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Of Farm Animals and Justice

Steven M. Wise*

I. Introduction

The average American consumes over six hundred pounds of animal flesh and animal products a year, and in doing so ingests about twice the amount of protein needed for health.¹ Over one hundred farm animals are slaughtered each second in the United States in the service of that appetite. In total, over three billion chickens, pigs, ducks, cows and calves, rabbits, sheep, turkeys and goats, an annual number equal to two-thirds of the entire human population of the world are slaughtered.² Millions more animals are confined in dairy herds and used for the production of milk or crowded into great flocks and used for egg production or meat. Most farm animals live out their lives in places that little resemble a traditional farm, but in a kind of factory, where they stand crowded on artificial ground and see only the light and feel only the warmth of artificial suns. Their bodies are often mutilated by the farmer and bear wounds inflicted by other animals whose aggression is spawned by the conditions in which they all live. Their instincts are frustrated.³ "Solitary" they

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1. J. Mason & P. Singer, *Animal Factories* 113 (1980); P. Singer, *Animal Liberation, A New Ethic For Our Treatment of Animals* 171-201 (1975).

2. See M. Fox, *Returning to Eden: Animal Rights and Human Responsibility* 86 (1980); D. Giehl, *Vegetarianism: Way of Life* 116 (1979); Galvin, *What Rights For Animals? A Modest Proposal*, 2 *Pace Env'tl. L. Rev.* 245, 245 (1985).

3. Council for Agric. Science & Tech., Rep. No. 91, *Scientific Aspects of the Welfare of Food Animals* (Nov. 1981) [hereinafter cited as CAST Report].

The commercial broiler industry has led in application of efficient production methods such as high density housing, control of housing environment, bulk feed delivery and mechanical feeding, use of fat and antibiotics in feed, and least cost feed formulation. Many of these progressive practices have been

are not, but otherwise theirs is the true Hobbesian life, "poor, nasty, brutish, and short."⁴ In addition, farm animals are now subject to advanced techniques of genetic engineering in order

applied to production of turkeys, hogs, and beef cattle, or are being applied.

Miller & Hodges, *One Man Feeds 5,000 Cattle Or 60,000 Broilers*, in *Contours of Change: The 1970 Yearbook of Agriculture* 58 (1970).

For detailed descriptions of factory-farming see, Curtis, *We Are What We Eat: Factory Farming*, in *Animal Rights - Stories of People Who Defend the Rights of Animals* 73-89 (1980); M. Fox, *supra* note 2, at 86-104; Harrison, *Ethical Questions Concerning Modern Livestock Farming*, in *Animals' Rights - A Symposium* 122-30 (D. Paterson & R. Ryder eds. 1979) [hereinafter cited as Harrison, *Ethical Questions*]; Harrison, *On Factory Farming*, in *Animals, Men and Morals: An Inquiry Into the Maltreatment of Non-Humans* 11-24 (S. Godlovitch, R. Godlovitch & J. Harris eds. 1971) [hereinafter cited as Harrison, *On Factory Farming*]; Mason, *Brave New Farm?*, in *In Defense of Animals* 89-107 (P. Singer ed. 1985); Note, *The Rights of Nonhuman Animals and World Public Order: A Global Assessment*, 28 N.Y.L. Sch. L. Rev. 377, 389-91 (1983); Comment, *Factory Farming: An Imminent Clash Between Animal Rights Activists and Agribusiness*, 7 B.C. Envtl. Aff. L. Rev. 423, 425-34 (1979). See generally Agric. Comm., First Rep., H.C., No. 406-I, *Animal Welfare in Poultry, Pig and Veal Calf Product* (1981) [hereinafter cited as House of Commons]; M. Fox, *Husbandry, Behavior, and Veterinary Practice* (1984); *Factory Farming: A Symposium* (J.R. Bellerby ed. 1970); Magel, *Factory Farming 1951-1980*, in *A Bibliography of Animal Rights and Related Material* (1980); J. Mason & P. Singer, *supra* note 1.

Ruth Harrison aptly summed up the system:

The factory farmer aims at a maximum turnover of capital with a minimum of effort, his main criterion being immediate profitability. He uses new systems - developed first and foremost for his own convenience - which subject the animals to conditions to which they are not adapted, systems . . . 'characterized by extreme restriction of freedom, enforced uniformity of experience, the submission of life processes to automatic controlling devices and inflexible time-scheduling . . . and running through all this the rigid and violent suppression of the natural.' Many of these farmers are not really farmers at all but business interests running their farms from their offices by remote control.

Harrison, *Animals in Factory Farming*, in *Animals and Their Legal Rights* 69 (E. Leavitt 3d ed. 1978) (emphasis in original) [hereinafter cited as Harrison, *Animals*].

4. W. Frankena, *Ethics* 97 (1963) (quoting T. Hobbs from *Leviathan*).

Detachment and unnecessary brutality seem to be universal components of intensive animal husbandry, presumably because they help to distance the farmer from the mass suffering and slaughter for which he is either directly or indirectly responsible. The process is also encouraged by the advent of modern farming methods. . . . At this level of detachment, the animal easily becomes a mere cipher, a unit of production, abstracted out of existence in the pursuit of higher yields.

J. Serpell, *In The Company of Animals* 155 (1986).

for them to better serve human beings.⁵

On the factory-farm, individual animals are frequently seen as unimportant; their interests and concerns are subordinated to those of the herd or flock and ultimately to those of man.⁶ Profitability is the star by which the animals' lives are steered.⁷ Their billions bear tragic witness to what occurs when human beings disregard the dignity of sentient beings and exploit them for economic or political ends.⁸

Before the general use of antibiotics in their feed and water, farm animals were raised in small groups, as large

5. Off. of Tech. Assessment, U.S. Cong., Rep. No. OTA-F-285, Technology, Public Policy and The Changing Structure of American Agriculture, 4-6, 31-39, 205-07 (1986) [hereinafter cited as Changing Structure of American Agriculture].

6. "Feeding systems for broilers, for example, now require the services of only one man to care for 60,000 to 75,000 birds. A man can feed upwards of 5,000 head of cattle in a modern feedlot." Miller & Hodges, *supra* note 3, at 57. See also Jensen, *The Science and Husbandry of Swine Management*, in *Animal Agriculture: The Biology of Domestic Animals and Their Use by Man 579* (H. Cole & M. Ronning eds. 1974) ("[h]istorically, they [pigs] have been recognized as 'mortgage lifters'").

Profits in agriculture are not made by setting up conditions in which each *individual* animal is maximally productive, or even maximally healthy. . . . The possibility of a split between the conditions which are commercially best for the farmer and those which favour the health of the individual animal becomes greater the more animals comprise the total unit. The smaller the proportion of the profit that is represented by one animal, the less that animal in an economic sense, matters. . . . Within this vast efficient industry, one animal is a very small cog. For this reason, the productivity of modern farming says very little about the welfare of the individual animal. It says little about its physical health, let alone its mental welfare.

M. Dawkins, *Animal Suffering, The Science of Animal Welfare 29-32* (1980) (emphasis in original). See also M. Fox, *supra* note 2, at 137-43.

It is the position of the agricultural community "that 'the goal of maximum profitability pursued by animal producers [and others] leads *automatically* to improved welfare of both animals and humans'." M. Fox, *supra* note 3, at 218 (emphasis added).

Both the conditions of factory-farming and its economic rationalizations recall the 'tight-packers' of the slave ships of the 'Middle Passage'. See D. Mannix & M. Crowley, *Black Cargoes: A History of the Atlantic Slave Trade 1518-1865* at 105-06 (1962).

7. P. Singer, *supra* note 1, at 98.

8. The plights of factory-farmed animals recall immense historical infringements on the moral rights and interests of helpless and subdued human beings at a time when they, too, were submerged within a vast and uncaring system that saw them beyond the scope of moral concern and civil protection. See generally N. Levin, *The Holocaust: The Destruction of European Jewry, 1933-1945* (1968); D. Mannix & M. Crowley, *supra* note 6.

groups encouraged outbreaks of serious disease.⁹ With the advent of the regular administration of antibiotics to farm animals, the size of flocks increased ten-fold, the herds on the feed lots a hundred-fold. It was the use of antibiotics "that rendered such mass production of livestock practicable and economically sound."¹⁰ But even factory-farming has not brought forth production sufficient to satisfy the meat and poultry producers. Farm animals are now being subjected to advance biotechnologies.¹¹ These include embryo transfers (through which the embryo can be sexed, split, frozen, and even fused with embryos of other animal species to produce chimeric animals),¹² recombinant deoxyribonucleic acid (rDNA) techniques (that allow the injection of growth hormone into animals and will allow future animals to be permanently endowed with the genetic traits of human beings, other animals, and even plants),¹³ and "artificial embryonation" (whereby embryos can be placed into the uteri of animals whose estrous cycles have been artificially regulated).¹⁴

The act of concentrating farm animals in a way that fails to respect their ethological needs, or *telos*,¹⁵ causes them to suffer mental and physiological stresses and renders them weak and further susceptible to disease.¹⁶ This mandates the

9. White-Stevens, *Antibiotics Curb Diseases in Livestock, Boost Growth*, in *That We May Eat*, The 1975 Yearbook of Agriculture 93 (1975).

10. *Id.* at 93-94.

11. See Changing Structure of American Agriculture, *supra* note 5, at 31-39.

12. *Id.* at 32, 36. One researcher has predicted the development of cattle weighing more than ten thousand pounds and pigs twelve feet long and five feet wide. Fox, *Genetic Engineering: Nature's Cornucopia of Pandora's Box*, *The Animal's Agenda* Mar. 1987 at 10. Dr. Fox has termed such as an example of "biological fascism." *Id.* at 12.

13. See Changing Structure of American Agriculture, *supra* note 5, at 33-35.

14. *Id.* at 37-38.

15. When an animal is alive, "it has what Aristotle called a *telos*, a nature, a function, a set of activities intrinsic to it, evolutionarily determined and genetically imprinted. . . . Furthermore, its life consists precisely in a struggle to perform these functions, to actualize this nature, to fulfill these needs, to maintain this life. . . ." B. Rollin, *Animal Rights and Human Morality* 39 (1982).

16. See, e.g., Coop. Extension Serv., Univ. of Mass., Rep. No. 106, *Raising Veal Calves* 4 (S. Gaunt & R. Harrington eds. 1975). "The health of the veal calf can best be described as anemic, weak and susceptible to disease." *Id.*

In the view of one critic of factory-farming: The primary evil of factory-farming

incessant administration of subtherapeutic doses of antibiotics that apply an evolutionary pressure to normal antibiotic-susceptible bacteria and cause them to evolve into antibiotic-resistant strains that can ultimately pose a health threat to the human beings who consume their flesh.¹⁷ The products of factory-farming have been criticized as a threat to the health and welfare of the human beings who eat them.¹⁸ Biotechnology

is that its methods

are pathogenic, as a consequence of immunosuppressive psychosocial stress [which may be exacerbated further by the synergistic effects of agrichemical contaminants of animals' feed, notably by pesticides, many of which are now known to be immunosuppressive]. This phenomenological correlation between emotional distress, stress, and disease resistance has been extensively investigated under controlled laboratory conditions and may well prove to be as relevant to the health and welfare of domesticated animals as to our own health and well-being also.

M. Fox, *supra* note 3, at 218 (citations omitted).

It has been found that a nonhuman animal's lack of control over a noxious environment alone lowers his or her body's immunological responses. Laudenslager, *Coping and Immunosuppression: Inescapable But Not Escapable Shock Suppresses Lymphocyte Proliferation*, 221 *Science* 568 (1983). Cf. Kaplan, Manuck, Clarkson, Lusso, Taub & Miller, *Social Stresses and Atherosclerosis in Normocholesterolemic Monkeys*, 220 *Science* 733 (1983) in which the variable of social stresses alone correlated with the development of atherosclerosis in cynomolgus monkeys.

