” 9 *Mich. State Univ. J of Med & L.* 389, 399 (2005) (explaining that even when a law protecting farm animals exists “[t]he law is violated due to the traditional corporate attitude of wanting to maximize profit and minimize expenses.”).

21. PL 103–272, July 5, 1994, 108 Stat 745.

22. 7 U.S.C. §§ 2131 *et seq.*, see also David J. Wolfson and Mariann Sullivan, “Foxes in the Hen House: Animals, Agriculture & the Law,” p. 207, in *Animal Rights: Current Debates and New Directions*, Cass Sunstein and Martha Nussbaum, eds. (Oxford University Press, 2005).

23. J.B. Ruhl, “Farms, Their Environmental Harms, and Environmental Law,” 27 *Ecology L.Q.* 263, 267 (2000).

24. Michael Pollan, *The Omnivore’s Dilemma: A Natural History of Four Meats* (New York: Penguin, 2006), 52–64. See also Michael Pollan, “Farmer in Chief,” *The New York Times*, October 9, 2008.



A new system of price supports guaranteed farmers a set price for their corn no matter the market price. This meant that growers had no incentive to decrease production when demand slacked. Instead, they were spurred to grow as much as possible and dump it into the market, which in turn caused prices to crater still more.<sup>25</sup> As prices fell, successive farm bills lowered the guaranteed price paid to farmers, causing them to have to grow still more to eke out a profit. Consequently, the market became perennially glutted with corn, small growers all but disappeared, and the need to utilize the ever-growing surplus became ever more urgent.<sup>26</sup>

Growers began feeding the corn to animals, including cattle, whose digestive systems cannot tolerate it without prophylactic antibiotics and other medications.<sup>27</sup> The feed itself was cheap but the consequences of the cattle ingesting that feed were not. From this tangled attempt to make efficient use of what should never have been grown, the factory farm emerged.

The story of other animals' journeys from farm to Concentrated Animal Feedlot Operation (CAFO)<sup>28</sup> is similar, albeit different in certain key respects. For example, animal agriculture for pigs and chickens (not cattle) is highly vertically integrated.<sup>29</sup> Growers do not own the animals and have no input into the manner in which the animals are fed or housed.<sup>30</sup> Growers also have little leverage with respect to the price they are paid for their labor. They cannot command prices sufficient to cover environmental degradation and waste disposal. As a result, these costs get externalized; they are passed along to the general public and not reflected either in the cost of production or in the retail price of the product.<sup>31</sup> Instead, they become hidden costs, which, along with corn subsidies, have become woven into the national tax burden.<sup>32</sup>

25. Op. cit., p. 52.

26. Op. cit., pp. 52–64.

27. Michael Pollan, "Power Steer," *The New York Times*, March 31, 2002. See also The Humane Society of the United States, "An HSUS Report: Human Health Implications of Non-Therapeutic Antibiotic Use in Animal Agriculture" (2007). Available at: <http://www.diningatpenn.com/penn/env/poultry/poultry--hsus-human-health-report-on-antibiotics.pdf>.

28. CAFOs are a type of AFO (Animal Feeding Operation). According to the EPA, an AFO is a lot or facility where: animals have been, are or will be stabled or confined for a total of 45 days or more in a 12 month period; and crops, vegetation, forage growth, or postharvest residues are not sustained in the normal growing season over any portion of the lot or facility. CAFOs are larger version of AFOs, containing 1,000 or more animals. See Concentrated Animal Feeding Operations, 40 C.F.R. § 122.23 (2008). For purposes of reducing the number of acronyms, I use the term CAFO in this essay generically to refer to all industrial livestock operations.

29. David N. Cassuto, "Owning What You Eat: The Discourse of Food," 4 *Revista Brasileira de Direito Animal* 45 (2009), p. 53.

30. Op. cit, p. 53.

31. *Putting Meat on the Table: Industrial Farm Animal Production in America* (A Report of the Pew Commission on Industrial Farm Animal Production), p. 6.

