

PIGS-IN-A-BLANKET: HOW CURRENT MEAT INSPECTION REGULATIONS WRAP AMERICA IN FALSE SECURITY

Andrea M. Repphun^{*}

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I. INTRODUCTION

Meat plays a central role in the American diet. In 2008 U.S. beef consumption was estimated at 27.3 billion pounds.¹ Although almost eighty-eight percent of Americans recognize the famous slogan, “Beef. It’s What’s for Dinner,”² and approximately ninety percent of consumers recognize the tagline, “Pork. The Other

^{*} J.D. Candidate, Drake University Law School, May 2011.

1. Econ. Research Serv., *U.S. Beef and Cattle Industry: Background Statistics and Information*, USDA, <http://www.ers.usda.gov/news/BSECoverage.htm> (last updated July 10, 2010).

2. Press Release, Nat’l Cattlemen’s Beef Ass’n, “Beef. It’s What’s For Dinner” Advertising Campaign Invites Consumers to Discover the Power of Protein (Jan. 7, 2008), *available at* <http://www.beefitswhatsfordinner.com/CMDocs/BIWFD/ApprovedCampaignPressRelease.pdf> [hereinafter *Cattlemen’s Press Release*].

White Meat,”³ it is debatable how many Americans truly know where their meat comes from. Would complete knowledge of how meat reaches grocery stores, restaurants, and kitchens nationwide prompt Americans to think twice about buying a package of pork chops or grabbing a second helping of meatloaf?

Americans know the meat on their plates comes from animals, but what they do not realize is what comes with the animals they consume. According to USDA records, the Agency has permitted downed animals with serious conditions and illnesses, such as gangrene and hepatitis, to enter the food supply.⁴ Animals that are too injured, sick, or diseased to walk and/or stand on their own are referred to as “downed animals.”⁵

With regard to contracting foodborne illnesses, many Americans presume that meat is safe, and if they get sick after eating meat, they assume it is either a mere coincidence or an issue with the meat’s preparation—perhaps undercooked rather than problems with the meat itself.⁶ There’s no doubt meat provides consumers with essential nutrients needed to develop and maintain healthy bodies, so the idea that it could be detrimental to one’s health is hard to digest.⁷

Nevertheless, Americans’ failure to suspect the source of the foodborne illness—the meat—and the industry that produces it, can have dire consequences. Some Americans have learned they were not just “unlucky victims of . . . some innocent mistake.”⁸ One such American was Mary Heersink, who could not have predicted her twelve-year-old son Damion’s seemingly harmless act of eating a small piece of hamburger at a cookout would drastically change the rest of his life.⁹ The meat Damion ingested was contaminated with *E. coli* 0157:H7, a fatal strain of bacteria that can cause mild to severe abdominal cramping and diarrhea as well as hemolytic uremic syndrome (HUS); the latter of which is an excruciating disease that “sends toxins coursing throughout the body and destroys the blood’s ability to clot” and is also “the leading cause of kidney failure in children.”¹⁰ Damion’s near-death

3. *Pork Board Buys Pork Brand*, NAT’L HOG FARMER (Mar. 31, 2006, 12:00 PM), http://nationalhogfarmer.com/news/Other_white_meat_trademark_pork_NPPC_approved/index.html.

4. See Gene Bauston, *Diseased Animals are being Marketed for Food—Medicine & Health*, USA TODAY, Mar. 2002, http://findarticles.com/p/articles/mi_m1272/is_2682_130/ai_84184881/?tag=content;coll.

5. Animals that are too injured, sick, or diseased to walk and/or stand on their own are referred to as “downed animals.”

6. NICHOLS FOX, *SPOILED: THE DANGEROUS TRUTH ABOUT A FOOD CHAIN GONE HAYWIRE* 67 (1997) (explaining how food is seen as a comfort and is considered safe, but that it must be handled safely in addition to people realizing the root of the issue may be in how it was handled, slaughtered, or processed).

7. *Id.*

8. GAIL A. EISNITZ, *SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLECT, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY* 283 (2007).

9. *Id.* at 35-36.

10. *Id.* at 37.

struggle spanned over the course of an entire year and consisted of “a series of mini-strokes, . . . seven surgeries, receiv[ing] more than a hundred units of blood, and los[ing] one-fourth of his body weight and thirty percent of his lungs’ function.”¹¹ Given that seventy-six million cases of foodborne illnesses occur in the United States annually,¹² and foods of animal origin are the major cause of foodborne illnesses,¹³ it is apparent that stories such as Damion’s are not confined solely to eating contaminated beef.

Despite the alarming number of foodborne illnesses that occur annually, meat inspection regulations surprisingly do not encompass all potential sources of contaminated meat which enter America’s food supply. Although America eats a substantial amount of beef,¹⁴ it is not the only meat consumed. Preceded by chicken and beef, pork was the third most consumed meat by the average American in 2007.¹⁵

Current regulations prohibit downed cattle from entering the food supply, but they do not prohibit meat slaughtered from other downed animals.¹⁶ On the menu of life, this ban may have alleviated the public’s fear of contracting foodborne illnesses from eating contaminated beef, but not everyone orders the filet mignon. People ordering pork chops may unexpectedly be served a complimentary side dish of bacteria or disease instead of the standard side dish of applesauce. It is undisputed that consumers deserve the same protection from contaminated meat, regardless of whether they eat beef or pork. Unfortunately, current federal meat inspection regulations make certain meats less safe to eat.

Foodborne illnesses are preventable, but steps need to be taken to “prevent or limit contamination all the way from farm to table.”¹⁷ Rather than relying on remedial actions, such as recalling contaminated meat, preventative measures should be taken before our meat reaches the menu. This Note will address the inadequate coverage of current meat inspection regulations over downed pigs and how it seriously threatens the safety of America’s meat supply by increasing the risks of foodborne illnesses. It will also address how the industry’s inhumane handling and slaughter methods further contribute to the occurrence of downed pigs and the increased risks of foodborne illnesses.

11. *Id.* at 38.

12. Dep’t of Health & Human Servs., *Foodborne Illness: Frequently Asked Questions*, CTRS. FOR DISEASE CONTROL & PREVENTION 5 (Jan. 10, 2005), http://www.cdc.gov/ncidod/dbmd/diseaseinfo/files/foodborne_illness_FAQ.pdf. [hereinafter CDC FAQs].

13. EISNITZ, *supra* note 8, at 158.

14. See Associated Press, *A Look at the Average American Meat Consumption*, USA TODAY, Nov. 14, 2008, http://www.usatoday.com/money/economy/2008-11-14-3913750537_x.htm (listing the average American as eating 63.5 pounds of beef in 2007).

15. *Id.*

16. 9 C.F.R. § 309.2(b), (e) (2010) (noting while all seriously crippled animals are removed, the only non-ambulatory animal that is also removed is cattle).

17. CDC FAQs, *supra* note 12, at 11.

Part II describes what constitutes a “downed animal” and why it poses a significant threat to America’s meat supply.

Part III outlines the historical background of slaughterhouses and meat inspection regulations by describing two Acts of central importance in the discussion of downed animals and food safety: The Federal Meat Inspection Act¹⁸ and the Humane Methods of Slaughter Act.¹⁹

Part IV illustrates that although public concern over food safety was stimulated over a century ago, modern meat inspection regulations provide a false sense of security for consumers because they are neither consistently followed nor enforced. It will explain that although meat inspection regulations were tightened over the years in response to public health scares, recent investigations and exposés into slaughterhouse practices reveal that more than amendments to regulations are needed to force the industry to change.

Part V focuses on providing pork protection to downed pigs and the public. It introduces the Downed Animal and Food Safety Protection Act, which should permanently ban downed pigs from entering the food supply, extend coverage beyond slaughterhouses to the farms where pigs are raised, and require immediate humane euthanasia for downed pigs.²⁰

Part VI explains how the benefits of The Downed Animal and Food Safety Protection Act²¹ will help eliminate the false security currently experienced by Americans. America can no longer afford to rely on the industry to protect it or the animals it eats. Although the Act will not eliminate the food safety problems completely, it is the most plausible step toward providing America the protection it deserves.

