

# COALITIONS IN THE JUNGLE: ADVANCING ANIMAL WELFARE THROUGH CHALLENGES TO CONCENTRATION IN THE MEAT INDUSTRY

By  
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*The meat processing conglomerates that currently control the majority of the market share in the meatpacking industry are responsible for its most systemic animal abuses. Increased concentration has enabled these larger processors to dictate animal treatment standards maintained by meat producers, most of whom have caved to economic pressure and moved their animals from small farms into Concentrated Animal Feeding Operations. Animal welfare proponents have failed to adequately challenge the concentration of the meat industry and in 2012 have yet to fully explore strategies made available by the Packers & Stockyards Act of 1921 (PSA). This Article proposes that a coalition between animal welfare activists and small meat producers, who have yet to be absorbed or driven out of business by the meatpacking giants, could effectively attack the concentration of the meat industry. First, animal welfare activists should work with small producers to expose to the public the negative human externalities associated with market concentration, such as intensive farming techniques that directly compromise consumer health. Second, the animal welfare movement should harness its legal experience to encourage small meat producers to pursue PSA-based civil suits aimed at challenging the power of the meatpacking conglomerates.*

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## I. INTRODUCTION

Proponents of animal welfare have failed to adequately challenge the concentration of the meat industry and in 2012 have yet to fully explore strategies made available by the Packers & Stockyards Act of

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1921 (PSA).<sup>1</sup> It is not surprising that the few meat-processing conglomerates that currently control the majority of the market share in the meatpacking industry are responsible for its most systemic animal abuses.

Increased concentration has enabled these large processors to dictate animal treatment standards maintained by meat producers, most of whom have caved to economic pressure by moving their animals from small farms and into Concentrated Animal Feeding Operations (CAFOs). In failing to ally itself with those independent meat producers who have yet to be absorbed or driven out of business by meatpacking giants, the animal welfare movement ignores an opportunity to strategically advance its own agenda.

While much has been written about the heretofore unrealized possibilities of a coalition between animal welfare activists and environmentalists,<sup>2</sup> no one has yet proposed an alliance between those who seek to reduce animal suffering and those who raise animals for slaughter. But activists wishing to decrease the suffering of farm animals would be wise to recognize that the reemergence and expansion of a market for small meat producers would significantly decrease animal suffering. A coalition between animal welfare activists and small producers could effectively attack the concentration of the meat industry on two fronts. First, in the court of public opinion, animal welfare activists and small producers would do well to aggressively expose the negative human externalities associated with concentration by arguing that processors' control over the feeding and housing of animals before they reach the slaughterhouse not only incentivizes but also effectively necessitates the intensive farming techniques that directly compromise consumer health. Second, with the goal of affecting the courts themselves, the animal welfare movement should join the debate about the scope of the PSA and marshal its legal experience to encourage small meat producers to pursue PSA-based civil suits aimed at challenging the power of meatpacking conglomerates.

## II. CONCENTRATION OF THE MEAT INDUSTRY, 1880s-1930s

The animal welfare movement was in its infancy when Upton Sinclair so vividly described that "square mile of abominations" within which thousands of cattle stood "crowded into pens whose wooden floors stank and steamed contagion . . . ."<sup>3</sup> While Sinclair's account of an animal's fate in the slaughterhouse was chilling, *The Jungle's* in-

<sup>1</sup> 7 U.S.C. §§ 181–229 (2006) (amended in 1958, 1976, 1987, and 2002).

<sup>2</sup> See e.g. Lars Johnson, *Pushing NEPA's Boundaries: Using NEPA to Improve the Relationship Between Animal Law and Environmental Law*, 17 N.Y.U. Env'tl. L.J. 1367, 1420 (2009) (arguing that the National Environmental Policy Act "provides a potentially effective way for animal welfare organizations and environmental groups to coordinate their work").

<sup>3</sup> Upton Sinclair, *The Jungle* 295 (Christopher Phelps ed., Bedford/St. Martin's 2005).

dictment of the meat industry was written to elicit sympathy not for animals but for workers preyed upon by “a gigantic combination of capital, which had crushed all opposition, and overthrown the laws of the land.”<sup>4</sup> But readers were not particularly interested in the plight of either animals or labor. Sinclair would later complain that he aimed at the public’s heart but hit it in the stomach:<sup>5</sup> while concerns about hygiene rose, readers were less disgusted by the industry’s treatment of workers and—presumably—of animals.<sup>6</sup> Consequently, outrage occasioned by the publication of *The Jungle* spurred the swift passage of the Federal Meat Inspection Act,<sup>7</sup> the Federal Food and Drugs Act,<sup>8</sup> and, with them, the development of a regulatory apparatus intended to sanitize the nation’s meat supply.<sup>9</sup>

It was not until 1917 that President Woodrow Wilson, prompted by suspicious fluctuations in the price of meat and complaints from producers, ordered the Federal Trade Commission (FTC) to conduct a “hoof to table” investigation of industry practices.<sup>10</sup> Under particular scrutiny were the “Big Five”—the largest meatpacking firms—that had secured substantial gains in market share in the three decades preceding the FTC report.<sup>11</sup> Armour, Cudahy, Morris, Swift, and Wilson had not only experienced growth in every region of the country, but had also expanded their activities into marketing and sales.<sup>12</sup> Wilson, for example, which had owned one meatpacking plant in 1857 and opened only six additional facilities by 1887, operated twenty such plants in 1897, fifty-seven in 1907, and as many as ninety-one in 1917.<sup>13</sup> In 1916, the Big Five slaughtered 82.2% of United States

<sup>4</sup> *Id.* at 333.

<sup>5</sup> Christopher Phelps, *Introduction*, in Upton Sinclair, *The Jungle* 3 (Christopher Phelps ed., Bedford/St. Martin’s 2005).

<sup>6</sup> *See id.* at 1 (“[T]he primary response of middle-class readers of *The Jungle* was not sustained political sympathy for immigrants or solidarity with the working class. Rather, they were shocked and appalled by what might be in their food.”).

<sup>7</sup> Fed. Meat Inspection Act of 1907, ch. 2907, 34 Stat. 1260 (1907) (codified as amended at 21 U.S.C. §§ 601–695).

<sup>8</sup> Fed. Food and Drugs Act of 1906, ch. 3915, 34 Stat. 768 (1907) (originally codified at 21 U.S.C. §§ 1–15).

<sup>9</sup> Sinclair, *supra* n. 3, at 3.

<sup>10</sup> G.O. Virtue, *The Meat-Packing Investigation*, 34 Q. J. Econ. 626, 626–31 (1920). While complaining producers could have refused to sell to the processors by forming marketing collectives that would allow them to circumvent the packer-owned stockyards entirely, the degree of solidarity among producers that would have been necessary for such a step was difficult to achieve. J’Nell L. Pate, *America’s Historic Stockyards: Livestock Hotels* 34 (TCU Press 2005).

<sup>11</sup> Virtue, *supra* n. 10, at 632–33 (“The theory that seems to underlie the whole report is that the dominant position of the five large companies is the most significant feature of the food situation the Commission was set to investigate; and this doubtless explains why the inquiry has so largely centered around these big concerns and their activities.”).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 633.

(U.S.) cattle, 76.6% of calves, and 61.2% of swine.<sup>14</sup> According to the FTC, the Big Five controlled approximately half of the poultry, eggs, and cheese that wound its way into the channels of interstate commerce.<sup>15</sup>

The Big Five were also industry leaders in the ownership of wholesale branch houses through which meat products were marketed and sold. In 1889, the firms owned only fifty branch houses between them but acquired 541 additional locations by the turn of the century.<sup>16</sup> In 1917, the Big Five operated 1,120 wholesale branch houses, and almost half of these were owned by Armour and Swift.<sup>17</sup> Because smaller interstate meatpackers owned only 139 of then-existing wholesalers, the Big Five comfortably controlled 89% of the wholesale market.<sup>18</sup> The firms were equally powerful in the realm of transportation, owning almost 92% of the brine-fitted cars necessary for the shipment of frozen meat throughout the country.<sup>19</sup>

The FTC focused its attention on stockyards, the ownership of which "carrie[d] with it the control of packing-house sites, the rendering business, cattle loan companies and other institutions which grow up in connection with the yards."<sup>20</sup> The FTC reported that the Big Five controlled twenty-two of the fifty centralized stockyards in the U.S. and held a minority interest in many of the remaining twenty-eight.<sup>21</sup> Indeed, over 84% of all animals marketed for meat consumption throughout the country passed through stockyards in which the Big Five held an interest, and in 56.8% of cases, that interest was controlling.<sup>22</sup>

The FTC concluded that so concentrated a level of ownership gave the five firms a degree of power that tended toward monopoly, threatened competitors, and harmed producers.<sup>23</sup> The Big Five's ownership of the stockyards, for example, enabled the firms to "exclude from all convenient places about the premises all banks and cattle loan companies except those controlled by the packers."<sup>24</sup> The FTC concluded that stockyard ownership gave the Big Five undue control over commission firms through which animals were sold because the com-

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<sup>14</sup> *Id.* at 634. These numbers reflect only those animals that passed into interstate commerce rather than the total number slaughtered in the country. Inclusion of animals processed by local slaughterers would reduce the Big Five's market share to 74.5% for cattle, 62.5% for calves, and 56.9% for swine. *Id.* at 634-35.

<sup>15</sup> *Id.* at 636 (quoting Fed. Trade Commn., *Food Investigation: Report of the Federal Trade Commission on the Meat-Packing Industry* pt. I, 231 (Govt. Prng. Off. 1919) [hereinafter *FTC Report*]).

<sup>16</sup> *Id.* at 633.

<sup>17</sup> Virtue, *supra* n. 10, at 633.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.* at 633-34.

