

# SOCIAL PSYCHOLOGY AND THE VALUE OF VEGAN BUSINESS REPRESENTATION FOR ANIMAL LAW REFORM

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You never change things by fighting the existing reality. To change something, build a new model that makes the existing model obsolete.

*Buckminster Fuller*<sup>1</sup>

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1. As quoted in DANIEL QUINN, *BEYOND CIVILIZATION: HUMANITY’S NEXT GREAT ADVENTURE* 137 (1999).

## INTRODUCTION

Two objectives have been prominent in animal law advocacy: reduction of human-inflicted suffering and recognition of legal personhood for animals. These have meant quite different things to different advocates, but each contains the perspective that animals are worthy of individual, not just group or species-based, protection. Another commonality is that all legal advocates encounter the challenge that animals are legally classified as the property of humans. This means that animals are not yet legally recognized persons; they are currently “resources” legally owned and controlled by human legal persons.<sup>2</sup> While animals could, theoretically, be protected despite their property status, the primary statutes enacted to protect them (anticruelty statutes) only promise, but do not deliver, protection from the infliction of severe suffering.<sup>3</sup> In a capitalistic society in which owners of resources are generally encouraged to fully exploit their property as those owners think best, regulations that limit owner prerogative must be justified, and legal contests between legal objects (animals) and their owners (humans) will not often turn out well for animals.<sup>4</sup>

This Article is about representation of vegan businesses as an underutilized but important pathway for animal law. It avoids contests between property animals and their owners and reduces argumentation about whether particular acts of inflicted suffering are

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2. Professor Gary Francione has written extensively about the nature and consequences of animals’ legal status as the property of humans. *See, e.g.*, GARY L. FRANCIONE, *ANIMALS, PROPERTY, AND THE LAW* 32 (1995).

3. *See, e.g., id.* at 32 (noting that while anticruelty statutes prohibit “unnecessary suffering, . . . suffering that results in a more efficient production of animal products is tolerated”); David J. Wolfson & Mariann Sullivan, *Foxes in the Hen House: Animals, Agribusiness, and the Law: A Modern American Fable*, in *ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS* 206 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004) (describing how the agriculture “industry alone defines the criminality of its own conduct”); Darian M. Ibrahim, *The Anticruelty Statute: A Study in Animal Welfare*, 1 *J. ANIMAL L. & ETHICS* 175, 203 (2006) (arguing that “anticruelty statutes, while noble in theory, are ineffective in practice precisely because they do not challenge the underlying exploitation of animals”).

4. At best, anticruelty statutes protect against individual acts of purely gratuitous cruelty inflicted on individual animals. Exemptions for all institutionalized forms of inflicted suffering—agricultural uses; research; entertainment such as circuses, zoos, rodeos, television, and film; pest control—reduce the scope of anticruelty statutes to the point that little remains. Certainly they do not serve to protect the billions of animals used for “necessary” purposes. *See generally* the various sources cited in *supra* note 3.

justified or whether animals are or are not worthy of better treatment when such better treatment diminishes human entitlement. I argue that providing good alternatives to consuming or using animals facilitates improved animal welfare laws or even abolition of animal use altogether because such replacement consumption loosens consumers' perceived need to consume animal-derived products, which, in turn, increases receptivity to legal reform for the benefit of animals.

For purposes of this Article, "vegan business" is defined as any for-profit enterprise with the potential to reduce or eliminate the use of animals altogether, whether or not that is the objective of the entrepreneur and whether or not animals are the exclusive beneficiaries of the business's success.<sup>5</sup> Imagine a world without zoos and yet rich with opportunities for people to learn about and "experience" animals. Virtually real presentations of drone and "selfie" footage of animals in the wild could eventually lead to a world of greater appreciation for animals, more vibrant "experiences" with them, and a greater sense of urgency to protect wild animals and their habitats.<sup>6</sup> Imagine a world without time-

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5. Under this definition, a business that produces equipment for determining whether an egg will hatch as a male or female chick is not a "vegan business," even though such equipment could eliminate the suffering of male chicks, who are killed in any number of ways because they serve no purpose in the egg industry. *Germany Says 'No More Chick Shredding,'* ANIMALS AUSTRALIA, <http://www.animalsaustralia.org/features/germany-stops-shredding-chicks.php> (last updated Oct. 21, 2015). Although such equipment would allow egg producers to destroy embryonic male chicks before they develop nervous systems, use of the equipment would be in furtherance of egg production, which involves severe suffering far beyond that experienced by unwanted male chicks and does not eliminate the use of animals. By contrast, a "vegan business" would replace the use of animal products altogether. The Vegg, a completely plant-based substitution for eggs, is produced by a "vegan business." THE VEGG, <https://thevegg.com> (last visited Nov. 9, 2015).

6. Regarding the use of drones to capture intimate footage of wild animals, see, for example, *Camera Drones Capture Africa's Wild Side*, SMITHSONIAN.COM, <http://www.smithsonianmag.com/videos/category/smithsonian-channel/camera-drones-capture-africas-wild-side/?no-ist> (last visited Nov. 9, 2015); Russell McLendon, *Drone Films Amazing Aerial Video of Dolphins, Whales*, MOTHER NATURE NETWORK (Mar. 5, 2014, 9:42 AM), <http://www.mnn.com/earth-matters/animals/blogs/drone-films-amazing-aerial-video-of-dolphins-whales>; Sarah Gordon, *Is This the Future of Safaris? Drones Get Up-Close to Capture Spectacular Footage of Curious Giraffes and a Family of Rhino*, DAILYMAIL.COM (May 9, 2014, 4:20 AM), <http://www.dailymail.co.uk/travel/article-2624119/The-future-safaris-Drones-close-Kenyan-wildlife.html#ixzz3e69pzFGA>; and Barcroft TV, *Homemade Safari: Incredible Drone Footage of Serengeti Wildlife*, YOUTUBE (Jan. 7, 2014), <https://www.youtube.com/watch?v=q6iXT4-Oc2Q>.

Regarding the use of “camera traps” and other techniques to capture still photos and, sometimes, motion-picture footage of animals in the wild, see, for example, Krithi K. Karanth & Arjun Srivathsa, *India’s Top Wild-Animal Selfies*, NAT’L GEOGRAPHIC (July 7, 2014), <http://voices.nationalgeographic.com/2014/07/07/indias-top-wild-animal-selfies/>; Lukas Pilz & Josh Sampiero, *Getting Close with Wild Beasts (and Cute Meerkats)*, RED BULL (Mar. 30, 2015), <http://www.redbull.com/us/en/adventure/stories/1331714278919/wild-animal-close-up-photos>; Natalie Crofts, *20 Wild ‘Selfies’ of Animals in the Serengeti*, KSL (June 9, 2015, 11:55 AM), <http://www.ksl.com/?nid=1012&sid=35001670>; Laura Poppick, *Photos: Best Wild Animal Selfies*, LIVE SCI. (Dec. 11, 2013, 10:00 AM), <http://www.livescience.com/41749-best-wild-animal-selfies.html>.

For examples of the growing use of virtual reality technology for enjoyment of and education about wild animals and their habitats, see Jeffrey Bedrick, *3D Virtual Reality Rainforest*, NAT’L WILDLIFE HUMANE SOC’Y, <http://www.humanewildlife.org/rainforest.html> (last visited Nov. 9, 2015); *Cardigan Bay Sea Quest*, THE WILDLIFE TRUST OF SOUTH & WEST WALES, <http://www.welshwildlife.org/visitor-centres/cardigan-bay-marine-wildlife-centre/cardigan-bay-sea-quest/> (last visited Nov. 9, 2015); *Oman WildLife Virtual Reality Application*, OMAN INFO. TECH. AUTHORITY (July 22, 2014), <https://www.youtube.com/watch?v=dOKTchI3Ujk>; Stephen Babcock, *This Edtech Startup Is Bringing Virtual Reality to the Classroom*, TECHNICAL.LY BALT. (May 29, 2015, 8:23 AM), <http://technical.ly/baltimore/2015/05/29/alchemy-learning-virtual-reality-classroom-oculus/>; *Dorling Kindersley Multimedia (DK) Eyewitness Virtual Reality Bird Animals & Wildlife for Windows for 10 and Up*, AMAZON.COM, <http://www.amazon.com/Kindersley-Multimedia-DK-Eyewitness-Wildlife/dp/B0047PEGXG> (last visited Nov. 9, 2015). Some of these programs, such as Alchemy Learning’s project in Baltimore and the Wildlife Trust of South and West Wales’ Marine Wildlife Sea Quest, explicitly use the Oculus Rift virtual reality technology and goggles developed for advanced video gaming. See OCULUS, <https://www.oculus.com/en-us/> (last visited Nov. 9, 2015).

Although there is ongoing debate about the appropriate use of, and limits on, drones and other photographic or monitoring devices with regard to wildlife and other issues, both drones and camera traps have become established tools used by wildlife conservationists both in government agencies and NGOs. See, e.g., Linda Qiu, *Watch: Can Drones Help Save Wildlife Around the World?*, NAT’L GEOGRAPHIC (Nov. 15, 2014), <http://news.nationalgeographic.com/news/2014/11/141114-drones-wildlife-poaching-animals-conservation/>; Nancy Averett, *Drones Take Off as Wildlife Conservation Tool*, AUDUBON (July-Aug. 2014), <https://www.audubon.org/magazine/july-august-2014/drones-take-wildlife-conservation-tool>; Adam Vaughan, *WWF Plans to Use Drones to Protect Wildlife*, THE GUARDIAN (Feb. 7, 2013, 9:17 AM), <http://www.theguardian.com/environment/2013/feb/07/wwf-wildlife-drones-illegal-trade>; Josh Lew, *The Ethics of Drones in the Wild*, MOTHER NATURE NETWORK (Jan. 21, 2015, 2:04 PM), <http://www.mnn.com/green-tech/gadgets-electronics/stories/the-ethics-of-drones-in-the-wild>; Karanth & Srivathsa, *supra*. Hunters, fishers, and illegal poachers also have sought to take advantage of drones, however. See, e.g., Sigi De Vos, *Poachers, Conservationists Use Drones and GPS in Wildlife Battle*, NBC NEWS (Jan. 17, 2015, 6:18 AM), <http://www.nbcnews.com/news/world/poachers-conservationists-use-drones-gps-wildlife-battle-n287611>; Michael R. Shea, *The Drone Report: Do Unmanned Aerial Systems Have a Place in Hunting and Fishing?*, FIELD & STREAM

consuming, inaccurate tests on animals and with safe, less expensive, faster means to determine chemical toxicity. Such alternative methods of toxicity testing are already available and more are in the pipeline.<sup>7</sup> Imagine a world without the severe suffering that results when mother cows are separated from the calves they are forced to bear so that humans can take those cows' milk,<sup>8</sup> and that same world

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(Mar. 2014), <http://www.fieldandstream.com/articles/hunting/2014/03/drone-report-do-unmanned-aerial-systems-have-place-hunting-and-fishing>.

