

CHAPTER SIXTEEN

OWNING WHAT YOU EAT: THE DISCOURSE OF FOOD

DAVID N. CASSUTO

Introduction

Discussions of animal treatment within the global food industry often devolve into debates about animal rights. Such detours needlessly distract from an ongoing social and environmental catastrophe. This essay attempts to reframe the global food debate in a manner that more directly acknowledges our obligations to and the needs of the billions of animals enslaved within the industrial food apparatus.

Industrial agriculture has refashioned animal husbandry into a mechanized process that ignores historic methods of human/nonhuman animal interaction (methods that evolved over millennia) as well as ethical mores. These industrial methods—cloaked in the mantle of efficiency—have become deeply entrenched despite clear evidence of their unsustainability and unworkability. This intractability results from a systemic flaw inherent in the role of efficiency in society. Not only is efficiency an amoral concept devoid of any normative component, but those who lionize it also routinely exclude externalities from their calculus. This makes any cost-based risk equation potentially unsound and misleading.

Consequently, using efficiency as an ethical barometer is flawed both hermeneutically and practically. It should never have acquired a normative aspect and it should never have been defined to exclude externalities. The upshot of this double mistake is that the prevailing mode of human/animal interaction is unsustainable (inefficient) and ethically bankrupt. Reframing that interaction will require refashioning the legal system that enables it.

Part II of this essay examines the role of communication in the formation of law and social norms and the implications of that role for animal law and ethics. Part III contextualizes animal law within contemporary risk society. Part IV looks at how efficiency has

transformed from an economic concept into a normative guideline and discusses how that transformation has affected animals and agriculture. It tracks the rise of industrial agriculture and ties it to this fundamental misunderstanding of the concept of efficiency. The essay concludes with some thoughts on how to reformulate contemporary notions of efficiency and ethics to account for the idealism that should be a necessary component of communication and, consequently, of law.

Communication and Law

Law governs interactions between and among members of society. It codifies shared goals that reflect an ideal vision of a just society.¹ This aspirational vision of justice arises through communication. For communication to be coherent there must be a shared belief amongst the interlocutors in the possibility of consensus and mutual understanding. They must evince a willingness to come to an agreement about the truth/correctness of the matter under discussion.² This shared commitment to agree forms the foundation of discourse, which in turn forms the foundation of norms that then become codified into law.

Consensus-driven communication requires a common language. Laws governing human interaction (property, contract, criminal, torts, etc.) all fit within the discursive framework of shared goals and commitment to the perpetuation of society. Animal law, however, does not. (Non-human) animals do not share a language with humans. Consequently, they do not participate in human discourse nor do they share the goals of human society.

Without a common normative vision, there is no consensus from which to create laws. Animals are not merely an unwilling participant in the law-making process; they *do not participate at all*. It therefore makes no sense to talk about animal law as such; it is more properly described as a set of laws governing how humans interact with the animals.

This distinction is more than merely semantic. Human interaction with animals lies within human control. However, the other side of that process—animal interaction with humans—resides entirely outside of human control. Given that the animal perspective is both varied and unknowable and that humans are social organisms who interact with other species, it is understandable and necessary that humans would create a set of rules to guide those interactions. But because those interactions lack any shared commitment to consensus, attempts to impart meaning to the process are necessarily counterfactual and ideological. Herein lies what Aristotle

might have described as the tragic nature of animal law. The impossibility of communication coupled with the immutable need for communication creates a crisis borne of conflicting truths that undermine meaningful interaction.

Despite this seemingly unsolvable dilemma, there is some cause for hope. *All* communication is arguably counterfactual; that does not make it pointless. When humans communicate they do not truly understand each other; they merely share the goal of achieving that understanding. As Habermas argues, it is not the existence of truth, but rather a shared commitment to its possibility that makes communication (and therefore society) possible.³ Similarly, with respect to animals, true, meaningful communication is impossible. However, if attempts at communication were made in good faith and predicated on a willingness to exclude ideology and self-interest, then the human component of the human/animal interaction would not differ fundamentally from other forms of discourse.

The impossibility of an ideal state need not doom a society founded on a commitment to its attainment. Consequently, the tragedy of animal law does not lie in its aspirational nature. It lies rather in the way that human nature undermines those aspirations. This is clearly visible in the principles of risk management.