17. *Animal Legal Defense Fund Boston, Inc. v. Provimi Veal Corp.*, 626 F. Supp. 278, 286 n.5 (D. Mass. 1986); *Changing Structure of Animal Agriculture*, *supra* note 5, at 206; O. Schell, *Modern Meat, Antibiotics, Hormones and the Pharmaceutical Farm* 3-180 (1984); Holmberg, Osterholm, Senger & Cohen, *Drug-Resistant Salmonella From Animals Fed Antimicrobials*, 311 *New Eng. J. Med.* 617 (1984); Holmberg, Wells & Cohen, *Animal-to-Man Transmissions of Antimicrobial-Resistant Salmonella: Investigations of U.S. Outbreaks, 1971-1983*, 221 *Science* 833 (1984); Levy, *Playing Antibiotic Pool: Time to Tally the Score*, 311 *New Eng. J. Med.* 663 (1984).

18. "To himself, the meat-eater seems to be eating life. To the vegetarian, he seems to be eating death." M. Midgley, *Animals and Why They Matter* 27 (1983). The deglutition of farm animals and their products have been implicated in a wide variety of serious human diseases. The consumption of meat alone has been labeled, after the uses of tobacco and alcohol, "the greatest single cause of mortality in the United States." Note, *supra* note 3, at 377, 389-90. It is a contributing cause to heart disease, several forms of cancer, kidney disorders, salmonellosis, osteoporosis, and trichinosis. See D. Giehl, *supra* note 2, at 23-42; J. Mason & P. Singer, *supra* note 1, at 117-19; Arntzenius, Kromhout, Barth, Reiber, Brusckke, Buis, van Gent, Kempenvoogd, Strikwerda & van der Velde, *Diet, Lipoproteins, and the Progression of Coronary Atherosclerosis*, 312 *New Eng. J. Med.* 805 (1985); Lipkin & Newmark, *Effect of Added Dietary Calcium On Colonic Epithelial-Cell Proliferation In Subjects at High Risk For Familial Colon Cancer*, 313 *New Eng. J. Med.* 1381 (1985); Ross, *The*

threatens the essence of the animals themselves.

In this article, the unjust state of present law as it concerns farm animals and the homocentricity that underlies it is examined and criticized. Some of the erroneous ways in which society thinks about farm animals, indeed animals in general, the ways in which the law drives this thinking, and the ways in which this thinking drives the law, are discussed. Integrated are proposals that would encourage the protection of the health and welfare of farm animals. Other proposals would encourage public awareness of the conditions under which farm animals live and die, of the waste, pollution, and inefficiency that is factory-farming's twin, and of the harmful effects of factory-farming upon the health of human beings. The hope is that presentation of the facts will permit an informed public to decide whether the factory-farming system is just, whether it wishes to support the factory-farm system by purchasing its products, or even whether it should call for its reform or abolition. Finally, the proposals would discourage factory-farming and the use of biotechnology that reduces the animal to an object, and encourage the return to and renewed growth of a humane and caring system of farm animal husbandry.

Pathogenesis of Atherosclerosis - An Update, 314 *New Eng. J. Med.* 488 (1986); Tornberg, Holm, Carstensen & Eklund, *Risks of Cancer of the Colon and Rectum in Relation to Serum Cholesterol and Beta-lipoprotein*, 315 *New Eng. J. Med.* 1629 (1986). Willett & MacMahon, *Diet and Cancer - An Overview*, 310 *New Eng. J. Med.* 698-701 (1984).

The commercial implications of the recognition of this health problem by the nation's consumers have not escaped the notice of the United States Dep't of Agriculture. "Vegetarian diets are becoming common in many countries, including the developed countries. Such diets demonstrate how health concerns have altered consumption patterns - the red meats, eggs, and dairy products are examples of recent losses due to health concerns." Mathia & Deaton, *Why People Eat What They Eat Around the World*, in *United States Agriculture in a Global Economy*, *The 1985 Yearbook of Agriculture* 49 (1985). However, this has been denied.

Exogenous cholesterol intake from animal fats was first thought to be responsible for the genesis of atherosclerosis, but this theory has proved erroneous. . . . It would not seem logical to blame the consumption of animal fats for the increased incidence of atherosclerosis during recent years. Nor would it seem desirable to advise consumers to avoid animal products that contain fats.

C. Lasley, *The Science of Animals That Serve Mankind* 57-58 (1975).

II. Inadequacies of Present Law

A. Background

It is difficult to place nonhuman animals in their proper perspective.¹⁹ Three fundamental, sometimes contradictory, mistakes in our thought about them are often made. First, we assume that they possess insufficient mind. By doing so, we neglect a lesson of biological evolution, that "the difference in mind between man and the higher animals, great as it is, certainly is one of degree and not of kind."²⁰ Indeed, "[t]he Western world has yet to make its peace with Darwin and implications of evolutionary theory."²¹ This matter of "difference" has tended historically to be a crucial component in human willingness to ignore the interests of other beings, human and otherwise, or to pretend that their interests do not exist. It was an oft-cited tenet of human slavery.²² In fact,

19. Perhaps it is more correct to say that it is difficult to place *human* animals in their proper perspective. Compare M. Midgley, *Beasts and Man: The Roots of Human Nature* (1980) (which sets forth the biological fact that "[w]e are not just rather like animals; we are animals") with M. Fox, *The Case for Animal Experimentation: An Evolutionary and Ethical Perspective* (1986) (which states that "the issue of humans place in nature is far from being resolved and never will be. Is *Homo Sapiens* an animal or more than an animal?").

20. C. Darwin, *The Descent of Man and Selection in Relation to Sex*, ch. IV (1891).

21. Gould, *A Matter of Degree*, in *Ever Since Darwin, Reflections in Natural History* 50 (1977).

22.

The strangeness and seeming savagery of the Africans, reinforced by traditional attitudes and the context of early contact, 'were major components in the sense of *difference* which provided the mental margin absolutely prerequisite for placing the European on the deck of the slave ship and the Negro in the hold.'

O. Patterson, *Slavery and Social Death, A Comparative Study* 7 (1982) (quoting W. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812* at 97 (1969) (emphasis in original). European and American whites struggled to demonstrate that the two races were separate species, as if once that border was crossed, further justification was unnecessary. Gould, *American Polygeny and Craniometry before Darwin, Blacks and Indians as Separate, Inferior Species*, in *The Mismeasure of Man* 30-72 (1981); Nott, *Two Lectures on the Natural History of the Caucasian and Negro Races*, in *The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1830-1860* at 212 (D. Faust ed. 1981). In the introduction to his book, Judge A. Leon Higginbotham, Jr. stated that he intended to "document the vacillation of the courts, the state legislatures, and even honest public servants in trying to decide

"[t]he legal position of animals is not unlike that of human slaves at the beginning of the nineteenth century in the United States. Slaves had no legal rights of their own, yet were afforded some special legal protection."²³

Second, we overly credit animals with the ability to engage in "moral thinking." We rationalize our consumption of them by confusing biology with ethics and looking to a non-moral nature to teach us the moral lesson that since nonhuman animals eat each other, we may eat them.²⁴ However, many farm animals are themselves natural vegetarians. More importantly, a farm animal is not a moral agent, defined as "an individual who can be held morally accountable for the

whether blacks were people, and if so, whether they were species apart from white humans, the difference justifying separate and different treatment." A. Leon Higginbotham, Jr., In *The Matter of Color, Race & The American Legal Process: The Colonial Period* 7 (1980). "Not surprisingly, modern livestock producers are generally unwilling to consider the welfare of their animals because this would entail thinking about them as subjects rather than objects. As persons rather than things, and this would raise imponderable questions about the morality of their treatment." J. Serpell, *supra* note 4, at 155.

23. D. Favre & M. Loring, *Animal Law* 2 (1983).

24. Gould, *Nonmoral Nature*, in *Hen's Teeth and Horse's Toes, Further Reflections in Natural History* 32-45 (1983). This error was repeated in a recent Office of Technology Assessment report to the United States Congress.

Consistency suggests rights should be ascribed to animals once rights are given to infants and mentally handicapped humans who also lack discretion. Yet it would be inconsistent to assert that humans are not superior to animals while suggesting that humans should refuse to exploit other species, even though other species exploit each other.

Off. of Tech. Assessment, U.S. Cong., Rep. No. OTA-BA-273, *Alternatives to Animal Use in Research, Testing, and Education* 83 (1986) [hereinafter cited as *Alternatives to Animal Use*]. Similar appeals to nature were made to justify slavery. Nott, *supra* note 22, at 238. There Nott quoted from Alexander Pope:

All Nature is but Art, unknown to see;
 All chance, Direction, which thou canst not see;
 All Discord, Harmony not understood;
 All partial Evil, universal Good.
 And spite of Pride, in erring Reason's spite,
 One truth is clear, WHATEVER IS, IS RIGHT.

Stephen Clark asserts that animals are not moral as "they do not, as far as we can see, have any occasion to moralize about themselves or to construct intellectual systems to accommodate their immediate responses." However, he contends they are ethical in that "they respond to aspects of a situation and to features of their kindred, that a good man also would respect." S. Clark, *The Nature of the Beast: Are Animals Moral?* 107 (1982).

acts he performs or fails to perform, one who can rightly be blamed or praised, criticized or condemned."²⁵ Animals can be held no more accountable for their actions than can human infants, young children, senile elders, or profoundly retarded or insane human beings.²⁶ We who seek to emulate their moral development may find ourselves engaged in one of the astounding array of actions that enliven the animal world, such as sexual cannibalism.²⁷ Such mimicry casts aside our humanity and "contradicts and cancels the one single advantage that our race has received from what is called evolution, namely the development of a sense of right and wrong."²⁸ Third, animals are viewed as incompletely evolved beings, lower than we on an evolutionary ladder. This essentially pre-Darwinian concept of organic evolution is a powerful echo of what the historian Arthur Lovejoy labeled as "one of the half-dozen most potent and persistent presuppositions in Western thought," the so called "Great Chain of Being."²⁹ This imaginary ladder of life, consisting "of an ordered series of beings, from the lowest, simplest, and tiniest at the bottom to the highest and most complex at the top"³⁰ embodies the idea

25. T. Regan, *The Case for Animal Rights* 86 (1983).

26. *Id.* at 53.

27. Buskirk, Frohlich & Ross, *The Natural Selection of Sexual Cannibalism*, 123 *American Naturalist* 617 (1984).

28. S. Clark, *The Moral Status of Animals* 154 (1977) (quoting J. Powys, *Autobiography* 638 (1967)). But Rhesus monkeys have consistently suffered hunger, sometimes for more than a week, rather than secure food at the expense of electrically shocking a conspecific. Wechkin, Masserman & Terris, *Shock to a Conspecific as an Aversive Stimulus*, 1 *Psychonomic Sci.* 47, 47-48 (1964); Masserman, Wechkin & Terris, *Altruistic Behavior in Rhesus Monkeys*, 121 *Am. J. Psychiatry* 584, 584-85 (1964). It is unclear whether this behavior involves moral thinking. Compare the altruistic behavior of the Rhesus monkeys to that of the human subjects in Stanley Milgram's famous experiment. See *Behavioral Study of Obedience*, 67 *J. Abnormal Psychology* 371, 371-78 (1963).

It certainly fails to explain how day old male chicks can be thrown into plastic bags to suffocate under the weight of the others cast atop them, simply because they serve no human economic interest alive. News & Analysis, *Egg Producers Issue Guidelines for Destroying Baby Chicks*, 4 *Int'l J. Study of Animal Problems* 14, 14-15 (Jan.-Mar. 1983); J. Mason & P. Singer, *supra* note 1, at 3-5.

29. A. Lovejoy, *The Great Chain of Being VIII* (1936), *quoted* in Gould, *Bound by the Great Chain*, in *The Flamingo's Smile* 281 (1985).

30. D. Boorstin, *The Discoverers, A History of Man's Search to Know His World and Himself* 457-58 (1983).

that organic evolution implies inevitable progress. Yet Darwinian evolution does not imply progress. It implies nothing but the operation of natural selection upon variation.³¹ The popular link of organic evolution with progress "remains a primary component of our global arrogance, our belief in domination over, rather than fellowship with, more than a million other species that inhabit our planet."³² To this extent our efforts to understand man's place in nature continue to be as "dominated, perverted, and obstructed,"³³ today no less than in the time before Darwin.