7. See, e.g., NAT'L ACAD. OF SCIS., NAT'L RESEARCH COUNCIL, COMM. ON TOXICITY TESTING & ASSESSMENT OF ENVTL. AGENTS, TOXICITY TESTING IN THE 21<sup>ST</sup> CENTURY: A VISION AND A STRATEGY—REPORT IN BRIEF (2007), [http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/Toxicity\\_Testing\\_final.pdf](http://dels.nas.edu/resources/static-assets/materials-based-on-reports/reports-in-brief/Toxicity_Testing_final.pdf) (calling for toxicity testing that is “quicker, less expensive, and more directly relevant to human exposures” by moving away from animal testing that is frequently unreliable or ambiguous as well as “expensive and time consuming” and moving toward more sophisticated modern test methods based upon laboratory exposure of human cells and tissue samples, new rapid assay technologies developed by the pharmaceutical industry, and the computational tools and Big Data analysis approach of bioinformatics). For the full report, see NAT'L ACAD. OF SCIS., NAT'L RESEARCH COUNCIL, COMM. ON TOXICITY TESTING & ASSESSMENT OF ENVTL. AGENTS, TOXICITY TESTING IN THE 21<sup>ST</sup> CENTURY: A VISION AND A STRATEGY (2007); see also K. van Leeuwen et al., *Using Chemical Categories to Fill Data Gaps in Hazard Assessment*, 20 SAR & QSAR ENVTL. RES. 207 (2009) (calling for increased testing using a chemical categories approach based upon similar toxicological behavior of substances); G. Schaafsma et al., *REACH, Non-Testing Approaches, and the Urgent Need for a Change in Mind Set*, 53 REGULATORY TOXICOLOGY & PHARMACOLOGY 70 (2009); Valerie Y. Soldatow et al., *In Vitro Models for Liver Toxicity Testing*, 2 TOXICOLOGY RES. 23, (2013); Shiranee Pereira & Massimo Tettamanti, *Testing Times in Toxicology: In Vitro vs In Vivo Testing*, 2 ALTEX PROC. 53 (2013); *In Vitro Predictive Toxicity Testing*, HEMOGENIX, [http://www.hemogenix.com/app\\_InvitroTox.php](http://www.hemogenix.com/app_InvitroTox.php) (last visited Nov. 9, 2015) (showcasing a wide range of non-animal testing alternatives); *Toxicology*, CYPROTEX, <http://www.cyprotex.com/toxicology> (last visited Nov. 9, 2015) (showcasing a wide range of non-animal testing alternatives); *In Vitro Toxicity Testing: Technologies and Global Markets*, BCC RES. (Jan. 2014), <http://www.bccresearch.com/market-research/pharmaceuticals/in-vitro-toxicity-phm017e.html> (noting that “the global *in vitro* toxicity testing market was valued at \$4 billion in 2011 and more than \$4.9 billion in 2012”). Regarding a recently developed testing technique to improve accuracy while avoiding animal testing—“organs on chips,” or computer chips designed to mimic the behavior of human organs—see, for example, James Mitchell Crow, *The Man Who Built Organs on Chips*, COSMOS (Jan. 19, 2015), <https://cosmosmagazine.com/life-sciences/man-who-built-organs-chips>; *Organs-on-Chips*, WYSS INST., <http://wyss.harvard.edu/viewpage/461/> (last visited Nov. 9, 2015); and *Three ‘Organs-on-Chips’ Ready to Serve as Disease Models, Drug Testbeds*, WYSS INST., <http://wyss.harvard.edu/viewpage/484/> (last visited Nov. 9, 2015).

8. Regarding suffering of dairy cows and calves from separation, see, for example, *How Does Drinking Milk Harm Cows?*, NZ DAIRY CRUELTY,

with flavorful nondairy cheese and milk products.<sup>9</sup> Slowly that world is becoming reality. Ideas at the cusp of the transition to a kinder-to-animals society deserve assistance from animals' legal advocates.

Lawyers who identify themselves as "animal lawyers" have been slow to get involved in representation of vegan businesses. More reasons for this will be explored in Part III of this Article, but here it is useful to note that one reason for this has been that the few lawyers able and willing to dedicate time and resources to help animals have been more drawn to stopping institutional and individual behaviors that cause current suffering to existing animals than to assisting companies whose products will reduce or eliminate future suffering. Stopping farming practices such as intensive confinement<sup>10</sup> has been seen as more compelling than assisting companies regarding legal hurdles to producing vegan products. An important related reason is that some animal lawyers do not identify with the idea of a vegan world in which animals are not used by humans. Along the lines of utilitarian philosopher Peter Singer's

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<http://www.nzdairy.org/thelifeofadairycow.htm> (last visited Nov. 9, 2015); *Cows for Dairy: The Milk of Human Unkindness*, WOODSTOCK FARM SANCTUARY, <http://woodstocksanctuary.org/learn-3/factory-farmed-animals/cows-for-dairy/> (last visited Nov. 9, 2015); and Sarah Taylor, *Dairy Cows and Their Calves: When Mother Is Separated from Baby*, VEGSOURCE (June 5, 2013), <http://www.vegsource.com/sarah-taylor/dairy-cows-and-their-calves-when-mother-is-separated-from-baby.html>.

9. There are numerous nondairy alternatives to milk, cheese, and other dairy products now available. See, e.g., Ashley Capps, *Your Guide to Going Dairy Free: Plant-Based Milks, Cheeses, and More*, FREE FROM HARM (Oct. 24, 2013), <http://freefromharm.org/food-products/your-guide-to-going-dairy-free/>; Carly Harrill, *5 Gourmet Vegan Cheeses for Any Occasion*, NATURALLY SAVVY (May 10, 2014), <http://naturallysavvy.com/eat/5-gourmet-vegan-cheeses-for-any-occasion> (noting that "rising in-store sales are starting to beg the question: Is gourmet vegan cheese the next big food trend?"); DAIYA FOODS, [HTTP://US.DAIYAFOODS.COM/](http://us.daiyafoods.com/) (LAST VISITED NOV. 9, 2015); Gwendolyn Mathers, *Vegans Take Home Trophies at the 10th Annual Grilled Cheese Invitational*, COMPASSION OVER KILLING (Apr. 30, 2012), <http://cok.net/blog/2012/04/vegans-win-grilled-cheese-invitational/>; Gwendolyn Mathers, *Award-Winning Aurora Borealis Dessert Grilled Cheese*, <http://us.daiyafoods.com/recipes/award-winning-aurora-borealis-dessert-grilled-cheese> (last visited Nov. 9, 2015); *Milk Free Chocolate - Dairy Free, Nut Free, Vegan Chocolate*, PREMIUM CHOCOLATIERS, <http://www.premiumchocolatiers.com/> (last visited Nov. 9, 2015).

10. See, for example, the Proposition 2 campaign in California, which successfully changed confinement standards for certain intensively confined animals. *California Proposition 2, Standards for Confining Farm Animals (2008)*, BALLOTEDIA, [http://ballotpedia.org/California\\_Proposition\\_2,\\_Standards\\_for\\_Confining\\_Farm\\_Animals\\_\(2008\)](http://ballotpedia.org/California_Proposition_2,_Standards_for_Confining_Farm_Animals_(2008)) (last visited Nov. 9, 2015); CAL. HEALTH & SAFETY CODE § 25990 (West 2012 & Supp. 2015) (codification of Proposition 2).

approach,<sup>11</sup> they hold the view that using, killing, and consuming animals is morally acceptable as long as those animals have not suffered. Support of vegan businesses seems to be overkill from this perspective.

I argue in this Article that support of vegan businesses makes it easier to secure change in *both* directions—reduction of human-inflicted suffering and reduction in use. In support of that argument, I begin in Part I with a consideration and application of two long-standing social psychological theories, cognitive dissonance and social conformity. These theories provide conceptual links between the degree of social normalization of the infliction of suffering on animals, human investment in seeing ourselves as morally good, human impulses to reduce dissonance between our behavior and moral beliefs, and blinding effects of social conformity.

Part II presents three examples of legal advocacy that can predictably enhance survival of vulnerable<sup>12</sup> vegan businesses (as I define the term above) and in which there is no record of animal advocacy of any kind. I begin with a product-labeling dispute between The Cultured Kitchen, an artisanal producer of cultured cashew cheese, and the California Department of Food and Agriculture. I next consider a California law that adversely impacted small-scale artisanal food vendors, followed by consideration of laws in California and New York City that have limited the operation of food trucks. Philosophical and pragmatic reasons for lack of animal lawyer advocacy emerge in these examples and are explored more directly in Part III.

## I. SOCIAL CONFORMITY AND COGNITIVE DISSONANCE THEORIES

Many people might guess that our views about what is acceptable or necessary to eat are colored by social conformity to eating standards we grew up with and adopted as we've moved through life in different social settings. Yet, few recognize how

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11. PETER SINGER, *ANIMAL LIBERATION: A NEW ETHICS FOR OUR TREATMENT OF ANIMALS* (1975).

12. In this context, a “vulnerable” vegan business is one that lacks sufficient resources to advance its legal interests. Some vegan businesses are so well-funded from the outset that they need little assistance with market access and navigating legal hurdles. An apparent example is Kite Hill, a vegan cheese manufacturer with a talented, resourceful, experienced founding team and a track record of remarkable success with innovation and market access. *See, e.g., Our Story*, KITE HILL, <http://www.kite-hill.com/about-us/our-story/> (last visited Nov. 9, 2015).

deeply social conformity runs. Similarly, many people might have learned already about cognitive dissonance as an explanation for our tendency to shift our beliefs about our actions, and the necessity of our actions, to align with a positive appraisal of ourselves. Yet here, too, it may be challenging to recognize the implications of this tendency. This Part considers research about these accepted social psychological theories and why support of vegan businesses holds promise for changing the cultural context in which people evaluate the need for legal reform.

### A. Social Conformity Theory

Many people know about the notorious experiments conducted by Stanley Milgram to test obedience to authority. Those experiments involved participants apparently giving electric shocks to confederates of the researcher, in accordance with researcher direction and in disregard of the confederates' expressions of pain.<sup>13</sup> Milgram found sobering degrees of willingness to abdicate responsibility for one's decisions, even to the extent of overriding basic humanity.<sup>14</sup> However, even before that, in 1951, Solomon Asch, a professor at Swarthmore College, designed a study to observe the effects of the broader phenomenon of social conformity.<sup>15</sup> His experiment required college students ("naïve participants"<sup>16</sup>) to perform a simple mental task of matching lines of the same length.<sup>17</sup> The task was intentionally very simple and could have been performed easily and correctly if the naïve participants made their decision without input from others. Instead, each naïve participant took the test with others who, as confederates of the researcher, unanimously chose an incorrect answer on several

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13. Stanley Milgram, *Behavioral Study of Obedience*, 67 J. ABNORMAL & SOC. PSYCHOL. 371 (1963).

14. *Id.* at 376-78.

15. S.E. Asch, *Effects of Group Pressure upon the Modification and Distortion of Judgments*, in *GROUPS, LEADERSHIP AND MEN* 177 (Harold Guetzkow ed., 1951); see also SOLOMON E. ASCH, *SOCIAL PSYCHOLOGY* 450-500 (1952); Solomon E. Asch, *Studies of Independence and Conformity: I. A Minority of One Against a Unanimous Majority*, 70 PSYCHOL. MONOGRAPHS 1 (1956).

16. I use the term "naïve participants" to refer to participants in the experiment who were not privy to the nature of the experiment. Asch used the term "critical subject." ASCH, *SOCIAL PSYCHOLOGY* *supra* note 15, at 454.

17. Test subjects compared a line on one card with three lines on another card to determine which of the three lines matched the line on the card with only one line. *Id.* at 451-52.

occasions during the experiment.<sup>18</sup> Asch reported that erroneous choices by the confederates altered the choice of the naïve participants in one-third of the trials.<sup>19</sup>

The test was very straightforward and easy for people not influenced by others expressing confidence in erroneous choices.<sup>20</sup> Between 20% and 42% of naïve participants remained consistently independent of the group,<sup>21</sup> although no participant completely disregarded the fact that his or her judgment differed from that of the group.<sup>22</sup> Among those who chose the correct answer, some were completely confident,<sup>23</sup> despite acknowledged difference; there were others who were uncertain to varying degrees but ultimately chose to go against the group.<sup>24</sup>

The situation with respect to those naïve participants who agreed with the group is particularly interesting for purposes of this Article. In the original experiment, only one person always yielded to the group's decision, giving the reason that he actually perceived the situation as they did.<sup>25</sup> That individual's perceptual alteration was rare for its consistency throughout all trials, but perceptual alteration does not seem at all uncommon among naïve participants who agreed with the majority. Asch suggested, but could not prove at that time, that altered perception was occurring with some regularity:

Others who yielded to the majority did so from time to time on a perceptual basis . . . . The contradiction of the majority produced at times what we may call "cognitive confusion." When the discrepancies were moderate, some subjects became increasingly uncertain and "made" their estimates conform to the majority on a seemingly perceptual basis. That this probably occurred seems supported by the observation that many subjects, when subsequently confronted with a pair of cards and informed of the erroneous estimates they had [given] earlier, showed unfeigned astonishment.<sup>26</sup>

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18. *Id.* at 455.

19. *Id.* at 457.

20. Asch reports a low error rate among control group members. *Id.*

21. *Id.* at 458. Twenty percent were consistently correct, but making a mistake would have been consistent with the control group, which had no wrong-choice confederates. *Id.* If naïve participants who made only one error are included with the 20% who made no errors, the percentage of consistently independent participants rises to 42%. *Id.*

22. *Id.* at 461.

23. *Id.* at 465-66.

24. *Id.* at 468.

25. *Id.* at 469.

26. *Id.* at 469-70.