<sup>20</sup> *Id.* at 639.

<sup>21</sup> *Id.* at 640.

<sup>22</sup> *Id.*

<sup>23</sup> Virtue, *supra* n. 10, at 645-47.

<sup>24</sup> *Id.* at 647.

mission firms were tenants of the stockyards in addition to being agents of producers.<sup>25</sup> This relationship created “a dependence of the commission men on the packer that ought not to exist[,] . . . weakening the zeal of the commission man for his principal in his dealings.”<sup>26</sup>

Noting that the market power of the Big Five was such that no commission firm could afford to question the firms’ practices, the FTC suggested that stockyard ownership made producers and their representatives timid in their pursuit of their own interests.<sup>27</sup> The FTC also concluded that the Big Five exploited their position of ownership of the stockyards to secure the valuable monopoly over the rendering of animals that prematurely expired en route to or in the yards.<sup>28</sup> The Big Five required sellers wishing to use their stockyards to first agree that the sale of any such dead or dying animal would be conducted according to the directives of the stockyard owner as to manner, price, and purchaser.<sup>29</sup> Most often, that designated purchaser was a rendering company controlled by the Big Five.<sup>30</sup>

After reviewing the FTC report in 1919, the Justice Department (DOJ) concluded “that there had been established such a degree of probability of monopoly” on the part of the Big Five as to warrant prosecution.<sup>31</sup> The DOJ was not persuaded by arguments that the stockyards so central to the case against the Big Five should be treated as public utilities.<sup>32</sup> As L.D.H. Weld noted in his commentary on the investigation, although “the stockyards might be considered as public utilities the packing industry itself is a private industry because it has no natural monopoly and because it buys and sells merchandise at fluctuating prices just like any other private industry.”<sup>33</sup> Armed with the FTC findings and the threat of protracted prosecution under the Sherman Act, Attorney General Alexander Mitchell Palmer successfully compelled the Big Five to accept a consent decree, the Palmer-Packer agreement, which forced them out of all non-production sectors of the industry, including wholesale, retail, stockyards, and warehouses.<sup>34</sup>

But the same producers whose complaints had prompted the FTC investigation were not satisfied by the consent decree and persisted in their demands for antitrust legislation tailored to the meat industry. Producers protested largely because the Palmer-Packer agreement

<sup>25</sup> *Id.* at 648.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* at 648–49.

<sup>29</sup> Virtue, *supra* n. 10, at 649 (quoting *FTC Report*, *supra* n. 15, at pt. III, 69).

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 677.

<sup>32</sup> *See id.* at 677–81 (noting that the DOJ pursued antitrust litigation despite legislative proposals to treat the slaughterhouses as public utilities).

<sup>33</sup> L.D.H. Weld, *The Meat-Packing Investigation: A Reply*, 35 Q. J. Econ. 412, 430 (1921).

<sup>34</sup> Virtue, *supra* n. 10, at 677–78 (offering a detailed summary of the Palmer-Packer agreement).

failed to address objectionable practices that the Big Five had voluntarily abandoned after the FTC investigation began.<sup>35</sup> Dubious, producers formed the American Farm Bureau Federation.<sup>36</sup> To head its lobbying efforts, the organization hired tenacious former West Virginia senator and longtime farmer Gray Silver, and under his canny guidance met with senators from the agricultural states throughout the spring of 1921.<sup>37</sup> With the group's support, a farm bloc comprised of Midwestern congressmen insisted that the 1921 Congress not adjourn without passing a bill to regulate the Big Five by, among other things, prohibiting them from owning stockyards.<sup>38</sup>

This sustained pressure from newly Washington-savvy producers led Congress to pass the Packers & Stockyards Act (PSA) on August 15, 1921.<sup>39</sup> A code of fair practices that could be enforced by the Secretary of Agriculture, the PSA sought to divorce stockyards from large processors by making those stockyards that exceeded 20,000 square feet of pen space semi-public utilities. With the explicit goal of fostering competition in the industry, the PSA made it

the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner, to prescribe rules and regulations and to require those persons engaging in or attempting to engage in the purchase, sale, or solicitation of livestock at such stockyard to conduct their operations in a manner which will foster, preserve, or insure an efficient, competitive public market.<sup>40</sup>

Moreover, it was now

unlawful for any stockyard owner, market agency, or dealer to engage in or use any unfair, unjustly discriminatory, or deceptive practice or device in connection with determining whether persons should be authorized to operate at the stockyards, or with the receiving, marketing, buying, or selling on a commission basis or otherwise, feeding, watering, holding, delivery, shipment, weighing, or handling of livestock.<sup>41</sup>

On a nuts-and-bolts level, the PSA prohibited stockyards from dealing in the animals that passed through their gates, required each yard to maintain exhaustive accounts in the interests of transparency, and authorized the Secretary of Agriculture to regulate rates charged by both stockyards and market agencies.<sup>42</sup> Crucially, the PSA also forbade meat processors from owning stockyards, apportioning animal supply, controlling prices, or collaborating with the intention of creating a monopoly.<sup>43</sup> The PSA failed, however, to provide any practically

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<sup>35</sup> *Id.* at 684.

<sup>36</sup> Pate, *supra* n. 10, at 32–33.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at 32.

<sup>39</sup> *Id.* at 33.

<sup>40</sup> 7 U.S.C. § 208(b).

<sup>41</sup> *Id.* at § 213(a).

<sup>42</sup> *Id.* at § 221.

<sup>43</sup> *Id.* at § 192.

useful guidance as to the meaning of its key terms, leaving it to the courts to decide what behavior would qualify as an “unfair, unjustly discriminatory, or deceptive” practice.<sup>44</sup>

The Big Five immediately sought to resist the PSA; only a year after its enactment, the Big Five challenged the legislation in *Stafford v. Wallace*<sup>45</sup> on the theory that the sale of animals in stockyards did not constitute interstate commerce.<sup>46</sup> Rejecting this argument, Chief Justice William Howard Taft called the stockyards “great national public utilities,” describing them as “but a throat through which the current [of commerce] flow[ed].”<sup>47</sup> While the Supreme Court concluded that the PSA was a constitutionally permissible regulation of interstate commerce, the Big Five also sought to block enforcement on other grounds.<sup>48</sup> Though this litigation delayed any substantive change in the management of the country’s stockyards, compliance with the PSA increased in the 1930s, when the Big Five began selling their interests in stockyards, railroads, cattle loan companies, banks, and market newspapers.<sup>49</sup> Producers took advantage of these developments by forming collective livestock marketing associations, something that had been difficult to achieve when processors owned the stockyards.<sup>50</sup> These marketing associations enabled different kinds of producers—pig farmers, poultry growers, and ranchers—to join together to sell their animals more profitably, and the success of the associations prompted producers to go further still by establishing cooperative commission companies where each paying member could sell animals through a cooperative.<sup>51</sup>

In 1958, Congress expanded the purview of the PSA to include smaller stockyards containing less than 20,000 square feet of pen space, as well as market agencies and dealers operating away from the stockyards.<sup>52</sup> The PSA was again amended eighteen years later in order to increase financial protection guaranteed to producers. The 1976 amendment required that processors who annually purchased over \$500,000 worth of animals be bonded, granted trust protection for live-

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<sup>44</sup> *Id.* at § 192(a). See *Wheeler v. Pilgrim’s Pride Corp.*, 591 F.3d 355, 359 (5th Cir. 2009) (stating that the Tenth Circuit concluded that it was left to the courts to determine what anti-competitive practices could be unfair, unjustly discriminatory, or deceptive because Congress “could not list [in 7 U.S.C. § 192(a)] the full panoply of unfair, unjustly discriminatory, or deceptive practices or devices that a covered entity might utilize”) (quoting *Been v. O.K. Indus., Inc.*, 495 F.3d 1217, 1229 (10th Cir. 2007)). See also Rachael L. Dettmann, *You’re Not the Boss of Me: An Analysis of GIPSA’s Authority to Regulate Private Contracting Rights in the Beef Industry*, 16 Drake J. Agric. L. 321, 325 (2011) (describing the “fertile ground for litigation” due to ambiguity in the PSA terms).

<sup>45</sup> *Stafford v. Wallace*, 258 U.S. 495 (1922).

<sup>46</sup> *Id.* at 523.

<sup>47</sup> *Id.* at 516.

<sup>48</sup> Pate, *supra* n. 10, at 34.

<sup>49</sup> *Id.* at 34–35, 45.

<sup>50</sup> *Id.* at 34, 36–37.

<sup>51</sup> *Id.* at 36.

<sup>52</sup> 7 U.S.C. § 202(a).

stock producers in the event of processor default, expanded the Secretary of Agriculture's control over wholesale sellers, and authorized the Secretary to assess penalties not to exceed \$10,000 per violation.<sup>53</sup> Subsequent amendments extended the trust protection afforded to livestock producers to include poultry producers and increased the penalty amount to \$11,000 for processors, swine contractors, and stockyard owners, and to \$27,000 for poultry dealers found violating the poultry trust provisions.<sup>54</sup> As of 2000, the PSA also requires the U.S. Department of Agriculture's (USDA) Packers and Stockyards Program (P&SP) to conduct an annual assessment of the cattle and swine industries.<sup>55</sup>

The P&SP, a division of the Grain Inspection, Packers & Stockyards Administration (GIPSA), "monitors industry activities and conducts regulatory compliance reviews and investigations to determine whether subject persons and firms are in compliance" with the PSA.<sup>56</sup> According to the P&SP, the species of enforcement depends on the perceived seriousness of a particular violation: while minor infractions result in a notice prompting regulated entities to correct problems on their own, in cases of more serious violations, the P&SP issues stipulation agreements citing the civil penalty amount that GIPSA will accept in settlement.<sup>57</sup> Violations that cannot be resolved through settlement or that are, at the outset, so serious as to make such resolution imprudent, are pursued as administrative actions within the USDA.<sup>58</sup> Penalties for violations range from cease and desist orders, suspension of business operations, and the aforementioned limited civil penalties to more cost-prohibitive—and consequently more effective—permanent injunctions and jail sentences.<sup>59</sup>

While GIPSA is responsible for enforcing the PSA, injured parties themselves—in this case meat producers—may independently bring civil actions.<sup>60</sup> Such claims have the potential to not only directly improve the economic position of the producers who bring them, but can also indirectly improve conditions of the animals in their control. Consequently, PSA-based litigation should be vigorously encouraged and supported by animal welfare organizations, which would do well to rec-

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<sup>53</sup> *Id.* at §§ 204, 209(a), 193(b).