Increasingly many argue that animals have moral rights and are not merely means to human ends.³⁴ If they have

31. Gould, *Chance Riches*, in *Hen's Teeth and Horse's Toes: Further Reflections in Natural History* 332-42 (1983) [hereinafter cited as Gould, *Chance Riches*]; Gould, *Darwin's Untimely Burial*, in *Ever Since Darwin* 39-45 (1977) [hereinafter cited as Gould, *Untimely Burial*]; Gould, *Darwin's Dilemma: The Odyssey of Evolution*, in *Ever Since Darwin* 34-38 (1977) [hereinafter cited as Gould, *Darwin's Dilemma*].

32. Gould, *Darwin's Dilemma*, *supra* note 31, at 38.

33. D. Boorstin, *supra* note 30, at 457.

34. They have urged teleological justifications, where the rightness of an act depends only on its consequences. J. Bentham, *The Principles of Morals and Legislation*, ch. XVII, § 1 (1789); Gruzalski, *The Case Against Raising and Killing Animals for Food*, in *Ethics and Animals* 251 (H. Miller & W. Williams eds. 1983); P. Singer, *supra* note 1, at 1-26; Singer, *The Fable of the Fox and the Unliberated Animals*, 88 *Ethics* 122 (Jan. 1978). See also L.W. Sumner, *Abortion and Moral Theory* 199 (1981), drawing on the utilitarian analysis of Singer to conclude that the characteristic of sentience requires us not only to grant moral rights to fetuses who have acquired sentience, but "requires that we become vegetarians (at least as long as intensive farming practices persist)." *Id.*

They have urged deontological justifications, where the rightness of an act does not depend only on its consequences to support the concept of the moral rights of animals. Brophy, *The Darwinist's Dilemma*, in *Animal Rights: A Symposium* 63-72 (1979); Bryant, *Fettered Kingdoms: An Examination of a Changing Ethic* 1 (undated); S. Clark, *The Moral Status of Animals* (1984); Feinberg, *Human Duties and Animal Rights*, in *On the Fifth Day: Animal Rights and Human Ethics* 45-69 (R.K. Morris & M.W. Fox eds. 1978); M. Fox, *supra* note 2, at 152-72; Godlovitch, *Animals and Morals*, in *Animals, Men and Morals: An Inquiry Into The Maltreatment of Non-Humans* 156-72 (S. Godlovitch, R. Godlovitch & J. Harris eds. 1971); S. Godlovitch, *Utilities*, in *Animals, Men and Morals: An Inquiry Into The Maltreatment of Non-humans* 173-90 (S. Godlovitch, R. Godlovitch & J. Harris eds. 1971); Nelson, *Duties to Animals*, in *Animals, Men and Morals: An Inquiry Into The Maltreatment of Non-humans* 149-55 (S. Godlovitch, R. Godlovitch & J. Harris eds. 1971); Rachels, *Do Animals have a Right to Liberty?*, in *Animal Rights and Human Obligations* 205-23 (T. Regan & P. Singer eds. 1976); T. Regan, *supra* note 25, at 331-98; B. Rollin, *supra* note 15, at 46-53; Rowan & Tannenbaum, *Animal Rights*, 66

moral rights, is it just to act as if they do not and also to deny them legal rights? Certainly the biological and moral characteristics that we ascribe to animals and the way in which we perceive animals have everything to do with the answer. Our understanding of who animals are has a powerful impact upon our sense of ideal justice. This sense of justice plays a powerful, and possibly determinative role, in how the law ultimately comes to treat animals.³⁵

National Forum 30 (1986); H.S. Salt, *Animal's Rights: Considered in Relation to Social Progress* (1980). See also B. Brody, *Abortion and the Sanctity of Human Life: A Philosophical View* 107-08, 155-56 n.11 (1975), where it is argued that if possession of a brain that has not suffered cessation of function is the essential prerequisite of a human being then "this raises, of course, a fundamental problem about the rights of animals, especially their right to life." *Id.* See also H. Beston, *The Outermost House* 19-20 (1971):

We patronize them [animals] for their incompleteness, for their tragic fate of having taken form so far below ourselves. And therein we err and greatly err. For the animal shall not be measured by man. In a world older and more complete than ours, they move finished and complete, gifted with extensions of the senses we have lost or never attained, living by voices we shall never hear. They are not brethren; they are not underlings; they are other nations caught with ourselves in the net of life and time, fellow prisoners of the splendor and travail of the earth.

Animals have sometimes been tried for their alleged transgressions against humanity. Beach, *Beasts Before the Bar*, in *Ants, Indians, and Little Dinosaurs* 53 (1950); G. Carson, *Men, Beasts, and Gods: A History of Cruelty and Kindness to Animals* 27-35 (1972).

In Western Europe procedure against animals was settled, both in the ecclesiastical and civil courts; in all cases they were provided with counsel, were duly summoned to appear, exceptions taken in their favor were considered, and their sentences sometimes commuted on the ground of relative youth, exiguity of body, or reputation for respectability.

Dox, *Beasts at the Bar*, 4 *Lincoln L. Rev.* 1, (1931). For further review of the trials and tribulations of alleged animal transgressors see E.P. Evans, *The Criminal Prosecution and Capital Punishment of Animals* (1906); Hyde, *The Prosecution and Punishment of Animals and Lifeless Things in the Middle Ages and Modern Times*, 64 *U. Pa. L. Rev.* 696, 696-730 (1916).

The English system of deodand, whereby personal chattels, inanimate or animal, that caused the death of a human being were forfeit, was a possible twist of this view of life. *Id.* at 726-30.

35. Reh binder, *Questions of the Legal Scholar Concerning the So-Called Sense of Justice*, in *Law, Biology & Culture: The Evolution of Law* 35-41 (M. Gruter & P. Bohannon eds. 1983). Our sense of justice as a segment of "one's ethical, as well as one's ontological framework is determined by what entities one is prepared to notice or take seriously." S. Clark, *The Moral Status of Animals* 7 (1984).

The arguments for basic human rights, as freedom from torture, are frequently

It has been more than three hundred years since Rene Descartes proclaimed that nonhuman animals were mere mechanical automata, unfeeling machines.³⁶ But Voltaire's response to Descartes remains unanswered: "You discover in him (an animal) *all the same organs of feeling as in yourself*. Answer me, mechanist, has Nature arranged all the springs of feeling in this animal *to the end that he may not feel?*"³⁷ Science has taught us that animals, certainly those whom we factory-farm, have such well-developed nervous systems that the question is not whether they feel and suffer, but how much.³⁸

justified on the noncomparative ground (a human being's right to receive certain treatment is absolute and exists simply because he or she is a human being and is not relative to whether other human beings receive it) that because "all persons in fact have certain capacities - e.g., to reason or to feel pain - and [they] therefore should be treated alike." Simons, *Equality As a Comparative Right*, 65 B.U.L. Rev. 387, 455 (1985). It is justified as well on the comparative ground (a human being's right to receive certain treatment is purely relative to whether other human beings receive it) "that persons *should* be treated with equal dignity or desert, with the consequences that rights should be universally distributed." *Id.* (emphasis in original). Such noncomparative rights follow from the facts of the animals' biology, while "[c]omparative rights can be liberal or conservative, utilitarian or based on fairness, general or specific, and so on." *Id.* at 480. The arguments that animals should receive certain basic rights can follow similar paths. On one hand, there exist noncomparative grounds for granting animals those rights that respect their physiologies. On the other hand, there exist comparative grounds for granting animals rights because human beings possess them and animals should be treated with equal respect; it is not claimed that animals should be able to vote or have freedom of religion and it is equally clear that human beings generally deserve a greater number of rights than do non-human animals. Therefore the comparative rights to which human beings and animals are entitled are proportionality rights, in that both are entitled to be treated proportionately to their morally relevant differences. *See id.* at 434-46. Professor Simons uses the term "rights" in "a very broad and generic sense, as referring to 'all claims that can justly be made by or on behalf of an individual or group . . . to some condition or power.'" *Id.* at 446-47 n.131.

36. Regan, *Introduction to Animal Rights and Human Obligations* at 4 (T. Regan & P. Singer eds. 1976).

37. Voltaire, *A Reply to Descartes*, in *Animal Rights and Human Obligations* 68 (T. Regan & P. Singer eds. 1976). For a more comprehensive rebuttal by a philosopher see T. Regan, *supra* note 25, at 9-33. For that of an animal physiologist and behaviorist see generally D. Griffin, *Animal Thinking* (1984) and D. Griffin, *The Question of Animal Awareness* (1981). *See also* M. Midgley, *Animals and Why They Matter* 134-43 (1984).

38. Focus, *The Problem of Pain: What Do Animals Really Feel?*, 3 Int'l J. Stud. Animal Problems 275 (Oct. - Dec. 1982). *See also* Fraser & Fox, *The Effect of Ethostasis on Farm Animals Behavior: A Theoretical Overview*, 4 Int'l J. Stud. Animal Problems 59 (Jan.-Mar. 1983); P. Singer, *supra* note 1, at 10-16. *See generally* M.

Is it not true that "[i]f a being suffers there can be no moral justification for refusing to take that suffering into consideration?"³⁹ Yet the law that regulates human behavior towards farm animals remains essentially grounded upon a Cartesian ethology and a pre-Darwinian biology.

Farm animals presently have no legal rights, for as will be discussed, they generally have no standing to litigate, their interests are usually not considered, and they have no remedy for their harm.⁴⁰ But they should not be barred from consideration as candidates for holding rights. "Each time there is a new movement to confer rights onto some new 'entity,' the proposal is bound to sound odd or frightening or laughable. This is partly because until the rightless object receives its rights, we cannot see it as anything but a *thing* for the use of 'us' - those who are holding rights at the time."⁴¹

Because farm animals suffer in great numbers, they make out a *prima facie* case both for moral and legal rights. While the possession of moral rights is not an absolute legal prerequisite to the possession of legal rights⁴² the acknowledgement of

Dawkins, *Animal Suffering, The Science of Animal Welfare* (1980).

Similar concerns have been expressed in anti-abortion literature.

Do the unborn also experience pain? In a society with strong humanitarian instincts this question has a special weight and deserves special consideration. . . .

The problem of knowing whether an animal, a baby, or an unborn child can suffer is basically the same. We cannot experience anyone else's pain. We know it only by empathy. We must be led to identify enough with the other to feel the pain. . . . With animals who do not scream and with the unborn, we must interpret other signs, such as wriggling, and by the context in which the sign occurs infer that pain is present. . . .

In each case in which we empathize we assume the presence of the physical organs necessary to apprehend pain.

J. Noonan, Jr., *A Private Choice: Abortion in America in the Seventies* 158-59 (1979).

39. P. Singer, *supra* note 1, at 9.

40. Dichter, *Legal Definitions of Cruelty and Animal Rights*, 7 B.C. Envtl. Aff. L. Rev. 147, 147-48 (1979); Galvin, *supra* note 2, at 245. See also, Stone, *Should Trees Have Standing? - Toward Legal Rights for Natural Objects*, 45 S. Cal. L. Rev. 450, 458-59 (1972).

41. Stone, *supra* note 40, at 455 (citations omitted).

42. House of Commons, *supra* note 3, at 9 ("[S]ociety has a duty to decide upon certain standards in respect to its treatment of animals. We maintain that this can be done without relying on philosophical arguments about animal rights or the nature of animal suffering.").

the one is an undeniable aid in the attainment by a living being of the other. Animals should not be required to wait for the final resolution of the question before they are protected by civil law.⁴³

B. *Anti-cruelty Laws*

The interests of American farm animals are protected by little more than general state anti-cruelty statutes,⁴⁴ most of which were passed before 1871, the year of the publication of Darwin's *The Descent of Man*. Virtually all the rest followed before the implications of that work were well understood.⁴⁵ It

43. Stone, *On the Moral and Legal Rights of Nature*, *Bostonia*, July-Aug. 1983, at 29, 33.

In the area of morals, the dominant misconception is to suppose that all arguments of the form 'X ought to have a legal right' have to be grounded on a demonstration that 'X has a moral right'. Some legal rights do, indeed, seem to secure historically antecedent liberties. But there is no necessary connection. Corporations, for example, are accorded all sorts of legal, even constitutional rights, a practice that does not commit to the view that corporations are metaphysical persons, much less moral agents. We may feel that a legal regime in which corporations are accorded the rights of natural persons is preferable to one in which they are not.