In 2005, Gregory S. Berns and a group of researchers employed an experimental protocol, modeled after Asch's original experiment, to test whether perception really is altered or if social conformity operates at the level of conscious choice.<sup>27</sup> Using fMRI, the researchers hoped to identify brain activity sufficient to distinguish between participants who knowingly chose an incorrect answer and participants whose actual perception of the task was altered by knowledge of others' choices such that those participants genuinely believed the answer they gave was correct when it was not.<sup>28</sup> Again, the task, modeled after Asch's experiment, was simple enough that all participants would very likely have made the correct choice if they were given no input from others.<sup>29</sup> Unlike the Asch test, though, the Berns testing strategy involved telling participants as to some questions that a computer had generated the model (incorrect) answer and as to other questions that a group of humans had generated the model (incorrect) answer.<sup>30</sup>

The hypothesis, framed in terms of brain activity, was presented as follows:

[I]f social conformity resulted from conscious decision making, this would be associated with functional changes in prefrontal cortex [which is activated during executive decision making and conscious choice among alternatives], whereas if social conformity was more perceptually based, then activity changes would be seen in occipital and parietal regions [associated with processing of visual information].<sup>31</sup>

Berns first found, as did Asch, that there was a statistically significant shift in the direction of incorrect answers when the participant thought s/he was participating in a group in which other participants unanimously chose a different (erroneous) answer. According to the data derived from the experiment, participants' error rates increased to 41% when participants believed that a group of other participants had all selected the same (erroneous) choice.<sup>32</sup>

The research team next examined the question of how the participant was using her/his brain when s/he yielded or failed to

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27. Gregory S. Berns et al., *Neurobiological Correlates of Social Conformity and Independence During Mental Rotation*, 58 *BIOLOGICAL PSYCHIATRY* 245 (2005).

28. *See id.* at 245.

29. Berns et al. used mental rotation of shapes instead of the line drawings used by Asch. *Id.*

30. *Id.* at 246.

31. *Id.* at 245.

32. *Id.* at 248.

yield to the group's decision. They did this in two ways: fMRI analysis of brain activity while the subject was engaged in the task of making a choice and debriefing questionnaires.<sup>33</sup> As to the fMRI results, the researchers detected increased brain activity only in those parts of the brain associated with processing visual information.<sup>34</sup> As to the debriefing questionnaires, the researchers report that "[t]he vast majority of participants indicated that, at least on some trials, they went along with the external information because they thought that they had arrived serendipitously at the same correct answer."<sup>35</sup>

What about the times when the participants made independent choices? Although sometimes people are impervious to outside influence because they are rock-solid as to their own decisions, other times people experience dissonance between their initial choice and that of the group but ultimately stick with their initial choice. The discomfort could stem from a lack of certainty or because holding a minority position is uncomfortable, even if the person knows his/her answer to be correct.<sup>36</sup> The Berns research team examined the images of brain activity when participants were deciding differently than the group and found evidence that some participants experienced emotional strain when going against the grain.<sup>37</sup> Interestingly, those participants' brains registered emotional strain only when reaching a conclusion different from that of other humans and not when disagreeing with a computer-generated "correct" response.<sup>38</sup>

The use of fMRI is still relatively new, and results based on the early science of measuring and analyzing brain activity may well be replaced when measurement techniques improve. Nevertheless, if we take these early findings as indicative of an underlying propensity to conform even as to incorrect choices about matters we would analyze correctly if left to our own devices, then what of choices that are difficult to begin with? The foregoing suggests that if the society around us has normalized, say, inequality as to women or infliction of suffering on animals, scientific information that might have been effective to help us behave morally correctly—no matter how

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33. *Id.* at 246-47.

34. "[I]t was striking that the effects of social conformity were detected only in the most posterior aspects—the occipital and parietal lobes." *Id.* at 251.

35. *Id.* at 252.

36. Matthew J. Hornsey et al., *On Being Loud and Proud: Non-Conformity and Counter-Conformity to Group Norms*, 42 *BRIT. J. SOC. PSYCHOL.* 319, 332 (2003).

37. Berns et al., *supra* note 27, at 252.

38. *Id.*

accurate and detailed—will have limited effect. An individual looking at an image of hens stacked floor to ceiling in small, intensely crowded cages might literally perceive the situation as benign if others around her tell her that the birds are not suffering, cannot suffer, or that their owners would never cause them to suffer because such suffering would diminish the birds' productivity.<sup>39</sup> Asch's and Berns's research suggests that it is too simple to assume that such a person is consciously choosing an external characterization or suppressing her idea to the contrary; s/he may not be consciously aware that there is another way of perceiving or understanding what s/he is seeing once it has been characterized a particular way by someone else.

### B. Cognitive Dissonance Theory

If we add to the idea of social conformity the idea that people strive to reduce cognitive dissonance in the direction of maintaining a positive self-image,<sup>40</sup> we have a prescription for the consumption of products derived from animals without psychological discomfort about the suffering those animals endured. For example, people who have enjoyed eggs all of their lives, perhaps including eggs prepared by their mothers, may link positive feelings about their mothers, the experience of eating eggs, and positive feelings about themselves such that they cannot easily consciously process or admit information about the suffering of the hens who produced those eggs. Even if the person himself does not enjoy eggs, the fact that a majority of others he considers kind are eating eggs creates conflict in the context of information that horrible suffering was inflicted on

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39. See UNITED EGG PRODUCERS, THE EGG INDUSTRY AND ANIMAL WELFARE: A SCIENCE-BASED APPROACH 5, 11 (2014), <http://perma.cc/KSE7-ZRLY> (claiming that use of conventional housing systems—cages—for egg-laying hens protects hens from predators, disease, pecking, and aggressive behavior, and that cage-free production would require use of more hens to meet egg demand, since “more eggs are lost or destroyed in cage-free environments”).

40. Development of the idea of “cognitive dissonance” is attributed to Leon Festinger. See, e.g., LEON FESTINGER, A THEORY OF COGNITIVE DISSONANCE (1957). In 1959, Festinger and Carlsmith reported on an experimental method for generating and analyzing cognitive dissonance, and, more recently, fMRI has been used to assess brain activity associated with cognitive dissonance. Leon Festinger & James M. Carlsmith, *Cognitive Consequences of Forced Compliance*, 58 J. ABNORMAL & SOC. PSYCHOL. 203 (1959). An example of fMRI research is that of Vincent van Veen et al., *Neural Activity Predicts Attitude Change in Cognitive Dissonance*, 12 NATURE NEUROSCIENCE 1469 (2009).

the hens who produced those eggs. If we also take seriously research showing that many people aware that society is morally incorrect about a matter will still yield to social pressure because of the extreme discomfort they experience from being in the minority, we must accept that there are a lot of people who, for various reasons, cannot adopt the perspective of those who seek change in the treatment of animals. This would be true regardless of the amount and kind of information available.

So how does an advocate work within a social system that normalizes the infliction of suffering on animals and whose members all too readily perceive the situation of animals with conformist brains that do not absorb information about animal suffering? Professor Francione argues that as long as people consume animals or products derived from animals, they will not be able to separate their own self-interest from the interests of animals.<sup>41</sup> I believe he is correct, but I also believe that the psychological ties that bind us to animal consumption make it difficult for many people to become vegan. There is no doubt that some people do process information about the extent of animal suffering and consciously change their behavior in light of what they learned,<sup>42</sup> just as some participants in Asch's and Berns's experiments resisted conformity. But the percentage of people who can or do resist is relatively low; a relatively low percentage of Americans are vegans,<sup>43</sup> despite ready availability of information about environmental, health, and animal-welfare benefits associated with veganism.<sup>44</sup>

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41. *E.g.*, GARY L. FRANCIONE, *ANIMALS AS PERSONS: ESSAYS ON THE ABOLITION OF ANIMAL EXPLOITATION* 12-13 (2008).

42. Tom Regan writes about the different ways people become vegan. TOM REGAN, *EMPTY CAGES: FACING THE CHALLENGE OF ANIMAL RIGHTS* 21-34 (2004).

43. Accurate measurement is difficult, but it appears that a relatively small percentage of Americans is vegetarian or vegan. *See, e.g.*, Erin Trauth, *Is 2014 the Year of the Vegan?*, ONE GREEN PLANET (Jan. 16, 2014), <http://www.onegreenplanet.org/news/is-2014-the-year-of-the-vegan/>.

44. *See, e.g.*, *11 Convincing Reasons That Going Vegan Isn't Crazy*, READER'S DIGEST, <http://www.rd.com/health/healthy-eating/going-vegan/#> (last visited Dec. 18, 2015); Christian Nordqvist, *Vegan Diet: Health Benefits of Being Vegan*, MEDICAL NEWS TODAY (Dec. 2, 2015), <http://www.medicalnewstoday.com/articles/149636.php>; *57 Health Benefits of Going Vegan*, NURSINGDEGREE.NET, <http://www.nursingdegree.net/blog/19/57-health-benefits-of-going-vegan/> (last visited Dec. 18, 2015); *Rewarded for Being Vegan*, GENTLE WORLD (June 27, 2011), <http://gentleworld.org/rewarded-for-being-vegan/>; Kathy Stevens, *Longevity, Anyone? Top 20 Reasons to Go Vegan During World Vegan Month*, HUFFINGTON POST (Jan. 25, 2014, 4:01 P.M.), [http://www.huffingtonpost.com/kathy-stevens/vegan-diet\\_b\\_4282272.html](http://www.huffingtonpost.com/kathy-stevens/vegan-diet_b_4282272.html); James McWilliams, *The Evidence for a Vegan*

### C. Applications to Animal Advocacy

One way to address the phenomena of social pressure and of striving for internal consistency in one's beliefs and actions is to normalize vegan options such that they are not positioned as counter-majoritarian choices. Theoretically, if vegan options are available and satisfactory enough to serve as a practical and acceptable substitute for nonvegan options, social pressure to define "cheese" only as "a human food product made from the mammary glands of female non-human mammals," for example, will be less. When psychologically freed to make an independent choice because good plant-based options are available and others are also choosing those options, it is possible that the purchaser will be able to more objectively match up a choice of "dairy" cheese with the infliction of suffering on cows used to produce milk for humans and the choice of plant-based cheese with the absence of that infliction of suffering. This second step is dependent on the purchaser reaching a truly neutral or vegan-positive point in cheese selection. If researchers at Rensselaer Polytechnic Institute are correct, a meaningful shift in the definition of "cheese" and the conceptual linkage of animal-derived cheese with high degrees of human-inflicted suffering can occur when as few as 10% of the population holds these ideas as unshakeable beliefs.<sup>45</sup> Viable, visible vegan options are an important part of a behavioral shift that will open possibilities of cognitive and cultural shifts. My expectation is that those shifts will further respect-oriented rather than use-oriented human-animal relationships.

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*Diet*, THE ATLANTIC (Jan. 18, 2012), <http://www.theatlantic.com/health/archive/2012/01/the-evidence-for-a-vegan-diet/251498/>; *Veganism & The Environment: By the Numbers [Infographic]*, LIVING GREEN MAGAZINE (Feb. 13, 2013), <http://livinggreenmag.com2013/02/13/energy-ecology/veganism-the-environment-by-the-numbers-infographic/>; *Environmental Destruction*, VEGAN OUTREACH, <http://www.veganoutreach.org/whyvegan/environment.html> (last visited Dec. 18, 2015); *Why Go Vegan?*, THE VEGAN SOCIETY, <https://www.vegansociety.com/try-vegan/why-go-vegan> (last visited Dec. 18, 2015); *Top 10 Reasons to Go Vegan in the New Year*, PETA, <http://www.peta.org/living/food/top-10-reasons-go-vegan-new-year/> (last visited Dec. 18, 2015).

45. Rensselaer Polytechnic Institute, *Minority Rules: Scientists Discover Tipping Point for the Spread of Ideas*, SCIENCE DAILY (July 26, 2011), <http://www.sciencedaily.com/releases/2011/07/110725190044.htm> (reporting on J. Xie et al., *Social Consensus Through the Influence of Committed Minorities*, 84 PHYSICAL REV. E 1 (2011)).

All parts of this hypothesis turn on the availability of flavorful, appealing vegan choices. In fact, I believe that it is considerably more important to have good-tasting vegan options ubiquitously and easily available than to have occasional access to good vegan recipes, to a practicing vegan, or to a great vegan restaurant, even though all of those provide a social context for normalizing vegan choices in a nonvegan society. That is primarily because the availability of good vegan options will result in more shelf space dedicated to those products, and more shelf space allocation implies a large enough consumer base to justify the allocation.