<sup>54</sup> 7 U.S.C. § 197; 7 C.F.R. § 3.91(b)(6) (2012).

<sup>55</sup> 7 U.S.C. § 228(d).

<sup>56</sup> U.S. Dept. of Agric., *Grain Inspection, Packers & Stockyards Administration: Packers & Stockyards Act* (June 2007) (available at <http://archive.gipsa.usda.gov/pubs/psact.pdf> (accessed Nov. 18, 2012)).

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*; 7 U.S.C. §§ 193(b), 204, 211(b), 213(b), 228a, 228b-2(b) (cease and desist); *id.* at §§ 194(c), 194(g)–(h), 203–205, 207(f), 216, 228(a), 228b-3(c), 228b-3(g) (temporary and permanent injunctions); *id.* at §§ 193(b), 195(3), 203, 207(g)–(h), 213(b), 221, 228b-2(b) (civil penalties); *id.* at §§ 195(3), 207(h), 221 (imprisonment).

<sup>60</sup> Student Author, *Challenging Concentration of Control in the American Meat Industry*, 117 Harv. L. Rev. 2643, 2658 (June 2004).



ognize that their own goals intersect with those of small meat producers.

It would not be the first time that animals were the ancillary beneficiaries of another interest group's struggle against large processors: it was unions and not animal welfare groups that actually (albeit unintentionally) improved conditions for animals in slaughterhouses during the middle of the century.

### III. SLOWING DOWN THE SLAUGHTERHOUSE, 1930s-1950s

As early as 1910, observers of the industry noted the relationship between animal suffering and processing speeds at large meatpacking plants. According to Albert Leffingwell's *American Meat and Its Influence upon the Public Health*, the worst abuses in slaughterhouses operated by the Big Five occurred during the internal transportation and subsequent slaughter of sheep and swine. Sheep were routinely "caught up by the hind-leg in bunches of three or four at a time," passed to the butcher who was supposed to cut the throat, "and then to a long line of assistants, each of whom ha[d] one thing to do."<sup>61</sup> While it was intended that the animal would bleed to death before slaughterhouse workers could begin the rendering process, it was "evident that too little time [was] allowed for dying, and removal of the skin [was] almost certainly commenced before sensibility . . . ceased."<sup>62</sup> Leffingwell recounted the grotesque sight of "the palpitating dying thing in the hands of someone, actively at work upon it, from the moment it [left] the butcher's hands."<sup>63</sup>

Swine fared no better. The process of transporting the heavy animals from ground level to the upper floor where they were slaughtered was accomplished with the aid of a large fifteen-foot wooden wheel from which three-foot iron chains hung at regular intervals.<sup>64</sup> A worker would fasten a chain "to the leg of a pig . . . and the animal, however large, despite all struggles" was then "lifted into the air and delivered automatically on a tramway, whereon, head down," it came before a butcher.<sup>65</sup> After the carotid artery and jugular vein of the animal were severed, it too was meant to bleed to death before being dropped into a vat of boiling water.<sup>66</sup> But with a new animal butchered every five or six seconds, the slaughter created "a terrible sense of weariness" in the workers, and this mix of haste and fatigue led to errors.<sup>67</sup> All too often, "not enough time [was] allowed for the creature to die," while at other times "the knife misse[d] the artery at which it was

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<sup>61</sup> Albert Leffingwell, *American Meat and Its Influence upon the Public Health* 4 (Theo. E. Schulte, G. Bell & Sons, Ltd. 1910).

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* at 5.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> Leffingwell, *supra* n. 61, at 5.

aimed” or “the animal passe[d] the butcher without being struck at all.”<sup>68</sup> Here too Leffingwell noted the “terrible spectacle . . . of living creatures writhing in torment,” before being “slowly boiled alive.”<sup>69</sup> The workmen interviewed by Leffingwell freely admitted that such blunders occurred routinely “when the haste of butchery passe[d] a certain point.”<sup>70</sup> Needless animal cruelty, Leffingwell concluded, was most abundantly “occasioned by the haste with which every operation pertaining to slaughter is carried on.”<sup>71</sup>

The animal welfare movement of the early twentieth century, however, wasn’t paying particular attention to slaughterhouse abuses. It was not until the 1950s, with the creation of groups such as the Animal Welfare Institute and the Humane Society of the United States, that a real conversation about the treatment of animals in the slaughterhouse began.<sup>72</sup> But the movement’s public relations campaigns during these years were focused on other issues, primarily animal testing and the treatment of domestic animals.<sup>73</sup> The few public conversations about slaughterhouses during the 1950s employed emotion-laden rhetoric.<sup>74</sup> Consequent legislative victories echoed that rhetorical foundation in their substance: appeals to consumer morality culminated in the 1958 passage of the Humane Slaughter Act (HSA)<sup>75</sup> which, though an important victory insofar as it reflected a shift in the public’s earlier acceptance of slaughterhouse brutality,<sup>76</sup> only marginally reduced animal suffering.

<sup>68</sup> *Id.*

<sup>69</sup> *Id.* at 6.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 3.

<sup>72</sup> Animal Welfare Inst. (AWI), *Who We Are*, <http://awionline.org/content/who-we-are> (2012) (accessed Nov. 18, 2012) (“Since its founding in 1951, AWI has sought to alleviate the suffering inflicted on animals by people.”); Humane Socy. of the U.S. (HSUS), *About Us: Overview*, <http://www.humanesociety.org/about/overview> (Sept. 19, 2011) (accessed Nov. 18, 2012) (“Established in 1954, the HSUS seeks a humane and sustainable world for all animals.”); see Bernard Unti, *Protecting All Animals: A Fifty-Year History of the Humane Society of the United States* 6 (Humane Socy. Press 2004) (noting that the first national campaign that focused on “the pre-slaughter handling and slaughter of animals used for food” did not emerge until after 1954).

<sup>73</sup> See AWI, *supra* n. 72, at ¶ 1 (noting that in its early years, AWI’s “particular emphasis was on the desperate needs of animals used for experimentation”).

<sup>74</sup> See e.g. 104 Cong. Rec. 15381 (1958) (containing Sen. Hubert Humphrey’s advocacy for the Humane Slaughter Act, including the following quotation: “[W]e are morally compelled, here in this hour, to try to imagine—to try to feel in our own nerves—the totality of the suffering of 100 million tortured animals. The issue before us today is pain, agony, and cruelty—and what a moral man must do about it in view of his own conscience.”).

<sup>75</sup> Humane Slaughter Act, 7 U.S.C. §§ 1901–1907 (2006) (amended in 1978 and 2002).

<sup>76</sup> Public demand for the HSA was considerable. President Eisenhower noted that the volume of mail he received on the subject suggested that “no one was interested in anything but humane slaughter.” Gene Baur, *Farm Sanctuary: Changing Hearts and Minds about Animals and Food* 43 (Touchstone 2008).

Twice amended since its passage, the HSA requires that a slaughtered animal be “rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective.”<sup>77</sup> Meant to regulate the instant of slaughter rather than treatment preceding slaughter, the HSA intervenes only during the final seconds of an animal’s life and has no effect on how that animal is housed, transported, or processed prior to death.<sup>78</sup> The scope of the HSA is further limited with respect to species: it mentions “cattle, calves, horses, mules, sheep, swine, and other livestock” but it fails to protect fish and poultry.<sup>79</sup> The exclusion of poultry in particular is staggering when measured as a function of net animal suffering because chickens, turkeys, ducks, and geese currently comprise the majority of animals slaughtered for human consumption.<sup>80</sup>

Even those species that are covered by the HSA do not substantially benefit from its protections. Enforcement of the HSA has been a concern since its passage and remains markedly inadequate to this day. The U.S. Department of Agriculture (USDA)—which is charged with enforcement of the HSA—“demonstrated its loyalty to the meat industry” when it vehemently opposed its passage during the 1950s.<sup>81</sup> It is hardly surprising that enforcement would be lacking where a regulatory agency and the industry that it is tasked with monitoring are so closely allied. USDA supervisors, including the veterinarians who conduct slaughterhouse visits, “go easy on the [slaughterhouses] because they know that after they leave the USDA they can get . . . high-

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<sup>77</sup> 7 U.S.C. § 1902(a). The 1978 amendment gave inspectors the nominal authority to stop the slaughtering line when they directly observed instances of cruelty. Pub. L. No. 95-445, § 3092, 92 Stat. 1069, 1069 (1978) (codified as amended at 21 U.S.C. § 603). The second amendment, part of the Farm Security and Rural Investment Act of 2002 (commonly known as the 2002 Farm Bill), merely stated that the HSA should be fully enforced. Pub. L. No. 107-171, § 10305, 116 Stat. 493, 493–494 (2002) (codified as amended at 7 U.S.C. § 1901(a)(2)).

<sup>78</sup> 7 U.S.C. § 1904(a) (limiting the Secretary’s authority under the HSA “to conduct, assist, and foster research, investigation, and experimentation” to “determin[ing] methods of slaughter and handling of livestock in connection with slaughter which are practicable . . . and humane”).