II. DOWNED ANIMALS

A downed animal, or “downer,” is an animal who is “unable to stand or walk without assistance.”²² In 2003, the USDA estimated approximately 130,000 downed cattle arrived at slaughterhouses; however, no statistics exist reporting the actual number of downed animals in the United States.²³ Aside from physical or neurologi-

18. Federal Meat Inspection Act, ch. 3915, 34 Stat. 768 (1906) (codified as amended at 21 U.S.C. §§ 601-625 (2006)).

19. Humane Methods of Slaughter Act, Pub. L. No. 85-765, 72 Stat. 862 (1958) (codified as amended at 7 U.S.C. §§ 1901-1907 (2006)).

20. Downed Animal and Food Safety Protection Act, H.R. 4356, 111th Cong. (2009).

21. See *infra* Part V.

22. Livestock Care and Handling Guidelines, 61 Fed. Reg. 24,916, 24,917 (May 17, 1996) (exemplifying the definition “downer” had within the regulatory context despite the fact that this regulation was issued by GIPSA); see 9 C.F.R. § 309.2(b) (2004) (showing that the term “downer” as commonly understood and used within FSIS regulations at that time).

23. Kevin Briley, Comment, *Downed Animals: Can Your Steak Stand up for Itself?*, 15 SAN JOAQUIN AGRIC. L. REV. 39, 41 (2005) (citing Frederic J. Frommer, House Narrowly Defeats Ban on

cal diseases, an animal can become “downed” from inhumane treatment received while in transit to slaughterhouses and/or before and during the slaughter process.²⁴

The slaughter of downed animals for human consumption poses a significant risk to public safety. There is an increased probability that downed animals, which have a higher likelihood of carrying diseases and bacteria, will transmit these diseases and bacteria to humans by the placement of their contaminated meat into the food supply.²⁵ Furthermore, because downed animals spend more time on the ground due to their inability to stand and/or walk on their own, there are increased chances that they will become contaminated with fecal matter, which in turn increases the risk of bacterial contamination if allowed to enter the food supply.²⁶

The risks of contracting foodborne illnesses from contaminants, such as *E. coli* and *Salmonella*, are increased by consuming beef from downed cattle.²⁷ Moreover, this beef has been linked to bovine spongiform encephalitis (BSE), more commonly referred to as mad cow disease.²⁸ Although the United States has only seen three cases of mad cow disease,²⁹ the effect of the disease on cattle and humans is alarming. BSE falls within a group called Transmissible Spongiform Encephalopathies (TSEs), which are types of chronic neurological diseases.³⁰ BSE has been linked to a human variant, Creutzfeldt-Jakob disease, which has similar symptoms and end results.³¹ In both cattle and humans, the disease causes progressive deterioration of the brain that inevitably results in death.³² Furthermore, the symptoms of the disease may not develop for several years, but in the case of humans, an individual eventually “falls into a coma and dies, almost always within a year of the onset of symptoms, and usually within four months.”³³

Sale of “Downed Animals,” AnimalRights.Net, July 14, 2003, <http://www.animalrights.net/2003/downed-animal-amendment-narrowly-defeated-in-us-house/>.

24. See Harold W. Gonyou, *Stressful Handling of Pigs*, PRAIRIE SWINE CTR., Nov. 2004, available at <http://www.thepigsite.com/articles/?Display=1246> (stating that aggressive and stressful handling contributes to the occurrence of downed pigs).

25. Nat’l Meat Ass’n v. Brown, No. CV-F-08-1963 LJO DLB, 2009 WL 426213, at *1 (E.D. Cal. Feb. 19, 2009).

26. Gene Bauston, *Downed Animals: Diseased Food on Your Plate*, IMPACT PRESS (Apr.-May 2001), <http://www.impactpress.com/articles/aprmay01/downed040501.html>.

27. Andrenna L. Taylor, *From Downer Cattle to Mystery Meat: Chapter 194 Is California’s Response to the Largest Beef Recall in History*, 40 MCGEORGE L. REV. 523, 525 (2009).

28. *Id.*

29. *Id.*

30. Jason R. Odeshoo, Note, *No Brainer? The USDA’s Regulatory Response to the Discovery of “Mad Cow” Disease in the United States*, 16 STAN. L. & POL’Y REV. 277, 280 (2005).

31. *Id.* at 278.

32. *Id.*

33. *Id.* at 281 (citing Philip Yam, *Mad Cow’s Human Toll*, SCI. AM., May 2001).

Moreover, meat unfit for human consumption is not isolated to beef. Any downed animal is susceptible to disease and bacterial contamination.³⁴ Just like cows, downed pigs spend more time on the ground than other pigs. Given that *E. coli* and *Salmonella* inhabit the intestines of livestock and poultry,³⁵ there is an increased chance downed pigs will become contaminated with fecal matter.³⁶ Thus, it is highly likely that during the slaughter process these bacterial diseases could contaminate pork that eventually enters the food supply.³⁷

A downed pig's inability to walk, coupled with unsanitary production, transportation, and processing conditions, presents a serious risk because it sets the stage for the spread of the *Salmonella*, the causative agent of salmonellosis, which has been linked to pigs and is the "leading cause of bacterial foodborne illnesses in the United States."³⁸ The pathogen inhabits the pig's intestinal tract and can spread by pig-to-pig contact as well as "indirect or direct contact with the intestinal contents or excrement of [the pigs]."³⁹ Increased shedding and spreading of the bacteria *Salmonella* occurs during transportation of the pigs to the slaughterhouse because of overcrowded conditions on the truck.⁴⁰ Furthermore, overcrowded conditions at the slaughterhouse facilitate the spread of bacteria by cross-infection.⁴¹

Furthermore, the drastic increase in microbial contamination is due in large part to "[e]xpeditious production practices, skyrocketing line speeds, and reduced federal oversight," which in turn correspond with the increase of foodborne illnesses.⁴² Once the slaughter operations begin, the high line speeds further increase the chances of meat contamination among the pigs slaughtered.⁴³ Allowing this meat to reach consumers increases the risk of contracting salmonellosis.⁴⁴ Symptoms may last up

34. See 149 Cong. Rec. 17875 (2003) (regarding proposed amendment to prohibit approval of slaughtered meat from "cattle, sheep, swine, goats, horses, mules, or other equines" that were downed).

35. EISNITZ, *supra* note 8, at 38.

36. Bauston, *supra* note 26.

37. *See id.*

38. Vaishali Dharmarha, Food Safety Research Info. Office, *A Focus on Salmonella—Updated Version*, NAT'L AGRIC. LIBRARY, http://fsrio.nal.usda.gov/nal_web/fsrio/fsheet.php?id=223 (last updated Oct. 2010).

39. P. KENDALL, COLO. STATE UNIV. EXTENSION, BACTERIAL FOOD-BORNE ILLNESS (2008), available at <http://www.cde.state.co.us/artemis/ucsu20/ucsu2062293002003internet.pdf>.

40. Dharmarha, *supra* note 38.

41. *Id.*

42. EISNITZ, *supra* note 8, at 160-61 fig.5.

43. *Slaughterhouses and Processing*, SUSTAINABLE TABLE (Sept. 2009), <http://www.sustainabletable.org/issues/processing>.

44. See *Interview with Dr. Robert Tauxe*, MODERN MEAT, <http://www.pbs.org/wgbh/pages/frontline/shows/meat/interviews/tauxe.html> (last visited Apr. 2, 2011) (noting increased line speeds open the door for contaminated meat to reach the consumer).

to one week and include vomiting, fever, abdominal pain, and diarrhea.⁴⁵ While seemingly mild compared to kidney failure, strokes, or BSE-induced neurological disease, the problem with salmonellosis is the fact that a simple preventative solution exists: remove downed pigs from the food supply.