Product placement is also important. If a person finds vegan cheeses alongside nonhuman mammary-gland-derived cheeses in the refrigerated section of the grocery store, the mere fact of the existence of the vegan cheese implies the existence of a reference group of people who buy the vegan cheese. Such availability should reduce pressure to conform to an expectation that “cheese” must be solely a nonhuman-mammary-gland-derived product and that everything else is “weird,” thereby opening up the freedom to make an independent choice—a choice that might stick and become a consumer’s favorite, thereby loosening his/her commitment to the idea that s/he “must” have cheese derived from animals. Asch found that any break in the unanimity of the group’s decision generated more independence of thought among naïve participants.<sup>46</sup>

The freedom to make an independent choice is important not only to reduce social conformity driven by avoidance of minority status or conformity driven by altered perception. For the person who is empathic enough to be receptive to the suffering of animals, psychological freedom to make a choice independent of the majority’s choice is important for reducing the internal conflict associated with wanting to eat cheese but not wanting to hurt animals. If a person can satisfy the desire for cheese without purchasing dairy cheese, s/he may more readily process the information about harms to cows associated with dairy production and choose not to participate in that market.

Vegan food must taste good and be reasonably health-sustaining to serve as a viable replacement for nonvegan food; it must be attractive to enough consumers who value it for its flavor and not for its connection to the moral choice it represents in order to draw a large enough consumer base to justify a retailer’s allocation of precious shelf space. Development and production of *good* vegan

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46. ASCH, SOCIAL PSYCHOLOGY, *supra* note 15, at 476-81.

cheese is difficult. Even Americans, the people who brought the world Velveeta cheese, balk at vegan cheeses with strange textures, unfamiliar flavors, and unpleasant gastrointestinal effects. Also significant to retailers is that cheese is perishable and must be thrown away if no one buys the product before the relatively short expiration date. A small company focused on vegan cheese and without considerable capital reserves may have difficulty developing a market presence sufficient to transition to an in-store sales opportunity, although it appears that consumers are increasingly willing to make online purchases that will establish a solid customer track record to present to brick-and-mortar retailers.

Some of these market hurdles are common to all new product developers, especially small businesses with minimal capital. However, vegan product developers have obstacles beyond customer receptivity and product fragility. One is that a retailer might well take a chance on a new type of a traditional food, such as a flavored potato chip, but not be willing to take a chance with a new type of food altogether, such as a vegan cheese. Another is that vegan food producers may be subjected to heightened regulatory requirements, which are difficult for vegan food producers to understand in any way other than as intentional market barriers.

## II. EXAMPLES OF MISSED OPPORTUNITIES FOR ANIMAL ADVOCACY

In Part II, I consider at length a product labeling dispute between a cultured cashew cheese producer and the California Department of Food and Agriculture. I then turn to problems of food distribution and consumer access: a law concerning sale of “homemade” products and laws regulating food truck vending.

The product labeling dispute is an important starting point because it has overlapping characteristics with the other examples presented in this Part. Essentially, vegan food producers are attempting to expand the concept of foods traditionally defined socioculturally only as animal derivatives. Conceptual flexibility creates the space for experimentation with foods that serve a similar purpose. Also, all of the vegan businesses I describe in this section have market-entry challenges. Finally, the legal work associated with these examples is not exclusively and directly connected to reduction of animal suffering, which may partially explain why animal advocates have been slow to warm to the idea of this type of legal work. None of these situations drew the support of legal advocates

for animals, yet support for vulnerable vegan businesses can benefit animals in multiple ways.

#### A. Product Labeling: The Cultured Kitchen

The Cultured Kitchen (TCK) produces raw fermented vegan products, such as cashew cheeses, sauerkrauts, gluten-free chocolate donuts, and desserts.<sup>47</sup> TCK came to the attention of the California Department of Food and Agriculture (CDFA) dairy division because of a recent voluntary recall of TCK's cashew cheese.<sup>48</sup> The CDFA inspected TCK's kitchen and reviewed whether TCK is compliant with California's licensing and labeling regulations. According to Rebeca Wise, TCK's majority owner, the CDFA advised TCK that TCK would have to be licensed and its cashew cheese products relabeled.<sup>49</sup> The label could not contain the word "cheese" or any misspelling of the word, such as "cheeze." Further, TCK was told that it would have to be licensed to produce a "product resembling a milk product," which would require TCK to produce the cashew cheese in a kitchen designed and regulated for processing animal-derived dairy products.

From TCK's perspective as a small start-up company, building and maintaining a dairy kitchen is a substantial financial hurdle because dairy kitchen requirements greatly exceed regulatory requirements for nondairy commercial kitchens. Moreover, there is no consumer value gained from the expenditures. TCK was told that sterilization and pasteurization equipment would be required, and that the kitchen had to have a sloping floor.<sup>50</sup> All of these requirements are antithetical or irrelevant for the production of raw vegan fermented foods.

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47. THE CULTURED KITCHEN, <http://theculturedkitchen.net/> (last visited Nov. 9, 2015).

48. Press Release, Cal. Dep't Pub. Health, CDPH Warns Not to Eat the Cultured Kitchen's Cashew Cheese Products Due to Health Risk (Dec. 31, 2013), <http://perma.cc/336L-XRD9>.

49. Nearly all the information presented in this section regarding the TCK case was derived from speaking with Rebeca Wise, majority owner of The Cultured Kitchen and its Head Chef and Educator, or from e-mails from Ms. Wise, or from conversations with her legal representative. Ms. Wise has reviewed and approved this section of the essay that concerns The Cultured Kitchen. E-mail from Rebeca Wise to author (Mar. 22, 2014, 12:32 PDT) (on file with author). Occasionally, as when quoting from Ms. Wise, a specific e-mail will be identified as the source.

50. E-mail from Rebeca Wise to author (Mar. 27, 2014, 02:41 PDT) (on file with author).

Because CDFA officials have declined to put their specific requirements as to TCK in writing,<sup>51</sup> TCK was confused as to both regulatory issues: labeling and licensing. As to labeling, California Food and Agricultural Code § 38956 provides that “[n]ondairy product containers and labels shall not contain any combination of words, symbols, marks, designs, or representations commonly used or associated with the sale, advertising, or distribution of milk products.”<sup>52</sup>

Also, according to Richard Estes, staff counsel with the CDFA, the Milk and Dairy Food Safety Branch of the CDFA

considers Cultured Kitchen products labeled as cheese . . . to be a product resembling a milk product as it is labeled as a substitute for cheese. (Food & Ag. Code, sec. 38903.5). It also qualifies as a product resembling a milk product because it “has the appearance, taste, smell, texture or color of a milk product.” (Food & Agric. Code, sec. 38912).<sup>53</sup>

TCK’s labels do contain the word “cheese,” but TCK resisted labeling changes because they cannot afford to throw away a large run of preprinted containers, their qualified use of “cheese” has not been confusing to customers,<sup>54</sup> and, most importantly, they want to be able to use the word “cheese” as they have been using it for customer recognition and self-presentation reasons. TCK argues that customers searching for alternatives to dairy cheese will search terms such as “alternative cheese,” “nondairy cheese,” or “nut cheese.” TCK contends, also, that using a label other than “cashew cheese” is misleading to consumers, who would know from use of the word “cheese” that the product is fermented (“cultured”) and that it has a “cheese-like” texture. Moreover, forcing TCK to use a different word

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51. Statement of TCK’s Legal Representative (Mar. 21, 2014).

52. CAL. FOOD & AGRIC. CODE § 38956 (West 2001).

53. E-mail from Richard Estes, Staff Counsel, CDFA, to Michael T. Roberts, Exec. Dir., UCLA Resnick Program for Food Law and Policy, (Feb. 28, 2014, 12:43 PST) (on file with author).

54. The label on the top of The Cultured Kitchen’s cashew cheese products clearly stated “Cashew Cheese, Dairy Free,” and all of the (non-dairy) ingredients were listed. The tops of the containers can be viewed online at *Chashew Cheeze*, THE CULTURED KITCHEN, <http://perma.cc/LFC5-XW8J> (last visited Nov. 9, 2015). The containers are clearly labeled “non-dairy.” The sides of the containers can be viewed online in the U.S. Food & Drug Administration’s recall notice at *The Cultured Kitchen® Voluntarily Recalls Cashew Cheese Due to Possible Risk of Contamination from Salmonella Photos*, FDA, <http://perma.cc/WB65-PZ7X> (last visited Nov. 9, 2015). In fact, TCK actively markets to consumers who want to avoid dairy for various reasons, and so TCK is particularly careful not to confuse purchasers as to whether their product contains dairy. E-mail from Rebeca Wise to author, *supra* note 49.

to refer to their product, as long as their labels are not misleading, seems to TCK to be a violation of a right to present the company and its products as they choose.

In an analogous situation involving the use of “milk” to describe nondairy milks, a northern California district court held on December 13, 2013, that a reasonable consumer would not be confused by clearly labeled “soymilk,” “coconut milk,” and “almond milk.”<sup>55</sup>

Plaintiffs essentially allege that a reasonable consumer would view the terms “soymilk” and “almond milk,” disregard the first words in the names, and assume that the beverages came from cows. The claim stretches the bounds of credulity. Under Plaintiffs’ logic, a reasonable consumer might also believe that veggie bacon contains pork, that flourless chocolate cake contains flour, or that e-books are made out of paper.<sup>56</sup>

In that there is a statutory requirement that “[n]ondairy product containers . . . not contain any combination of words . . . commonly used . . . with . . . milk products,”<sup>57</sup> TCK’s situation is different from the soymilk lawsuit. Nevertheless, CDFA’s position is still weak to the extent that avoidance of consumer confusion is an anchoring principle of labeling regulations.

Besides the question of whether clearly labeled nondairy milk product equivalents adequately prevent consumer confusion, there is another potential negative effect from allowing the word “cheese” or “milk” to appear only on animal-derived products: nonvegan consumers’ definition of what constitutes “cheese” cannot expand to include nondairy products, resulting in unnecessary delays in the normalization of completely satisfactory substitutes for animal-derived products. If nondairy cheese equivalents cannot be directly

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55. Order Granting Motion to Dismiss at 11, *Ang v. Whitewave Foods Co.*, 2013 WL 6492353 (N.D. Cal. Dec. 10, 2013) (No. 3:13-cv-01953). This dispute did not involve the California Department of Food and Agriculture (CDRA). The class action Plaintiffs claim to be consumers confused by the labeling of nondairy milks, and they rest their case on U.S. Food and Drug Administration regulations. *Id.* at 1-2, 7. The Court cites the FDA requirement that food be identified by “(1) the name prescribed by federal law or regulation, ‘(2) [t]he common or usual name of the food; or, in the absence thereof, (3) [a]n appropriately descriptive term, or when the nature of the food is obvious, a fanciful name commonly used by the public for such food.’” *Id.* at 8 (citation omitted). The Court then finds that, since there is no prescribed name for non-dairy milks, the common or usual name should be used. *Id.* at 9. In this case, “milk” qualified with its non-dairy origin would meet the objective of avoiding consumer confusion. *Id.* at 10.

56. *Id.* at 11.

57. CAL. FOOD & AGRIC. CODE § 38956 (West 2001).

labeled as such and are relegated to specialized sections of specialty markets, they will not serve as an introduction to thinking about and experiencing vegan foods as an accepted and acceptable alternative to animal-derived products. Conversely, allowing the definition of “cheese” to include nondairy cheese will loosen the grip of social pressure to reach for animal-derived cheese so that consumers can make independent choices without implied or actual social pressure to consume only animal-derived cheese. Acceptance of nondairy cheese as a reasonable alternative to animal-derived cheese can then loosen the investment consumers have in eating animal-derived products. It would enable them to more objectively process information about the suffering inflicted on animals for the production of products consumers would know from experience are not necessary for flavor or nutrition.