<sup>79</sup> *Id.* at § 1902(a).

<sup>80</sup> At the time of the passage of the HSA, Americans consumed less poultry than they do today. Though the number of poultry farms declined by 50% during the last fifty years, output increased. Where the country consumed roughly 1.5 billion birds in 1959, that number rose to over 8 billion in 2009. While part of this increase is an inevitable result of population growth, changes in consumer preferences have also benefited the industry: in 1992, sales of chicken outpaced those of red meat for the first time, and ten years later, chicken comprised nearly 40% of the domestic market for meat. HighBeam Bus., *Broiler, Fryer, and Roaster Chickens: Industry Report*, <http://business.highbeam.com/industry-reports/agriculture/broiler-fryer-roaster-chickens> (2012) (accessed Nov. 18, 2012). It could be argued that the HSA’s initial failure to protect poultry is attributable to market conditions at the time of its passage and that the HSA has yet to be amended to reflect the increase in poultry consumption.

<sup>81</sup> Donna Mo, Student Author, *Unhappy Cows and Unfair Competition: Using Unfair Competition Laws to Fight Farm Animal Abuse*, 52 UCLA L. Rev. 1313, 1319 (2005).

paying jobs as . . . industry consultants.”<sup>82</sup> As a result of this conflict of interest, enforcement “is so weak that workers are often unaware that such laws even exist or that agricultural departments have authority to enforce humane treatment of farm animals.”<sup>83</sup> Ultimately, its limitations and accompanying under-enforcement stripped the HSA of any potential to actually reduce animal suffering.

But while the animal welfare movement, wedded as it was to rhetoric aimed at creating sympathy for animals, achieved only superficial gains such as the HSA, another interest group organized to slow down the meatpacking process for its own benefit. Even as market power of what were now the Big Four<sup>84</sup> declined in the late 1930s, their employees were taking gradual but significant steps toward improving working conditions in the slaughterhouse. Initially able to resist pressure to accept collective bargaining, the Big Four had to concede to unionization in the face of labor-friendly New Deal regulations.<sup>85</sup> And workers, as Sinclair had so dramatically illustrated, had abundant grievances. A 1943 report conducted by the Department of Labor (DOL) found that slaughterhouse accidents serious enough to require absence from work were double the national average for manufacturing operations.<sup>86</sup> Some injuries were a predictable part and parcel of the trade: Among butchers, Sinclair noted, one “could scarcely find a person who had the use of his thumb; time and time again the base of it had been slashed, till it was a mere lump of flesh against which the man pressed the knife to hold it.”<sup>87</sup> Because none of the Big Four plants visited by DOL inspectors contained power saws equipped with finger guards, such grisly amputations were relatively frequent.<sup>88</sup>

Workplace safety was touted as one of the main goals of union organizers, who pressured plant managers to install various safety devices including guards on cutting tools and machinery, which slowed

<sup>82</sup> *Id.*

<sup>83</sup> *Id.*; see Bill Winders & David Nibert, *Consuming the Surplus: Expanding “Meat” Consumption and Animal Oppression*, 24 *Intl. J. of Sociology and Soc. Policy* 76, 88 (2004) (“Humane treatment . . . is at a minimum in day-to-day slaughterhouse operations. Although the United States passed a[n] [HSA] in 1960, the regulations are minimal, and the only enforcement mechanism attached was the ability of inspectors to stop the infamous ‘disassembly line’ until a problem is corrected. Inspectors who attempt to use even this feeble enforcement tool frequently are harassed by slaughterhouse managers and negatively sanctioned by the superiors at the U.S. Department of Agriculture.”).

<sup>84</sup> After securing federal permission for the sale, the sons of Nelson Morris transferred their meatpacking operations to Armour, choosing to retain their interests in the stockyards rather than the packing plants. Pate, *supra* n. 10, at 35–36.

<sup>85</sup> Jimmy M. Skaggs, *Prime Cut: Livestock Raising and Meatpacking in the U.S. 1607–1983* 130 (Tex. A&M U. Press 1986).

<sup>86</sup> Roger Horowitz, “That Was a Dirty Job!” *Technology and Workplace Hazards in Meatpacking over the Long Twentieth Century*, 5 *Labor* 13, 14 (2008).

<sup>87</sup> Sinclair, *supra* n. 3, at 133–34.

<sup>88</sup> Bureau of Lab. Stat., U.S. Dept. of Lab., *Injuries. and Accident Causes in the Slaughtering and Meat-Packing Industry*, *Bull. No. 855* 9, 30–31, 38 (Govt. Prtg. Off. 1943).

down the assembly-line process.<sup>89</sup> Most importantly, union presence on slaughterhouse floors, “backed by a grievance system and occasional job actions, permitted a reduction in work tempo” and “slowed production speeds to curtail accidents.”<sup>90</sup> As expectations of processing speed were tempered by safety concerns, workers became slower and more careful in accomplishing the tasks of slaughter.

The efforts to reduce processing speed and resultant accidents proved successful: within seven years of the DOL report, the meatpacking industry’s injury rate dropped to one-third of the 1943 level, placing it fifty-second among the nation’s manufacturers.<sup>91</sup> As conditions changed, popular perception of the industry changed with them so that, by the mid-1950s, to be “a meatpacking worker was to have one of the best manufacturing jobs in the United States.”<sup>92</sup> Though some of its hazards remained inescapable, meatpacking was now a safer, cleaner, and more careful enterprise.<sup>93</sup> Deceleration not only improved the physical safety of the workers, but also simultaneously decreased their levels of frustration while on the job, a factor contributing not only to inadvertent blunders but also to intentional animal abuses in the slaughterhouse.<sup>94</sup>

#### IV. RECONCENTRATION, 1950s–2010s

Unfortunately, improvements in working conditions and the changes in animal treatment that accompanied them proved to be only temporary. At the root of this decline was the slow but sure reconcentration of the large processors. The Packers & Stockyards Act (PSA) had been successful in its objectives: by 1970, hundreds of meatpacking companies emerged to create a competitive market and the four largest processors held only 20% of the market share.<sup>95</sup> Within thirty-six years, however, those same companies would regain their former command of the market, and control approximately 80% of it today.<sup>96</sup> Reasons for reconcentration of market power are numerous and interdependent to so great an extent as to frustrate—if not wholly pre-

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<sup>89</sup> Horowitz, *supra* n. 86, at 15–16.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> Jennifer Evans, Rice News, *Schlosser: Meatpacking Reforms Have Rotted Away*, <http://news.rice.edu/2006/03/09/schlosser-meatpacking-reforms-have-rotted-away> (Mar. 9, 2006) (accessed Nov. 18, 2012).

<sup>93</sup> Horowitz, *supra* n. 86, at 92; see Evans, *supra* n. 92, at ¶ 8 (explaining that “[t]hings had turned around so much that even the worst company to work for at the height of the beef trust . . . had become one of the best. It even adopted a paternalistic attitude toward its workers.”).

<sup>94</sup> See Jennifer Dillard, *A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress through Legal Reform*, 15 Geo. J. on Pov. L. & Policy 391, 395–96 (2008) (suggesting a “connection between the cruel nature of the slaughterhouse industry and the cruel actions of the slaughterhouse workers” towards animals in slaughterhouses).

<sup>95</sup> Evans, *supra* n. 92, at ¶ 9.

<sup>96</sup> *Id.*

clude—an accurate assessment of individual causes. Among these were the birth of Concentrated Animal Feeding Operations (CAFOs) in the 1960s, the diminishing influence of meatpacking unions, and the growth of a fast-food industry that guaranteed a steady demand for cheap meat. These and other factors prompted a reversion to industry standards that are certainly as gruesome for animals and arguably as detrimental to human health—now of consumers rather than workers—as plant conditions had been during the 1930s and 1940s.

CAFOs, large-scale operations where animals are kept confined in mud and manure-impacted feedlots and fed corn rather than permitted to graze, emerged to meet the nation's growing demand for cheap meat.<sup>97</sup> Eager to forget World War II rationing, Americans ate more red meat than ever once government controls were lifted, and demand rose precipitously.<sup>98</sup> Where annual consumption of red meat at the conclusion of the war averaged 145.2 pounds per capita, it rose to 193 pounds by 1976.<sup>99</sup> The 64% population growth during that interval further amplified demand; not only did the number of red-meat consumers increase, but each individual was consuming more of it.<sup>100</sup> The numbers reflecting poultry consumption demonstrate a similar increase in demand: From 25.1 pounds per capita in 1945 to 39.9 pounds three decades later.<sup>101</sup>

Beef proved to be the principal driver of the post-war boom in meat demand.<sup>102</sup> While Americans already ate an average of 71.3 pounds of beef and veal in 1945, their taste for pork at the time was equally pronounced at 66.6 pounds, compared to 7.3 pounds of lamb, mutton, and goat and 25.1 pounds of poultry.<sup>103</sup> By 1976, however, average commercial consumption of all meat other than beef and poultry was in decline, and the increasingly populous nation ate only 61.5 pounds of pork and 1.7 pounds of lamb per capita.<sup>104</sup> While its poultry intake had increased to 39.9 pounds, America's growing love affair with meat centered on beef—of which it was now consuming 129.8 pounds per capita—often in the guise of a hamburger, which gained popularity throughout the fast food decades of the 1960s and 1970s.<sup>105</sup>

The importance of the fast food industry in general and of McDonald's in particular would be difficult to overemphasize in any analysis of processors' influence in the meat industry. McDonald's began as a single San Bernardino restaurant in 1940 and laid the foundation for

<sup>97</sup> Skaggs, *supra* n. 85, at 166.