Id. See also *Sierra Club v. Morton*, 405 U.S. 727, 741-43 (1972) (Douglas, J., dissenting); Stone, *supra* note 40, at 450.

44. Leavitt & Halverson, *The Evolution of Anti-Cruelty Laws in the United States, in Animals and Their Legal Rights: A Survey of American Laws from 1641-1978* at 11-32 (3d ed. 1978); Dichter, *supra* note 40, at 151-52 & 156-60; Friend, *Animal Cruelty Laws: The Case for Reform*, 8 U. Rich. L. Rev. 201 (1974); Comment, *Towards Legal Rights for Animals*, 4 *Envtl. Aff. L. Rev.* 205, 212-16 & 224-27 (1974); Comment, *supra* note 3, at 436-46; Annot. 82 *A.L.R.2d* 794 (1962).

45. Leavitt & Halverson, *supra* note 44, at 13-14.

The earliest such law was placed in the "Body of Liberties" of Massachusetts Bay Colony in 1641, which stated that "[n]o man shall exercise any Tyranny or Cruelty towards any brutie Creature which are usuallie kept for man's use." *Id.* at 11. Anti-cruelty laws were not universally seen as products of the inevitable turn of the wheel of civilization. William Harper, a United States Senator, state appeals court judge and chancellor, wrote "[w]ho but a driveling fanatic, has thought of the necessity of protecting domestic animals from the cruelty of their owners? And yet, are not great and wanton cruelties practised on these animals?" Harper, *Memoir on Slavery, in The Ideology of Slavery: Proslavery Thought in the Antebellum South, 1830-1860*, at 98 (D. Faust ed. 1981). See also G. Carson, *Man Beasts, and Gods, A History of Cruelty and Kindness to Animals* 49 (1972).

In 1809 the Scottish Lord Thomas Erskine, then lord chancellor, presented a bill to prevent malicious and wanton cruelty to a quite restricted list of domestic animals, the horse, ox, sheep and pig. Though the proposal was nar-

is therefore not surprising that these early statutes were chiefly codifications of the indirect duty view of human responsibility toward animals. That is "the proposition that we have no duty directly to animals; rather, animals are a sort of medium through which we may either succeed or fail to discharge those direct duties we owe to nonanimals, either ourselves, other human beings, or, as on some views, God."⁴⁶

State anti-cruelty statutes were in place long before the post World War II advents of factory-farming and genetic engineering.⁴⁷ Although today every state has its anti-cruelty

row in scope, the dome of the rotunda of the House of Lords rang with wails and caterwauls, mewings and cock crowings.

Id.

46. T. Regan, *supra* note 25, at 150. See, e.g., *Knox v. Massachusetts Soc'y for the Prevention of Cruelty to Animals*, 12 Mass. App. Ct. 407, 409, 425 N.E.2d 393, 396 (1981) ("These [anti-cruelty] statutes are 'directed against acts which may be thought to dull humanitarian feelings and to corrupt morals of those who observe or who have knowledge of those acts.' *Commonwealth v. Higgins*, 277 Mass. 191, 194 (1931)."). A hundred years earlier the Massachusetts Supreme Judicial Court stated that these statutes defined an offense not against the "rights of animals that are in a sense protected by it. The offence is against the public morals, which the commission of cruel and barbarous acts tend to corrupt." *Commonwealth v. Turner*, 145 Mass. 296, 300, 14 N.E. 130, 131-132 (1877). Even that rare court that has spoken in terms of animal "rights" usually returned to the indirect duty view. See, e.g., *Stephens v. State*, 65 Miss. 329, 3-4 So. 458 (1887).

To disregard the rights and feelings of equals, is unjust and ungenerous, but to wilfully or wantonly injure or oppress the weak and helpless, is mean and cowardly. Human beings have at least some of the means of protecting themselves against the inhumanity of man, - that inhumanity which "makes countless thousands mourn," but dumb brutes have none. Cruelty to them manifests a vicious and degraded nature, and it tends inevitably to cruelty to men. Animals whose lives are devoted to our use and pleasure, and which are capable, perhaps, of feeling as great physical pain or pleasure as ourselves, deserve, for these considerations alone, kindly treatment. The domination of men over them, if not a moral trust, has a better significance than the development of malignant passions and cruel instincts. Often their beauty, gentleness and fidelity suggest the reflection that it may have been one of the purposes of their creation and subordination to enlarge the sympathies and expand the better feelings of our race. But, however this may be, human beings should be kind and just to dumb brutes, if for no other reason than to learn how to be kind and just to each other.

Id. at 331-32, 3-4 So. at 459.

French law viewed this requirement technically, according to one writer, as it "punishes cruelty to animals only if it occurs in public so as to scandalize human observers." G. Carson, *supra* note 45, at 16 (citations omitted).

47. Leavitt & Halverson, *supra* note 44, at 13-14.

statute, "an analysis of this body of legislation demonstrates that these statutes provide virtually no real protection for the modern farm animal."⁴⁸ The statutes are frequently drafted in exceedingly general terms. For instance, the word "animal" is "generally construed . . . to include any living creature other than man unless a contrary legislative intent is suggested,"⁴⁹ a definition so broad that one court simply narrowed the meaning to exclude fowl.⁵⁰ In order to be deemed "cruel," an act must usually be "unjustifiable," "unnecessary," or be performed "cruelly," "wantonly," "maliciously," "intentionally," "needlessly" or "knowingly", and cause purely physical suffering.⁵¹ They frequently address cruelty problems typical of the nineteenth and early twentieth centuries, the overloading, overdriving or overworking of work animals.⁵² Anti-cruelty statutes did not envision the necessity of the protection of farm animals living on the factory-farm and subject to sophisticated biotechnological processes whose sole object is to increase food efficiency.⁵³

The enforcement of these criminal statutes is typically left to a public prosecutorial agency, itself overwhelmed by human problems, or to an overburdened private SPCA or similar society, with no private enforcement right provided.⁵⁴

48. See Comment, *supra* note 3, at 437.

"Although society's attitudes towards animals have been evolving, only occasionally have statutes been redrafted. The result is that most of the statutes are old and full of archaic phrases. The statutes often appear to overlap, and many terms used are redundant or undefined." D. Favre & M. Loring, *supra* note 23, at 121.

49. Friend, *supra* note 44, at 204 (citations omitted).

50. See *State v. Buford*, 65 N.M. 51, 331 P.2d 1110 (1958).

51. See *Alternatives to Animal Use*, *supra* note 24, at 306-09; Leavitt & Halverson, *supra* note 44, at 21-27; Friend, *supra* note 44, at 207-08; Comment, *supra* note 3, at 438-42.

52. See D. Favre & M. Loring, *supra* note 23, at 124; Leavitt & Halverson, *supra* note 44, at 21-22.

53. See *Changing Structure of American Agriculture*, *supra* note 5, at 10, 31, 38-39, 75-85. Other than a comment that two groups have charged in lawsuits that genetic engineering of farm animals is immoral and unethical, the Office of Technology Assessment Report ignores the impact of this biotechnology on the welfare of the animals.

54. See Comment, *supra* note 3, at 443-46. See also Comment, *Creating a Private Case of Action Against Abusive Animals Research*, 134 U. Penn. L. Rev. 399, 419-21 (1986) (discussing the difficulty of using anti-cruelty statutes to protect abuses

Fines are low and the maximum terms of imprisonment are short.⁵⁵ Considering the billions of animals involved and their diversity of species, the regulation of the treatment of factory-farmed animals by general state anti-cruelty statutes reveals a lack of concern with the interests and needs of farm animals that is without legal analogue in the world of human regulation.⁵⁶ It is as if all human health, sanitary, and criminal codes simply permitted any and all acts against or involving other human beings, except "malicious" acts that were "cruel" or "unnecessary".⁵⁷ Anti-cruelty statutes generally provide so little protection to farm animals that in reality there is no distinction between those states which do and those that do not exclude farm animals from their anti-cruelty statutes.⁵⁸

In our relationship with farm animals, "individual human need and desire [are treated] as the ultimate frame of reference" with the underlying assumption being that the "human goals and ends must be taken as externally 'given' . . . rather than generated by reason."⁵⁹ This frame of reference has an-

in animal experimental laboratories).

55. Leavitt & Halverson, *supra* note 44, at 28-32.

56. The criminal process is obviously unfit to deal with the scope of the problem. For example, in Massachusetts the anti-cruelty statute metes out punishment less than that given to despoilers of graveyard shrubery. *Compare* Mass. Gen. Law Ann. ch. 272, § 73 (West Supp. 1986) (which sets a maximum penalty of five years in state prison or a five thousand dollar fine, or both, for being one who "willfully destroys, mutilates, removes, cuts, breaks, or injures a tree, shrub, or plant" placed within a cemetery lot) *with* Mass. Gen. Law Ann. ch. 272, § 77 (West Supp. 1986) (which identifies the maximum penalty of one year, five hundred dollar fine, or both, for conviction of violating the anti-cruelty statute).

57. Ark. Stat. Ann. § 41-2918 (1975); Del. Code Ann. tit. xi, § 1325 (1974); Fla. Stat. Ann. § 828.12 (West 1976); Mo. Ann. Stat. § 578.055, 578.060 (Vernon 1970); Okla. Stat. Ann. tit. xxi, § 685 (West 1965); Wash. Rev. Code § 16.52.070 (1974); W. Va. Code § 61-8-19 (1984).

58. Ark. Stat. Ann. § 41-2918 (1975); Del. Code Ann. tit. xi, § 1325 (1974); Fla. Stat. Ann. § 828.12 (West 1976); Hawaii Rev. Stat. § 37-711-1109 (1976); Iowa Code Ann. § 717.2 (West 1979); La. Rev. Stat. Ann. § 14.102-102.1 (West 1986); Me. Rev. Stat. Ann. tit. xxviiA, § 510 (1983); Mo. Ann. Stat. §§ 578.055, 578.060 (Vernon 1976); Neb. Rev. Stat. § 28.1002 (1985); N.H. Rev. Stat. Ann. § 644:8 (1974); N.C. Gen. Stat. § 14:360 (1981); Okla. Stat. Ann. tit. xxi, § 685 (West 1965); xviii Pa. Cons. Stat. Ann. § 5511 (Purdon 1983); Tex. Penal Code Ann. § 42.11 (1974); Utah Code Ann. § 79-9-301 (1978); Wash. Rev. Code § 16.52.070 (1974); W. Va. Code § 61-8-19 (1984).

59. Tribe, *Ways Not To Think About Plastic Trees: New Foundations for Environmental Law*, 83 Yale L. J. 1315, 1326 (1974). This attitude was vividly portrayed

cient philosophical and religious foundations whose bedrock is that human beings are godlike, hold absolute dominion over nonhuman animals, and are the ends of all means.⁶⁰ But,

in a recent animal husbandry text. “[L]iving animals are used for milk, wool, draft, transportation, protection, sport, work, and pleasure. When slaughtered, they supply meat and byproducts ranging from glue to medicine, confectionary to fertilizer, catgut to chemicals. *Few other raw products have such versatility.*” J. Blakely & D. Bade, *The Science of Animal Husbandry* 2 (4th ed. 1985) (emphasis added).

Modern farming views farm animals and plants as agricultural units whose production efficiency is subject to constant improvement. See *Changing Structure of American Agriculture*, *supra* note 5, at 31. “Such Knowledge and skills [biotechnology] will give scientists much greater control over biological systems, leading to significant improvements in the production of plants and animals.” *Id.* at 12.

60. The King James version of the Old Testament says that God gave Adam and Eve “dominion over the fish of the sea, and over the fowl of the air, and over every other living thing that moveth upon the earth,” (Genesis 1:28) and told Noah that “[e]very moving thing that liveth shall be meat for you” (Genesis 9:3). *But see Ecclesiastes* 3:19-21.