Even if using the word “cheese” were okay, the product would still be a “product that resembles a milk product” because of its flavor, texture, and color. As to such products, Mr. Estes has stated that:

[T]he Cultured Kitchen must comply with the sanitary requirements for the operation of a milk products plant to manufacture [products resembling milk products] as set forth in Food and Agricultural Code sections 33761 through 33782. Food and Agricultural Code section 33782 states that they apply to “any building or structure in which any product resembling a milk product is manufactured, processed or compounded.”<sup>58</sup>

He also maintains that a dairy kitchen has to be maintained as a matter of licensing requirements.<sup>59</sup> Yet, the burden on TCK to comply with the requirement of a dairy kitchen would greatly exceed the benefit to be obtained from treating a nondairy product like a dairy product, unless the actual goal is hindering the development of competitors with the animal-derived dairy industry. It is important to note that these requirements are additional to other regulatory requirements designed to ensure availability of clean, safe products. TCK is already subject to California’s Department of Health regulations and inspections.<sup>60</sup> The CDFA dairy division thus represents yet another regulatory agency, one whose requirements are not just redundant and unnecessary to maintain standards of cleanliness and product safety for TCK; they are irrationally

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58. E-mail from Richard Estes to Michael T. Roberts, *supra* note 53.

59. Interview with Michael T. Roberts, Exec. Dir., UCLA Resnick Program for Food Law and Policy, in L.A., Cal. (Mar. 21, 2014) (on file with author).

60. E-mail from Rebeca Wise to author (Mar. 7, 2014, 12:34 PDT) (on file with author).

burdensome because TCK does not produce animal-derived dairy products at all. TCK will most likely survive because a loyal consumer base had already been established before CDFA came on the scene, but the expense and time involved in compliance often could break a fledgling company, preventing its products from reaching market, preventing consumer access to products they are seeking, and delaying shift in the cultural definition of “cheese.”

TCK’s legal representative brought to CDFA’s attention the fact that the requirement to build out a specialized kitchen for the production of animal-derived dairy products, including equipment for pasteurization and sterilization, would be inappropriate and burdensome for this small business whose products do not actually include any animal-derived products at all.<sup>61</sup> One CDFA official said that the CDFA has statutory authority to require maintenance of a complete dairy kitchen with sterilization and pasteurization equipment even in the case of a producer of fermented products that would be destroyed by either process.<sup>62</sup> Another CDFA official agreed that there is broad statutory authority but said that the CDFA would only require a kitchen build-out appropriate for the particular product.<sup>63</sup> What is clear from both of these officials is CDFA’s position that it has complete statutory authority and broad discretion to place on TCK whatever requirements it deems appropriate because TCK’s product “resembles a milk product.”

Ultimately, the CDFA stuck to its stringent reading of the statutes, forcing TCK to change its labeling or sue.<sup>64</sup> TCK had been unable to operate for a substantial period of time due to CDFA delays in response, could not afford to litigate, and changed its label. It is vulnerable vegan businesses like this one—which have a good case according to reliable legal counsel but cannot afford to pursue litigation—that deserve the support of animal lawyers. This is particularly true when the outcome promises to redefine a food

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61. E-mail from Michael T. Roberts, Exec. Dir., UCLA Resnick Program for Food Law and Policy, to Rebeca Wise (Mar. 21, 2014, 3:32 PDT) (on file with author).

62. Interview with Michael T. Roberts, *supra* note 59.

63. *Id.*

64. TCK’s cultured “cheese” products are now called “Raw Cultured Cashew.” *Semi-Firm Herbs De Provence—Raw Cultured Cashew—Formerly Called Cashew Cheeze*, THE CULTURED KITCHEN, <https://culturedkitchen.myshopify.com/collections/frontpage/products/semi-firm-herbs-de-provence-raw-cultured-cashew-formerly-called-cashew-cheeze> (last visited Nov. 9, 2015).

product from exclusively animal-derived to one that includes plant-derived forms as well.

CDFA's official position can be characterized simply as a literal focus on an argument that "products resembling a milk product"<sup>65</sup> must meet particular animal-based dairy product standards because they fall into the same category as animal-derived products or because of greater risk of consumer confusion or consumer lack of familiarity with safety standards for vegan, raw, or fermented foods. However, some producers who have been hit with compliance raids, requirements for dairy kitchen equipment unnecessary for the production of their products, and pressure to change labels believe that a primary motive is protection of dairy industry interests.<sup>66</sup> Titles of CDFA officials responsible for these matters do nothing to dispel that belief. For instance, the CDFA official who first visited TCK's kitchen at the time had the title of "Dairy Foods Specialist, Milk & Dairy Food Safety Branch, CDFA,"<sup>67</sup> and that official's supervisor's title was "Dairy Program Coordinator, CDFA, Milk and Dairy Food Safety Branch."<sup>68</sup>

In fact, CDFA has no specific regulations or guidelines for the production of raw, fermented, or vegan foods, and there is no division in the CDFA organized specifically to oversee the production of such foods. By default, "products resembling milk products" fall within a framework designed for regulation of dairy products.

TCK does not resist regulation. In fact, Ms. Wise of TCK supports product-appropriate regulation for raw fermented foods:

I don't think the CDFA dairy division should regulate raw vegan foods, because they have no interest in seeing vegan companies succeed. The[ir] interest is the opposite. I think in America every food producer should have access to the technology and support from officials to produce the safest product possible. When I was looking up the category of what type

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65. CAL. FOOD & AGRIC. CODE §§ 38901, 38902, 38903, 38903.5, 38915, 38924 (West 2001).

66. This was explained to me by Ajna Sharma-Wilson, an attorney involved in legal issues pertaining to raw food production. Ms. Sharma-Wilson added that the broad discretion the CDFA believes it holds under the current statutory framework results in a lack of clarity about what producers are required to do and leads to apprehension about unfair application of that discretion. Interview with Ajna Sharma-Wilson (Jan. 11, 2014).

67. E-mail from Rebeca Wise to author (Jan. 16, 2014, 16:30 PDT) (on file with author).

68. Rebeca Wise identified the name of the individual with oversight in her e-mail. E-mail from Rebeca Wise to author, *supra* note 49.

of food producer we should register as, there was not a category for raw non animal based foods. But the movement of eating that way is growing and there needs to be safe/affordable guidelines put in place for the start up companies that will be coming forward.

Nut cheeses are not going away even if the [dairy industry] wants them to. . . . My fear is if we continue to slam producers, over regulate them, and make it impossible for them to stay in business, [i]t will create an over growth of radical producers and people creating in the[ir] own homes products that could cause potential health risks to themselves and others. Such would be a human tragedy.<sup>69</sup>

It would surely delay acceptance of fermented raw products if there were illness outbreaks associated with consumption of certain improperly prepared products. Indeed, news media were not shy about vilifying TCK products. Despite the facts that TCK recalled its products when there was no proof of contamination and no final results that their products made anyone ill,<sup>70</sup> media accusations greatly affected TCK's customer relationships, including those with vendor-distributors of their products.<sup>71</sup>

The hurdles TCK experienced are arguably the most thorny a small artisanal business could face because fermenting foods involves the deliberate introduction and culturing of bacteria in foods sold for human consumption—in a culture traditionally obsessed with destroying bacteria. Similarly, unfermented raw food producers come up against the obstacle that American regulators persist in a belief that raw foods, especially raw milk, carry greater risk of contamination such that even consumers who intentionally seek out raw milk should be protected from their misguided consumption choices.

One cannot dismiss the TCK dispute as simply the result of bias against raw and fermented food producers. Many small artisanal businesses suffer similar difficulty because American state regulators tend to think that small-scale food production poses greater public health and safety risks.<sup>72</sup> Since there is little to support that bias, there is room for artisanal producers to believe that large food producers are able to commandeer regulatory agencies to gain protection from competition presented by small artisanal producers. Big producers seem willing to aggressively defend the definition of food products

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69. E-mail from Rebeca Wise to author (Jan. 13, 2014, 14:23 PST) (on file with author).

70. E-mail from Rebeca Wise to author, *supra* note 49.

71. *Id.*

72. Interview with Michael T. Roberts, *supra* note 59.

that have traditionally contained animal products. For instance, Unilever sued Just Mayo, which produces mayonnaise without eggs.<sup>73</sup>

This situation should concern animal advocates because good vegan products—products that can shift the definition of what constitutes a particular type of food—often originate from the ranks of artisanal producers who believe in the value of their products, despite financial risks and difficulties marketing to a largely nonvegan population—risks a large corporate food producer may be unwilling to take.

#### B. Product Distribution: California's Homemade Food Act and Food Truck Regulation in New York City and Los Angeles

Product labeling is only one of many hurdles to securing customer awareness and loyalty. The product has to be available for consumers to purchase. Consider the small artisanal producer, such as TCK, that sells at farmers' markets until a sufficient loyal consumer base is established to warrant approaching local grocers for shelf space. With sufficient showing of enough unit sales, a retailer may be willing to allocate shelf space even though doing so could result in a lower rate of return than allocating that space to a producer of a traditionally appealing product with a documented higher sales volume.

Once vegan food is visible alongside nonvegan alternatives, shoppers receive the message that the vegan food is a viable choice and may give it a try. Over time, vegan products will improve in flavor, variety, and price. Consumers will develop a taste for such products and establish brand loyalties. Consumers' reliance on animal-derived products *and the processes perceived as "necessary" to produce them* may loosen sufficiently that their willingness to back animal-supportive changes, including legal changes, will

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73. Major Anglo-Dutch multinational corporation Unilever had sued a small San Francisco-based company, Hampton Creek, for using the name "mayo" to market its egg-free mayonnaise, but Unilever dropped the suit in December 2014, allowing Hampton Creek to work out any issues with industry groups and regulatory authorities. Ben Rooney, *Unilever Lays an Egg: Drops Just Mayo Lawsuit*, CNN MONEY (Dec. 19, 2014, 11:12 AM), <http://money.cnn.com/2014/12/19/news/companies/mayo-lawsuit-unilever/>; *Hellman's Owner Unilever Cracks over Egg-Free Just Mayo Lawsuit*, THE GUARDIAN (Dec. 19, 2014, 2:59 AM), <http://www.theguardian.com/business/2014/dec/19/hellmans-unilever-drops-egg-free-just-mayo-lawsuit> ("Anglo-Dutch firm drops legal claim that rival's use of 'mayo' amounted to false advertising as mayonnaise must contain egg.").

increase. This is the predictive pathway that supports legal assistance to vegan businesses as a means of animal advocacy for humane use of animals or abolition of the use of animals altogether.

Selling food to the public is highly regulated and not simply a matter of setting up a lemonade stand or reserving a space at a local farmers' market. State and local consumer protection regulations, as well as each farmers' market regulations, impose direct and indirect costs that increase costs of production and, ultimately, costs to consumers. For example, TCK operates in California where food sellers have been required to prepare food in commercial kitchens. Small start-up entrepreneurs, including many manufacturers of vegan foods, have had to add the cost of renting commercial kitchen space and bear the risk that sufficient commercial kitchen space is available when needed.<sup>74</sup> This increases the relative cost of artisanal products compared to products of the same type produced by larger scale operations with sufficient resources to own commercial kitchen space. Large-scale operations already enjoy competitive benefits of scale, such as bulk purchasing of ingredients.

In 2012, California enacted legislation<sup>75</sup> to exempt from the commercial kitchen requirement “nonpotentially hazardous food[.]”<sup>76</sup> producers lawfully permitted to operate a “cottage food” business and grossing less than \$50,000 per year from food sales.<sup>77</sup> The legislative findings and declaration of Chapter 415, Statutes of 2012, list as reasons for its enactment such considerations as the role of small-scale food producers in reducing the prevalence of obesity, increasing access to health-sustaining food, and the fact that “[a]t least 32 other states have passed laws that allow small business entrepreneurs to use their home kitchens to prepare, for sale, foods that are not potentially hazardous.”<sup>78</sup> These laws may not be sufficient to protect small-scale producers unless they preempt individual farmers' market regulations or local government

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74. The closest commercial kitchen to Cheryl Gaines, a southern California producer of jams, jellies, sauces, and seasonings, has been the Ronald McDonald commercial kitchen. However, she cannot easily reserve the kitchen for use during the height of the berry season because it is being used by children attending the Ronald McDonald camp where the kitchen is located. Cheryl Gaines, Statement at the Santa Monica Farmers' Market (Sept. 30, 2015).

75. 2012 Cal. Stat. ch. 415 (originally introduced as California Assembly Bill 1616 (2012)).

76. CAL. HEALTH & SAFETY CODE § 114365.5 (West 2012 & Supp. 2015).

77. § 113758(a).

