

BEYOND THE SLAUGHTERHOUSE: THE PUSH FOR FARM-ANIMAL WELFARE  
REFORM AND THE RESISTANCE OF INDUSTRIAL AGRICULTURAL AMERICA

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## I. INTRODUCTION

“A new type of farming is upon us . . . [with] animals living out their lives in darkness and immobility without the sight of the sun, of a generation of men who see in the animal they rear only its conversion to human food.”<sup>1</sup> The rapid shift to a modern farming regime represents a stark change in the values, traditions, and practices that once encompassed traditional American farming.<sup>2</sup> Market forces and capital incentives have replaced the ethics behind small family farming with the controversial tactics of industrial farms, also known as Concentrated Animal Feeding Operations (hereinafter “CAFOs”).<sup>3</sup> The movement away from the traditional ethics of animal husbandry has given rise to animal welfare concerns advanced by the questionable practices of modern industrial farming.<sup>4</sup> At the forefront of this controversy is the operation of intensive confinement

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<sup>1</sup> RUTH HARRISON, *ANIMAL MACHINES: THE NEW FACTORY FARMING INDUSTRY 1* (London: Vincent Stuart LTD 1964).

<sup>2</sup> See *Putting Meat on the Table: Industrial Farm Animal Production in America*, A Report of the Pew Commission on Industrial Farm Animal Production (2009), available at <http://www.ncifap.org/bin/e/j/PCIFAPFin.pdf> [hereinafter *Putting Meat on the Table*] (noting that prior to the emergence of the industrial farm, it was in the best interest of the farmer to take good care of animals); see also Jonathan R. Lovvorn & Nancy V. Perry, essay, *California Proposition 2: A Watershed Moment for Animal Law*, 15 *ANIMAL L.* 149, 151 (2009) (“Farmers, faced with pressures to produce in greater quantities and at lower prices, succumbed to increasingly harsh and industrial techniques that treat animals as machines, rather than living, breathing individuals with natures, instincts, and needs.”); Jimena Uralde, comment, *Congress’ Failure to Enact Animal Welfare Legislation for the Rearing of Farm Animals: What is Truly at Stake?*, 9 *U. MIAMI BUS. L. REV.* 193, 202 (“While agriculture has seemingly always been profit motivated, traditional husbandry practices embodied a symbiotic and interdependent relationship between producers and their animals; for example, if the animals thrived, then producers thrived as well. Today’s animal agricultural industry lacks this mutuality.”).

<sup>3</sup> See Lovvorn & Perry, *supra* note 2, at 151 (“[F]arms in the 21st Century have become highly specialized systems and no longer produce more than one crop and several species of livestock.”); see also Nicole Fox, Note and Comment, *The Inadequate Protection of Animals Against Cruel Animal Husbandry Practices Under United States Law*, 17 *WHITTIER L. REV.* 145, 145 (1995) (“Corporate farms have prospered because ‘federal policy and market forces have favored large-scale mechanized and capital-intensive farming as the means to ensuring cheap and plentiful food.’”) (internal citation omitted).

<sup>4</sup> See discussion *infra* pp. 13-15.

practices<sup>5</sup> within the farming industry. More specifically, numerous animal rights organizations have attacked the use of battery cages, gestation crates, and veal crates,<sup>6</sup> arguing that the limitations on animal mobility amount to “significant and prolonged physical and psychological assaults” of animals.<sup>7</sup> While some vehemently believe the confinement practices give CAFOs “a virtual free hand to systematically abuse animals with impunity,”<sup>8</sup> proponents of these methods argue that confinement actually promotes animal welfare by protecting animals from adverse weather conditions, predators, diseases, and parasites.<sup>9</sup>

The ethics of modern industrial farming tactics are now being challenged on the political front, as animal welfare organizations seek to rectify the injustices caused through the use of intensive confinement practices.<sup>10</sup> The Humane Society of the United

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<sup>5</sup> Intensive confinement practices used by CAFOs have the biggest impact on egg-laying hens, pregnant sows, and calves raised for veal. The Humane Society of the United States, *An HSUS Report: The Welfare of Intensively Confined Animals in Battery Cages, Gestation Crates, and Veal Crates* 1 (Oct. 2009) [hereinafter *The Welfare of Intensively Confined Animals*]. As HSUS notes, “[t]he intensive confinement of these production systems severely impairs the animals’ welfare, as they are unable to exercise, fully extend their limbs, or engage in many important natural behaviors.” *Id.* See also Fox, *supra* note 3, at 146 (“[i]ntensive confinement’ is a method of raising farm animals which maximizes the use of land and space in order to maximize corporate profits”) (internal citation omitted).