For that which befalleth the sons of man befalleth beasts; even one thing befalleth them; as one dieth, so dieth the other; Yea, they have all on breath; so that a man hath no pre-eminence above a beast: for all is vanity. All unto one place; all are of dust, and all turn to dust again.

Id. The word “dominion” was also chosen by the court in *State v. Mann* to characterize the relationship of master to slave as it turned back an attempt to hold a master responsible for the “cruel and unreasonable battery” of a female slave, and noted that the power of the master was “conferred by the laws of man at least, if not by the law of God.” *State v. Mann*, 13 N.C. 263, 266 (1829).

“The Bible [also] served as the core of (the proslavery mainstream) defense.” Faust, *Introduction to The Ideology of Slavery: Proslavery Thought in the Antebellum South 1830-1860* at 10 (D. Faust ed. 1981). See e.g., Stringfellow, *A Brief Examination of Scripture Testimony on the Institution of Slavery*, in *The Ideology of Slavery, Proslavery Thought in the Antebellum South, 1830-1860* at 136-67 (D. Faust ed. 1981). It is ironic that

[f]rom an evolutionary point of view, religions are based on emotions that are nourished by reactions and impulses derived from phylogenetically older parts of the brain. Ethics, beliefs, morality, the qualities that make us human, and all values we cherish, are strongly influenced by the regions that already existed in the reptile brain millions of years ago.

Gruter, *Biologically Based Behavioral Research and the Facts of Law*, in *Law, Biology, and Culture: The Evolution of Law* 4 (M. Gruter & P. Bohannon eds. 1983).

Aristotle held that animals, like slaves, were articles of property, and that animals existed for the sake of man. Aristotle, *Animals and Slavery*, in *Animal Rights and Human Obligations* 109-10 (T. Regan & P. Singer eds. 1976); Comment, *supra* note 44, at 20.

Aquinas taught that “[a]ccording to the Divine ordinance the life of animals and plants is preserved not for themselves but for man.” Aquinas, *On Killing Living Things and the Duty to Love Irrational Creatures*, in *Animal Rights and Human Obligations* 119 (T. Regan & P. Singer eds. 1976).

“[s]urely this is an infantilism which is unendurable . . . a residue from a past of inconsequence when a few puny men cried of their supremacy to an unhearing and uncaring world.”⁶¹ It is unnecessary for human beings to treat farm animals as they do, and because it is unnecessary and because the animals suffer, it is unjust.

The legislatures of the nineteenth and twentieth centuries were correct in their belief that cruelty to animals hardens the heart of mankind.⁶² But legislatures err in believing that when they narrow the positive law that codifies this moral precept, as when they exclude farm animals or animals raised under factory-farming conditions from its reach, they modify the moral precept. Part of the Congressional purpose of the Federal Animal Welfare Act⁶³ was “the humane ethic that animals should be accorded the basic creature comforts of adequate housing, ample food and water, reasonable handling, decent sanitation, sufficient ventilation, shelter from extreme weather and temperature, and adequate veterinary care. . . .”⁶⁴ Yet, “farm animals, such as, but not limited to

The Devil “was frequently identified with or associated with animals (including pigs, bulls, geese, sheep, and horses), sometimes following earlier Judeo-Christian tradition and sometimes because the animals were sacred to pagan gods, whom Christians identified with demons.” J. Russell, *Lucifer: The Devil In The Middle Ages* 67 (1984). But,

the Devil could never be a lamb, because Christ is the lamb of God; the Devil was never an ox and seldom (in spite of its logical appropriateness) an ass, because the ox and ass were supposed to have been in the manger and the ass also bore Jesus into Jerusalem on Palm Sunday.

Id. at 67 n.10.

Pope Pius IX (reigned 1846-1878) refused a request by the Royal Society for the Prevention of Cruelty to Animals to open a branch in Rome as it was his view that man owed no duties to the lower animals. E.S. Turner, *All Heaven in a Rage* 163 (1964). *But see* C. Hume, *The Status of Animals in the Christian Religion* 27 (1980).

61. McHarg, *Values, Process and Form*, in *The Fitness of Man's Environment* 213-14 (1968); Stone, *supra* note 40, at 493.

62. Stone, *supra* note 40, at 455.

63. 7 U.S.C. §§ 2131-2157 (Supp. III 1985).

64. H.R. Rep. No. 1651, 91st Cong., 2d Sess. 3 *reprinted in* 1970 U.S. Code Cong. & Admin. News 5103, 5104. See also the pronouncements that the Animal Welfare Act was a “statutory mandate that small helpless creatures deserve the care and protection of a strong and enlightened public” and reflected “the philosophy of caring for animals enunciated by W.D. Hoard in 1885, who said: The stupid brutishness of men who are too ignorant of their own interests to be gentle and humane finds, at

livestock or poultry" are excluded from the statutory definition of "animal",⁶⁵ as if they were not "animals" and did not also require adequate housing, ample food and water, reasonable handling, decent sanitation, sufficient ventilation, shelter, and veterinary care.

Direct federal regulation of farm animals consists only of two statutes. The older statute is the Twenty-Eight Hour Law,⁶⁶ which provides that animals cannot be transported without being unloaded for at least five hours of rest, watering, and feeding.⁶⁷ No differentiation of need among species is made. There is little ethological justification for any animal having to endure such confinement and deprivation for as long as twenty-eight hours without relief. The time consumed in loading and unloading the animals is not counted.⁶⁸ Sheep are not required to be unloaded at night and so may stand loaded for up to thirty-six hours, as may other animals upon the grant of a written request.⁶⁹ The penalty for violation is small and must be recovered in a civil action filed by the United States Attorney.⁷⁰ The statute arguably does not apply to transportation by truck as it was passed in 1873.⁷¹

The newer statute is the Humane Slaughter Act.⁷² Its purpose was to require that livestock slaughter "be carried out only by humane methods", to prevent "needless suffering".⁷³ It requires all animals to be "rendered insensible to pain by a single blow or gunshot or an electrical, chemical, or other means that is rapid and effective, before being shackled, hoisted, thrown, cast or cut".⁷⁴ However, it contains an impor-

last, sharp punishment, for God, ever just to the least of his creatures, denies such men profit or prosperity and thereat all good men say 'Amen!'. *Id.*

65. 7 U.S.C. § 2132(g) (1982).

66. 45 U.S.C. §§ 71-74 (1982).

67. *Id.* § 71.

68. *Id.*

69. *Id.*

70. *Id.* §§ 73-74.

71. D. Favre & M. Loring, *supra* note 23, at 151.

72. 7 U.S.C. §§ 1901-1906 (1982).

73. *Id.* § 1901.

74. *Id.* § 1902(a).

tant exemption "for reasons of freedom of religion".⁷⁵ It defines Kosher slaughter as "humane".⁷⁶ This definition is valid despite the controversy over, (1) whether, as a matter of biology, not religion, the manner in which pure Kosher slaughter is carried out is, in fact, humane, and (2) whether, when Kosher slaughter is carried out in conjunction with United States Department of Agriculture regulations that forbid placing an animal on the ground,⁷⁷ it is humane.⁷⁸ The statute has been upheld against the claim that it amounted to an establishment of religion in violation of the first amendment.⁷⁹

European countries currently lead in regulating factory-farming. English concern over the conditions of factory-farming began to rise shortly after the publication of *Animal Machines*⁸⁰ in 1964. A governmental Technical Committee was appointed "to examine the conditions in which livestock are kept under systems of intensive husbandry and to advise whether standards ought to be set in the interests of their welfare, and if so what they should be."⁸¹ This "Brambell Committee" investigated, advised and set detailed standards for chickens, turkeys, cattle, pigs, sheep, and rabbits. However, many of these standards were diluted or not adopted. None were given the force of law, though some were made

75. *Id.* § 1906.

76. *Id.* § 1902(b).

77. *Jones v. Butz*, 374 F. Supp. 1284, 1290 n. 8 (S.D.N.Y. 1974), *aff'd mem.* 419 U.S. 806 (1975).

78. *Jones*, 374 F. Supp. at 1292-94. For discussions of the humaneness of Kosher slaughter see News & Analysis, *Jewish Ritual Slaughter May Ignore Animals' Welfare*, 3 Int'l J. Stud. Animal Problems 92 (1982); P. Singer *supra* note 1, at 152-57. For an example of a system that would replace shackling and hoisting see *A Pilot Study of a Small Animal Restrainer for Ritual Slaughter*, 7 The Vealer 28 (June 1985).

In *The Slaughter of Food Animals* by The Royal Society for the Prevention of Cruelty to Animals, it is stated that animals slaughtered according to Jewish (Shechita) and Moslem (Halal) traditions take from seventeen seconds to six minutes to lose consciousness. See *RSPCA Urges Immediate Slaughter Reform*, 82 Agscene 6 (Mar. 1986). In 1985, the British Government's Farm Animal Welfare Council also criticized religious slaughter methods. See *U.K. Review on Religious Slaughter*, 5 Animals International 7 (Winter 1985).

79. *Jones*, 374 F. Supp. at 1284.

80. R. Harrison, *Animal Machines* (1964).

81. House of Commons, *supra* note 3, at 5.

part of a Ministry of Fisheries, Agriculture and Food Code of Recommendations.⁸²

Concerning the problem of confinement itself, the Brambell Committee set forth the "Five Freedoms" of movement:

In principal we disapprove of a degree of confinement of an animal which necessarily frustrates most of the major activities which make up its natural behavior. . . . An animal should at least have sufficient freedom of movement to be able without difficulty to turn around, groom itself, get up, lie down, stretch its limbs.⁸³

A West German appellate court has ruled that keeping layer hens in battery cages violates the German Animal Protection Act of 1972, as the practice fails to take the natural behavior of the hens into account.⁸⁴ When it takes full effect, a Swiss law will halt many practices that have come to be associated with factory-farming.⁸⁵ Denmark, Sweden, Norway, and Luxembourg have laws that prohibit one or more of these practices.⁸⁶ Article 3 of The European Convention For The Protection Of Animals Kept For Farming Purposes requires that animals be housed and provided with food, water, and care in a manner which is appropriate to their physiological and ethological needs, taking the species into consideration.⁸⁷ Article 4 forbids restricting freedom of movement so as to cause the animal unnecessary suffering or injury, taking spe-

82. *Id.* at 74-75. The further recommendations of the House of Commons Agricultural Committee in 1981 have similarly remained uncodified. See Mason, *supra* note 3, at 104.

83. See House of Commons, *supra* note 3, at 37; P. Singer, *supra* note 1, at 135. See also Albright, *Animal Welfare and Animal Rights*, Nat'l Forum, Winter 1986, at 34, 35. ("To my knowledge, no one has been prosecuted for violation of these codes.")

84. Mason, *supra* note 3, at 104.

85. Mason, *supra* note 3, at 104-05; J. Mason & P. Singer, *supra* note 1, at 138; Comment, *supra* note 3, at 448; Note, *supra* note 3, at 421.

86. Harrison, *Animals*, *supra* note 3, at 71-72; J. Mason & P. Singer, *supra* note 1, at 138-39; Comment, *supra* note 3, at 448.

87. Leavitt & Halverson, *supra* note 44, at xxiii-xxvii. See also M. Fox, *supra* note 3, at 215-16.

cies into account.⁸⁸ Recently, the Convention published a draft proposal that would establish minimum standards concerning layer hens.⁸⁹

Nothing resembling these tentative steps have found their way into the positive or common law of the fifty states or the federal government of the United States. There is no law akin to the simple policy enunciated in Article 9 of the United Declaration of the Rights of Animals: "Where animals are used in the food industry they shall be reared, transported, caged, and killed without the infliction of suffering".⁹⁰ Such laws should be enacted not only for the sake of the animals, but for the sake of justice.⁹¹

C. *Difficulties in Invoking Civil Process on Behalf of Animals*

While the criminal process fails, as a practical matter, to protect the welfare of animals, the civil process is often held, in theory, to be out of bounds. One reason is the overly-strict application of the doctrine of "standing." Enshrined in both the United States Constitution,⁹² and in the general common law of most states,⁹³ standing generally requires a plaintiff to

88. Leavitt & Halverson, *supra* note 44, at xxiii - xxiv.

89. Mason, *supra* note 3, at 104.

90. Note, *supra* note 3, at 414-15 n.259. See the specific recommendations for allocations of space set forth in Webster, *The Economics of Farm Animal Welfare*, 3 Int'l J. Stud. Animal Problems 301 (Oct.-Dec. 1982).