The motivation behind these factors in the production stage is best illustrated by a former meat and poultry inspector's description of the inhumane treatment that occurs in slaughterhouses as primarily fueled by productivity and profit:

To keep that production line moving . . . quite often uncooperative animals are beaten, they have prods poked in their faces and up their rectums, they have bones broken and eyeballs poked out, [downers] are left unattended for days. Sometimes animals are simply beaten to death out in the pens before being slipped into the slaughtering process.⁴⁶

Thus, it is apparent that business demands in slaughterhouses force workers to keep the slaughter line moving at the expense of animal safety and the safety of American consumers. A downed animal represents a loss in profit.⁴⁷ So even if an animal may become injured during the process, as long as it can still stand or walk, or be forced to do so, it can still make money. But while the meat industry may not suffer a loss, America itself foots the bill by tendering payment in the form of the nation's health.

III. HISTORICAL BACKGROUND OF SLAUGHTERHOUSES AND MEAT INSPECTION REGULATIONS

Public concern over slaughterhouse practices and the quality of meat entering the food supply was stimulated by Upton Sinclair's publication of *The Jungle*, which depicted the extremely unsanitary slaughterhouse conditions of the Chicago meat industry and, as a result, triggered the enactment of the Federal Meat Inspection Act of 1906.⁴⁸ The primary goal of the Federal Meat Inspection Act (FMIA) is to "ensure the safety of the nation's food supply and to minimize the risk to public health from potentially dangerous food and drug products."⁴⁹

45. KENDALL, *supra* note 39.

46. EISNITZ, *supra* note 8, at 187-88 (quoting interview with Dave Carney, Chairman, Nat'l Joint Council of Food Inspection Locals).

47. *A Ban on Downed Cattle—Are Pigs Next?*, FARM SANCTUARY, http://www.farmsanctuary.org/get_involved/alert_downed_animal_protection.html (last visited Apr. 2, 2011).

48. EISNITZ, *supra* note 8, at 21.

49. *Baur v. Veneman*, 352 F.3d 625, 634 (2d Cir. 2003) (citing 21 U.S.C. §602 (2006), which states, "It is essential in the public interest that the health and welfare of consumers be protected by assuring that meat and meat food products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.").

The FMIA requires inspectors to conduct inspections before and after the slaughter of all animals sent to slaughterhouses and provides sanitary standards for slaughtering establishments.⁵⁰ Titles of inspectors range from food and consumer safety inspectors to public health veterinarians, all of whom work together to inspect for contaminated meat and proper sanitation to ensure that only safe food enters the food supply.⁵¹ These regulations are implemented and enforced by the Food and Safety Inspection Service (FSIS), an agency within the USDA.⁵²

Over time, the government enacted other laws that addressed animal welfare concerns in relation to food inspection and safety regulations. For example, the Humane Slaughter Act (HSA) of 1958 focused primarily on the humane treatment of livestock, including downed livestock, during the slaughter process.⁵³ Similar to the enactment of the FMIA, public concern over the inhumane treatment of livestock occurring in meat-packing plants stimulated the passage of the HSA.⁵⁴ The enactment of the Humane Methods of Slaughter Act (HMSA) of 1978 amended the HSA by requiring the adoption of humane handling and slaughtering methods in all federally inspected slaughterhouses.⁵⁵

Essentially, Congress codified humane methods to avoid the needless suffering of livestock, create safer and improved working conditions, improve the products and economies of slaughter operations, and generate various other benefits among producers, processors, and consumers.⁵⁶ Although Congress specified two humane methods of slaughter, the key provision of the HMSA required that before “cattle, calves, horses, mules, sheep, swine, and other livestock” are shackled and placed on the line, they need to be “rendered insensible to pain by a single blow or gunshot or an electrical, chemical or other means that is rapid and effective.”⁵⁷ Congress also included special provisions relating to downed livestock.⁵⁸

50. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-686T, HUMANE METHODS OF HANDLING AND SLAUGHTER: PUBLIC REPORTING ON VIOLATIONS CAN IDENTIFY ENFORCEMENT CHALLENGES AND ENHANCE TRANSPARENCY 4 (2008), available at <http://www.gao.gov/new.items/d08686t.pdf> [hereinafter GAO, HUMANE HANDLING AND SLAUGHTER]; see 21 U.S.C. § 608 (2006).

51. GAO HUMANE HANDLING AND SLAUGHTER, *supra* note 50.

52. *Id.*; see FSIS Responsibilities, 9 CFR § 300.2(b)(1) (2010).

53. See Humane Slaughter Act of 1958, Pub. L. No. 85-765, § 2, 72 Stat. 862, 862 (codified as amended at 7 U.S.C. §§ 1901-1906 (2006)) (describing livestock handling requirements during slaughter).

54. GAO HUMANE HANDLING AND SLAUGHTER, *supra* note 50, at 3.

55. Humane Methods of Slaughter Act of 1978, Pub. L. No. 95-445, §§ 2-5, 92 STAT. 1069, 1069.

56. Humane Slaughter Act, 7 U.S.C. § 1901 (2006).

57. *Id.* § 1902(a); GEOFFREY S. BECKER, CONG. RESEARCH SERV., RS22819, NONAMBULATORY LIVESTOCK AND THE HUMANE METHODS OF SLAUGHTER ACT 2 (2009).

58. See Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, § 10815, 116 Stat. 134, 532 (codified at 7 U.S.C. § 1907 (2006)) (requiring the Secretary of Agriculture to submit

As under the FMIA, the FSIS is charged with implementing and enforcing the provisions of the HMSA.⁵⁹ FSIS-issued regulations and directives cover various stages of the slaughter operations as well as methods by which the slaughter is to be conducted.⁶⁰ Furthermore, they address how FSIS inspection personnel are to ensure compliance with the regulations and directives, in addition to identifying noncompliance.⁶¹ Although FSIS inspectors do not watch all animals at every moment for HMSA compliance but instead monitor the entire handling and slaughter process,⁶² they are required to stop slaughter operations when they do observe any HMSA violation and only resume once the violation is remedied.⁶³ Additionally, plant management needs to be notified, and violations need to be documented.⁶⁴ For example, if an inspector observed an animal being repeatedly stunned with an electric prod to force it to move, he would be required to stop the line and report the violation.⁶⁵

Consequences for HMSA violations vary. Depending on the severity of the violation, the FSIS has three options: it can place “reject tags” on certain equipment or areas, suspend all operations, or withdraw inspection all together.⁶⁶ The use of reject tags and suspension of all operations are less harsh consequences for noncompliance because operations can resume once the violations are corrected; but withdrawing all inspections is by far the most severe consequence because it stops production and requires the facility to reapply for a grant of inspection to resume its operations.⁶⁷ The consequences for HMSA violations act as incentives for facility compliance because violations essentially result in short-term or long-term loss of profits.⁶⁸

reports to Congress about non-ambulatory livestock and promulgate regulations pertaining to their treatment, handling, and disposition if he determines it necessary).

59. 9 C.F.R. § 300.2(a) (2010).

60. BECKER, *supra* note 57, at 2.

61. *Id.*; see 9 C.F.R. §§ 313.2, 500.2-500.8 (2010).

62. GAO HUMANE HANDLING AND SLAUGHTER, *supra* note 50, at 4.

63. EISNITZ, *supra* note 8, at 24.

64. Notification, Appeals and Actions Held in Abeyance, 9 C.F.R. § 500.5 (2010) (discussing requirements for taking a withholding action or imposing a suspension).

65. See EISNITZ, *supra* note 8, at 46-47 (noting that excessive use of electric prods is prohibited and may not exceed fifty volts).