32. David N. Cassuto, "Owning What You Eat: The Discourse of Food," 4 *Revista Brasileira de Direito Animal* 45 (2009), p. 53.

In order to turn agriculture into agribusiness, growers had to embrace large commercial enterprises as superior and preferable to small-scale farming. The alternative was replacement by others more sympathetic to the corporate goal. The stated goal: making agriculture more efficient. The missing option – which to this day remains unentertained – involves interrogating the utility of efficiency as a bounding principle in agriculture.

In economic terms, efficiency means getting the best possible return on an investment. Any resources spent should lead to a greater yield. In this sense, efficiency is a fundamental principle of a market economy. However, agriculture – and specifically animal agriculture – is not economics. While economics drives many facets of agriculture, that does not make them equivalent.

Agriculture relies on human/animal interactions, which are subsumed within the ecological web even while also forming part of the human economy. The uneasy relationship between ecological unpredictability and bottom line analytics has existed for centuries but the twentieth century witnessed market dynamics becoming dominant. As a result, the barnyard became the stockyard, the farmyard a CAFO, and the manure pile a sewage lagoon.

When market efficiency displaced ecology as the foundation of agriculture, another crucial component was lost as well. Ethics were once relevant to animal agriculture. While the welfare of nonhuman animals was never the priority, it lies beyond cavil that the treatment and care of animals in the days prior to industrial agriculture differed markedly from animal treatment today.

Farmers used to house and feed animals in a manner that allowed the animals a modicum of comfort and the ability to develop relationships, including with their human custodians.<sup>33</sup> These relationships did not necessarily maximize economic yield. They were rather based on a set of normative guidelines (and economics) even as the ultimate reality of the animals' commodity status inevitably imbued that bond with a sense of unreality.

One sees vestiges of this bifurcated relationship in agricultural education organizations like 4-H, where children are given animals to care, raise and nurture. Often, the children grow to love these animals, even as they are raising them for meat. The culmination of their efforts usually happens at county fairs; the animals are auctioned for slaughter, leaving the children grief-stricken and heartsick, while parents and teachers crowd around offering congratulations for a job well done.<sup>34</sup>

This complicated relationship between the children and the animals is emblematic of the tensions underlying the traditional approach to animal husbandry. It was impossible to escape the animals' commodity status even as ethics demanded their decent treatment. The advent of industrial agriculture eliminated the tension within the human/animal relationship by commodifying the animals completely. Animals went from partially commoditized beings whose value could be measured both in individual terms and as units

33. Op. cit.

34. Anne Hull, "The Strawberry Girls," *The New Yorker*, August 11, 2008.

of exchange to simple merchandise whose value derived exclusively from decreased costs of care and increased value at alienation.

The commoditization process confers an exchange value that, in the case of “meat” animals, gets realized through slaughter. For producers (milk cows, breeding sows, etc.), value emerges through maximizing productivity while minimizing costs. In neither instance does the animals’ quality of life enter the equation. Instead, economic incentive (the driver of exchange value) lies with minimizing the expenses of maintaining the animal while maximizing the yield resulting from its use and/or death.<sup>35</sup> It is easy to see how this logic leads to factory farms designed to maximize profit regardless of the impact on animals.

## 2 Dead Animal Welfare

The basic incompatibility between interactions predicated on ethics and those predicated on commoditization means that relationships created through agriculture are inherently problematic.<sup>36</sup> Nevertheless, the ascent of the factory farm resulted less from the inexorable logic of the market than from a concerted effort to reimagine productivity as inclusive of agribusiness methods. That in turn led lawmakers and regulators to exclude animal welfare issues that did not facilitate increased production and profit from legal consideration. The inevitable result was a focus on the viability of the dead animal product rather than the experience of the living meat producer.<sup>37</sup>

Even as one can decry the law’s indifference to whether animals are living or dead, the genesis of that indifference is as old as the law itself. Every first year law student