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> Skaggs, *supra* n. 85, at 166.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*; Josh Ozersky, *The Hamburger: A History* 84 (Yale U. Press 2008) (“The post-war decades were the high summer of the hamburger, the years when burgers attained the summit of symbolism.”).

its success when it introduced the self-service drive-in system eight years later.<sup>106</sup> By relying on the principles of the factory assembly line, McDonald's standardized its offerings and could therefore franchise its restaurants throughout the country.<sup>107</sup> The decision to focus on standardization and uniformity in production proved economically advantageous: Growth was so rapid that McDonald's opened its 1,000th restaurant in 1968, the year in which the Big Mac first appeared on its menu.<sup>108</sup> Today, McDonald's remains the largest purchaser of ground beef in the country and is one of its most capacious buyers of pork and poultry.<sup>109</sup> The trend toward conformity in beef that began in the 1960s and 1970s has since expanded to include pork and poultry, which made considerable inroads onto fast-food menus.<sup>110</sup> It is understandably in the interest of McDonald's, and the numerous other fast food chains that have followed in its wake, to purchase meat from large suppliers who can guarantee not only a sufficient supply of product but also the level of uniformity expected by consumers. Business generated by the fast food industry has helped the meat processors grow as well, contributing to the reconcentration of the market.

Because processors can guarantee standardization only insofar as the producers supplying animals for slaughter can achieve it, uniformity in the slaughterhouse must be preceded by uniformity in the poultry house and on the livestock feedlot. Responding to this problem, "processors have begun to exert direct control over producers through supply contracts and ownership arrangements" in a scheme that inevitably gives processors overwhelming power over producers, regulators, and public perceptions of the meat industry.<sup>111</sup> In order to run plants at full capacity to realize economies of scale, processors must ensure a constant supply of animals at a consistent price.<sup>112</sup> To this end, processors enter supply contracts with producers whereby processors provide and, in many cases, actually own the animals raised on producers' land.<sup>113</sup> As Ralph Nader points out, processors have successfully pursued a strategy by which they now "own and operate massive factory farms, or contract in advance with factory farmers for a specified sup-

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<sup>106</sup> McDonald's, *McDonald's History: Travel through Time with Us!*, [http://www.aboutmcdonalds.com/mcd/our\\_company/mcdonalds\\_history\\_timeline.html](http://www.aboutmcdonalds.com/mcd/our_company/mcdonalds_history_timeline.html) (accessed Nov. 18, 2012).

<sup>107</sup> Eric Schlosser, *Fast Food Nation: The Dark Side of the All-American Meal 19–20* (Houghton Mifflin 2001).

<sup>108</sup> McDonald's, *supra* n. 106.

<sup>109</sup> Schlosser, *supra* n. 107, at 4.

<sup>110</sup> See e.g. McDonald's, *Full Menu Explorer*, [http://www.mcdonalds.com/us/en/full\\_menu\\_explorer.html](http://www.mcdonalds.com/us/en/full_menu_explorer.html) (accessed Nov. 18, 2012) (revealing that today on a McDonald's menu there is almost the same number of chicken sandwich options as there are hamburger options).

<sup>111</sup> Student Author, *supra* n. 60, at 2646.

<sup>112</sup> *Id.* at 2648.

<sup>113</sup> *Id.*

ply.”<sup>114</sup> Small producers, in turn, have found the open market contracted to the point that little demand for their animals remains.<sup>115</sup> By 2000, for example, concentration within the industry was so pronounced that it effectively “choked the open market for cattle and hogs.”<sup>116</sup>

Today, the trend toward reconcentration is most pronounced in the market for poultry, where the physical size and lifespan of the animal make the conformity achievable in CAFOs relatively inexpensive. The details of poultry consolidation contracts can be summarized in broad strokes: the processor provides individual growers with day-old chicks, feed, and technical support, thus assuring that the mature animals will be of comparable size and the resultant meat of uniform flavor.<sup>117</sup> Technical support includes guidelines and, in many cases, affirmative requirements for intensive confinement systems, as well as treatments with hormones and antibiotics, all of which are calculated to maximize the producer’s yield.<sup>118</sup> Individual producers provide land, labor, and capital to construct and maintain the CAFOs on their property.<sup>119</sup> While the sizes of such structures vary, a CAFO qualifies as “large” if it holds 125,000 or more birds.<sup>120</sup> As the expense of construction and maintenance forces many producers to take out loans, they become dependent on the continued business of the processors. Recognizing this power differential, processors demand that producers regularly renovate CAFOs to increase yield by confining the animals more closely. During an interview for the 2008 documentary *Food, Inc.*, Perdue grower Carole Morison disclosed that the processors “constantly come back with demands of upgrades for new equipment and the grower has no choice, they have to do it or [are] threatened with loss of a contract.”<sup>121</sup> This, she said, “is how they keep the farmers under control” and “spending money, going to the bank and borrowing more money” as their debt keeps building.<sup>122</sup>

This arrangement favors the large processor at the expense of the small producer: “The processor benefits by not having to shoulder the

<sup>114</sup> Ralph Nader, *Factory Farms Continue to Be a Blight on Landscape*, St. Paul Pioneer Press (Dec. 30, 2000) (available at [http://detagreens.tripod.com/factory\\_farms.htm](http://detagreens.tripod.com/factory_farms.htm) (accessed Nov. 18, 2012)).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> Schlosser, *supra* n. 107, at 141.

<sup>118</sup> See Alan R. Sams, *Poultry Meat Processing 1* (Alan R. Sams ed., CRC Press LLC 2001) (“Tightly managed breeding, incubation, rearing, and nutritional regimes have create a bird that is a virtual copy of its siblings. The uniformity has allowed poultry processing plants to develop into highly automated facilities with an efficiency that is unmatched by other live-stock processors.”).

<sup>119</sup> Schlosser, *supra* n. 107, at 141.

<sup>120</sup> Env’tl. Protec. Agency, *Animal Agriculture Concentrated Animal Feeding Operations—Livestock Operation Inspection*, <http://www.epa.gov/agriculture/factsheets/epa-305-f-03-009ag.html> (May 2003) (accessed Nov. 18, 2012).

<sup>121</sup> *Food, Inc.*, DVD at 15:56 (Magnolia Pictures 2008).

<sup>122</sup> *Id.* at 16:14.



large investments in facilities and technology, ensuring that producers will sustain the bulk of the losses in the event of a market downturn.”<sup>123</sup> Given this dichotomy, producers have neither the ability nor the incentive to concern themselves with the treatment of their animals. To the contrary, the processors’ overwhelming market power allows them to dictate the rules by which producers must play, and those who refuse are driven out of business. Morison’s Purdue contract, for example, was terminated when she refused to upgrade her wire mesh CAFOs to the dark, tunnel-ventilated model that cuts animals off from sunlight and fresh air for the entirety of their lives.<sup>124</sup> The effects of these arrangements are pervasive throughout the poultry market. Currently, almost all broiler chickens sold in the U.S. are raised under supply contracts between processor and producer.<sup>125</sup>

The swine and cattle industries are following suit. Like poultry CAFOs, swine “farms have become larger and fewer through horizontal integration,” while “processors have similarly consolidated and are beginning to form supply chains.”<sup>126</sup> Where only 65% of swine producers were selling their animals to slaughterhouses through supply contracts in 1999, that rose to 80% by 2001.<sup>127</sup> In these arrangements, a processor provides animals, premixed feed, and a regimen of production methods which, like those promulgated by poultry processors, sacrifice the quality of the meat and the treatment of the animal in favor of yield.<sup>128</sup>

The trend toward reconcentration is also becoming apparent in the beef industry, although on a smaller scale. In 2000, approximately 20% of the cattle in the U.S. were controlled by processors through captive supply arrangements “in which cattle are kept in processor-owned feedlots or bought through forward contracts,”<sup>129</sup> and that percentage has since risen considerably.<sup>130</sup> To compound the trend, the major beef processors routinely provide financing for CAFO owners who then manage cattle under the direction of the processors.<sup>131</sup>

Like processors’ control over poultry growing houses, their ability to manage cattle and swine CAFOs decreases competition by pushing small producers out of the market. Many independent producers “claim that they must contract with processors or pull out of the farming business altogether because of the concentration of power among a

<sup>123</sup> Student Author, *supra* n. 60, at 2649.

<sup>124</sup> *Food, Inc.*, *supra* n. 121, at 16:41.

<sup>125</sup> Student Author, *supra* n. 60, at 2644, 2649.

<sup>126</sup> *Id.* at 2649.

<sup>127</sup> *Id.*

<sup>128</sup> Matthew Scully, *Dominion: The Power of Man, the Suffering of Animals, and the Call to Mercy* 252 (St. Martin’s Press 2002).

<sup>129</sup> Student Author, *supra* n. 60, at 2650.

<sup>130</sup> See Schlosser, *supra* n. 107, at 138 (“On any given day in the nation’s regional cattle markets, as much as 80 percent of the cattle being exchanged are captive supplies.”).