The Risks of the Risk Society

How risk society came into being

Ulrich Beck explains that: “Just as modernization dissolved the structure of feudal society in the nineteenth century and produced the industrial society, modernization today is dissolving industrial society and another modernity is coming into being.”⁴ In industrial society, wealth production overshadowed risk production because (among other reasons), the risks accompanying the ascendancy of industry were poorly understood and because the remnants of feudal society imputed a sense of preordained destiny both to social status and to the workings of environment.⁵ Furthermore, the omnipresent struggle against scarcity engendered a willingness to endure detrimental side effects.

Beck notes, for example, that in the early 1800s, the Thames was so polluted that people who fell in **suffocated** instead of drowning—the result of inhaling the poisonous gases carpeting the river.⁶ These and other risks

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arose as a consequence of modernization and were easily apparent. Today (at least in the developed world), scarcity no longer drives production. Society now produces at such a rate that many of its hazards are associated with *over*-production. Furthermore, the accompanying risks of post-industrial society are less visible (e.g., toxins in the food web, ozone depletion, climate change, etc.). These shifts have precipitated a fundamental reordering of society. Managing risk has become at least as important as wealth amassment.

Risk management in post-industrial society is reflexive; it is the “systematic way of dealing with hazards and insecurities induced and introduced by modernization itself.”⁷ Because risks are often not readily perceptible, the task of identifying risk falls most often to science, propelling scientists into the role of neutral and benevolent expert. Yet, identifying risk is not a neutral act. It has profound societal implications that transcend science. Risk identification determines what constitutes harm (an inherently subjective determination) and assesses whether that harm rises to a level requiring mitigation. In this manner, science, when wielded by the powerful, becomes the organizing principle around which society constructs its response to danger.

Through its role as risk creator/assessor, science becomes the source of what Mary Douglas calls “taboo thinking,” which uses the threat of danger to create and uphold community values.⁸ Shared danger bonds society through the shared goal of mutual survival. Because modern threats are invisible, “experts” who inform the public of the existence of the threat and the proper response wield a powerful tool of mass coercion. This aggregation of power in the hands of a select few would be troubling enough by itself. The situation is exacerbated by the fact that the risks that science is tasked with identifying and mitigating are themselves the *creations* of science.

Creation here refers not just to the social construction of risk (determining whether a given behavior constitutes a threat) but also to the behavior itself. For example, once science identifies mass confinement of animals as a potential cause of pandemic influenza—it then must determine the proper reaction to that threat by determining whether the risks from continued confinement outweigh the benefits of (and to) industrial agriculture. This is the process of defining risk and responding to it. Embedded within this identification/mitigation heuristic lies the fact that the confinement methodology is itself a creation of science.

The multi-tiered role of science in risk creation means that it is tasked with the impossible chore of neutral, critical self-evaluation. It engages in risk behavior, defines the risk created by that behavior, evaluates the level

of threat produced, and then advises society on how to respond.⁹ Allocating all these tasks to experts amounts to a wholesale abdication of responsibility by the lay public and by law-making bodies.

While the public has become more aware of the existence of threats, it has also become increasingly unable to recognize them and complacent in its incompetence. It has effectively forfeited its “cognitive sovereignty.”¹⁰ Such behavior amounts to complicity in a social structure constructed not around consensus and common belief but rather around the goals and conclusions of an elite sub-group.¹¹ Horkheimer and Adorno’s warning of a post-enlightenment world wherein reason metamorphosed into technology seems profoundly and disturbingly apt.¹²

Despite its seemingly privileged status, the societal position of science remains unenviable. Risk management decisions that science must make regarding its own behavior and creations have potentially draconian implications. As the number of risks increase and their consequences become more severe, the margin for error shrinks to the point where admitting mistake becomes a profoundly anti-social act.