91. Tribe, *supra* note 59, at 1348 ("[w]ho can fail to admit that the homocentric logic of self-interest leads finally not to human satisfaction but to the loss of humanity?").

We are degrading animals in our day by methods of reproduction and rearing we are now employing. De-beaked hens, cooped-up calves fed on antibiotics, and our growing denial of the personal association to our domesticated animals, which is their *right* if we domesticate them, constitutes a degradation not only of animals, but of ourselves.

F. Darling, *Wilderness and Plenty* 80 (1970) *quoted in* S. Clark, *The Moral Status of Animals* 28 (1977). George Bernard Shaw made a similar point when, speaking of animal experimentation, he labelled it "a social evil because if it advances human knowledge, it does so at the expense of human character." *The Extended Circle: A Dictionary of Human Thought* 324-25 (Jon-Wynne Tyson ed. 1985) (quoting G.B. Shaw from the *Preface of Doctor's Dilemma* (19___)).

92. U.S. Const., art. III.

93. *But see* *Boryszewski v. Brydges*, 37 N.Y.2d 361, 364, 334 N.E.2d 579, 581, 372

“show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant.”⁹⁴ Thus, one may not assert the rights of third parties.⁹⁵

This permits sufficient access to the courts if one assumes that only competent human beings can suffer injury, pain, or loss. However, since animals “are uniquely incapable of defending their own interests in court,”⁹⁶ and the human beings who seek to defend the animals’ interests are often unable to

N.Y.S.2d 623, 626 (1975). The court of appeals ruled that suits would be permitted where the failure to accord “standing would be in effect to erect an impenetrable barrier to any judicial scrutiny of legislative action.” *Id.* See also *Salorio v. Glaser*, 82 N.J. 482, 414 A.2d 943 (1980) *cert. denied* 449 U.S. 804 (1980); *Stocks v. City of Irvine*, 114 Cal. App. 3d 520, 170 Cal. Rptr. 724 (1981) (both of which held that the states were not bound by the “case or controversy” requirement of Article III of the United States Constitution); McDonald, *Creating A Private Cause of Action Against Abusive Animal Research*, 134 U. Pa. L. Rev. 399, 426-31 (1986).

94. *Valley Forge Christian College v. American United for Separation of Church & State*, 454 U.S. 464, 472 (1982), (quoting *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)). This injury may be economic, esthetic, or environmental (*Sierra Club v. Morton*, 405 U.S. 727, 734 (1972)) and may be quite small (*Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966) (\$1.50 poll tax); *Baker v. Carr*, 369 U.S. 186, 204-08 (1961) (a fraction of a vote)).

In addition, the United States Supreme Court has sometimes but not always required the alleged injury be traceable to the challenged action. *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.* 438 U.S. 59, 72-81 (1978). That the relief sought will likely redress the claimed injury (*Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 37-39 (1976)) and that the interest sought to be protected is within the zone of interests intended (*Association of Data Processing Serv. Org., Inc. v. Camp.*, 397 U.S. 150, 1 (1970)).

95. *Valley Forge*, 454 U.S. at 474.

The United States Supreme Court has occasionally tacked on so-called “prudential” rules of standing, such as: (1) courts should seek to avoid deciding questions of broad social import where no individual would be indicated (*Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91 (1979)), (2) courts should seek to limit access to federal courts to those litigants best suited to assert a particular claim, (*id.*), (3) courts should seek to evaluate the plaintiff’s alleged personal stake to determine if it is strong enough to assume the concrete adverseness sufficient to sharpen the presentation of the issues, (*Baker*, 369 U.S. at 186), and (4) courts should require the plaintiff to differentiate his or her inquiry from that of the public (*Sierra Club*, 405 U.S. at 736-41.). *But see Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372-79 (1982), where the court stated that it lacked authority to create prudential barriers to suits brought under Article III and should require the plaintiff to differentiate its injuries from the public’s injury.

96. *Animal Welfare Inst. v. Krepes*, 561 F.2d 1002, 1007 (D.C. Cir. 1979), *cert. denied*, 434 U.S. 1013 (1977).

show a direct injury to themselves, the true interests of animals will remain unrepresented in perpetuity.⁹⁷ "Must our law be so rigid and our procedural concepts so inflexible that we render ourselves helpless when the existing methods and the traditional concepts do not quite fit and do not prove to be entirely adequate for new issues?"⁹⁸

Through the traditional standing doctrine, the courts make "at least a rough attempt to put the decision as to whether review will be sought in the hands of those who have direct stake in the outcome."⁹⁹ However, when those who have the direct stake are incompetent, as animals are, it is an extension of the cruelty that these animals have already suffered to close the courts to their interests because of that incompetence. One solution would be to expand the notion of guardianship to permit human beings to act on behalf of farm animals in a manner analogous to the way in which guardians currently act on behalf of incompetent human beings.¹⁰⁰

97. *Id.* See also *Jones v. Butz*, 374 F. Supp. 1284, 1289 (S.D.N.Y. 1974), *aff'd mem.* 419 U.S. 806 (1975). The court held that the plaintiffs' allegation of injury to moral and aesthetic values was sufficient to sustain standing, in a case where the animals were likely the true intended beneficiaries. The court stated that:

plaintiffs allege that the [Humane Slaughter] Act [7 U.S.C. 1901, et. seq.] contains a religious exception making it impossible as a practical matter to be certain of purchasing meat from animals slaughtered by a process that they consider humane and consistent with the policy of the United States as declared in section 1 of the Act. Plaintiffs contend that this uncertainty causes injury to their moral principles and aesthetic sensibilities. These allegations are substantially comparable to the allegations of environmental injury in *United States v. S.C.R.A.P.*, [412 U.S. 669 (1973)] *supra*, where the court sustained standing of plaintiffs.

Id. But see *Jones v. Beame*, 56 A.D.2d 778, 779, 392 N.Y.S.2d 444, 445 (1977), *aff'd on other grounds*, 45 N.Y.2d 402, 308 N.E.2d 277, 408 N.Y.S.2d 449 (1978). There, the court held that the plaintiffs, both natural persons and animal rights organizations, had no standing to request a declaratory judgment and injunction against the city concerning the manner in which it was operating its zoos, because this would inject the court into public management issues. However, the court said that the plaintiffs had standing to seek enforcement of the state anti-cruelty statute.

98. *Sierra Club v. Morton*, 405 U.S. 727, 755-56 (1972) (Blackmun, J., dissenting).

99. *Id.* at 740.

100. *Id.* at 750 n.8 (Douglas, J., dissenting). See also Cohen, *Some Preliminary Thoughts On Permitting Animals To Sue In Contract and Tort*, 4 Int'l J. Stud. Animal Problems 284, 285 (1983); McCarthy, *The Changing Concept of Animals as*

Presently, one is required to translate an animal injury into an injury of a human being.¹⁰¹ However, one who utilizes this tactic to improve the short-term welfare of farm animals may run the ultimate risk of being counterproductive, for

[b]y couching his claim in terms of human self-interest—by articulating . . . goals wholly in terms of human needs and preferences—he may be helping to legitimate a system of discourse which so structures human thought and feelings as to erode, over the long run, the very sense of obligation which provided the initial impetus for his own positive efforts.¹⁰²

The problem of standing has been confronted by persons who defend the interests of such natural or environmental entities, as rivers and wilderness areas.¹⁰³ Yet, the standing problem confronting farm animals is greater, for they are already privately owned;¹⁰⁴ a human being already has “stand-

Property, 3 Int'l J. Stud. Animal Problems 295, 298 (1982); Galvin, *supra* note 2, at 248; Stone, *supra* note 40, at 464-73; Tischler, *Rights For Nonhuman Animals: A Guardianship Model For Dogs and Cats*, 14 San Diego L. Rev. 484, 500-06 (1977); Note, *Use of Animals in Medical Research: The Need for Governmental Regulation*, 24 Wayne L. Rev. 1733, 1749-50 (1978); Comment, *supra* note 44, at 277-81.

101. Tribe, *supra* note 59, at 1332; Stone, *supra* note 40, at 490. In a recent case it was held that a humane society with a statutory charge to prevent and prosecute animal cruelty and statutory authorization to present complaints before any tribunals for violations of laws relating to or affecting the prevention of cruelty to animals had standing to press a civil complaint against departments of the United States government. *Humane Soc'y of Rochester & Monroe County v. Lyng*, 633 F.Supp. 480, 482, 485 (W.D.N.Y. 1986). The courts have specifically recognized standing for animal protective societies in similar cases. *Id.* at 485; *Comm. for Humane Legislation v. Richardson*, 540 F.2d 1141 (D.C. Cir. 1976).

One untried method of obtaining standing would be for a plaintiff animal rights or welfare organization to allege that the defendant's actions towards animals frustrate the plaintiff's activities. *Havens Realty Corp.*, 455 U.S. at 372-79.

102. Tribe, *supra* note 59, at 1330-31. Perhaps the best way to accommodate both long and short-term animal interests is to adopt a “standing” strategy of raising the animal's interest alongside the human interest, while seeking to nudge the court towards an understanding of who is suffering the true injuries.

103. See Stone, *supra* note 40, at 450. See generally Tribe, *supra* note 59.

104. D. Favre & M. Loring, *supra* note 23, at 22-67. This problem could be further complicated should the Congress allow our courts to hold that chimeric animals, like microorganisms, are subject to patent. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980). The patent and trademark office recently announced it will consider patents

ing" to raise an animal's injury in court. But the interest of the owner in a farm animal is economic. The individual animal's welfare may be congruent with the owner's economic interest, it may be irrelevant, or it may be opposed.¹⁰⁵ The anomalous legal situation created is that the only person with the standing to sue on the animal's behalf as plaintiff is likely to be that person who is inflicting the injury upon the animal and who should therefore be the defendant. Another practical consequence of, and difficulty with, leaving the protection of farm animals almost solely to criminal law is that even if a private citizen attempting to halt a practice surmounts the obstacle of legal standing, the matter may be dismissed upon the traditional equitable ground that the court will not enjoin a criminal act.¹⁰⁶ An example of this is *Animal Legal Defense Fund, Inc. v. Provimi Veal Corp.*¹⁰⁷ There the plaintiff sought, not under the state criminal anti-cruelty statute,¹⁰⁸ but pursu-

from any animal other than man. J. Rifkin, *Of Private Property*, N.Y. Times, Apr. 26, 1987, at 2F; *Playing God? We've Done it for Centuries*, N.Y. Times, Apr. 26, 1987, at 2F.

105. Tribe, *supra* note 59, at 1331. In *Humane Soc'y of Rochester*, 633 F. Supp. at 485, a dairy farmer was granted standing to challenge a United States Department of Agriculture rule that mandated the hot face branding of dairy cattle as a requirement for acceptance into the federal Dairy Termination Program because to do so would expose him to the risk of a criminal prosecution for animal cruelty under a state statute. In *Int'l Primate Protection League v. Inst. for Behavioral Research*, No. 86-1508 slip op. at 12-13 (4th Cir. Sept. 4, 1986), the court held that neither long-standing interests in the subject monkeys or in the preservation and encouragement of humane treatment of animals generally stated an article III injury. Yet the plaintiffs were the only parties unalloyedly interested in the monkey's welfare. One major defendant had performed medical experiments upon monkeys that involved severing the monkeys nerves had been convicted of cruelty to animals. This conviction was ultimately reversed on the ground that the Maryland animal cruelty statute did not apply to federally funded research programs. *Taub v. State*, 296 Md. 439, 463 A.2d 819 (1983). The other major defendant, the National Institute of Health, had funded the project. Such a holding is ironic because the major reason for the doctrine of standing, is the fear of inadequate legal representation because of the plaintiff's insufficient interest in winning. *Int'l Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Brock*, 106 S. Ct. 2523, 2536 (1986) (Powell, J., dissenting).