35. David N. Cassuto, “Bred Meat – The Cultural Foundation of Factory Farms,” 70 *Law & Contemp. Probs.* 59 (2007); David N. Cassuto, “The CAFO Hothouse: Climate Change,” *Industrial Agriculture & the Law*, policy paper commissioned by the Animals & Society Institute (2010); *See also* Gary Francione, *Animals, Property, and the Law* (Temple University Press, 1995), p. 25; Robyn Mallon, “The Deplorable Standard of Living Faced by Farm Animals in America’s Meat Industry and How to Improve Conditions by Eliminating the Corporate Farm,” 9 *Mich. State. Univ. J. of Med & L.* 389, 399 (2005) (explaining that even when a law protecting farm animals exists “[t]he law is violated due to the traditional corporate attitude of wanting to maximize profit and minimize expenses”).

36. As Marlene Halverson observes: “The ethical relationship of farmers to farm animals is unique. The farmer must raise a living creature that is destined to an endpoint of slaughter for food, or culling and death after a lifetime of production, without becoming cynical about the animal’s need for a decent life while the animal is alive. The farmer must somehow raise the animal as a commercial endeavor without regarding the animal as a mere commodity.” Jonathan Safran Foer, *Eating Animals* (Little, Brown, & Company, 2009), p. 242.

37. It’s also interesting to note that the vocabulary of animal agriculture labels humans as “producers” and the animals who actually form the food as “stock” or “food animals.” Perhaps acknowledging the animals’ role as (involuntary) producers would permit them a degree of agency that the food manufacturing process and the legal system could not comfortably withstand.

reads *Pierson v. Post* (1805).<sup>38</sup> In that case, the complainant, Post, and his hounds were in pursuit of a fox when Pierson preempted the chase by killing the fox and carrying it off. Post sued claiming that the fox was his property and that Pierson had illegally interfered with the chase. Pierson argued that Post had never gained possession of the fox and that therefore it was in the public domain. The question before the court was whether Post did indeed possess the fox. The court examined authorities stretching back to Justinian in order to determine the indicia of ownership of a wild animal. It concluded that killing or mortally wounding the animal demonstrates control and dominion and thereby possession. Thus, one gains ownership of a living animal by killing it. Because Post had not killed or mortally wounded the fox, he had failed to establish ownership of the animal. Therefore his lawsuit failed as well.

In *Post*, just as in *Harris*, living and dead animals are legally equivalent and conflated. Though the concept is facially bizarre, just as in *Harris*, it is contextually intelligible. Hunters often claim rights to the same animal and the law requires a method for resolving such disputes. Proof of dominion or capture offers a logical means through which to do so. However, the rule only makes sense if one accepts the principle that a living animal and a dead animal are the same thing. This is an odd concept. Living people and dead people are fundamentally different; a corpse is not the same as a person. The same clearly holds true for nonhumans as well. Nevertheless, the court ignores the distinction because it is most concerned with the state of animal being (death) that has the most meaning for human society and commerce. That state of being is similarly the focus in *Harris*.

#### IV. Conclusion

Agricultural animals are not just raised for food; they are raised *as* food. Their care and treatment acquires legal relevance only inasmuch as it impacts the marketability of their dismembered bodies. With the wellbeing of the living animal excluded from the equation, “humane standards” take on an entirely different meaning. A slaughterhouse facility can seriously injure an animal, take in and slaughter animals already gravely sick or injured, and process them into the human food supply, all the while treating them humanely. This humane treatment is accomplished through the oversight of meat inspectors whose mandate has literally nothing to do with animal welfare.

And with this reality, we return to where this essay began. A meat animal is not “meat and animal.” *National Meat Association v. Harris* makes plain that the law does not recognize or protect the lives of agricultural animals. An agricultural animal is meat from the moment it is born. Thus, no conjunction is necessary. Indeed, in a very real sense, “meat animal” is a redundancy. We should simply call them meat.

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38. *Pierson v. Post*, 3 Cai. R. 175 (1805).

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