To admit today that one had been mistaken in setting the acceptable values for the safety of pesticides—which actually would be a normal case in science—amounts to the unleashing of a *political* (or economic) catastrophe, and must be prevented for that reason alone. The destructive forces scientists deal with in all fields today impose on them the inhuman law of *infallibility*. Not only is it one of the most human of all qualities to break this law, but the law itself stands in clear contradiction to science’s ideals of progress and critique.¹³

Science relies on experimentation and hypothesis. Uncertainty is inseparable from scientific method. Yet in a risk society, if science admits error, the implications can be catastrophic both for society and for science’s privileged role within it. Consequently, science must act as the legitimating body for the regulatory apparatus that straitjackets it. It is trapped in a self-perpetuating cycle of taboo thinking.

This is the cycle of contemporary risk management. In order for society to function efficiently, risks must be assayed and behavioral guidelines issued with the goal of attaining a smooth-functioning, efficient society. In this manner, efficiency attains the status of norm, with science as its arbiter. Smooth functioning requires minimizing exposure to risk. And science determines risk and also the proper techniques for mitigation.

Were science not used to cause so many societal risks, thereby rendering it unable to objectively analyze potential threats, the process of identifying risk would be a quintessentially scientific task. Mitigation

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analysis contains a significant scientific component. If the role of science involved simply theorizing about how to reduce threat levels, that would present little conflict with scientific method. However, when science is called upon to determine an acceptable level of risk, it takes on a normative function that becomes self-undermining. The unworkability of this arrangement becomes starkly apparent in the context of agriculture.

Animals at risk

In the early years of the last century and prior, farms were hotbeds of cultivated biodiversity. Farmers often raised a dozen or more species of fruits and vegetables, including corn, alfalfa and hay to support the pigs, cattle, chicken and horses that populated the farm. Less than a hundred years later, the animals are gone, as is just about everything else save one or two crops—usually corn or soybeans.

The metamorphosis of small, diversified farms into large, monocultural, agribusinesses has many causes. However, as Michael Pollan explains, the biggest factor behind the transformation was cheap, abundant corn made possible both by the advent of nitrogen-based fertilizer and a generous (if misguided) program of agricultural subsidies.¹⁴ The availability of synthetic fertilizer meant that rotating crops became unnecessary and the nation's growing demand for corn could be met with an even larger output by the nation's farms.

Under normal economic conditions, corn's superabundance would have glutted the market and caused prices to fall. However, New Deal farm programs set a target price for the corn and allowed farmers to take out loans, using their surplus corn as collateral. When prices recovered, farmers sold the corn and paid back the loans. If prices failed to recover, they kept the loan money in exchange for the government's keeping the corn. The government could afford to wait until demand ticked up to put it on the market. In either case, surplus corn stayed off the market until demand revived.

Everything changed for agriculture in the United States during the 1970s. Earl Butz, President Nixon's Secretary of Agriculture, introduced a new system of price supports guaranteeing farmers a set price for their corn no matter the market price. Butz exhorted farmers to "get big or get out" and to regard themselves as "agribusinessmen" rather than farmers.¹⁵ A predetermined price per bushel of corn meant that growers had no incentive to decrease production when demand slacked. Instead, they were

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spurred to grow as much as possible and dump it into the market, which in turn caused prices to crater still more.

As prices fell, successive farm bills enacted by Congress lowered the guaranteed price paid for corn, causing farmers to have to grow still more to eke out a profit. Consequently, the market became perennially glutted with corn, small growers all but disappeared, and the need to utilize the ever-growing surplus became ever more urgent. Growers began feeding the corn to animals, including cattle, whose digestive systems cannot tolerate it without prophylactic antibiotics and other medications. The feed itself was cheap but the consequences of the cattle ingesting that feed were not. From this tangled attempt to make efficient use of what should never have been grown, the factory farm emerged.

The story of other animals' journeys from farm to Concentrated Animal Feedlot Operation (CAFO) is similar, albeit different in some key respects. For example, animal agriculture for pigs and chickens (not cattle) is highly vertically integrated. Growers do not own the animals and have no input into the manner in which the animals are fed or housed. They must simply obey the dictates of their corporate overlords. The growers also have little leverage with respect to the price they are paid for their labor. They cannot command prices sufficient to cover environmental degradation and waste disposal. As a result, these costs get externalized. They are passed along to the general public and not reflected either in the cost of production or in the retail price of the product.¹⁶ Instead, they become hidden costs, which, along with corn subsidies, become woven into the national tax burden.