<sup>131</sup> *Id.*

few large processors.”<sup>132</sup> The processors exacerbate the problem by giving large producers preferential treatment in contract negotiations, thus forcing an ever-growing number of small producers out of the market entirely.<sup>133</sup> The crux of the small producers’ problem is their lack of power vis-à-vis the behemoth processors. Those that do not accept the processors’ control are gradually driven out of business because reconcentration has rendered a lack of access to the handful of major meatpackers synonymous with a lack of access to the market itself. Producers willing to play ball with the processors are hardly safe, as the supply arrangements give “processors control over producers’ practices, which in turn forces small-scale producers out of the market” when they, like Morison, are unable to keep up with the debt incurred in upgrading their CAFOs on the demands of the processors.<sup>134</sup>

With respect to animals, reconcentration among large meatpacking firms has introduced intense confinement practices on CAFOs. The Environmental Protection Agency (EPA) defines a CAFO as an animal feeding operation of a certain size that confines animals for over forty-five days during a normal growing season in an area barren of vegetation.<sup>135</sup> The size requirement varies depending on the species housed in the CAFO: a large CAFO might contain over 125,000 chickens, over 1,000 cattle, or over 10,000 swine.<sup>136</sup> Here, the animals stand and sleep in their own bacteria-riddled excrement, unable to perform species-appropriate behaviors such as foraging for grass or, in the case of many chickens, unable to venture outside at all.<sup>137</sup>

In the slaughterhouse, reconcentration has reversed the modest but not insignificant gains in livestock treatment, accomplished chiefly through the slowing down of the slaughterhouse, which accompanied union efforts to make the industry safer for workers. As modern processing speeds increased well beyond those of the 1930s or 1940s, so has the frequency of careless slaughter. As Jennifer Dillard points out, “the frantic pace of production [in modern meatpacking plants] discourages workers from taking the care necessary to ensure that the animals do not suffer.”<sup>138</sup> Because “[p]rofit is maximized by increasing output . . . line speeds are so high that workers do not have time to properly stun an animal before it is eviscerated.”<sup>139</sup> All too often, workers react to the demand for speed by assuming a “flippant attitude toward the suffering of animals imprisoned in [the] industrialized

<sup>132</sup> *Id.*

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at 2658.

<sup>135</sup> 40 C.F.R. § 122.23(b)(1)–(2) (2011).

<sup>136</sup> *Id.* at § 122.23(b)(4)(iii), (v), (x).

<sup>137</sup> 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. St. U. J. Med. & L. 389, 395–96 (Summer 2005).

<sup>138</sup> Dillard, *supra* n. 94, at 394.

<sup>139</sup> Mallon, *supra* n. 137, at 401.

assembly line,”<sup>140</sup> and some workers relieve their own stress by intentionally abusing them.<sup>141</sup> While these concerns are reminiscent of those described by Sinclair, the net amount of animal suffering in the slaughterhouse has and continues to increase with the growth of the industry:

The cruelty inflicted on farm animals has increased over the last several years. As Americans increase their consumption of meat and kill rates rise, the “performance [of slaughterhouse workers] doesn’t simply decline—it crashes.” Because of the rise in standard kill rates, workers are pressured to kill more quickly and therefore become sloppy. Such sloppiness results in “incidents in which live animals [are] cut, skinned or scalded.”<sup>142</sup>

With respect to the risks that reconcentration poses to consumer health, of greatest immediacy is the contamination of the food supply. Approximately 30% of the country’s land base is devoted to growing corn, a ratio driven by government subsidies that enable farmers to grow the crop well below the cost of production.<sup>143</sup> Paid to overproduce corn, farmers are able to pass on the savings when selling it as animal feed—the federal government promotes corn precisely because large processors with an interest in purchasing it well below the cost of production have become so adept at lobbying Congress in favor of corn-friendly farm bills.<sup>144</sup> This overabundance of corn facilitated the birth of the feedlot in the 1960s. Cattle once permitted to graze on grass were corralled in one location and fed an amalgam of corn and meat scraps from the slaughterhouse. Today, the crop continues to be the primary component of feed for cattle, swine, and poultry, and is quickly becoming a staple even on salmon farms.<sup>145</sup>

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<sup>140</sup> *Id.* For Ed Van Winkle, a hog-sticker at a Morrell slaughterhouse in Iowa, “[t]he worst thing, worse than the physical danger, is the emotional toll. . . . Pigs down on the kill floor have come up and nuzzled me like a puppy. Two minutes later I had to kill them—beat them to death with a pipe. I can’t care.” Dillard, *supra* n. 94, at 391 (discussing the psychological effects of institutionalized animal cruelty on the workers perpetrating it).

<sup>141</sup> For example, a 2006 undercover investigation conducted by the People for the Ethical Treatment of Animals (PETA) documented Butterball slaughterhouse workers deliberately stomping on live birds, punching them, and slamming them against walls. An employee “stomped on a bird’s head until her skull exploded, another swung a turkey against a metal handrail so hard that her backbone popped out, and another was seen inserting his finger into a turkey’s [cloaca].” PETA, *Butterball’s House of Horrors: A PETA Undercover Investigation*, <http://www.peta.org/features/butterball-peta-investigation.aspx> (accessed Nov. 18, 2012). Workers bragged about kicking the animals, and one informed the undercover investigator that “[i]f you jump on their stomachs right, they’ll pop . . . or their insides will come out of their [rectums].” *Id.*

<sup>142</sup> Mo, *supra* n. 81, at 1318 (quoting Joby Warrick, “*They Die Piece by Piece*”: *In Over-taxed Plants, Humane Treatment of Cattle is Often a Battle Lost*, Wash. Post A01 (Apr. 10, 2001)) (internal citations omitted).

<sup>143</sup> *Food, Inc.*, *supra* n. 121, at 18:52 to 19:08.

<sup>144</sup> *Id.* at 19:08 to 19:35.

<sup>145</sup> *Id.* at 21:27 to 21:42; Michael Pollan, *The Omnivore’s Dilemma: A Natural History of Four Meals* 67 (Penguin Press 2006).

Processors prefer corn because it is cheaply available and grows larger animals more quickly. Accelerated growth, however, leads to an increased amount of illness and disease in the food supply, especially when its effects are compounded by the hormone additives that are now standard throughout the industry. As a grower who raises 300,000 chickens for Tyson pointed out, “[i]f you can grow a chicken in forty-nine days, why would you want one you gotta grow in three months?”<sup>146</sup> Perdue grower Morison has observed the effects of this process in her own animals as well, noting that when a chick transforms into a five and a half pound chicken in just seven weeks, its “bones and . . . internal organs can’t keep up with the rapid growth.”<sup>147</sup> Morison’s animals, raised according to her contract with Perdue, “can take a few steps and then they plop down . . . because they can’t keep up with all the weight that they’re carrying.”<sup>148</sup> Morison’s observations of her own animals are hardly atypical. According to the U.S. Department of Agriculture (USDA), if a person grew at the same rate as one of these chickens, an eight-week-old human baby would weigh 349 pounds.<sup>149</sup> As a consequence of this accelerated growth, 90% of broiler chickens have detectable gait problems<sup>150</sup> and many suffer chronic pain as a result of bone disorders.<sup>151</sup> Though the implications of these high intensity production methods for animals are clear, activists should focus vehemently on consequences for consumers: Birds rendered immobile and dying in their own excrement routinely enter the food supply.<sup>152</sup>

Poultry are not the only animals affected by the meatpackers’ reliance on corn. Cattle fed the grain bulk up more quickly than those that have been allowed to graze.<sup>153</sup> Because cows are not evolutionarily designed to eat corn, their digestive tracts become fertile ground for the development of *E. coli* that in some cases have mutated to become acid resistant.<sup>154</sup> The *E. coli* O157:H7 strain, for example, was first recognized in 1982 during an outbreak of a previously unknown gastrointestinal illness that would later be traced to contaminated ground beef.<sup>155</sup>

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<sup>146</sup> *Food, Inc.*, *supra* n. 121, at 10:36 to 11:03.

<sup>147</sup> *Id.* at 12:12 to 13:18.

<sup>148</sup> *Id.* at 13:18 to 13:27.

<sup>149</sup> Karen Davis, *Prisoned Chickens, Poisoned Eggs: An Inside Look at the Modern Poultry Industry* 101–02 (Cheryl Redmond ed., rev. ed., Bk. Publg. Co. 2009) (referencing U.S. Dept. Agric., *People on the Farm: Broiler Growers*, Leaflet (Govt. Prtg. Off. 1982)).

<sup>150</sup> *Id.* at 104 (citing a 1999 study by Gurbakhsh Singh Sanotra).

<sup>151</sup> *Id.* at 103–04.

<sup>152</sup> *Id.* at 101.

<sup>153</sup> Pollan, *supra* n. 145, at 71.

<sup>154</sup> Michael Pollan, *When a Crop Becomes King*, N.Y. Times A17 (July 19, 2002) (available at <http://www.nytimes.com/2002/07/19/opinion/when-a-crop-becomes-king.html> (accessed Nov. 18, 2012)); Michael Pollan, *Power Steer*, N.Y. Times Magazine ¶¶ 33–34 (Mar. 31, 2002) (available at <http://www.nytimes.com/2002/03/31/magazine/power-steer.html> (accessed Nov. 18, 2012)).

<sup>155</sup> Ecolab, *Escherichia Coli (E. Coli) O157:H7*, <http://www.ecolab.com/our-story/our-company/our-vision/safe-food/microbial-risks/e-coli> (2012) (accessed Nov. 18, 2012).

According to Michael Pollan, the new species of bacteria spawned in CAFOs is not only a product of the corn-rich diet but also of feedlot life itself:

The animals stand ankle-deep in their manure all day long, so that if one cow has it, the other cows will get it. When they get to the slaughterhouse, their hides are caked with manure, and if the slaughterhouse is slaughtering 400 animals an hour, how do you keep that manure from getting onto those carcasses? And that's how the manure gets in the meat. And now this thing that wasn't in the world gets in the food system.<sup>156</sup>

*E. coli* O157:H7 poisoning results in varying degrees of illness and, in extreme cases, can cause hemolytic uremic syndrome, which leads to kidney failure and death.<sup>157</sup> The Centers for Disease Control and Prevention estimate that of the 73,480 cases of *E. coli* O157:H7 poisoning reported in the first fifteen years following its discovery, 85% were caused by food-borne transmission.<sup>158</sup> At a hospitalization rate of nearly 30%, medical costs to consumers are considerable, and risks of infection are increasing.<sup>159</sup> During the 1970s, there were thousands of slaughterhouses throughout the U.S. Today, the thirteen largest plants process the vast majority of the beef sold in the country.<sup>160</sup> Because today's hamburger is a composite of meat from thousands of cattle, the odds of its contamination are statistically higher than those of a cut of beef from only one animal.<sup>161</sup>

Cheap, subsidized corn has not only driven down the price of meat and reduced its quality, but has negatively affected other food products as well. While the majority of recalls due to *E. coli* concern beef products, feedlot runoff containing *E. coli* O157:H7 has spread the bacteria to drinking water, spinach, lettuce, onions, apple juice, and even prepackaged cookie dough.<sup>162</sup> The 2006 *E. coli* outbreak in spinach and lettuce that resulted in 102 hospitalizations, 31 cases of irreversible kidney failure, and 3 deaths was already the twentieth such epidemic to involve leafy greens since 1996.<sup>163</sup> The federal government, in turn, has failed to protect consumers. In 1972, the U.S. Food and Drug Administration (FDA) conducted some 50,000 food safety inspections,

<sup>156</sup> *Food, Inc.*, *supra* n. 121, at 24:20 to 24:52.