106. Comment, *supra* note 44, at 229-30.

107. *Animal Legal Defense Fund of Boston, Inc. v. Provimi Veal Corp.*, 626 F.Supp. 278 (D. Mass. 1986). *appeal filed*.

108. Mass. Gen. Laws Ann. ch. 272, § 77 (West Supp. 1984).

ant to the Massachusetts Consumer Protection Act,¹⁰⁹ to enjoin an unfair or deceptive act or practice.¹¹⁰ The plaintiff argued that¹¹¹ “[c]onsumers have a right to know that veal sold to them comes from cruelly mistreated calves; [the producer’s] failure to give consumers that information, *not the cruel treatment itself*, is the unfair and deceptive trade practice. . . .”¹¹² However, the court looked not to the statute invoked but to the practical effect of granting the requested injunction. “An ALDF [Animal Legal Defense Fund] victory in this action would have an unmistakable effect: to enforce by means of an injunction obtained in a private lawsuit, a criminal statute enforceable only by public prosecutors. . . .”¹¹³

D. *Lack of Consumer Information*

Factory-farming is not necessary to meet human nutritional needs. At the heart of factory-farming beats a remarkably inefficient agricultural system, one that results in a monumental waste of soil, water, and fossil fuels.¹¹⁴ It has been aptly termed “a protein system in reverse,”¹¹⁵ whereby vast amounts of such vegetable proteins as corn, oats, barley, soybeans, and sorghum are grown, then fed to factory-farmed animals who produce five to fifteen percent of the same amount of animal protein.¹¹⁶ If the object of a rational system of agricultural is to feed a people cheaply and nutritiously, factory-farming falls short.

If factory-farming is unnecessary to meet human nutri-

109. Mass. Gen. Laws Ann. ch. 93A, §§ 1-11 (West Supp. 1984).

110. *Id.* §§ 2, 9.

111. *Provimi*, 626 F. Supp. at 280.

112. *Id.* (emphasis added).

113. *Id.* at 281.

114. F. Lappe, *Diet for a Small Planet* 74-83 (1982). “The number one factor in elimination of Latin America’s tropical forests is cattle raising.” N. Myers, *The Primary Source, Tropical Forests and Our Future* 127 (1984). This vast potential reservoir of food, medicines, fuel, and industrial products, which regulates our climate and environment in ways we both know and do not know (*Id.* at 189-293.) is rapidly succumbing to “the ‘hamburgerization’ of the forests.” *Id.* at 142.

115. F. Lappe, *supra* note 114, at 70.

116. J. Mason & P. Singer, *supra* note 1, at 116; P. Singer, *supra* note 1, at 170. This is not true when farm animals graze upon non-arable land.

tional needs, wastes natural resources, despoils the environment, results in the sale of animal products that are deleterious to the health of the humans who consume them, and causes cruel suffering to the animals emmeshed within by it, why does it continue and what justifies its existence and apparent legal sanction? One likely answer is that the consumer does not know this and, in fact, is likely to believe the opposite to be true.

The products of factory-farming are multifarious. The shelves of grocery stores and the menus of restaurants are saturated with factory-farmed meat and animal products.¹¹⁷ Their very pervasiveness anchors them to the modern landscape as firmly as the stores and restaurants in which they are offered. Such inundation carries with it its own acceptance, often uncritically embraced. Consumers rarely have heard of the factory-farm and understand little of biotechnology.

In general we are ignorant of the abuse of living creatures that lies behind the food we eat. Our purchase is the culmination of a long process, of which all but the end product is delicately screened from our eyes. . . . There is no reason to associate [a neat plastic] package with a living, breathing, walking, suffering animal.¹¹⁸

Factory farmers sometimes heap scorn upon urban dwellers who criticize them for their methods and claim that the urbanites are ignorant of animal husbandry.¹¹⁹ This may well

117. A multibillion dollar animal by-products industry turns such waste products as hooves, hair, hides, horns, blood, and bones into such things as glue, toothbrushes, camera film, paint brushes, cosmetics, and detergents. Robeznieks, *Hidden Animal Products*, 5 *The Animals' Agenda* 4, 10-11 (Dec. 1985).

118. P. Singer, *supra* note 1, at 92-93.

119. Even nonurbanites may not wholly sympathize. Larry Benolt, author of *How to Bag the Biggest Deer of Your Life*, was recently quoted:

"People ask me how I can kill such a beautiful animal", and I say "Have you ever seen a slaughterhouse and watched them kill cows and pigs, mass-slaughter chickens? God put animals on earth to feed man. Domesticated animals can be easily killed, but once they were wild. Some of us still like the wild ones, that's all."

Chamberlin, *Woods and Shore*, *Boston Globe*, Dec. 31, 1985, at 41, col. 1.

be true.¹²⁰ However, the factory-farmers' livelihood may be predicated on the ignorance they deride, for if enough city dwellers learn what is really happening on the farm, the industry could be shaken. A public opinion poll in England, whose populace is traditionally viewed as more informed on issues concerning animal welfare than is that of the United States, showed a large majority in favor of abolishing or severely restricting factory-farming.¹²¹ American consumers need the opportunity to learn the facts and to differentiate among those meats and meat products that come from the factory-farm and those that do not.

Probably the most effective media for conveyance of consumer information are the package and package inserts. However, the Federal Meat Inspection Act¹²² forbids the states from requiring meat producers to inform the consumer either of the manner in which the factory-farmed animal is raised or of the many health implications of eating such meat or animal products. Enacted because Congress found that "[m]eat and meat food products are important source of the Nation's total supply of food,"¹²³ and "to protect the health and welfare of consumers,"¹²⁴ the Federal Meat Inspection Act has been used repeatedly to frustrate attempts to convey truthful informa-

120. A national survey sponsored by the Interior Department to learn the extent of the knowledge of Americans concerning animals and wildlife conservation found that slightly less than half believed that veal was a lamb. Kellert & Berry, *Knowledge, Affection and Basic Attitudes Towards Animals in Society*, in *American Attitudes, Knowledge and Behaviors Toward Wildlife and Natural Habitats* 18 (1980). Only twenty-six percent knew that a manatee was not an insect. *Id.* at 13. Thirty-seven percent did not know that all adult birds have feathers. *Id.* at 17. Forty percent knew that the impala, muskrat, iguana, and killer whale were not all mammals. *Id.* at 20. The authors concluded that "[f]or the most part, Americans appear to possess an extremely limited understanding of animals." *Id.* at 11.

121. See *Clear Mandate to Abolish Factory Farming*, 4 *Intl. J. Stud. Animal Problems* 273, 273-74 (1983).

A 1985 public opinion poll conducted for the Frankfurt (West Germany) Zoological Society found that eighty-two percent of the respondents were totally opposed to the use of battery cages for hens, fourteen percent were partly opposed, and seventy-six percent were willing to pay extra money for eggs not produced in them. *German Poll Against Batteries*, 82 *Agscene* 9 (Mar. 1986).

122. 21 U.S.C. §§ 601-695 (1982 & Supp. III 1985).

123. *Id.* § 602.

124. *Id.*

tion to the nation's consumers. This has been accomplished through its express pre-emption clause, in which Congress sacrificed consumer information on the altar of a national uniformity that informs the consumer of almost nothing of consequence.¹²⁵ Attempts to provide the consumer with the information needed to distinguish between foods that contain low cholesterol cheese alternatives or regular cheese,¹²⁶ to warn that raw pork must be heated to a temperature of not less than one hundred forty degrees to prevent trichinosis,¹²⁷ and to warn of the dangers of antibiotic-resistant bacteria,¹²⁸ have been held pre-empted by the Federal Meat Inspection Act.¹²⁹ In addition, state and local laws that require truthful, accurate, and relevant information on product labels also continue to be pre-empted by the Act.¹³⁰ However, the Act's pre-emption clause arguably violates¹³¹ the first amendment.¹³² If it is so held, the states would be free to or-

125. *Id.* § 678 (“[m]arketing, labeling, packaging, or ingredient requirements in addition to, or different than, those made under this chapter may not be imposed by any State or Territory to the District of Columbia . . .”).

126. *Grocery Mfr. of Am. v. Gerace*, 755 F.2d 993, 997, 1005 (2d Cir. 1985).

127. *Meat Trade Inst., Inc. v. McLaughlin*, 37 A.D.2d 456, 326 N.Y.S.2d 683 (1971) (the specific provision of the New York City Health Code is found in *Meat Trade Inst., Inc. v. McLaughlin*, 66 Misc. 2d 1037, 1037, 323 N.Y.S.2d 103, 104 (1971), which was reversed by the Appellate Division).

128. *Provimi*, 626 F. Supp. at 281.

129. Similar problems have occurred in the area of laboratory animal experimentation. See *Alternatives to Animal Use*, *supra* note 24, at 310-13. Conversely, an attempt failed to require the Secretary of Agriculture, pursuant to his power under 21 U.S.C. § 621, to mandate product labels that warned consumers that meat contained salmonella and other bacteria and could cause food poisoning if handled incorrectly. *American Pub. Health Ass'n v. Butz*, 511 F.2d 331, 335 (D.C. Cir. 1974).

130. Meat producers have sought and received permission from the United States Department of Agriculture under the Federal Meat Inspection Act to label their products as derived from animals that were not fed antibiotics.

131. 21 U.S.C. § 678 (1982).

132. The first amendment may be violated to the extent that the pre-emption clause of the Federal Meat Inspection Act, 21 U.S.C. § 678, forbids either a meat producer, supplier, or seller from voluntarily including accurate, informative, and relevant product information on its packaging label or a state or local government, pursuant to their normal police powers that allow governments to protect the public health, welfare, or morality of its citizens from requiring such information to be placed on such a label. *Hillsborough County v. Automated Medical Laboratories, Inc.*, 105 S. Ct. 2371, 2376 (1985). Pre-emption has been successfully invoked when the Supremacy Clause and 21 U.S.C. § 678 were wielded offensively. See *supra* notes 119-

der meat producers to place upon the packaging, labels, or on

20. See also *Jones v. Rath Packing Co.*, 430 U.S. 519, 520, *reh'g denied*, 431 U.S. 925 (1977). Pre-emption has been invoked as an affirmative defense by meat-promoting or producing organizations to strike at state or local legislation that arguably required more informative packaging or labeling information than did the Federal Meat Inspection Act.

In *Jones*, 430 U.S. at 525, the Supreme Court stated that “[t]he first inquiry is whether Congress, pursuant to its power to regulate commerce, U.S. Const., art. I, Sec. 8, has prohibited state regulation of the particular aspects of commerce involved in this case.” But the *first* inquiry should be whether the Federal Government has the constitutional *capability* of pre-empting the subject area of the statute. See, e.g., *Winkler v. Colorado Dep’t of Health*, 193 Colo. 170, 175, 564 P.2d 107, 111 (1977). The subject area must involve the Congressional exercise of either a constitutionally enumerated power, *National League of Cities v. Usery*, 426 U.S. 833 (1976); *Maryland v. Wirtz*, 392 U.S. 183, 196 (1969); *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316, 405 (1819), or of the “Necessary and Proper Clause,” U.S. Const., art. I, § 8, cl. 18, in order to effectuate an enumerated power, though the means of effectuation be unenumerated. See *Alternatives to Animal Use*, *supra* note 24, at 311-12; Engdahl, *Some Observations on State and Federal Control of Natural Resources*, 15 Hous. L. Rev. 1201, 1206 (1978); Engdahl, *Pre-emptive Capability of Federal Power*, 45 U. Colo. L. Rev. 51 (1973); Wiggins, *Federalism Balancing and the Burger Court: California’s Nuclear Law as a Pre-emption Case Study*, 13 U.C.D. L. Rev. 3, 27 (1979); Note, *Federal Pre-emption: Protect Endangered Species*, 47 U. Colo. L. Rev. 261, 265-68 (1977). Congressional power, even that bestowed by the Commerce Clause, necessarily excludes the exercise of power in a subject area expressly forbidden to Congress, as the abridgement of first amendment rights to freedom of speech. For instance, Congress could not, pursuant to its power under the Commerce Clause, pass a valid statute that regulated the political content of newspapers that either traveled in interstate commerce or affected it.