78. 2012 Cal. Stat. ch. 415, § 1(f) (2012).

regulations, but they represent increasing awareness and attempts to reduce market-entry challenges experienced by such producers.<sup>79</sup>

Animal welfare is not on the list of justifications for the law. In fact, one of my animal law advocate acquaintances privately scorned this particular bill as trivial relative to authoring directly animal-protective legislation. Yet, animals do benefit from this legal change, and that would be true even if it were not the case that nondairy, nonmeat food items are more likely to be identified as “nonpotentially hazardous foods.”<sup>80</sup> Both vegan and nonvegan small-scale producers of nonpotentially hazardous foods benefit from this relaxation of the requirements, but vegan producers arguably benefit more because farmers’ market sales can reassure brick-and-mortar retailers to take a chance on a vegan food product. For example, a nonvegan chocolate chip cookie producer does not have to show that consumers will buy nonvegan chocolate chip cookies; consumers already buy them. That producer has to show only that consumers will buy a particular nonvegan chocolate chip cookie. On the other hand, a vegan chocolate chip cookie producer does have to provide evidence that consumers will buy vegan chocolate chip cookies at all because there are relatively few such cookies on the market. A vegan chocolate chip cookie producer thus has to show both that consumers will buy vegan cookies in general and *these* chocolate chip cookies in particular.

Similarly, food truck regulation can limit the development of consumer appreciation for vegan food. The owners of Cinnamon Snail, a successful kosher–vegan food truck operating in and around New York City,<sup>81</sup> finally gave up their food truck because of

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79. For example, many local farmers’ markets in southern California still require use of a commercial kitchen even for the production of “nonpotentially hazardous foods.” Even more restrictive markets allow the sale of products from commercial kitchens only if the producer herself has numerous licenses that only commercial producers, and not most small-scale farmer/vendors, can afford to obtain. Newly enacted California legislation creates even more requirements for small-scale farmer/vendors who sell at farmers’ markets. CAL. FOOD & AGRIC. CODE §§ 43100, 47000, 47000.5, 47001, 47002, 47004, 47010, 47011, 47020, 47021 (West Supp. 2015); see also Assemb. B. 1871, 2013 Leg., Reg. Sess. (Cal. 2014), [http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill\\_id=201320140AB1871](http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201320140AB1871).

According to one such vendor, the law reduces the efficacy of the California Homemade Foods Act and places particular burdens on some, such as jam and jelly producers, but not other farmer/vendors. Gaines, *supra* note 74.

80. CAL. HEALTH & SAFETY CODE § 114365.5 (West 2012 & Supp. 2015).

81. In 2014, Yelp identified Cinnamon Snail as “the 4<sup>th</sup> best eatery in America.” Jessie Katz, *Kosher Vegan Food Truck Rolls to a Stop*, FORWARD (Feb.

difficulty reliably securing permits to operate on New York City streets.<sup>82</sup> In order to own and operate a food truck in New York State, one must apply for a Mobile Food Vendor License, apply for Authority to Collect Sales Tax in New York, file quarterly as to collected sales taxes even if no sales have been made, pass a Department of Health eight-hour food-handling course, and obtain a Mobile Food Vending Permit.<sup>83</sup> Securing a Mobile Food Vending Permit is difficult because only a certain number of such permits are allowed at any one time,<sup>84</sup> and those with existing permits can renew indefinitely.<sup>85</sup> This results in an exceedingly long waitlist for permits, leaving few alternatives.<sup>86</sup> One alternative is to apply for a permit to sell only in New York City parks,<sup>87</sup> which would not enable as broad

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22, 2015), <http://forward.com/food/215243/kosher-vegan-food-truck-rolls-to-a-stop/>. Another sign of its success is that the owner has a cookbook (ADAM SOBEL, STREET VEGAN: RECIPES AND DISPATCHES FROM THE CINNAMON SNAIL FOOD TRUCK (2015)) and will be opening a brick-and-mortar restaurant built on the success of Cinnamon Snail. Rebecca Fishbein, *R.I.P. Cinnamon Snail Truck*, GOTHAMIST (Feb. 14, 2015, 4:45 PM), [http://gothamist.com/2015/02/14/rip\\_cinnamon\\_snail\\_truck.php](http://gothamist.com/2015/02/14/rip_cinnamon_snail_truck.php).

82. Fishbein, *supra* note 81 (“At the end of this month, on February 28th[, 2015], our permit expires, and there is not a new one available to us. I have thoroughly explored every possible way to continue having our truck(s) on the streets, but it’s time for a change for us.” (quoting owner Adam Sobel)). Sobel mentions other significant challenges of running a food truck, but failure to secure a permit was the final blow. *Id.*

83. See generally RULES OF THE CITY OF NEW YORK, tit. 24, tit. IV, pt. A, art. 89, especially §§ 89.01-89.19, <http://www.nyc.gov/html/doh/downloads/pdf/about/healthcode/health-code-article89.pdf>; *Food Protection Course for Mobile Vendors*, OFFICIAL WEBSITE OF THE CITY OF N.Y., <http://www1.nyc.gov/nycbusiness/description/food-protection-course-for-mobile-vendors> (last visited Nov. 9, 2015).

84. Adam Davidson, *The Food-Truck Business Stinks*, N.Y. TIMES MAG. (May 7, 2013), <http://www.nytimes.com/2013/05/12/magazine/the-food-truck-business-stinks.html?pagewanted=all&r=0> (“In the ‘80s, the city capped the number of carts and trucks at 3,000 (plus 1,000 more from April to October).”).

85. Ilya Marritz, *Broken Permitting System Forces Food Trucks into Black Market*, WNYC NEWS (June 6, 2012), <http://www.wnyc.org/story/214757-food-trucks/>.

86. “[T]here are so many names on the wait list (more than 2,000) that the Department of Health hasn’t taken names since 2007.” *Id.* Moreover, positions on the waiting list are not transferable, just as permits and licenses are not. See RULES OF THE CITY OF N.Y., tit. 24, ch. 19, § 19-11, <http://rules.cityofnewyork.us/content/section-19-11-eligibility-apply-mobile-food-vending-unit-permit>.

87. Such permits are called Restricted Area Mobile Food Vending (MFV) permits. See *Mobile Food Vending Unit Permit (Seasonal or Two-Year)*, OFFICIAL WEBSITE OF THE CITY OF N.Y., <https://www1.nyc.gov/nycbusiness/description/mobile-food-vending-unit-permit-seasonal-or-twoyear/about> (last visited Nov. 9, 2015).

a consumer base. Another solution is to purchase a permit on the black market, which is risky because the permits are legally nontransferable yet can cost as much as \$20,000.<sup>88</sup> A final solution is to rent a permit, which is also illegal.<sup>89</sup>

This set of legal rules and circumstances led one observer to claim:

Over the past few years, the economic and community impact of food trucks has only been positive, yet the stifling nature of mobile food vendor laws may be preventing the industry from thriving even more. The [New York City Food Truck Association] pointed out that its 50 food truck members contributed more than \$2 million to the [New York City] budget in 2011, and anticipated a contribution of \$3 million in 2012.<sup>90</sup>

Unlike the District of Columbia, which established a lottery system to enable vendors to “win” opportunities to sell in popular places, New York City has yet to establish an alternative, fair system to the one that allows unlimited renewals by holders of a limited number of permits.<sup>91</sup>

The consequence of scarce lawful access to Mobile Food Vending Permits means that a commercially viable food truck, such as a vegan food truck, cannot enter the competitive market, while relatively less viable or valued food trucks can continue to hold permits simply because those owners acquired permits early on. Because vegan food, as compared to many other types of food sold from food trucks, is a relative newcomer to the American gustatory scene, vegan food trucks suffer a greater disadvantage. That disadvantage is significant considering how difficult it is to establish a brick-and-mortar restaurant dedicated to a type of food not eaten by most Americans. It is also significant because a mobile source of good-tasting vegan food could inspire people in all walks of life in

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88. Joyce Lam, *What's It Take to Become a Food Truck Vendor in NYC?*, UNTAPPED CITIES (July 11, 2013, 9:00 AM), <http://untappedcities.com/2013/07/11/whats-it-takes-to-become-a-food-truck-vendor-in-nyc/>; see also RULES OF THE CITY OF NEW YORK, tit. 24, tit. IV, pt. A, art. 89, § 89.17.

89. Lam, *supra* note 88.

90. *Id.* See also the New York City Food Truck Association website, which includes in its FAQ section links to government requirements. *FAQ*, N.Y.C. FOOD TRUCK ASS'N, <http://www.nycfoodtrucks.org/faq> (last visited Nov. 9, 2015).

91. Eleanor Mueller, *Cities Struggle to Develop Fair Food-Truck Rules*, USA TODAY (Dec. 11, 2014, 5:12 PM), <http://www.usatoday.com/story/news/nation/2014/12/11/food-truck-regulations/20215643/> (“Officials in the District of Columbia last year established a food truck lottery system that mobile food vendors can enter to ‘win’ parking spots at popular locations like the National Mall each month.”).

all parts of a city to try plant-based alternatives to animal-based foods. Loosening of commitment to animal-based foods as an “essential” part of the American diet loosens the perception of “necessity” to exploit animals for human nutritional purposes. Since American state anticruelty statutes are framed in terms of avoidance of “unnecessary” harm to animals, a change in the sociocultural context of “necessity” to harm animals for food production could ultimately have significant legal effects.<sup>92</sup>

Food truck regulation is not unique to New York City; it is increasing and controversial in many jurisdictions.<sup>93</sup> In California, despite state laws providing that it is legal to sell food from vehicles parked on city streets<sup>94</sup> and that state law preempts local laws except as to local laws that further public safety,<sup>95</sup> at least two municipalities, Santa Ana and the City of Los Angeles, enacted ordinances limiting the length of time that a food truck can remain in one location.<sup>96</sup> In Los Angeles, city ordinances required food trucks in residential areas to move at least half a mile every thirty minutes

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92. See, e.g., ARIZ. REV. STAT. ANN. § 13-2910(A)(3) (West 2012) (“A person commits cruelty to animals if the person does any of the following . . . [i]ntentionally, knowingly or recklessly inflicts unnecessary physical injury to any animal.”); WASH. REV. CODE § 16.52.207 (2011) (“A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.”).

93. Food truck vending is increasing in municipalities throughout the United States, generating various types of regulations intended to balance the interests of brick-and-mortar restaurateurs and their mobile competitors. See *id.*

94. CAL. VEH. CODE § 22455(a) (West 2000 & Supp. 2012).

95. *Id.* §§ 21, 22455(b).

96. Santa Ana’s ordinance was successfully challenged in 2006 in *Vasquez v. City of Santa Ana*, described by Ingrid Eagly in her thoughtful, informative article about litigation on behalf of a food truck entrepreneur who challenged the City of Los Angeles’s similar ordinance. Ingrid V. Eagly, *Criminal Clinics in the Pursuit of Immigrant Rights: Lessons from the Loncheros*, 2 U.C. IRVINE L. REV. 91, 97-98 (2012). In 1991, Los Angeles first enacted an ordinance limiting the time a food truck could remain at a particular location in the city, but it was rarely enforced and, in any case, the law allowed vendors to return immediately once they had moved. *Id.* at 95. Then in 2006, Los Angeles changed the laws such that vendors could not return immediately, and began enforcing the laws with fines. L.A. MUN. CODE § 80.73(b)(2)(F) (2011) (effective July 23, 2006) (lunch trucks parked in residential areas must move at least one-half mile every thirty minutes; lunch trucks parked in commercial areas must move at least one-half mile every hour). Los Angeles County also enacted a time limit for food truck operation. L.A. CTY. CODE § 7.62.070 (2011) (during any three-hour block of time, lunch trucks could operate only thirty minutes in residential zones or sixty minutes in a commercial zone).

and not to return to the previous location for at least thirty minutes.<sup>97</sup> Food trucks in commercial districts could sell food in the same parked location for as long as sixty minutes but then had to move at least half a mile away and not return to the previous location for at least sixty minutes.<sup>98</sup> In addition to substantial fines for violations of the Code provisions,<sup>99</sup> these regulations adversely impacted costs of operation and consumer access. Imagine patiently waiting in line to purchase food only to have the truck pull away as you reach the counter.