<sup>157</sup> *Ecolab*, *supra* n. 155, at ¶¶ 4, 8.

<sup>158</sup> Paul S. Mead et al., *Food-Related Illness and Death in the United States*, 5 *Emerging Infectious Diseases* 607, 610 (1999).

<sup>159</sup> *Id.*

<sup>160</sup> *Food, Inc.*, *supra* n. 121, at 26:50 to 26:55.

<sup>161</sup> *Id.* at 27:05 to 27:20.

<sup>162</sup> Marian Burros, *Produce is Growing Source of Food Illness*, N.Y. Times A13 (Sept. 16, 2006); Gardiner Harris, *Nestle Recalls Cookie Dough Tied to E. Coli*, N.Y. Times A9 (June 20, 2009).

<sup>163</sup> Ctrs. for Disease Control and Prevention, *Update on Multi-State Outbreak of E. coli O157:H7 Infections From Fresh Spinach*, <http://www.cdc.gov/foodborne/ecolispinach/100606.htm> (Oct. 6, 2006) (accessed Nov. 18, 2012); Annys Shin, Yan Q. Mui & Nancy Trejos, *After the Breakout*, Wash. Post (Oct. 2, 2006) (available at [http://voices.washingtonpost.com/thecheckout/2006/10/after\\_the\\_spinach\\_outbreak.html](http://voices.washingtonpost.com/thecheckout/2006/10/after_the_spinach_outbreak.html) (accessed Nov. 18, 2012)).

but by 2006, that number dropped to 9,164; the decline in oversight is hardly surprising given the pervasive influence of meat processors in Washington, D.C., where lobbyists routinely become regulators, and vice versa.<sup>164</sup>

*E. coli* outbreaks are only one example of the negative externalities that increased concentration in the meat industry has forced upon consumers. While these are too numerous to detail here, their significance can be summarized in two basic premises. First, the control processors amass through contracts with producers harms the industry because it “encourages the use of harmful farming methods”<sup>165</sup> geared toward bulk production and these, in turn, reduce the quality of the consumed product. Second, the contracts “hamper[] the development and use of [curative] industry practices”<sup>166</sup> by preventing producers from making any independent or innovative decisions about the housing, feeding, or treatment of the animals in their care.

## V. CREATING COALITIONS IN THE JUNGLE

While the animal welfare movement may not have been ready to exploit the moment at which its interests intersected with those of unionizing slaughterhouse workers, it would do well to now recognize the possibilities of allying itself with small producers. The idea of such cooperation may prove repugnant to purists for whom nothing less than a total prohibition on all animal slaughter would be acceptable; nonetheless, those who can appreciate the benefits of incremental change would be wise to champion the cause of the small producer.

An animal raised on a small producer’s farm suffers less than it would in a Concentrated Animal Feeding Operation (CAFO) for two reasons. First, as discussed above, animals on small farms are by definition not subject to the intense confinement practices employed by factory farm operations. Unlike CAFOs, small meat producers generate several crops in order to sustain their operations, and utilize species-specific behavioral patterns of their animals—foraging by cattle, rooting by pigs—to their advantage in that endeavor.<sup>167</sup> As Pollan describes in *The Omnivore’s Dilemma*, such farms are “built on the efficiencies that come from mimicking relationships found in nature, and layering one farm enterprise over another on the same base of land.”<sup>168</sup> This return to traditional agricultural models is beneficial for animals who, unlike those penned by the thousands in CAFOs, can “fully express their physiological distinctiveness.”<sup>169</sup> To use one species as an exemplar of all,

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<sup>164</sup> *Food, Inc.*, *supra* n. 121, at 25:00 to 26:25.

<sup>165</sup> Student Author, *supra* n. 60, at 2658.

<sup>166</sup> *Id.*

<sup>167</sup> Pollan, *supra* n. 145, at 209–25.

<sup>168</sup> *Id.* at 215.

<sup>169</sup> *Id.*

instead of treating the chicken as a . . . protein machine, [small producers can] honor [ ]—and exploit [ ]—”the innate distinctive desires of a chicken,” which include pecking in the grass and cleaning up after herbivores. The chicken gets to do, and eat, what they evolved to do and eat, and in the process the farmer and his cattle both profit.<sup>170</sup>

Second, and perhaps less obviously, because the majority of the small producers who have remained in business have done so by appealing to customers willing to pay a high premium for organic,<sup>171</sup> antibiotic-free meat, the animals on their farms reap the benefits of organic accreditation. After Congress passed the Organic Foods Production Act of 1990,<sup>172</sup> the U.S. Department of Agriculture (USDA) was tasked with developing national standards for organic produce. These standards are set by the National Organic Standards Board, a fifteen-member committee comprised of four producers, three environmentalists, three consumer advocates, two processors, one retailer, one scientist, and one USDA accredited certifying agent.<sup>173</sup> Although animal welfare advocates are not represented on the Board and animal suffering was not a motivating concern behind the promulgation of the standards, an animal raised on an organic farm receives several protections not enjoyed by its counterparts in the CAFOs.

A producer wishing to certify livestock as organic—defined as “[a]ny cattle, sheep, goats, swine, poultry, or equine animals used for food or in the production of food”<sup>174</sup>—must assure “appropriate housing, pasture conditions, and sanitation practices to minimize the occurrence and spread of diseases and parasites.”<sup>175</sup> In a crucial difference from the CAFO, an organic farm must maintain “conditions which allow for exercise, freedom of movement, and reduction of stress appropriate to the species.”<sup>176</sup> Feed is also closely regulated: “Mammalian or poultry slaughter by-products” are disallowed,<sup>177</sup> as are the plastic pellets sometimes fed as roughage on CAFOs.<sup>178</sup> An organic producer may not administer hormones for growth promotion or any drugs, other than vaccines, in the absence of illness.<sup>179</sup>

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<sup>170</sup> *Id.*

<sup>171</sup> Marvin T. Batte et al., *Putting Their Money Where Their Mouths Are: Consumer Willingness to Pay for Multi-Ingredient Processed Organic Food Products*, 32 *Food Policy* 145, 147–48 (2006) (available at <http://www.aseanfood.info/Articles/11018629.pdf> (accessed Nov. 18, 2012)).

<sup>172</sup> Pub. L. No. 101-624, 104 Stat. 3935 (1990) (codified as amended at 7 U.S.C. §§ 6501–6523 (2006)).

<sup>173</sup> 7 U.S.C. § 6518; see also U.S. Dept. of Agric., *Natl. Organic Stands. Bd. (NOSB)*, <http://www.ams.usda.gov/AMSV1.0/NOP> (June 6, 2012) (accessed Nov. 18, 2012) (providing more information on the Board).

<sup>174</sup> 7 U.S.C. § 6502(11).

<sup>175</sup> 7 C.F.R. § 205.238(a)(3).

<sup>176</sup> 7 C.F.R. § 205.238(a)(4).

<sup>177</sup> 7 C.F.R. § 205.237(b)(5).

<sup>178</sup> 7 U.S.C. § 6509(c)(2)(A).

<sup>179</sup> 7 U.S.C. § 6509(d)(1)(C).

Though hardly ideal or free of cruelty, an animal's life on a small farm is quantifiably better than life in a CAFO. With this comparison in mind, the animal welfare movement should recognize that its interests intersect with those of small producers and divert legal resources toward helping small producers regain market share in the meat industry. With more legal and public relations experience than small producers, the animal welfare movement is particularly well-equipped to aid producers in exploring litigation strategies under the Packers & Stockyards Act (PSA) and to shape academic discourse about its interpretation.

But support, if it is to be given at all, must come swiftly. It may be argued that the animal welfare movement has already missed an opportunity to participate in discussions about the scope of the PSA. Since it was enacted, interpretation of the PSA remains contested. As John D. Shively points out in *Competition Under the Packers and Stockyards Act: What Now?*, the USDA, farmers, and academics—whom Shively aptly dubs “Populists”—have consistently argued that the scope of the PSA was meant to be broader than that of other antitrust statutes, including the Sherman Act, and that courts could find processors liable for violating the PSA even in the absence of affirmative proof of anti-competitive impact.<sup>180</sup> On the other hand, processors backed by Chicago School academics have argued as vehemently that the PSA is no more than an antitrust statute and, as such, requires a finding of an adverse impact on competition as a predicate for liability.<sup>181</sup>

As reconcentration in the meat industry intensified between the 1960s and 2000s, the Seventh, Eighth, and Ninth Circuits each addressed this issue. In the first of these cases, *Armour & Co. v. U.S.*,<sup>182</sup> the Seventh Circuit reasoned that “[w]hile [the PSA] may be broader than antecedent antitrust legislation found in the Sherman, Clayton, Federal Trade Commission and Interstate Commerce Commission Acts, there is no showing that there was any intent to give the Secretary of Agriculture complete and unbridled discretion to regulate the operations of packers.”<sup>183</sup> Noting that “Congress gave the Secretary no mandate to ignore the general outline of long-time antitrust policy by condemning practices which are neither deceptive nor injurious to competition nor intended to be so by the party charged,” the Seventh Circuit held that a violation of the PSA requires a showing of adverse impact on competition.<sup>184</sup>

Twelve years later, the Ninth Circuit took a different approach, finding in *De Jong Packing Co. v. U.S. Dept. of Agric.*<sup>185</sup> that proces-

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<sup>180</sup> John D. Shively, *Competition Under the Packers and Stockyards Act: What Now?*, 15 Drake J. Agric. L. 419, 425 (Fall 2010).