66. GAO HUMANE HANDLING AND SLAUGHTER, *supra* note 50, at 4-5; see 9 C.F.R. §§ 500.3-500.4, 500.6 (2010).

67. GAO HUMANE HANDLING AND SLAUGHTER, *supra* note 50, at 4-5.

68. See EISNITZ, *supra* note 8, at 24 (explaining industries will comply because the threat of stopping the line means fewer profits).

IV. AMERICA'S REACTION TO MODERN MEAT INSPECTION REGULATIONS AND PRACTICES

As of today, federal meat inspection regulations have not varied substantially from those enacted in 1906.⁶⁹ An inspector is required to conduct inspections before and after an animal is slaughtered.⁷⁰ Ante-mortem examinations refer to pre-slaughter inspections, in which the inspector examines the animal “to detect signs of any disease or health problems that might render the animal unfit for human food.”⁷¹ For example, observations of abnormal gaits, paralysis, inability to walk, teeth grinding, or infections would prompt the inspector to conclude the animal is possibly unfit for human consumption.⁷² Inspectors deem downers, as well as any severely crippled livestock, as “U.S. Suspects,” which could be condemned due to a possible disease or other condition.⁷³ This label requires that the animal be slaughtered separately⁷⁴ and then re-examined by a veterinarian before it can be approved to enter the food supply.⁷⁵ In the alternative, post-mortem examinations refer to post-slaughter inspections,⁷⁶ in which the inspector “inspect[s] each animal’s head, carcass, and internal organs for signs of disease, abscesses, and lesions, as well as contaminants like fecal material, hair, and dirt.”⁷⁷ Similar to ante-mortem examinations, if an inspector discovers any sign of disease or abnormalities during the post-mortem inspection, he sends it to a veterinarian for further examination.⁷⁸

Nevertheless, even over a century later, evidence of noncompliance with FMIA and HMSA by both the meat industry and slaughterhouses reveals that these laws and implementing regulations are neither consistently followed nor enforced.⁷⁹ Recent investigations and exposés of slaughterhouse practices revealed unsanitary conditions and inhumane treatment of animals.⁸⁰ Nowadays, inspectors are often

69. See *id.* at 21 (noting today’s meat inspection methods are similar to those of 1906).

70. Ante-Mortem Inspections, 9 C.F.R. pt. 309 (2010); Post-Mortem Inspections, 9 C.F.R. pt. 310 (2010); BECKER, *supra* note 57, at 2.

71. BECKER, *supra* note 57, at 2.

72. EISNITZ, *supra* note 8, at 21.

73. BECKER, *supra* note 57, at 3; see 9 C.F.R. § 309.2(b) (2010).

74. 9 C.F.R. § 309.2(n) (2010).

75. BECKER, *supra* note 57, at 3.

76. Post-Mortem Inspections, 9 C.F.R. pt. 310 (2010).

77. EISNITZ, *supra* note 8, at 21, 24.

78. 9 C.F.R. § 310.3 (2010); EISNITZ, *supra* note 8, at 24.

79. GAO HUMANE HANDLING AND SLAUGHTER, *supra* note 50, at 5-6 (noting that reports in 2004 revealed inconsistent records and enforcement actions regarding HMSA violations); BECKER, *supra* note 57, at 4 (noting that the 2006 audit report conducted by the USDA Office of Inspector General raised concerns over meat inspection procedures).

80. See EISNITZ, *supra* note 8, at 295-301 (pointing to an investigation of Tyson Fresh Meat’s violations and unsanitary conditions in 2000 that was revealed in an exposé piece by the *Washington Post*).

disciplined for stopping the line to address HMSA violations, and some are unaware that the HMSA even exists.⁸¹ Furthermore, reports of illnesses and/or disease from consuming contaminated meat that possibly came from downed animals have made the public question if the current meat inspection regulations “compromise meat safety instead of ensuring it.”⁸²

In December 2003, America experienced its first known case of mad cow disease after a downed cow was slaughtered and permitted to enter the food supply.⁸³ In response to subsequent tests revealing that the cow tested positive for BSE,⁸⁴ the FSIS banned the slaughter of all non-ambulatory cattle, no matter why or when they became non-ambulatory, to prevent potentially infected beef from being consumed.⁸⁵ The interim final rule defined non-ambulatory livestock as “livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions” and it required that cattle exemplifying this definition be condemned, humanely euthanized, and disposed of.⁸⁶ The FSIS reasoned that the prohibition was necessary because studies showed there was a higher probability of downed cattle having BSE, and it would be difficult to distinguish BSE symptoms from other signs of disease or health problems that also afflict downed cattle.⁸⁷ Nevertheless, this prohibition was not permanent; it was modified by the FSIS in July 2007 to provide for case-by-case inspections of downed cattle.⁸⁸ If a cow became downed after ante-mortem inspection, the cow could proceed to slaughter provided the FSIS veterinarian determined it only suffered from an acute injury, such as a broken leg.⁸⁹

A January 2008 investigation into a California meatpacking plant revealed gruesome acts of violence against downed cattle, such as the use of forklifts and electric prods to force them to move.⁹⁰ After national exposure of the investigation video, the USDA instituted the largest beef recall in history—143 million pounds of beef—

81. *See id.* at 105, 189-90.

82. *See* Justine Hinderliter, Comment, *From Farm to Table: How This Little Piggy was Dragged Through the Market*, 40 U.S.F. L. REV. 739, 741 (2006).

83. Odeshoo, *supra* note 30, at 289, 297-98.

84. *Id.* at 298.

85. Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle, 69 Fed. Reg. 1862, 1870 (Jan. 12, 2004) (codified as amended at 9 C.F.R. § 309.3 (2010)).

86. *Id.*

87. *Id.*

88. Prohibition of the Use of Specified Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle, 72 Fed. Reg. 38700, 38729 (July 13, 2007) (codified as amended at 9 C.F.R. § 309.3 (2010)).

89. BECKER, *supra* note 57, at 3.

90. Taylor, *supra* note 27, at 523.

mainly because inspectors failed to identify cattle that became downed after ante-mortem inspections.⁹¹ Nevertheless, 37 million pounds could not be recalled because they had already entered the food supply via restaurants and school lunch programs.⁹²

In response, the USDA proposed a rule to prohibit the slaughter of cattle that go down at any point in the slaughter process.⁹³ The final rule issued on March 14, 2009 (hereinafter referred to as “the 2009 finalized ban on downed cattle”) prohibited the slaughter of all downed cattle even if veterinarians determined after ante-mortem inspections that they only suffered from acute injuries.⁹⁴ In addition, official establishments were required to condemn and dispose of all downed cattle and inform FSIS inspection personnel that cattle became downed after ante-mortem inspections.⁹⁵ The FSIS hoped this 2009 finalized ban on downed cattle would reassure the public that the meat it consumed was safe and the animals eaten were being humanely handled.⁹⁶

The revelations of the January 2008 investigation are not isolated.⁹⁷ Furthermore, these incidents of livestock abuse are not new.⁹⁸ More disturbing is the fact that the FSIS has been fully aware of its shortcomings to ensure compliance,⁹⁹ yet violations persist. HMSA enforcement problems arise because the industry is ““primarily concerned with productivity and profit.””¹⁰⁰ Thus, an industry that treats the animals it slaughters as mere ““raw materials in a manufacturing operation”” clearly should not be trusted to enforce an Act that is designed to protect those animals.¹⁰¹

91. BECKER, *supra* note 57, at 1.

92. Taylor, *supra* note 27, at 523-24.

93. Press Release, USDA, Agriculture Secretary Ed Schafer Announces Plan To End Exceptions to Animal Handling Rule (May 20, 2008), *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2008/05/0131.xml> [hereinafter Schafer Press Release].

94. Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11,463, 11,466 (Mar. 18, 2009) (codified at 9 C.F.R. pt. 309.3(e) (2010)).