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Efficiency

Efficiency as norm

In order to turn agriculture into agribusiness, growers had to embrace large commercial enterprises as superior and preferable to small-scale farming. If some farmers bristled at this mission, they faced replacement by others more sympathetic to the corporate goal. That goal was simple: make agriculture more efficient. The missing option—one that to this day remains unexplored—involves interrogating the utility of efficiency as a bounding principle in agriculture.

In economic terms, efficiency means getting the best possible return on an investment. Any resources spent should lead to a greater yield. In this

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sense, efficiency is a fundamental principle of a market economy. However, agriculture—and specifically animal agriculture—is not economics. While economics drives many facets of agriculture, that does not make them equivalent any more than gasoline powering a car renders them the same.

Agriculture is grounded in ecology. And, while ecology's definition has evolved over the years, it has always centered on the relationship between living things and their surroundings. It has been variously defined as: the study of the interaction between organisms and their environment, the study of the distribution and abundance of organisms, and the scientific study of the processes influencing the distribution and abundance of organisms, the interactions among organisms, and the interactions between organisms and the transformation and flux of energy and matter. For none of these definitions, however, does efficiency serve as the organizing principle.

When organisms interact with their environment, redistribute themselves, or when the environment is in flux, one sees an almost wanton expenditure of energy. Whether it be the volume of water cascading into the ocean from a river after a rain or the playfulness of a polar bear cub frolicking on the ice, energy and resources get expended in a seemingly heedless, environmental potlatch. The river's swollen discharge will help keep the estuary's salinity constant during a future dry time and the bear cub will use precious calories but that play will help it learn coordination and how to interact. Yet, at no time is there any regimented, perfect equilibrium sought, or any real method of calculating efficient behavior.

Agriculture relies on human/animal interactions, which are subsumed within the ecological web even while forming part of the human economy. Ecology has no defined bounding principles while the latter cleaves to efficiency. The relationship between ecological unpredictability and bottom line analytics has existed for centuries but the twentieth century witnessed a shift. Market dynamics became dominant; ecosystemic expenditures fell prey to accounting principles and animal behavior became almost irrelevant to animal "science." As a result, the barnyard has become the stockyard, the farmyard a CAFO, and the manure pile a sewage lagoon.

When market efficiency displaced ecology as the foundation of agriculture, another crucial component was lost as well. Ethics once provided the moral principles underlying human/animal interactions. While one could argue (persuasively) that those principles were never sufficiently sensitive to the needs and welfare of the nonhuman animals, it lies beyond cavil that the treatment and care of animals in the days prior to

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industrial agriculture differed markedly from their treatment now. Farmers used to house and feed animals in a manner designed to keep them comfortable, and to develop relationships with each other and with humans. These relationships did not necessarily maximize yield but were rather based on a set of normative guidelines even as the ultimate reality of the animals' commodity status inevitably imbued that bond with a sense of unreality.

One sees vestiges of this bifurcated relationship in agricultural education organizations like 4-H, where children are given an animal to care, raise and nurture. Often, the children grow to love these animals, even as they know they are raising them for slaughter. The culmination of their efforts usually happens at the county fair where the animals are auctioned for slaughter, leaving the children grief-stricken and heartsick even as parents and teachers congratulate them on a job well done.

This complicated and problematic relationship between the children and their animals is emblematic of the tensions underlying traditional approaches to animal husbandry. It was impossible to escape the animals' commodity status even as ethics demanded their decent treatment. The advent of industrial agriculture simplified eliminated any tension within the human/animal relationship by completely commodifying the animals and removing ethics from the equation. Instead, the focus became exclusively on profit generation. Animals went from partially commodified beings whose value could be measured both in individual terms and as units of exchange value to simple merchandise whose value derived from decreased costs of care and increased value at alienation.

An object's market value increases with marketability leading to an increased desire to alienate it. The greater an object's value, the greater the temptation to divest oneself of it. Thus, the realities of the marketplace make it both difficult and counterproductive to form a relationship with a commodity, a fact that further facilitates objectification. In the case of animals, it also enables mistreatment.