<sup>6</sup> See generally, *id.* Battery cages are “small, barren wire enclosures. . . [t]he most commonly used cages hold 5- 10 birds.” *Id.* at 2, Gestation crates are used for breeding sows, which are then transferred into farrowing stalls after the birth of piglets, which restrict the movement of the sow. Nat’l Pork Board, 2003 Swine Care Handbook 8-9 (2002). In veal crates, calves are “tied to the front of the crate with a short tether, restricting virtually all movement. See *supra*, note 5, at 7. The calves remain “nearly immobilized until they reach slaughter weight.” *Id.*

<sup>7</sup> *The Welfare of Intensively Confined Animals*, *supra* note 5, at 1. HSUS argues that “scientific evidence shows that intensively confined farm animals are frustrated, distressed, and suffering.” *Id.*

<sup>8</sup> Lovvorn & Perry, *supra* note 2, at 150.

<sup>9</sup> See The Ohio State University College of Food, Agriculture, and Environmental Sciences, *The Economics of Animal Welfare Regulations Proposed for Ohio*, June 18, 2009 [hereinafter The OSU College of Food, Agriculture, and Environmental Sciences].

<sup>10</sup> HSUS, United Farm Workers, Center for Food Safety, and The Humane Society Veterinary Medical Association are all examples.

States (hereinafter “HSUS”) has acted as the driving force behind these legislative efforts. HSUS and animal welfare organizations have been successful in implementing legislation through the ballot initiative process in Florida,<sup>11</sup> Arizona,<sup>12</sup> and California.<sup>13</sup> This legislation seeks to phase out the use of battery cages, gestation crates, and veal crates over the course of several years.<sup>14</sup> Oregon,<sup>15</sup> Colorado,<sup>16</sup> Maine,<sup>17</sup> and

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<sup>11</sup> See FLA. CONST. art. X, § 21(a) (2002) (“[i]t shall be unlawful for any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely.”); see also Kristin Hinnman, *The Humane Society’s Fight Began Right Here in Florida*, New Times, (April 15, 2010), available at <http://www.browardpalmbeach.com/2010-04-15/news/the-humane-society-s-battle-with-farmers-began-right-here-in-florida/2> (“Florida made for an attractive guinea pig . . . [r]anking 33rd in hog production, the state lacked an obvious deep-pocketed opponent for the Humane Society’s “End Factory Farming” campaign. Moreover, its population centers are stacked predominantly on the urban coasts, far from farmlands.”).

<sup>12</sup> See ARIZ. REV. STAT. ANN. §§ 13-2910.07 (A)(1)-(2) (2009) (“a person shall not tether or confine any pig during pregnancy or any calf raised for veal, on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) lying down and fully extending his or her limbs; or (b) turning around freely.”).

<sup>13</sup> See CAL. HEALTH & SAFETY CODE § 25990 (West 2009) (“A person shall not tether or confine any covered animal, on a farm, for all or the majority of any day, in a manner that prevents such animal from: (a) lying down, standing up, and fully extending his or her limbs; and (b) turning around freely.”) In California, a “covered animal” includes “any pig during pregnancy, calf raised for veal, or egg-laying hen who is kept on a farm.” *Id.* at § 25991.

<sup>14</sup> See Elizabeth R. Springsteen, *A Proposal to Regulation Farm Animal Confinement in the United States and an Overview of Current and Proposed Laws on the Subject*, 14 DRAKE J. AGRIC. L., 440-49 (Fall 2009), for a detailed explanation of the legislative initiative in Florida, Arizona, and California, Oregon, Colorado, Maine, Michigan, and Ohio, as well as a comprehensive comparison of the similarities and differences of the applicable statutes.

<sup>15</sup> See OR. REV. STAT. § 600.150(2) (2008) (“A person commits the offense of restrictive confinement of a pregnant pig if the person confines a pregnant pig for more than 12 hours during any 24-hour period in a manner that prevents the pregnant pig from: (a) [l]ying down and fully extending its limbs; or (b) [t]urning around freely.”).

<sup>16</sup> See COLO. REV. STAT. § 35-50.5-102 (1) (2009) (“No person shall confine a calf raised for veal or gestating sow in any manner other than the following: (a) [a] calf raised for veal shall be kept in a manner that allows the calf to stand up, lie down, and turn around without touching the sides of its enclosure; (b) [a] gestating sow shall be kept in a manner that allows the sow to stand up, lie down, and turn around without touching the sides of its enclosure until no earlier than twelve days prior to the expected date of farrowing. At that time, a gestating sow may be kept in a farrowing unit.”).

<sup>17</sup> See ME. REV. STAT. ANN. Tit. 7 § 4020 (2) (2009) (“A person may not tether or confine a covered animal for all or the majority of a day in a manner that prevents the animal from (a) [l]ying down,

Michigan<sup>18</sup> have also passed reforms through the traditional legislative process. Finally, Ohio, being the most recent target of HSUS, implemented its own legislation which passed on November 3, 2009.<sup>19</sup> However, these legislative movements have been met with extreme resistance.<sup>20</sup> Large industrial food producers adamantly oppose legislative reform, arguing that change will virtually wipe out the markets for egg, veal, and pork in their respective states.<sup>21</sup>

As HSUS and other animal welfare organizations continue to push ballot initiative states into enacting legislation which reforms intensive confinement practices, other states have been forced to take a critical look at their current practices, with some opting instead to create their own legislation rather than adopt the recommendations of HSUS.<sup>22</sup>

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standing up and fully extending the animal's limbs; and (b) [t]urning around freely.”). In Maine, a “covered animal” includes “a sow during gestation or calf raised for veal that is kept on a farm.” *Id.* at § 4020 (1)(b).