95. Press Release, USDA, Agriculture Secretary Tom Vilsack Announces Final Rule for Handling of Non-Ambulatory Cattle (Mar. 14, 2009), *available at* <http://www.usda.gov/wps/portal/usda/usdahome?contentidonly=true&contentid=2009/03/0060.xml> [hereinafter Vilsack Press Release].

96. *Id.*

97. BECKER, *supra* note 57, at 1 (stating that the Humane Society of the United States reported new evidence after the January 2008 investigation, which revealed inhumane treatment of downed cattle and pigs occurring at auctions in four different states).

98. *See id.* at 7 (noting numerous news stories which revealed ongoing abuses at slaughterhouses in 2000).

99. *See* Humane Handling and Slaughter Requirements and the Merits of a Systematic Approach To Meet Such Requirements, 69 Fed. Reg. 54,625, 54,625 (Sept. 9, 2004) (recognizing an increase in HMSA violations over a three-year period as well as increased congressional and public concern over the inhumane treatment of animals).

100. *See* EISNITZ, *supra* note 8, at 188 (quoting statements from an interview with Dave Carney, now the chairman of the National Joint Council of Food Inspection Locals).

101. *See id.*

Although the meat industry plugs campaigns to emphasize the nutritional benefits of eating lean beef hoping to remind Americans they can “reclaim the dinner they love,”¹⁰² disturbing events such as the above suggest Americans might be better off not cleaning their plates. Not just of beef, but other meats as well.

V. PROVIDING PORK PROTECTION: THE DOWNED ANIMAL AND FOOD SAFETY PROTECTION ACT

In view of the events leading up to the 2009 finalized ban on downed cattle, that ban was a necessary step toward ensuring the safety of America’s food supply as well as the cattle themselves.¹⁰³ However, it fell short by failing to address all potential food safety risks and inhumane treatment concerns. For one, cattle are not the only livestock that can become downed and are also not the only animals subject to inhumane treatment.¹⁰⁴ Despite the similarities between downed cattle and downed pigs, only downed cattle are permanently banned from entering the food supply.¹⁰⁵ It is in the public’s best interest to take similar steps and remove downed pigs from the food supply altogether before it is too late.

On December 16, 2009, Representative Gary Ackerman introduced the Downed Animal and Food Safety Protection Act.¹⁰⁶ Specifically, this Act would give the Secretary of Agriculture the authority to “promulgate regulations to provide for the humane treatment, handling, and disposition of all nonambulatory cattle by covered entities,” and it would require that once a cow becomes downed, it be immediately and humanely euthanized.¹⁰⁷ The covered entities would include establishments covered by the FMIA, slaughter facilities, packers, dealers, market agencies, and stockyards.¹⁰⁸ If passed, the most important amendment made by this Act would be that once a cow becomes downed, it would have to be immediately rendered unconscious and remain in that state until its death.¹⁰⁹ Similar to the 2009 finalized ban on downed cattle, this amendment would be a big step toward improving food safety and

102. Cattlemen’s Press Release, *supra* note 2 (quoting John Dudley, beef producer and “former chair of the Beef Checkoff’s Advertising Committee”).

103. Vilsack Press Release, *supra* note 95.

104. See Press Release, Farm Sanctuary, President Obama Urged To Stop Sick and Injured Pigs and Other Farm Animals from Entering the Food Supply (Dec. 10, 2009), *available at* http://www.farmsanctuary.org/mediacenter/2009/pr_obama_pig_petition.html [hereinafter Farm Sanctuary Press Release] (describing examples of inhumane treatment methods inflicted on downed pigs).

105. See 9 C.F.R. § 309.3(e) (2010).

106. Downed Animal and Food Safety Protection Act, H.R. 4356, 111th Cong. (2009).

107. *Id.* § 3(b), (c)(1).

108. *Id.* § 3(a)(1)-(2).

109. *Id.* § 3(d).

the treatment of cattle by preventing needless suffering and the spread of bacterial contamination and disease.¹¹⁰

Unfortunately, like the 2009 finalized ban on downed cattle, Representative Ackerman's proposed Act does not extend coverage to downed pigs.¹¹¹ Therefore, a modified version of the Downed Animal and Food Safety Protection Act is necessary. Mirroring the 2009 ban on downed cattle, this version should permanently ban downed pigs from entering the food supply, regardless of whether they become downed before or after ante-mortem inspections.¹¹² In addition, it should extend coverage to factory farms and other covered entities and not just apply during the slaughterhouse operations.¹¹³ Lastly, this version should require that downed pigs be humanely euthanized upon becoming downed and remain unconscious until their death.¹¹⁴

A. Downed Pigs Endure Inhumane Treatment

Attempts to protect America's food supply as well as the animals eaten are not new. Organizations such as Farm Sanctuary and the Humane Society of the United States (HSUS) have dedicated extreme amounts of time and effort to promoting "No Downer" policies, which advocate for the removal of all downed livestock from the food supply.¹¹⁵ In addition, various forms of legislation aimed at preventing all downed animals from entering the food supply have been introduced in Congress since 1992.¹¹⁶ Despite the fact that none of these Acts passed, these repeated attempts illustrate the public's strong distaste for the inhumane treatment of downed animals and a desire to ensure that they are not slaughtered for human consumption.

110. *Id.* § 2(a)(1), (3).

111. *See id.* § 2(a) (showing bill provisions only apply to nonambulatory cattle).

112. *Cf. id.* § 3(c)(1) (providing for the ban on downed cattle from the food supply, which should also include downed pigs).

113. *Cf. id.* § 3(a)(1)-(2) (requiring humane euthanasia of downed cattle by stockyards, market agencies, dealers, packers, slaughter facilities, and other establishments covered by the FMIA, which should equally apply to downed pigs).

114. *Cf. id.* § 3(c)(1), (d)(2) (requiring that downed cattle be humanely euthanized upon becoming downed or remain unconscious up until their death if the nonambulatory cattle need to be moved, which should govern the treatment of nonambulatory pigs as well).

115. *See, e.g., Downers, Human Health Hazards, and USDA Policy*, HUMANE SOC'Y OF THE U.S. (Apr. 23, 2008), <http://www.humanesociety.org/assets/pdfs/farm/downers-health-concerns-usda-policy-4-23-08.pdf>.

116. *See* H.R. 661, 110th Cong. (2007); H.R. 3931, 109th Cong. (2005); *see also* H.R. 2519, 108th Cong. (2003); H.R. 1421, 107th Cong. (2001); H.R. 443, 106th Cong. (1999); H.R. 453, 105th Cong. (1997); H.R. 2143, 104th Cong. (1995); H.R. 559, 103d Cong. (1993); H.R. 5680, 102d Cong. (1992) (illustrating repeated efforts to introduce legislation in the House to protect downed livestock). Related bills were also introduced in the Senate. *See* S. 2770, 110th Cong. (2008) (providing penalties for the slaughter of downed livestock).

In addition, recent investigations reveal that downed pigs, like downed cattle, experience similar inhumane treatment before and during slaughter.¹¹⁷ To get downed pigs to slaughter, it is customary for workers to use forklifts or repeatedly shock the pigs with electric prods to force them to move.¹¹⁸ In addition, aggressive handling of downed cattle and downed pigs, which causes stress and/or injuries, can have a negative effect on the quality of the meat.¹¹⁹ Studies also show that aggressive handling, such as the use of electric prods, is a contributing factor to a pig becoming downed because the increased stress produces higher levels of blood lactate that cause metabolic acidosis, which may contribute to a pig's refusal, or inability, to walk.¹²⁰

Despite these similarities between downed cattle and downed pigs, the only real difference is that in the case of downed pigs, the practices are standard and legal.¹²¹ On December 8, 2009, CNN aired an undercover video filmed by HSUS that exposed disturbing scenes of downed pigs waiting to be sent to slaughter.¹²² America caught an unsettling glimpse into what really happens behind the scenes and saw that the standard and legal practices were anything but humane: downed pigs struggled to walk or even stand on the assembly line before slaughter.¹²³

This video displayed striking similarities to the January 2008 undercover investigation of the California meatpacking plant.¹²⁴ It exposed similar acts of inhumane treatment going on behind closed doors, and the only real difference was that this time the victims were downed pigs.¹²⁵ Given that the January 2008 video trig-

117. See Farm Sanctuary Press Release, *supra* note 104 (describing examples of inhumane treatment methods inflicted on downed pigs).