Because California state law prohibits local regulation of mobile food vending operations except for public safety reasons,<sup>100</sup> the City of Los Angeles had to justify this set of rules on public health and safety grounds.<sup>101</sup> The City argued that the regulation promoted public safety by preventing groups of people from gathering, which increases criminal activity in neighborhoods.<sup>102</sup> Ultimately, that reasoning did not convince the judge as to the Los Angeles City ordinance,<sup>103</sup> just as it had not persuaded the judge as to the similar Santa Ana City ordinance.<sup>104</sup>

Several food trucks in Los Angeles serve vegan food, yet protecting food trucks was not identified by animal lawyers as a cause connected to their advocacy mission. After all, removing food truck barriers would provide access to nonvegan food trucks as well as vegan food trucks. Yet, there are few equally effective,

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97. L.A. MUN. CODE §§ 80.73(b)(1)(B), 80.73(b)(2)(F).

98. See §§ 80.73(b)(1)(B), 80.73(b)(2)(F).

99. § 89.60 (providing for fines as high as \$371).

100. CAL. VEH. CODE § 22455(b) (West 2000 & Supp. 2012).

101. In California there are many state, county, and municipal regulations concerning public health and safety. For a brief description, see Eagly, *supra* note 96, at 94-96. The challenge for the City of Los Angeles in this case was to justify durational parking limits as a matter of public health or safety. Arguably, requiring food trucks to move frequently increases, rather than reduces, risk.

102. The “broken windows” theory of policing and its role in L.A. City’s defense of the food truck ordinance is described and considered at length by Eagly. *Id.* at 97.

103. *Id.* at 108 n.104 (quoting *Gonzalez v. City of L.A. Dep’t of Transp.*, No. 09K08413 (L.A. Cty. Super. Ct. June 5, 2009)).

104. *Id.* at 98 n.42 (quoting Minute Order Granting Entry of Preliminary Injunction at 12, *Vasquez v. City of Santa Ana* (Orange Cty. Super. Ct. Aug. 18, 2006) (No. 05CC13450)) (“[T]he City of Santa Ana has not demonstrated a specific public safety issue . . . with the activities of the vendors. . . . Absent a specific verifiable public safety problem, the court cannot say that either of the solutions, by regulating their hours or requiring their movement, meets the requirements of a public safety exception to the clearly preempted area of street vending.”).

economically viable means of introducing vegan food to a broad sector of society besides through food trucks. Even if animal protectors believe that they can free-ride on advocacy for food truck operators, it is not clear that food truck operators have a great deal of access to legal advocates.<sup>105</sup> Moreover, an animal-protective advocate might approach food truck advocacy differently than a food-truck-focused representative. For example, the animal advocate might not care about a rule limiting a food truck vendor to particular districts on particular days if unlimited parking is allowed on the particular days the vendor is allowed to sell in specific districts. The food truck representative would likely want no restrictions, which might be a harder sell, except in the case of a fortuitous state law such as California's, which prohibits local regulation for reasons other than public health and safety.

### III. WHY HAVE ANIMAL LAWYERS NOT EMBRACED THIS TYPE OF ADVOCACY?

My claim is that representation of vegan businesses benefits animals by using existing sociocultural preferences for capitalism and business solutions to social problems, by avoiding disputes about the limits of (animal) property ownership, and, ultimately, by serving to increase consumer willingness to accept legal change that protects animals. If my claim is valid, why have animal lawyers not explored this pathway to any great extent? Part of it may simply be that there were previously too few vegan businesses to assist and too few animal lawyers to deal with existing severe, human-inflicted suffering. That there are signs of increasing willingness to assist producers of vegan products<sup>106</sup> might be the result in an increase in

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105. Food truck vending is not typically associated with high net income, and it is likely that vendors cannot individually, or perhaps even collectively as organizations, hire private attorneys to represent their interests. The UCLA Law School Criminal Defense Clinic represented food truck entrepreneur Francisco Gonzalez in contesting the Los Angeles City ordinances under which he had been fined and the Institute for Justice has identified food truck vendor defense as a priority area. *See* Eagly, *supra* note 96, at 105. This is not to say that private attorneys do not represent food truck vendors. *See id.* at 97 n.40; *see also* Mueller, *supra* note 91 (describing a lawsuit brought by a Chicago food truck vendor, Laura Pekarik). It is to say only that it is not clear that doing so is financially viable or that there are many attorneys willing to represent food truck vendors.

106. *See*, for example, the newly formed Vegan Trade Council, which, among other objectives, seeks to provide legal assistance in various ways. *About Us*,

the number of such producers and the number of legal advocates for animals.

Despite those signs of change, based on conversations I had with a few animal lawyers in the context of The Cultured Kitchen dispute with the CDFA, I suspect that for such animal advocates, the immediacy of existing animals' suffering remains more compelling and inspires more urgency than future-oriented advocacy. Lawyers working in animal law want to help animals first and foremost, not human entrepreneurs. The expectation that entrepreneurs have or should have resources sufficient to protect their interests is strong. Also at play may be concerns about the unknowns associated with enterprises not owned and operated by those who care about animal protection. For instance, drone technology might turn out to be important in making zoos obsolete, but drone technology could also be used for sport hunting.<sup>107</sup> Working to ban drone-facilitated hunting might seem a much more valuable use of an animal lawyer's limited time than assisting a company that may not have commitments to future cruelty-free developments and uses.<sup>108</sup>

Animal lawyers whose goal is reducing animal suffering and not elimination of use of animals might think vegan business representation too distant from their objective, but loosening consumer commitment to animal product consumption might well loosen consumer support of current legal rules that greatly advantage producers that inflict high levels of suffering on animals while turning animals into consumption goods. Certainly, there are many opportunities for legal work in support of vegan businesses, as the previous examples illustrate.<sup>109</sup>

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VEGAN TRADE COUNCIL, <http://www.vegantradecouncil.com/about-us.html> (last visited Nov. 9, 2015).

107. See sources cited in last paragraph in *supra* note 6.

108. Several states have taken steps to ban sport hunting with drones. Robert Gearty, *Eyes in the Air: States Move to Ban Drone-Assisted Hunting*, FOXNEWS.COM (Mar. 25, 2014), <http://www.foxnews.com/science/2014/03/25/eyes-in-air-states-move-to-ban-drone-assisted-hunting/>; see also Shea, *supra* note 6; *Wildlife Officials Take on Drone Hunting Controversy*, CBS DENVER (Jan. 9, 2014, 9:55 PM), <http://denver.cbslocal.com/2014/01/09/wildlife-officials-take-on-drone-hunting-controversy/> (discussing wildlife officials' views about the ethics and effects of drones on hunting).

109. See, e.g., Bernardo Teixeira, *Investing in a Plant-Based Future*, SEEKING ALPHA (June 16, 2015, 8:54 AM) <http://seekingalpha.com/article/3261725-investing-in-a-plant-based-future> (describing good options for investment in enterprises that produce vegan options but describing, also, challenges faced by such enterprises).

The greater mystery is why abolitionists—attorneys who oppose exploitation of animals for human purposes no matter how kindly an animal might be treated—would not have started representing vegan enterprises in greater numbers earlier on. Abolitionist lawyers have used their skills to secure access to vegan food by vegan incarcerated individuals,<sup>110</sup> to legally allow dissenting students to complete science courses without having to perform surgeries or kill animals,<sup>111</sup> and to protect the free speech rights of those protesting animal experimentation, for instance.<sup>112</sup>

An entirely different abolitionist approach seeks legal recognition of individual animals' legal personhood. This would seem to be a promising direct approach, particularly since scientists have confirmed similarity between some animal species and humans with respect to capacities through which humans have defined themselves as unique. If there are limited resources with which to provide legal assistance to animals, this might seem more promising than support of vegan entrepreneurs because it is more direct. If animals' legal personhood is recognized, they could initiate legal proceedings to change how they are treated.

Two recent lawsuits are worth brief exploration to understand the promise and limits of this attractive advocacy pathway. Both suits were brought to alter the property status of animals by calling

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110. See, e.g., David Cassuto, *You'll Eat It and Like It: Rehabbing Vegans in Texas Prisons*, ANIMAL BLAWG (Feb. 27, 2011), <https://animalblawg.wordpress.com/2011/02/27/youll-eat-it-and-like-it-rehabbing-vegans-in-texas-prisons/> (noting attorneys assisting vegan prisoners); see also Amy Ogden & Paul Rebein, *Do Prison Inmates Have a Right to Vegetarian Meals?*, VEGETARIAN J. (Mar./Apr. 2001), <https://www.vrg.org/journal/vj2001mar/2001marprison.htm>.

111. See, e.g., Sarah Lyall, *Student Sues SUNY on Frog Dissection*, N.Y. TIMES (May 3, 1990), <http://www.nytimes.com/1990/05/03/nyregion/student-sues-suny-on-frog-dissection.html> (Gary Francione represented student in first such suit against a university).

112. See, e.g., *Activists Challenge Animal Rights Terrorism Law as a Violation of Free Speech*, CTR. FOR CONST. RTS. (Dec. 15, 2011), <https://ccrjustice.org/home/press-center/press-releases/activists-challenge-animal-rights-terrorism-law-violation-free>. Regarding attorneys (not necessarily abolitionist attorneys) representing animal rights activists on free speech grounds outside the context of animal experimentation, see also, for example, *ACLU Files Lawsuit Challenging Miami-Dade Police Restrictions on Animal Rights Advocates at Miami Seaquarium*, ACLU (Jun. 2, 2015), <https://www.aclu.org/news/aclu-files-lawsuit-challenging-miami-dade-police-restrictions-animal-rights-advocates-miami>; and Beau Yarbrough, *Cal Poly Pomona Student Sues over 'Free Speech Zone'*, DAILY BULL. (Apr. 9, 2015, 11:41 AM), <http://www.dailybulletin.com/social-affairs/20150409/cal-poly-pomona-student-sues-over-free-speech-zone> (vegan student activist represented by Foundation for Individual Rights in Education (FIRE)).

for judicial recognition of animals as legal persons. One is PETA's 2011-2012 lawsuit to free five named orca plaintiffs owned by SeaWorld.<sup>113</sup> PETA's argument is that the orcas are persons illegally held by SeaWorld in violation of the U.S. Constitution's Thirteenth Amendment, which prohibits slavery and involuntary servitude.<sup>114</sup> Another such lawsuit is The Nonhuman Rights Project's habeas corpus petition, filed in 2013, which argues that chimpanzee plaintiffs Hercules and Leo are legal persons illegally detained and confined by Stonybrook University (for research purposes).<sup>115</sup> Both lawsuits are premised on the idea that the animals involved are legal persons awaiting legal recognition of that fact by common law courts in the United States.

In the orca lawsuit, the court held that the Thirteenth Amendment to the U.S. Constitution applies only to humans.<sup>116</sup> In the chimpanzee lawsuit, a lower court ordered Stonybrook to show cause as to how it is lawfully holding Hercules and Leo<sup>117</sup> but ultimately refused to recognize Hercules's and Leo's liberty interest.<sup>118</sup> Judicial denial of the legal personhood claims raised by PETA and The Nonhuman Rights Project does not mean that animals will not be recognized as legal persons eventually. Recognition of a right to

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113. Complaint for Declaratory and Injunctive Relief, *Tilikum v. Sea World Parks & Entm't, Inc.*, 842 F. Supp. 2d 1259 (S.D. Cal. 2012) (No. 3:11-cv-02476).

114. *Id.* at 1.

115. Verified Petition for Writ of Habeas Corpus at 1-2, Nonhuman Rights Project, Inc. v. Stanley, 2015 WL 1812988 (N.Y. Cty. Sup. Ct. April 21, 2015) (No. 152736/2015).

116. *Tilikum*, 842 F. Supp. 2d at 1264.

117. Order to Show Cause & Writ of Habeas Corpus at 2, *Nonhuman Rights Project, Inc.*, 2015 WL 1812988 (Index No. 152736/2015), <https://iapps.courts.state.ny.us/fbem/DocumentDisplayServlet?documentId=4D9287VfBiI66TYZPi4P1w==&system=prod>; *Judge Recognizes Two Chimpanzees as Legal Persons, Grants Them Writ of Habeas Corpus*, NONHUMAN RIGHTS PROJECT (Apr. 20, 2015), <http://www.nonhumanrightsproject.org/2015/04/20/judge-recognizes-two-chimpanzees-as-legal-persons-grants-them-writ-of-habeas-corpus/>. In a similar, habeas corpus lawsuit, a court ruled that it would "not recognize a chimpanzee as a human or as a person . . . who can seek a writ of *habeas corpus*." Transcript of Oral Argument at 26, *Nonhuman Rights Project, Inc. ex rel. Tommy v. Lavery*, No. 02051 (Fulton Cty. Sup. Ct. 2013), <http://perma.cc/6N6Y-885Y> (emphasis added).