<sup>181</sup> *Id.*

<sup>182</sup> *Armour & Co. v. U.S.*, 402 F.2d 712 (7th Cir. 1968).

<sup>183</sup> *Id.* at 722.

<sup>184</sup> *Id.*

<sup>185</sup> *De Jong Packing Co. v. U.S. Dept. of Agric.*, 618 F.2d 1329 (9th Cir. 1980).



sors had violated the PSA on the basis of potential rather than actual anti-competitive impact:

The government contends that the purpose of the Act is to halt unfair trade practices in their incipiency, before harm has been suffered; that unfair practices under [the PSA] are not confined to those where competitive injury has already resulted, but includes those where there is a reasonable likelihood that the purpose will be achieved and that the result will be an undue restraint of competition. We agree.<sup>186</sup>

The Ninth Circuit went on to note that waiting for processors to “finally acquire[] sufficient market power to succeed” in their “efforts to coerce a change in market practices” would be nonsensical and disruptive to the market.<sup>187</sup>

The Eighth Circuit adopted both approaches in succession. First, in *Farrow v. U.S. Dept. of Agric.*, the Court found that livestock dealers who agreed not to compete against each other when purchasing cattle from a particular auction house were liable for violating the PSA although no adverse impact or intent to adversely impact competition had been shown.<sup>188</sup> The Court concluded that “a practice which is likely to reduce competition and prices paid to farmers for cattle can be found an unfair practice under the Act . . . even in the absence of evidence that the participants made their agreement for the purpose of reducing prices to farmers or that it had that result.”<sup>189</sup> In 1999, however, the Eighth Circuit altered course, holding that a contract which gave a processor the right of first refusal for cattle sold by feedlots did not run afoul of the PSA because it did not “potentially suppress or reduce competition sufficient[ly] to be proscribed by the Act.”<sup>190</sup> During the 2000s, the Fourth, Sixth, Tenth, and Eleventh Circuits continued the trend toward a narrow interpretation of the PSA, holding that a processor could be found liable under the PSA only where a showing of adverse impact on competition had actually been made.<sup>191</sup>

The Supreme Court has yet to weigh in on the issue, and while the debate about the scope of the PSA continues, academics within the animal welfare movement should add their voice to those of Populist academics. While the tide may favor a narrow reading of the PSA, hope is not yet lost. Even those circuits which interpret the PSA to require a showing of adverse impact have in dicta suggested that proof identical to that required under the Sherman Act may not be necessary in all

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<sup>186</sup> *Id.* at 1336–37.

<sup>187</sup> *Id.* at 1337.

<sup>188</sup> *Farrow v. U.S. Dept. of Agric.*, 760 F.2d 211, 214 (8th Cir. 1985).

<sup>189</sup> *Id.* at 214.

<sup>190</sup> *IBP, Inc. v. Glickman*, 187 F.3d 974, 977 (8th Cir. 1999).

<sup>191</sup> *Been*, 495 F.3d at 1230; *London v. Fieldale Farms Corp.*, 410 F.3d 1295, 1303 (11th Cir. 2005); *Philson v. Goldsboro Milling Co.*, No. 96-2542, 1998 U.S. App. LEXIS 24630, at \*11 (4th Cir. Oct. 5, 1998) (available at <http://www.ca4.uscourts.gov/opinions/Unpublished/962542.U.pdf> (accessed Nov. 18, 2012)); *Terry v. Tyson Farms, Inc.*, 604 F.3d 272, 277–79 (6th Cir. 2010).

applications of the PSA.<sup>192</sup> There is also reason to believe that the USDA, which favors an expansive reading of the PSA, would seize on further arguments in support of its position. In 2010, the Grain Inspection, Packers & Stockyards Administration (GIPSA) proposed a regulation which would clarify, once and for all, that “[a] finding that the challenged act or practice adversely affects or is likely to adversely affect competition is not necessary in all cases. Conduct can be found to violate [the Act] . . . without a finding of harm or likely harm to competition.”<sup>193</sup> GIPSA did not finalize the provision, noting that comments on the proposed language were sharply divided: supporters “point[ed] out it would provide legal relief for farmers and ranchers who suffer because of unfair actions, such as false weighing and retaliatory behavior, without having to show competitive harm”; but opponents “rel[ie]d heavily on the fact that several of the United States Courts of Appeals have ruled that harm to competition (or the likelihood of harm to competition) is a required element” under the PSA.<sup>194</sup> While GIPSA noted that comments related to animal welfare had been made with respect to other proposed rules,<sup>195</sup> it appears that the animal welfare movement did not seek to make a case for interpreting the PSA broadly.

In addition to joining the continuing debate about the scope of the PSA, the animal welfare movement should encourage small producers to challenge the anti-competitive practices of processors. While some producers have already begun confronting large processors on their own, thus far they have had little success and would undoubtedly benefit from the legal experience and resources that the animal welfare movement could provide, especially in jurisdictions where proving anti-competitive impact—a tall order even when one’s legal budget is not limited—is required.

In 2004, for example, an Alabama jury found in favor of ranchers who argued that Tyson’s practice of contracting exclusively with CAFOs for a set amount and type of cattle at a predetermined price drove down prices for ranchers seeking to sell cattle in the open market.<sup>196</sup> The district court overturned the \$1.28 billion verdict, and the

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<sup>192</sup> See *Armour*, 402 F.2d at 722 (holding that the PSA may be broader than the Sherman Act); *Been*, 495 F.3d at 1232 (requiring a showing of anticompetitive effect); *Farrow*, 760 F.2d at 214–15 (holding that a plaintiff must only show that a practice has caused or is likely to cause an anticompetitive effect).

<sup>193</sup> Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Conduct in Violation of the Act, 75 Fed. Reg. 35338, 35351 (proposed June 22, 2010) (to be codified at 9 C.F.R. § 201).

<sup>194</sup> Implementation of Regulations Required Under Title XI of the Food, Conservation and Energy Act of 2008; Suspension of Delivery of Birds, Additional Capital Investment Criteria, Breach of Contract, and Arbitration, 76 Fed. Reg. 76874, 76875 (Dec. 9, 2011) (to be codified at 9 C.F.R. § 201).

<sup>195</sup> *E.g. id.* at 76879–76880 (discussing comments received about the length of time processors are allowed to remedy a breach of contract with regards to animal welfare issues).

<sup>196</sup> *Pickett v. Tyson Fresh Meats, Inc.*, 315 F. Supp. 2d 1172, 1174 (M.D. Ala. 2004).

Eleventh Circuit affirmed on grounds that, in order to succeed under the PSA, a plaintiff “must show that the defendant’s unfair, discriminatory or deceptive practice adversely affects or is likely to adversely affect competition.”<sup>197</sup> Producers challenging a swine processor in the Eastern District of Virginia were similarly derailed in *Griffin v. Smithfield Foods, Inc.*<sup>198</sup> when the court found that they failed to state a claim under the PSA because, though they could show that the processor’s practices drove down prices, they did not allege that the processor was motivated by a desire to manipulate the market.<sup>199</sup> Time and time again, suits launched by producers under the PSA fail because plaintiffs do not demonstrate adverse impact or intent, and so it is here—in working alongside small producers to find and prepare better test cases—that the animal welfare movement’s litigation experience and resources could be leveraged to greatest effect.

Comparable antitrust cases in other industries offer some measure of hope that efforts made by the animal welfare movement to help producers would not be wasted. Challenges to increased concentration achieved through contracts between hospitals and payers, for example, have been resolved by determining whether existing or even potential adverse effects on competition exist, an assessment made by analyzing “a defendant’s market power within a given market structure.”<sup>200</sup> While many of these challenges in the medical arena have failed because of plaintiffs’ inability to show that the defendant had sufficient market share,<sup>201</sup> meat producers would have no such problems, because “control is more consolidated in the meat industry than [it is] in medical markets, and the PSA can . . . cover claims that would fail under other antitrust laws.”<sup>202</sup>

Because the scope of the PSA remains a contentious and open subject, the current academic discourse and litigation will likely shape subsequent implementation of the Act and, in so doing, determine its potency as an instrument against reconcentration in the meat industry. The window of opportunity for animal welfare activists willing to form unorthodox but potentially rewarding coalitions with small producers will not remain open indefinitely.

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<sup>197</sup> *Id.* at 1174; *Pickett v. Tyson Fresh Meats, Inc.*, 420 F.3d 1272, 1279 (11th Cir. 2005) (quoting *London*, 410 F.3d at 1303).

<sup>198</sup> *Griffin v. Smithfield Foods, Inc.*, 183 F. Supp. 2d 824 (E.D. Va. 2002).

<sup>199</sup> *Id.* at 827–28.

<sup>200</sup> *Women’s Clinic, Inc. v. St. John’s Health Sys., Inc.*, 252 F. Supp. 2d 857, 865 (W.D. Mo. 2002).

<sup>201</sup> *Id.* at 868.

<sup>202</sup> Student Author, *supra* n. 60, at 2661.