118. *Id.*

119. FLOYD MCKEITH, UNIV. OF ILL., EFFECT OF DOWNERS ON PORK QUALITY 3-4 (2003), available at <http://www.pork.org/FileLibrary/ResearchDocuments/02-107-MCKEITHL.4-3-03.pdf>; Carolyn L. Stull et al., *A Review of the Causes, Prevention, and Welfare of Nonambulatory Cattle*, 231 J. AM. VETERINARY MED. ASS'N 227, 229 (2007).

120. Gonyou, *supra* note 24.

121. *Downer Pigs in the Food Supply* (CNN television broadcast Dec. 8, 2009), <http://www.cnn.com/video/data/2.0/video/us/2009/12/08/lapin.downer.pigs.cnn.html> [hereinafter *Downer Pigs in the Food Supply*] (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0912/08/cnr.07.html>).

122. *Id.*

123. See *Issues with Jane Velez-Mitchell: Cruel Practices Allowed in Pork Industry* (CNN television broadcast Dec. 9, 2009), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0912/09/ijvm.01.html> [hereinafter *Velez-Mitchell*] (explaining that America needs to know the horrific conditions suffered by downed pigs are standard and legal). See generally *Downer Pigs in the Food Supply*, *supra* note 121 (showing the conditions that downed pigs go through in an undercover video).

124. Compare *HSUS Investigates Slaughterhouse*, HUMANE SOC'Y OF THE U.S., http://hsus.feedroom.com/?fr_story=346bfda2cbbf061e88fa57cbef243b30d049b3b7, with *Downer Pigs in the Food Supply*, *supra* note 121.

125. *Downer Pigs in the Food Supply*, *supra* note 121.

gered the 2009 finalized ban on downed cattle,¹²⁶ it seems logical that a permanent ban on downed pigs would stem from the December 2009 video, but that result has yet to be realized. A permanent ban on downed pigs should result, and, given other similarities, it is a necessary preventive measure.

While the January 2008 video prompted the largest beef recall in history, the December 2009 video has not prompted any pork recalls. Like the beef recall where some meat had already entered the food supply, it is a disturbing coincidence that the USDA purchased approximately \$50 million worth of pork products for federal food programs about one month prior to the airing of the video—some of which were destined for school lunch programs.¹²⁷

B. Increased Risks of Foodborne Illnesses from Downed Pigs

According to the Center for Science in the Public Interest (CSPI), “[a] total of 233 foodborne illness outbreaks with 6,954 illnesses were linked to pork.”¹²⁸ Nevertheless, these numbers do not represent all cases of foodborne illnesses attributable to pork because the CSPI’s database only contains outbreaks, which are foodborne illnesses involving two or more ill people who consumed the same contaminated food.¹²⁹ Therefore, the number recorded by CSPI may be an underestimate because most foodborne illnesses are actually isolated cases.¹³⁰ The CSPI did not indicate if the illnesses were linked to pork from downed pigs, but because meat from downed animals is generally more unfit for human consumption and downed pigs are still allowed to enter the food supply, there is an increased possibility that meat from downed pigs may have been the root of some of the illnesses.

When an inspector conducts an ante-mortem inspection on a pig, he should be able to determine in a general sense if the pig is a downer based on whether the pig can or cannot walk or stand up. But according to Dr. Michael Greger, the Director of Public Health for HSUS, these inspection procedures are problematic:

You can’t tell just by looking at a pig whether the pig is down because of fatigue, because of injury or because of sickness. And, indeed, the science is very clear that these pigs are at increased risk of having disease. They are more likely to contaminate their

126. See Requirements for the Disposition of Cattle that Become Non-Ambulatory Disabled Following Ante-Mortem Inspection, 74 Fed. Reg. 11,463, 11,463 (Mar. 18, 2009) (noting that the proposed rule, which was issued in response to the video investigation, led to findings that prompted the final rule permanently banning downed cattle from slaughter).

127. Press Release, Nat’l Pork Producers Council, USDA To Purchase More Pork Products (Nov. 11, 2009), available at <http://www.nppc.org/News/DocumentSingle.aspx?DocumentID=25483>.

128. CAROLINE SMITH DEWAAL ET AL., CTR. FOR SCI. IN THE PUB. INTEREST, OUTBREAK ALERT! 2008: CLOSING THE GAPS IN OUR FEDERAL FOOD-SAFETY NET 13 (2008).

129. *Id.* at 3.

130. *Id.* at 1.

hide and some of that contamination can get into the plant. . . . [T]here's multiple reasons why animals too sick to even stand up or for whatever reason really should be excluded from the food supply.¹³¹

Clearly it is difficult to ascertain the reasons why a pig is downed. But what is known is that if any animal is downed, it has an increased risk of being diseased or contaminated with bacteria. Such potentials for illness can be more threatening than proven dangers. For instance, a person would not eat a steak if he knew he would always contract a foodborne illness. If there is only a chance that the meat will make him sick though, that is a risk he will likely take.

In 2008 sixty-four percent of consumers were very or somewhat worried about getting sick from bacterial or viral contaminated food.¹³² Without permanently removing downed pigs from the food supply, a person is forced to decide whether or not he wants to assuredly protect himself by refraining from eating pork altogether because all he knows is that he *might* get sick from eating pork. Americans' decisions to eat or not eat pork should not be their first line of defense against foodborne illnesses. Prohibiting downed pigs from entering the food supply is a necessary preventive measure to ensure the safety of the meat Americans eat before they actually choose to eat it.

C. Risks to Food Safety and Inhumane Treatment Occur Outside Slaughterhouses

Contamination occurring during production, processing, handling, or shipping is responsible for the majority of foodborne illnesses.¹³³ Support for extending the ban on downed pigs to all covered entities, especially factory farms, stems from the fact that the increased potential for bacterial contamination and disease is related to how pigs are raised and produced. Factory farming has been said to be a threat to the nation's health.¹³⁴ It is the result of the consolidation of food production¹³⁵ and the desire to produce more meat for less money.¹³⁶ Because factory farms raise an abnormally large number of animals in small confined areas, they are able to churn out

131. *Downer Pigs in the Food Supply*, *supra* note 121.

132. DEWAAL ET AL., *supra* note 128, at 15.

133. *Id.* at 17.

134. *Velez-Mitchell*, *supra* note 123 (attributing this conclusion to the Pew Commission on Industrial Farm Animal Production, which is one of the Commission's independent trusts established to analyze this public policy issue).

135. *See Slaughterhouses and Processing*, *supra* note 43 (highlighting that high levels of contamination result from the filthy consolidated facilities in which pigs are raised).