Animals' commodification confers an exchange value that, in the case of "meat" animals, is realized through death and dismemberment. For animal producers (milk cows, breeding sows, etc.), value emerges through maximizing productivity while minimizing costs. In neither instance does the animals' quality of life enter the equation. Rather, in both cases, the economic incentive (which is, after all, what drives exchange value) lies with minimizing expenses associated with the thing while maximizing its yield.¹⁷ It is easy to see how this logic leads to factory farms designed to maximize economic efficiency regardless of the impact on animals. It also catalyzed the industry's vertical integration. As a result, a few large

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conglomerates now control the animal production process “from squeal to meal.”¹⁸

Classification as a thing also exempts objects from any moral calculus. Exchange value is amoral; it is a function of demand. Owners maximize value through increasing marketability. Moral arguments as to the market value of things carry little practical weight because the two systems (moral and market) do not share a common mode of valuation.¹⁹

This basic incompatibility between relationships predicated on ethics and those predicated on commoditization means that the role of agriculture could never be other than problematic.²⁰ However, the ascent of the factory farm was not inevitable. It could have been avoided and will eventually be undone primarily for two reasons.

First, the factory farm system is not efficient. It ignores externalities that render the cost/benefit calculus profoundly against its continuation and relies on a massive subsidies and a (government abetted) propaganda campaign to sustain itself in the face of increasing public opprobrium. Second, circling back to Habermas’ thesis—communication (and society) does not require an ideal state in order to exist.²¹ They rather require a shared commitment to its attainment. Consequently, the incompatibility of agriculture, ethics and a market economy need not lead inevitably to catastrophe. The discord can rather serve as the basis for a discourse grounded in aspiration.

Agribusiness is bad business

As noted above and as has been well-covered elsewhere, industrial agriculture’s dependence on cheap corn, which is a product of unsustainable government subsidies, means that the price of food does not reflect the actual cost to produce it. Nor does it reflect the loss of biodiversity or the increase in the national carbon footprint that comes from increased reliance on petroleum-based fertilizers (crop rotation once served to replace depleted nitrogen in the soil but that practice has all but disappeared with the ascent of monoculture) and mass production of methane-emitting animals. Furthermore, industrial agriculture is the single largest producer of sewage waste in the United States. The waste collects in sewage lagoons, makes its way into the groundwater, surface water, and soil. This leads to massive and sometimes irremediable contamination problems, dead zones in the ocean, pernicious algae blooms, and other environmental problems. In addition, when the lagoons rupture or spill, it

causes contamination and loss of life in rivers and surrounding ecosystems.

When one further factors in the increase in antibiotic resistant bacteria as well as the respiratory infections that result from inhaling the poisonous fumes from the facilities, the costs of maintaining large-scale animal confinement facilities becomes far from economical. Recent events have also shown the lurking dangers of deadly influenza, for which confinement agriculture provides an ideal incubator. The threat from an influenza pandemic is almost incalculable.

Given all this, even if efficiency provided a normative basis for the treatment of nonhumans, industrial agriculture **would remain** woefully inefficient, and would be classified as unethical on that basis alone. But, as already **discussed**, efficiency lacks a normative component. Norms derive from ethics, which do not cleave to any economic model. They are a set of principles designed to govern human interaction with each other and with their environment. In that sense, ethics represent a form of human ecology.

Because ethics govern behavior and behavior implicates interactions with the human and nonhuman environments, ethics have an ecological component. And, since ecology is the study of flux (ecosystems constantly evolve; stasis—a lack of energy flow in or out of the system means that the system is inert), ethics must constantly evolve to reflect that change. Ethics are fluid because both the environment and human relationships must always remain in flux. Aldo Leopold's famous Land Ethic aptly captures the character of the human commitment to environment as well as the shifting parameters of that commitment.²² Nonetheless, ethics embody a dedication to the attainment of a just society and in that sense remain static.

While the tension between ethical behavior and an agricultural system based on commoditization of nonhumans was unavoidable, it has also long been present. The shift from uneasy coexistence to monolithic dominance by the market-based approach to animal management was triggered by the emergence of the risk society. Both with respect to physical dangers—where threats became more dispersed and beyond the ken of the lay person—and in the realm of the economy, where the complexity of commerce has increased exponentially in the past half-century, the public has come to rely more and more on experts to interpret the data and advise on the correct course of behavior.