118. Nonhuman Rights Project, Inc. *ex rel. Hercules & Leo v. Stanley*, 16 N.Y.S.3d 898, (N.Y. Sup. Ct. 2015) (denial of petition for writ of habeas corpus). The Nonhuman Rights Project has filed a Notice of Appeal. *See Notice of Appeal Filed in Hercules and Leo Case*, NONHUMAN RIGHTS PROJECT (Aug. 20, 2015), <http://www.nonhumanrightsproject.org/2015/08/20/notice-of-appeal-filed-in-hercules-and-leo-case/>.

noninterference with bodily integrity and legal personhood sufficient to protect that right seem basic and important in a rights-centered society. As philosopher Mary Midgley has written:

It is . . . hard to adopt effectively the compromise which some philosophers now favour, of saying that it is indeed wrong to treat animals in certain ways, but that we have no duties to them or that they have no rights. 'Animal rights' may be hard to formulate, as indeed are the rights of humans. But 'no rights' will not do. . . . Where the realm of right and duty stops, there, to ordinary thinking, begins the realm of the optional.<sup>119</sup>

As important as it may be ultimately, the legal road to such recognition is likely to be long and focused only on specific animals with capacities similar to humans' capacities. Both of these lawsuits on behalf of nonhuman animals are premised on the idea that orcas and chimpanzees are so similar to humans that justice requires their liberty from human tyranny and enslavement. Scientists have confirmed that chimpanzees and orcas have cognitive capacities similar to humans and that these animals can suffer in many of the same ways as humans.<sup>120</sup> Yet, with each new addition of information about human-like capacities of animals, humans have simply redrawn the line between animals and humans such that animals remain firmly on one side and humans on the other.<sup>121</sup> The scientific ground shifts every time there is some reason to accept some type of nonhuman animal as a moral or legal rights-holder. This shifting should not be surprising because status change, especially to a rights-holding status, would undoubtedly make use of animals more difficult.

Suppose that courts in today's cultural climate were to accept that orcas and chimpanzees are so like humans that they are legal persons. The central question is: would that declaration change things for them, for other animals, or for society? Perhaps the easiest

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119. Mary Midgley, *Duties Concerning Islands*, in ENVIRONMENTAL ETHICS 89, 94 (Robert Elliot ed., 1995) (footnote omitted).

120. E.g., Lori Marino, *Brain Structure and Intelligence in Cetaceans*, in WHALES AND DOLPHINS: COGNITION, CULTURE, CONSERVATION AND HUMAN PERCEPTIONS 115 (Philippa Brakes & Mark Peter Simmonds eds., 2013); Jane Goodall, *Why Is It Unethical to Use Chimpanzees in the Laboratory?*, 23 ATLA 615 (1995); Lori Marino, *Convergence of Complex Cognitive Abilities in Cetaceans and Primates*, 59 BRAIN BEHAV. & EVOLUTION 21 (2002); Alexandra G. Rosati & Brian Hare, *Chimpanzees and Bonobos Exhibit Emotional Responses to Decision Outcomes*, 8 PLoS ONE 1 (2013).

121. I have written extensively about this elsewhere. Taimie L. Bryant, *Similarity or Difference as a Basis for Justice: Must Animals Be Like Humans to Be Legally Protected from Humans?*, 70 LAW & CONTEMP. PROBS. 207 (2007).

of those questions to answer concerns other animals. If the basis for the lawsuits is similarity of particular animals to humans, then mere recognition of orcas' and whales' similarity to humans would say nothing about the similarity to humans of other nonhuman animals. The capacities by which we measure similarity validate human types of cognition, suffering, and responses to suffering. Even if we could painstakingly gain legal personhood status for some animals documented as sufficiently like humans, we would rapidly run out of qualified animals because our standards for admission are so limiting. With this model of entrance to a community of human (or human-like) legal persons, there is little room for diversity or difference no matter how much we may marvel at the unique capacities of animals that enable them to do things humans cannot do. The exclusive measure of animals is standards derived from human capacities. That we would allow some animals entry based on similarity to humans only reinforces a hierarchy of human qualities through which humans initially received moral and legal privilege to harm other animals. If anything, it gives new rights-holders the similar ability to harm other animals not included in the circle of rights-holders.<sup>122</sup> So nothing would change for other animals except, perhaps, the addition of a new class of oppressors.<sup>123</sup>

There is no reason to believe that things would change dramatically even for the particular animals involved in the lawsuits: chimpanzees and orcas. After all is said and done, what exactly would it mean to treat them the same as humans? At its heart, there are two fundamental questions about the consequences for animals of gaining legal personhood. One is: would chimpanzees and orcas be granted autonomy in the way that humans understand "autonomy" for themselves? The other is: what do we do about competition for resources among those in the circle of rights-holders? If chimpanzees and humans both want the same habitat, would humans *ever* yield to chimpanzees? If orcas and humans both want the same fish, would

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122. *Id.* at 218.

123. "If . . . sea lions were found to be sufficiently similar to humans that justice required their receiving entitlements, their representatives surely would try to safeguard the health of sea lions by securing for them all the fish they need, which would most likely mean increasing the production of fish by intensive fish-farming. Overall consumption of fish would increase, so that no sea lion would be undernourished, which occurs now when sea lions must do their own fishing. Sea lions—via their human representatives—would thereby add to the exploitation that fish already experience . . . assum[ing] that fish ha[ve] not [also] been granted entitlements." *Id.* at 218-19 (footnotes omitted).

humans *ever* yield to orcas? Already we see competition between marine mammals' and humans' uses of the oceans.<sup>124</sup> Would recognition of chimpanzees and orcas mean that humans would *have* to yield, at least some of the time? If that is what it means to be recognized as legal persons, such recognition may be a very long time in coming. That these are both stumbling blocks is indicated by questions about what is to happen to the orcas (should they be kept in sea pens or released or kept in some other type of housing?)<sup>125</sup> and the chimpanzees (would confining them in a chimpanzee sanctuary nicer than their current cages be the limit of our obligation?).<sup>126</sup> These are concerns about the extent to which humans must accommodate nonhuman animals if those animals' status is changed.

Despite these conceptual and pragmatic hurdles, it is likely that eventually animals will have to receive some kind of rights recognition because only laws based on rights and rights-holders confer adequate protection in the American context as it now exists.<sup>127</sup> Yet, even if that is true, there are still choices among pathways to that goal. For instance, elsewhere I have suggested that legally limiting owner prerogative to end the lives of healthy companion animals would be a simple legal step in the direction of

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124. See, e.g., Amended Complaint for Declaratory Relief & Injunctive Relief at 5-8, Conservation Council for Haw. v. Nat'l Marine Fisheries Serv., 2015 WL 1499589 (D. Haw. Mar. 31, 2015) (No. 1:13-cv-00684-SOM-RLP) (harms to marine mammals caused by sonar testing); Press Release, Ctr. for Biological Diversity, Lawsuit Launched to Protect Sea Turtles from Drowning in Shrimp Fishing Nets (Feb. 19, 2014), <http://perma.cc/MY2L-544F>; Christine Dell'Amore & Christina Nunez, *3 Surprising Sources of Oil Pollution in the Ocean*, NAT'L GEOGRAPHIC (Mar. 25, 2014, 10:06 AM), <http://perma.cc/Y2YW-YFT5> (noting that automotive oil, for example, may be an even bigger ocean pollutant than massive oil spills).

125. Chris Clarke, *State Law or Not, Orca Shows Need to Go*, REWILD (Mar. 11, 2014, 2:40 PM), <http://perma.cc/EV3D-PVEX>.

126. Verified Petition at 1-2, Nonhuman Rights Project, Inc. *ex rel.* Tommy v. Lavery, No. 02051 (Fulton Cty. Sup. Ct. 2013), <http://perma.cc/R998-XUGQ> (dismissed Dec. 17, 2013).

127. I emphasize "perhaps" because I believe that there is dynamism in the concept of rights and hierarchy in the structuring of law and society. If activists do not pursue advocacy that entrenches hierarchy but, instead, attempt to diminish the meaning of rights and the privileges of hierarchy there could be a shift such that, coupled with societal shifts in conceptions of animals, could produce alternative legal constructs. Such is beyond the scope of this Article except to say that it is possible to pursue legal advocacy for animals that is not premised on entrance to the hierarchy of worthiness represented by humans. This Article provides one example of that type of advocacy: legal advocacy to protect those who are creating the opportunity within society to break free of the idea of animals as resources.

generating and signaling change in the meaning of “ownership” of animals.<sup>128</sup> In this Article, I suggest that legal advocacy to protect the interests of producers of vegan products can shift cultural norms and eventually the legal rules about animals, including recognition of their personhood. No matter the rationale for the change in consumption behavior, respect for animals or health or social conformity to a new “trendy” way of eating, not consuming animals loosens the hold of the idea that we need to consume animals and the related idea that our need to consume them justifies however we treat them. At its heart, this is an argument about legal rules evolving in the context of culturally supported individual behavioral shifts (choice of consumption goods) rather than legal rules evolving based on scientific developments (chimpanzees and orcas documented as having capacities similar to humans).

#### CONCLUSION

The idea of this Article emerged from conversations I had with animal lawyers regarding representation of The Cultured Kitchen. It was striking to me that the legal department of one of the animal protection organizations responsible for fighting the United Egg Producers’ fraudulent “Humane Care Certified” label<sup>129</sup> and quite knowledgeable generally about labeling law would be unwilling to fight for a label that changes the definition of “cheese” from “a human food product made from the mammary glands of female non-human mammals” to “a food product consumed as a protein source or complement to beverages or other foods.” Providing legal assistance to cruelty-free producers interested in forging new definitions of formerly animal-based foods seems at least as beneficial to animals as litigating for a change in egg carton labels from “Humane Care Certified” to “Certified Humane Raised and Handled.”<sup>130</sup> Which does more for consumers interested in protecting

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128. Taimie L. Bryant, *Sacrificing the Sacrifice of Animals: Legal Personhood for Animals, the Status of Animals as Property, and the Presumed Primacy of Humans*, 39 RUTGERS L.J. 247 (2008).

129. See, e.g., Nelson Hernandez, *Egg Label Changed After Md. Group Complains*, WASH. POST (Oct. 4, 2005), <http://www.washingtonpost.com/wp-dyn/content/article/2005/10/03/AR2005100301593.html>; Alexei Barrionuevo, *Egg Producers Relent on Industry Seal*, N.Y. TIMES (Oct. 4, 2005), <http://www.nytimes.com/2005/10/04/business/media/egg-producers-relent-on-industry-seal.html>.

130. *Our Mission*, HUMANE FARM ANIMAL CARE, <http://certifiedhumane.org/> (last visited Nov. 9, 2015) (HFAC calls itself “the leading non-profit certification

animals? Which is likelier to decrease consumption of animal products?

To me, the answer to those questions is obvious: Using legal skills to replace cruelly produced products with plant-based products is more beneficial in every way than is using legal skills to craft a compromise on the labeling of cruelly produced products. I write this even while holding some uneasiness about promoting more technology as the solution to problems born of technological developments of the past. It seems to me that Americans' faith in the power of business to advance social goals is even stronger than American agribusiness's present power to control and define what constitutes "food" and how it is produced. The legal and political decks are so heavily stacked in favor of producers of animal-derived products, fighting them head-on is unlikely to prove successful to any meaningful extent. As Buckminster Fuller is reputed to have emphasized, "You never change things by fighting the existing reality. To change something, build a new model that makes the existing model obsolete."<sup>131</sup>

In a society that values business and business-driven solutions, businesses that promise reduction in animal use are the "new model" that will assist us in redefining our relationship with animals. Instead of a relationship based on the old model of human consumption of animals and products derived from them—a model heavily laden with human-inflicted suffering justified by dismissing the experience of animals forced to endure that suffering—a new relationship can be forged based on the unique and wonderful characteristics of animals as individuals and as communities. What is being changed by the "new model" is the very basis upon which humans define animals and view animals and their habitats as worthy of protection.

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organization dedicated to improving the lives of farm animals in food production from birth through slaughter").

131. QUINN, *supra* note 1, at 137.