136. PEW COMM'N ON INDUS. FARM ANIMAL PROD., PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA 33, *available at* <http://www.ncifap.org/bin/e/j/PCIFAPFin.pdf> [hereinafter PEW COMM'N].

food in high volumes, but at the expense of the animals and the public's health.¹³⁷ These unnatural conditions threaten the safety of America's food supply by acting as breeding grounds for disease and the spread of pathogens responsible for foodborne illnesses.¹³⁸

Each year the United States raises and slaughters approximately 105 million pigs.¹³⁹ Almost all of these pigs are raised in factory farms,¹⁴⁰ and more than three-fourths are raised on factory farms with at least 2,000 pigs.¹⁴¹ Similar to the conditions that cows endure on factory farms, pigs are forced to spend their lives confined to cages or overcrowded areas covered in feces and are denied exercise;¹⁴² both conditions cause crippling leg disorders.¹⁴³ The excessive amount of waste produced by pigs in large numbers¹⁴⁴ creates a serious risk because it harbors pathogens, such as *Salmonella*,¹⁴⁵ which can be carried from the pig to the slaughterhouse and ultimately reach the consumer.¹⁴⁶ Furthermore, pigs regularly harbor the serotype O:3, which is a frequent cause of *Yersinia enterocolitica*.¹⁴⁷ The increase in the outbreaks of this foodborne disease parallels the increasing trend of raising large numbers of pigs in close quarters, which favors the spread of the bacterial disease.¹⁴⁸ These bacteria inhabit the pig's head and tonsils, which ultimately end up in processed products like lunch meats.¹⁴⁹ The effects of this illness range from mild self-resolving diarrhea to severely incapacitating reactive arthritis and potentially fatal septicemia.¹⁵⁰ Even though America eats less pork in comparison to beef, if pigs continue to be raised in environments that support the spread of *Yersinia*, there is a higher danger that America will experience more of this illness.¹⁵¹

137. *Factory Farming*, SUSTAINABLE TABLE, <http://www.sustainabletable.org/issues/factoryfarming/> (last visited Apr. 2, 2011).

138. PEW COMM'N, *supra* note 136, at 11.

139. *Factory Pork Production*, FARM SANCTUARY, <http://www.farmsanctuary.org/issues/factoryfarming/pork/> (last visited Apr. 2, 2011).

140. *See Pigs Used for Food*, PETA, <http://www.peta.org/issues/animals-used-for-food/pigs.aspx> (last visited Apr. 2, 2011).

141. *Factory Farming*, *supra* note 137.

142. *Pigs Used for Food*, *supra* note 140.

143. *Pigs*, WOODSTOCK FARM ANIMAL SANCTUARY, <http://www.woodstocksanctuary.org/learn/factory-farmed-animals/pigs/> (last visited Apr. 2, 2011).

144. *See Factory Farming*, *supra* note 137.

145. Dharmarha, *supra* note 38.

146. *See* PEW COMM'N, *supra* note 136, at 11 (explaining pathogens originating in confinement facilities can cause disease outbreak if they persist through slaughter and contaminate meat that reaches the consumer).

147. FOX, *supra* note 6, at 55.

148. *Id.* at 55-56.

149. *Id.* at 56.

150. *Id.* at 55.

151. *Id.* at 58-59.

Moreover, the contamination that occurs from unsanitary conditions continues to spread because of overcrowding.¹⁵² Therefore, even if only a small number of pigs are initially infected, overcrowding leads to a larger number of infections via pig-to-pig contact.¹⁵³ Similarly, the spread of bacterial contamination and disease also occurs in transport to the slaughterhouse because the trucks are extremely overcrowded.¹⁵⁴ Not only are trucks so overcrowded that pigs have difficulties breathing, but spaces are so tight that sometimes they experience rectal prolapse.¹⁵⁵ More disturbing is the fact that the industry is aware of the dangerous consequences of overcrowding in transportation but fails to take any action. After he acknowledged the high death rates during transport, one hog industry expert explained, “[I]t doesn’t take a lot of imagination to figure out why we load as many hogs on a truck as we do. It’s cheaper.”¹⁵⁶

Unfortunately, while the industry focuses on penny-pinching, these atrocious conditions are responsible for the deaths of over 170,000 pigs in transport each year, as well as more than 420,000 that are crippled upon arrival.¹⁵⁷ So if a pig is lucky enough to make it to the slaughterhouse alive, there is an increased chance that it will be downed. Therefore, because of the increased risks of bacterial contamination and disease during production and transportation, pigs that become downed at factory farms or in transportation to the slaughterhouses need to be permanently removed from the food supply upon arrival.

D. Putting an End to Suffering

Once a pig becomes downed, immediate humane euthanasia is necessary to prevent the needless suffering and the spread of bacterial contamination and disease.¹⁵⁸ In the absence of a requirement that downed animals be immediately humanely euthanized, the industry has a profit-motivated incentive to keep these ani-

152. PEW COMM’N, *supra* note 136, at 13 (noting confinement of large numbers of animals increases risk of pathogen transfer).

153. *See id.* (explaining large concentrations of animals facilitates the spread of infection and increases the infection rate of the total group).

154. Dharmarha, *supra* note 38.

155. *Pig Transport and Slaughter*, PETA, <http://www.peta.org/issues/animals-used-for-food/pig-transport-slaughter.aspx> (last visited Apr. 2, 2011); *see* NAT’L PORK BD., TRANSPORT QUALITY ASSURANCE HANDBOOK 24-25 (2008), available at <http://www.pork.org/filelibrary/TQA/manual.pdf> (associating high rectal temperatures and heart rate increases to stress experienced during transport).

156. *Factory Pork Production*, *supra* note 139.

157. *Top 10 Reasons Not to Eat Pigs*, PETA, <http://www.peta.org/living/vegetarian-living/Top-10-reasons-Not-to-Eat-Pigs.aspx> (last visited Apr. 2, 2011).

158. *See Introduction to the Downed Animal Protection Act*, NODOWNERS.ORG, http://www.nodowners.org/intro_dapa.htm (last visited Apr. 2, 2011).

imals alive since dead animals cannot be slaughtered for human consumption.¹⁵⁹ Pigs that become downed before or upon arrival at the slaughterhouse are denied medical care, food, and water, and they are left to suffer for hours or days until they make it to slaughter or ultimately die.¹⁶⁰ A downed pig means a loss in profits;¹⁶¹ therefore, if it cannot be used, it appears that in the industry's mind there is no use in helping it die humanely.

Each year approximately 100,000 to 900,000 downed pigs endure needless suffering and inhumane treatment,¹⁶² which constitutes approximately .1% to .9% of the total number of pigs slaughtered.¹⁶³ Although this is a small percentage, the fact that even twenty pigs would be subject to needless suffering and inhumane treatment is appalling. Requiring the humane euthanasia of these downed pigs would not be a detriment to producers or slaughterhouses because they constitute such a small number,¹⁶⁴ and thus they are not essential to the livelihood of the producer or the industry.¹⁶⁵ An important factor to compare is the cost to the industry from the 2009 finalized ban on downed cattle. The FSIS reasoned that because the number of downed cattle was so small in comparison to the total number of cattle slaughtered, the loss to the industry by not being able to slaughter downed cows was minimal.¹⁶⁶ It is arguable that had the proposed ban negatively affected the industry's ability to make a profit, it would not have been finalized.

Therefore, it is evident that this requirement is the most reasonable and economical solution: it would put an immediate end to the animal's suffering and put only a minimal dent in the industry's profits. Downed pigs have already suffered extreme amounts of inhumane treatment; eliminating the hours or days that it would take for them to die on their own allows them to die with some sense of dignity.

VI. PART OF THE SOLUTION: BENEFITS OF THE DOWNED ANIMAL AND FOOD SAFETY PROTECTION ACT

In an ideal world, pigs would be raised on several acres of farmland, transported to slaughter in roomy trucks, and slaughtered in immaculate slaughterhouses where workers engage in the most humane handling and slaughter methods. In reali-

159. *Id.*

160. Farm Sanctuary Press Release, *supra* note 104.

161. Tyler Kelley, *Don't Let Stress, Heat be a Downer for Pigs*, PORK, May 2, 2005, available at <http://www.porknetwork.com/pork/features/dont-let-stress-heat-be-a-downer-for-pigs-113887184.html>.

162. Farm Sanctuary Press Release, *supra* note 104.

163. *Introduction to the Downed Animal Protection Act*, *supra* note 158.