With the state supporting large agribusiness, the views of the “experts” employed by those businesses increasingly came to dominate the discourse. Furthermore, the government experts worked within a regulatory regime that supported that market-based approach. As

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industrial agriculture become integrally woven into the fabric of the economy, the risks inherent in that approach (pollution, economic collapse, systemic animal abuse, etc.) became hidden costs embedded in a downward spiraling feedback loop. The risks grew worse as the risk behavior became more prevalent (industrial agriculture has become a worldwide phenomenon) and those increased risks meant that the dangers associated with their exposure also increased.

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Science as gatekeeper

Were science not the cause of so many societal risks and thus unable to objectively analyze the existence of dimensions of potential threats, the process of identifying risk would be a quintessentially scientific task. If the role of science (both hard and social) involved simply theorizing about how to reduce threat levels, there would be little conflict with scientific method. However, when science is called upon to determine an acceptable level of risk, its actions take on a normative component that undermines the entire process.

The same "experts" who invent and propagate the methods that generate the risks must also assess the danger from those methods and, if necessary, expose it and suggest mitigating measures. Those obligations put scientists and economists in the unenviable position of assessing whether the risks created by their behavior are worthwhile. They must determine how much danger and damage from the sanctioned behavior is acceptable. And it is precisely here that risk assessment leaves the realm of science and enters the realm of ethics. It also creates an unsustainable conflict of interest. Unfortunately, this is precisely the situation in which we find ourselves today with respect to industrial agriculture.

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The inhumane treatment of animals has been rationalized as the inevitable byproduct of efficient agriculture. As a result, industrial agriculture flourished and became interwoven with the global economy. Now, as the flaws in the industrial model become increasingly clear, so too do the risks inherent in moving away from that model. Society has grown to depend on and expect cheap, mass produced meat, which in turn requires enormous amounts of corn, which in turn requires government subsidies, inhumane, confinement agriculture and antibiotics. Yet, abandoning that model will cause significant economic upheaval, social unrest, and undermine faith in those entrusted with safeguarding society. In sum, protecting society from the danger will involve endangering that

same society. This situation involves a risk analysis that those who created the situation are ill-equipped to make.

Conclusion

Untangling this Gordian knot of dependence involves acknowledging the essential incompatibility of certain foundational ethical precepts (i.e. humane interaction with nonhumans) with a market-based approach to agriculture. This intractable conflict could lead to systemic paralysis or collapse. However, it need not so long as the aspirational nature of society is recognized and embraced.

As Habermas observes, communication (and society) is built on the counter-factual premise that the conditions for ideal discourse (a just society) exist and that true consensus (free of any externally imposed constraints) is possible. Similarly, social ideals and the laws that codify them are counter-factual as well. They are aspirational—representing a shared vision of a society where externally imposed behavioral standards would not be necessary. Norms (and laws) presuppose a shared commitment to consensus and ethical behavior even as their very existence testifies to the absence of that consensus.

In this sense, human society is predicated on contradiction. On the one hand, this might be fodder for a legitimization crisis. On the other hand, it is profoundly reassuring in that this foundational contradiction within society does not mean its inevitable demise or that nihilism will envelop us all. On a practical level, however, the problem of industrial agriculture remains.

Recalibrating our relationship to animals within the ecology of the market will require several steps. The first involves recognizing the dichotomy between efficiency and ethics. Efficiency has no normative component and ethics have no necessary relationship with efficiency. In the context of agriculture, acknowledging this schism will necessitate a through reexamination of efficiency's role in determining acceptable treatment of nonhumans. This must be coupled with a recognition that a deliberate indifference to life does not align with any extant ethical vision.

The second step requires acknowledging that the current vision of agricultural efficiency is based on flawed assumptions and bad science. It has wrought ecological havoc and undermined the global economy. In addition, as factory farming spreads, so too do worldwide health problems, including obesity, diabetes, and heart disease.