The pre-emption clause, § 678, of the Federal Meat Inspection Act, however, forbids a state from requiring a meat producer, supplier, or seller from providing the consumer with accurate and relevant product information, for instance, that the meat animal was fed subtherapeutic dosages of antibiotics or was the product of factory-farming. “Where a government restricts the speech of a private person, the state action may be sustained only if the government can show that the regulation is a precisely drawn means of serving a compelling state interest.” *Consolidated Edison Co. of New York v. Pub. Serv. Comm’n*, 447 U.S. 530, 541 (1980). A corporation is clearly such a “private person”. *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 771 (1978), *reh’g. denied*, 438 U.S. 907 (1978). There can be no doubt that speech is being restricted here. There is serious doubt that this restriction is in the service of a “compelling state interest,” or that such an across-the-board silencing is “a precisely drawn means” of serving such an interest. This is especially true since the statement of findings concerning the Federal Meat Inspection Act reveals concern over possible “injury to consumers” and a desire that the “the health and welfare of consumers be protected,” 21 U.S.C. § 602 (1982), areas in which that the states may also wish to address themselves.

It is likely that the proposed information conveyed on a meat label will not be characterized as “commercial speech.” It is neither “an expression related solely to

accompanying inserts, such further information as might be important to a substantial number of potential consumers.¹³³ Such information might be as simple, yet compelling, as the facts that the meat was or was not the product of factory-farming or that the animal was or was not fed continuous sub-therapeutic dosages of antibiotics.¹³⁴

the economic interests of the speaker and its audience, . . ." nor "speech proposing a commercial transaction." *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 561-62 (1980). In *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n*, 106 S. Ct. 903, 907-08, *reh'g denied* 106 S. Ct. 1667 (1986), the Supreme Court held that the utility's newsletter, inserted with the monthly bill, was entitled to "full protection of the First Amendment. See also *In Re Nat'l Serv. Corp.*, 742 F.2d 859, 861-62 (5th Cir. 1984) (the court held that a corporation's billboards were not "solicitation[s] for the sale or purchase of a product or service" and that it was not going to profit financially from the message"). It will then be protected by the full force of the first amendment. But even if proposed information, such as the facts of the feeding of subtherapeutic dosages of antibiotics to the meat animal or the fact that the animal was factory-farmed, is held to be "commercial speech", it would likely still be protected. See *Hudson Gas & Elec.*, 447 U.S. at 561-71.

The states and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading, or that proposes an illegal transaction. Commercial speech that is not false or deceptive and does not concern unlawful activities, however, may be restricted only in the service of a substantial governmental interest, and only through means that directly advance that interest.

Zauderer v. Off. of Disciplinary Counsel, 105 S. Ct. 2265, 2275 (1985) (citations omitted). First amendment protections of commercial speech are "justified by the value to consumers of the information such speech provides." *Id.* at 2282. "[R]estrictions involving commercial speech that is not itself deceptive [must] be narrowly crafted to serve the State's purposes." *Id.* at 2278.

If the proposed information is true, accurate, and relevant, its blanket prohibition by § 678 of the Federal Meat Inspection Act may therefore violate the first amendment, whether the information is seen as noncommercial or commercial speech. Section 678 of the Federal Meat Inspection Act therefore has no pre-emptive capability and the asserted defense of pre-emption must fall, no matter what the intention of Congress was in passing the statute.

133. One court acknowledged that "[a] virtually unlimited variety of information might cause large numbers of consumers to modify their behavior." *Community Nutrition Inst. v. Block*, 749 F.2d 50, 56 (D.C. Cir. 1984).

Many might disfavor, for instance, meat from animals anesthetized with carbon dioxide gas prior to being slaughtered, *cf.* 9 C.F.R. sec. 313.5 (1984); meat from cattle afflicted with tapeworm cysts, *cf.* 9 C.F.R. sec. 311.23; or liver sausage that contains lips, snouts, and ears, *cf.* 9 C.F.R. secs. 319.182(b), 301.2(tt), 301.2(uu).

Id.

134. A 1985 public opinion poll conducted for the Frankfurt (West German) Zoological Society found that seventy-six percent of the respondents were in favor of a

While the *Provimi* court stated that its decision was rested solely on pre-emption grounds, it made clear that it was not minimizing the serious risk that resistant bacteria, immune to antibiotic medicines, could grow in drug-fed animals and spread to human beings where they could cause diseases that could not be treated with normally effective antibiotics.¹³⁵

The ALDF could well be concerned about the federal government's ability and eagerness to oversee and regulate the animal drug and livestock industries. Such concern is justified . . . [But] [t]he FMIA and the FDCA evince Congress's intent to control the use of antibiotics in animal feed and this complaint cannot get around that fact.¹³⁶

Consumers might also learn the history of the meat animals they are considering purchasing through enactment of state laws that would require grocers and restaurateurs to post an informative sign,¹³⁷ or to place required information directly on the menu.¹³⁸

But Americans are told that meat and animal products are necessary for good physiological¹³⁹ and mental¹⁴⁰ health. Factory-farmers and others seeking markets for their animal products find it profitable to perpetuate the myth of the pasture and the barnyard as a marketing device.¹⁴¹ Meat-eating is

law by which factory-farmed eggs would be so marked. *German Poll Against Batteries*, 82 Agscene 9 (Mar. 1986).

135. *Provimi*, 626 F. Supp. at 286 n.5.

136. *Id.*

137. *Grocery Mfrs.*, 755 F.2d at 993. See also *Meat Trade Inst. v. Ball*, 424 F. Supp. 758 (W.D. Mich. 1976). Informational signs were not intended to be included within the scope of the Federal Meat Inspection Act, 21 U.S.C. § 601. In dictum the court stated that it would consider such a sign ban to be a violation of the first amendment. *Id.* at 767-70.

138. *Grocery Mfrs.*, 755 F.2d at 993.

139. J. Mason & P. Singer, *supra* note 1, at 114-19.

140. Morris, *Animal Foods for Human Needs* in *Animal Agriculture, The Biology of Domestic Animals and Their Use by Man* 31 (H. Cole & M. Ronning eds. 1974) ("[f]oods of animal origin generally have a greater capacity to satisfy 'appetite' and to produce a hedonistic experience than foods of plant origin, even though they may have comparable nutritional value.").

141. D. Giehl, *supra* note 2, at 180-88; F. Lappe, *supra* note 114, at 90-91.

associated with material success.¹⁴² Powerful industry boards and the individual companies create demand for the products of the factory-farming system through advertising, sometimes with explicit federal governmental sanction.¹⁴³ Most of the meat consuming population is non-rural and if they do not know the species of the animal that they eat, they have no glimmer of that animals' ethological needs or the conditions in which the animal was raised. They are not going to receive this information through the mechanism of the Beef Research and Information Act,¹⁴⁴ the Egg Research and Consumer Information Act¹⁴⁵ or the Dairy Research and Promotion Act,¹⁴⁶ each of which has the purpose of increasing industry profits.¹⁴⁷

It is probable that states with heavy dependence on the products of factory-farming will simply refuse to regulate factory farming practices. In 1985, the Indiana legislature amended its anti-cruelty statute to exclude "acceptable farm management practices."¹⁴⁸ But the consumers of factory-farmed animals and their products, and producers of them do not live in the same states and it is the citizens of the urban consuming states who will ultimately determine the fate of the factory-farming and genetic engineering of farm animals.¹⁴⁹

142. J. Blakely & D. Bade, *supra* note 59, at 2 ("[a] rising standard of living in the United States has carried beef as a status symbol on the coattails of success"); D. Giehl, *supra* note 2, at 180-88.

143. J. Mason & P. Singer, *supra* note 1, at 106-07.

The Beef Research and Information Act (7 U.S.C. §§ 2901-2911 (Supp. III 1985)) and the Egg Research and Consumer Information Act (7 U.S.C. §§ 2701-2718 (1982)) declare that beef and eggs, respectively, are "basic, natural foods in the diet." 7 U.S.C. § 2701; 7 U.S.C. § 2901. The Dairy Research and Promotion Act of 1983 declares dairy products to be "basic foods that are a valuable part of the human diet." 7 U.S.C. § 4501(a)(1) (Supp. III 1985).

144. 7 U.S.C. §§ 2901-2911 (Supp. III 1985).

145. 7 U.S.C. §§ 2701-2718 (1982).

146. 7 U.S.C. §§ 4501-4538 (Supp. III 1985).

147. These three statutes authorize the establishment of procedures for "promotion designed to strengthen" each "industry's position in the market place, and maintain and expand domestic and foreign markets and uses" each industry's product. 7 U.S.C. § 2701; 7 U.S.C. § 2901; 7 U.S.C. § 4503(b).

148. 1985 Ind. Acts ch. 326.

149. "[W]e recommend that [the Minister] . . . encourage retailers as well as caterers to describe the origin of their products in a way which will encourage the

III. Conclusion

The problem of the unjust use of farm animals is large, growing, historical, institutionalized, governmentally encouraged, and fundamentally unregulated at either the state or federal level. Farm animals are treated essentially as raw materials. Their ethological needs and direct interests are neglected to the extent that their needs are not as congruent with higher productivity and profit. Their interests are primarily protected, if at all, through archaic state anti-cruelty statutes that were not passed in contemplation of the factory-farm or genetic engineering. They are of little use and little used. Farm animals remain helpless, because they are legally incompetent, and assertion of their interests are barred by the traditional legal doctrine of "standing," a concept that is sound only when applied to competent human beings. Though factory-farming and biotechnological techniques massively violate the moral rights of farm animals, they have no remedy.

American consumers know little of the needs of farm animals, little of the health risks of eating them, and almost nothing of modern factory-farming and biotechnological techniques. The federal government neither adequately protects nor informs consumers about the animal products they eat or of the health hazards of eating them. Instead it aids industry boards that exist solely to sell animal products. It also provides tax incentives to factory-farmers.¹⁵⁰ Because Congress has pre-empted the field, states have been unable to enact ad-

choice . . ." between factory-farmed and humanely raised veal calves. House of Commons, *supra* note 3, at 24. English surveys have revealed that consumers are prepared to pay higher prices for animal products produced by less intensive methods. J. Serpell, *supra* note 4, at 155.

150. The Internal Revenue Code encourages factory-farming. Under the Code, structures built for factory-farming are entitled to a investment tax credit, § 48(p), while other farm structures are treated as normal capital expenditures. Treas. Reg. § 1.162-12 T.D. 7198 July 13, 1972.

Not only should there be no tax incentives for cruel methods of animal husbandry, but there should be disincentives that encourage humane methods of farm animal husbandry. "[W]e . . . invite the Minister . . . to . . . try, on the one hand to avoid measures which will encourage the trend to undesirable methods and, on the other, to see whether incentives can be devised . . . to encourage more humane ones. . . ." House of Commons, *supra* note 3, at 17.

ditional laws that require meat producers to provide consumers with accurate and relevant product information. Consumers should have the right to know in order to make informed decisions.

Anglo-American justice has reformed or abolished the unregulated wholesale exploitation of the helpless by the strong; women, children, blacks, and the disabled have all tasted its sweet fruits. “[F]iat justicia, ruat coelumtet,”¹⁵¹ spoke Lord Mansfield, upon deciding that a Virginia slave was a free man on English soil.¹⁵² The factory-farming and genetic engineering of farm animals, based as it is upon their unregulated institutionalized exploitation in a manner that inherently and unnecessarily infringes their basic needs and concerns, is unjust. Because it is unjust it should be abolished.

151. “Let justice be done whatever be the consequence.” *The Case of James Sommersett, a Negro, on a Habeus Corpus*, 20 *Howell’s State Trials* 1, 79 (1771-1772) [herewithin cited as *James Sommersett*].

152. *James Sommersett*, *supra* note 151, at 1.