164. *Id.*

165. Bauston, *supra* note 26 ("No farmer depends on the sale of downed animals for a livelihood.").

166. Schafer Press Release, *supra* note 93.

ty, however, the current system is far from perfect. Pigs endure inhumane treatment on factory farms, during transport, and at the slaughterhouse. Potential for food contamination increases at each step—from the farm to Americans' plates. By not immediately removing pigs from the food supply at the point in which they become downed, current regulations carelessly allow inhumane handling and slaughter practices to persist at the expense of the nation's health and animal's welfare. Nevertheless the industry's selfish desire to maximize profits ranks higher on its list of priorities than public safety and treatment of animals. America can no longer afford to rely on the industry to protect it, or the animals it eats. No single solution will cure all the defects in the food system or guarantee that no pig will ever again be brutally beaten and left to die.

The Downed Animal and Food Safety Protection Act would act as a federal solution that would establish uniformity across the nation by requiring that all covered entities immediately remove pigs from the food supply at the point in which they become downed. In the absence of a federal solution, states may desire to enact laws to protect their citizens from the risks of consuming contaminated meat from downed animals. Nevertheless, industry opposition to state-level laws in the past has shown that it is difficult to achieve change at the state level.¹⁶⁷

In July 2008, California enacted a law that banned the sale and transport of all downed animals.¹⁶⁸ Section 599f of the California Penal Code prohibited the sale of meat from downed animals for human consumption and required that all downed animals be immediately euthanized.¹⁶⁹ It also provided penalties for violations that apply not only to slaughterhouses, but stockyards, auctions, dealers, and market agencies as well.¹⁷⁰

Less than two months after the law became effective, the National Meat Association and the American Meat Institute won a preliminary injunction enjoining the enforcement of the law against swine slaughterhouses in California regulated under the FMIA.¹⁷¹ The court held Section 599f was preempted by the FMIA because it imposed additional and different requirements on the processing and inspection procedures.¹⁷² The court stated that California could prohibit the slaughter of all pigs because the FMIA permits states to regulate the "type of meat" that can be sold, but could not prohibit the slaughter of downed pigs because a downed pig was not a type

167. See Nat'l Meat Ass'n v. Brown, No. CV-F-08-1963 LJO DLB, 2009 WL 426213, at *1 (E.D. Cal. Feb. 19, 2009) (featuring industry-initiated litigation opposing the California law relating to downed animals).

168. 2008 Cal. Stat. 194.

169. CAL. PENAL CODE § 599f(b)-(c) (West 2010).

170. *Id.* § 559f(a), (d), (h).

171. *Brown*, 2009 WL 426213, at *16.

172. *Id.* at *9-10.

of meat and doing so would differ from FMIA requirements.¹⁷³ The court recognized the State's significant interest in protecting the public's health, but concluded the FMIA already protected this interest because its purpose was to protect the food supply from potential risks by using comprehensive inspection procedures.¹⁷⁴ This unfortunate defeat suggests that if states are not allowed to make changes as they see fit because the FMIA already embodies their interests, then changes need to be made at a federal level.

The Downed Animal and Food Safety Protection Act is the most plausible federal solution because it would resolve problems arising during ante-mortem inspections; if a pig could not stand or walk on its own, it would be removed with no questions asked. The industry's arguments that its methods of self-regulation are an adequate safeguard against contamination and that removing a federal veterinarian's discretion to determine if the pig is downed would result in a loss of healthy products¹⁷⁵ are both misplaced. The industry contends that "[t]his is not a public health issue"¹⁷⁶ and removing a veterinarian's discretion would result in a "waste of livestock that could provide healthy meat products"¹⁷⁶ because the ban would apply to all non-ambulatory pigs, including fatigued pigs, which it opines are different from downed pigs.¹⁷⁷ Both are non-ambulatory, but fatigued pigs are described as unable to move off the truck on their own and out of breath, but are capable of being slaughtered with no negative effects on the quality of their meat if given time to rest and recover.¹⁷⁸

According to the National Pork Producers Council, banning all non-ambulatory pigs would result in the loss of approximately forty-one million pounds of safe pork that could have entered the food supply.¹⁷⁹ From the industry's point of view, a federal veterinarian will be able to do a "quick physical exam" to determine if the pig is or is not healthy in his professional judgment.¹⁸⁰ Nevertheless, the causes of downed pigs are closely related to those of fatigued pigs; stressful handling and use of aggressive methods such as electric prodding attribute to the occurrences of both.¹⁸¹ Unless the industry is willing to require that all covered entities set aside the time to prove that a pig is fatigued by giving it time to rest and recover, the pig needs to be considered downed and removed. There is no way to discern from a quick

173. *Id.* at *9 (referencing *Empacadora De Carnes De Fresnillo v. Curry*, 476 F.3d 326, 333 (5th Cir. 2007); *Cavel Int'l., Inc. v. Madigan*, 500 F.3d 551, 554 (7th Cir. 2007)).

174. *Id.* at *14.

175. *Downer Pigs in the Food Supply*, *supra* note 121.

176. Jim Miller, *New Anti-Cruelty Law Faces Court Challenge*, PRESS ENTERPRISE (Jan. 6, 2009), http://www.hfa.org/pdf/For_Web_Press_Enterprise_News_Article.pdf (quoting Janet M. Riley, American Meat Institute spokeswoman).

177. Kelley, *supra* note 161.

178. *Id.*

179. *Downer Pigs in the Food Supply*, *supra* note 121.

180. *Id.*

181. Gonyou, *supra* note 24; Kelley, *supra* note 161.

physical exam that stressful handling or electric prodding only made the pig fatigued or actually made it downed. Differentiating based on the presence of injuries is also problematic because injuries and diseases are frequently interrelated, thus making it very difficult or almost impossible for an inspector to determine if the animal is safe for human consumption.¹⁸² For example, “[D]iseases which affect coordination and other aspects of gait often predispose an animal to injuries such as broken limbs or soft tissue damage. If the animal is then down because of a broken leg, or torn ligament, the injury may be the prominent or sole presenting sign” of an underlying disease.¹⁸³

Furthermore, the permanent ban will not result in an automatic loss of profits even though the industry believes a downed pig represents a lost profit. Given that 75-90% of downers are preventable,¹⁸⁴ the industry can choose to make changes and reduce lost profits by considering alternatives. The permanent ban as applied to all factory farms and other covered entities would increase incentives to engage in more humane and less stressful methods to ensure that pigs are ambulatory upon arrival at the slaughterhouse, thereby lowering the incidence of downed and fatigued pigs. If a producer knew a pig would be removed immediately at the point at which it became downed, it is likely that he would engage in more humane handling methods for the sake of not losing any pigs or profits. It is inevitable that some pigs would become downed for reasons beyond the industry’s control, but controlling the factors related to the causes of fatigued and downed pigs would lower the overall amount of downers. This is not a question about how much money will be lost because of how much pork will be removed from the food supply. Unless a change is made, the industry will inevitably lose money by decreased consumer demand due to the choice to continue to allow potentially contaminated meat from downed pigs into the food supply.

VII. CONCLUSION

Americans know the meat they see on their plates comes from animals, but what they do not see is what comes with the animals they consume or what the animals endured all the way from the farm to their plates. They cannot discern potential foodborne illnesses lurking inside an animal’s flesh, nor should they have to. Current meat inspection regulations wrap the public in false security instead of insulating them from contaminated meat. By allowing downed pigs to enter the food supply, the industry evades its responsibility to provide the public with safe pork and ultimately forces Americans, and the pigs it slaughters, to suffer the consequences.

182. BECKER, *supra* note 57, at 6.

183. *Id.* (quoting Linda A. Detweiler, the USDA’s former BSE expert, commenting on the difficulty in determining whether a cow was infected with BSE).

184. Sara Novak, *Stop “Downer” Animals from Entering the Food Supply*, TREEHUGGER (Dec. 19, 2009), <http://www.treehugger.com/files/2009/12/downer-animals-in-the-food-supply.php>.

There is no one solution, but the Downed Animal and Food Safety Protection Act is the next best step in the right direction.