Industrial agriculture has grown ascendant because its drawbacks have been deliberately obscured. It has used subsidies to obscure a lack of

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profitability, sited its facilities far from population centers to keep the animals from prying eyes, and successfully lobbied for the exemption of its methods from animal cruelty laws. All of these strategies allowed the public to embrace ignorance and to assume that their safety was entrusted to a sagacious and risk averse set of experts. But as Aldo Leopold observed, “too much safety seems to yield only danger in the long run.”²³ Ignorance has led to a dangerous loss of agency. People are no longer in touch with their food. Even as the animals they consume have devolved almost entirely into commodities, those who consume them have divorced themselves from the process that turned the animals into food. Ignorance has obscured responsibility. Therein lies the last and most important step in the unmaking of the factory farm. We must learn to own what we eat.

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Notes

¹ See Jürgen Habermas, *Legitimation Crisis* (Thomas McCarthy trans., Polity Press, 2007; originally published 1976). Note that this vision is necessarily counterfactual.

² See Thomas McCarthy, 'Introduction' to Jürgen Habermas, *Legitimation Crisis*, at xvi (Thomas McCarthy trans., Polity Press 2007; originally published 1976).

³ E.g. *id.*

⁴ Ulrich Beck, *Risk Society* 10 (Mark Ritter trans., Sage Publications, 2007; originally published 1986).

⁵ *Id.* at 12-14.

⁶ *Id.* at 21.

⁷ *Id.*

⁸ Mary Douglas, *Risk and Blame* 4 (Routledge Press 1992).

⁹ As Beck observes, eventually, "one comes up against the law that so long as risks are not recognized scientifically, *they do not exist*—at least not legally, medically, technologically, or socially, and they are thus not prevented, treated, or compensated for." Beck, *supra* note 5 at 71 (emphasis in original).

¹⁰ *Id.* at 53.

¹¹ See Jenny Steele, *Risks and Legal Theory* 33 (John Gardner ed., Hart Publishing 2004) ("[T]he growing *recognition* that we are ignorant, and especially that we are ignorant of the way that our actions will interact with other factors, means that we are increasingly 'culpable' ... Ignorance loses its innocence as awareness of limits to knowledge grows.") (emphasis in original).

¹² See, e.g. Lash, et al., *Risk, Environment and Modernity* 3 (Sage Publications, 2000; originally published 1996).

¹³ Beck, *supra* note 5 at 54.

¹⁴ Michael Pollan, *The Omnivore's Dilemma: A Natural History of Four Meals* 54-64 (Penguin, 2006)

¹⁵ *Id.* at 52.

¹⁶ *Putting Meat on the Table: Industrial Farm Animal Production in America* (A Report of the Pew Commission on Industrial Farm Animal Production) p6.

¹⁷ See Gary Francione, *Animals, Property, And The Law* 29 (1995); Robyn Mallon, 'The Deplorable Standard of Living Faced by Farm Animals in America's Meat Industry and How to Improve Conditions by Eliminating the Corporate Farm', 9 *Mich. State Univ. J. of Med & L.* 389, 399 (2005) (explaining that even when a law protecting farm animals exists "[t]he law is violated due to the traditional corporate attitude of wanting to maximize profit and minimize expenses.").

¹⁸ Smithfield Foods, the world's largest vertically integrated producer of pig products, proudly embraces both the term and the concept. This quotation, from Lewis Little, president of Smithfield's largest subsidiary, appears in the company's

promotional material. See “Understanding Smithfield,” available at: staging.smithfieldfoods.com/Understand/Family/smithfieldFerme.asp

¹⁹ See Francione, *Animals, Property and the Law*, *supra* note 18 at 27 (“[O]ur allocation to humans of rights in the bodies of animals reflects the notion that it is more efficient to relegate animals to property status ... than it is to value animals for themselves and to accord them dignity and respect. Moral concern for animals is not a cost-justified policy.”)

²⁰ This argument is drawn from (and covered in greater detail in): David N. Cassuto, *Bred Meat – The Cultural Foundation of Factory Farms*, 70-WTR LAW & CONTEMP. PROBS. 59 (Winter 2007)

²¹ Jürgen Habermas, *Moral Consciousness and Communicative Action* 133-36 (Christian Lenhardt & Shierry Weber Nicholson trans. MIT Press 1990).

²² “A thing is right when it tends to preserve the integrity, stability, and beauty of the biotic community. It is wrong when it tends otherwise.” Aldo Leopold, *A Sand County Almanac* 262 (Oxford University Press 1949)

²³ *Id.* at 141

David Cassuto 11/18/09 10:19 PM

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