<sup>18</sup> See MICH. COMP. LAWS § 287.746(2) (2009) (“a farm owner or operator shall not tether or confine any covered animal on a farm for all or the majority of any day, in a manner that prevents such animal from doing any of the following: (a) [l]ying down, standing up, or fully extending its limb; (b) [t]urning around freely.”). In Michigan, a “covered animal” includes “any gestating sow, calf raised for veal, or egg-laying hen that is kept on a farm.” *Id.* at § 287.746(1)(b) (2009).

<sup>19</sup> See Springsteen, *supra*, note 14, at 440-49 (providing a discussion of Ohio’s legislation and Pacelle’s disapproval).

<sup>20</sup> See The Ohio State University College of Food, Agriculture, and Environmental Sciences, *supra* note 9 (arguing that if similar Proposition 2 legislation is implemented in Ohio then the state would see diminished crop agriculture); see also Steve Lawrence, *California Initiative Campaigns Cost \$227 Million*, sfgate.com, February 3, 2009 (noting that supporters of Proposition 2 in California spent \$10.6 million dollars on the initiative campaign, along with opponents spending \$8.9 million dollars).

<sup>21</sup> See Monica Scott, *Michigan Farmers to Face Off with Humane Society Activists Over Animal Care Legislation*, THE GRAND RAPIDS PRESS, July 28, 2009, available at [http://www.mlive.com/news/grand-rapids/index.ssf/2009/07/michigan\\_farmers\\_prepared\\_to\\_f.html](http://www.mlive.com/news/grand-rapids/index.ssf/2009/07/michigan_farmers_prepared_to_f.html) (“When you have outside groups calling the shots - - in any industry - - it’s a recipe for disaster,” said Langeland, whose 2,700 – acre farm raises dairy cows and poultry.”).

<sup>22</sup> See, e.g., Terry Kinney, *Ohio Governor Backs Plan for Livestock Standards: Humane Society Says Ohio Governor’s Plan for Livestock Standards Doesn’t Go Far Enough*, Associated Press – ABC News, June 23, 2009, available at <http://abcnews.go.com/print?id=7904514> (“We’ve come to the conclusions that a negotiated settlement is the best way to go,” said Roger Wise, a third-generation farmer and president of the Ohio Farmers Union. ‘It’s misguided to draw a line in the sand and say it’s us versus them.’”).

Still, states which do not possess ballot initiatives do not go unaffected.<sup>23</sup> Rather, the current legislative reforms have the potential to affect the economic markets of other states with high production rates in egg, veal, and pork.<sup>24</sup>

Pennsylvania has yet to enact legislation which would affect the intensive confinement practices of CAFOs.<sup>25</sup> Because Pennsylvania is not a ballot initiative state,<sup>26</sup> it has the luxury of implementing its own legislative reform. Moreover, should Pennsylvania decide not to enact legislation in the near future, it could potentially reap wide-spread economic rewards based upon the legislation implemented in other top producing states.<sup>27</sup>

The clash between animal welfare organizations and modern industrial agricultural practices will continue to be an issue which will play out on the legislative front. Given the future ramifications this legislation may have on agricultural America, this article provides an in depth overview of the animal welfare movement, with an analysis of the future of animal welfare in Pennsylvania, as related to intensive confinement practices.

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<sup>23</sup> See the Initiative and Referendum Inst. at the Univ. of S. Cal., *States with Direct (DA) and In-direct (IDA) Initiative Amendments; Direct (DS) and In-Direct (IDS) Initiative Statutes and Popular (PR) Referendum*, for a list of the twenty-four states which have initiative procedures.

<sup>24</sup> See e.g., The OSU College of Food, Agriculture, and Environmental Sciences (noting that because Ohio is surrounded by states with competitive laying hen enterprises, that the Ohio market for hen producers would not be competitive.)

<sup>25</sup> See generally Springsteen, *supra* note 14.

<sup>26</sup> See Initiative and Referendum Institute at the Univ. of S. Cal., 2008, <http://www.iandrinstute.org/Pennsylvania.htm> (noting that Pennsylvania is not an initiative state, but describing an exception from May 1983 in Bucks County where environmentalists and voters were able to pass legislation by slim margin.)

<sup>27</sup> See *The Economics of Animal Welfare Legislation Proposed for Ohio*, *supra*, note 9, at 3.

## II. THE STORY BEHIND INTENSIVE CONFINEMENT PRACTICES: THE CLASH BETWEEN ANIMAL WELFARE ORGANIZATIONS AND MODERN INDUSTRIAL AGRICULTURE

An understanding of the recent legislative push to eliminate intensive confinement practices cannot be adequately understood without an explanation of the goals behind the animal welfare movement. Accordingly, part A of this section begins with an analysis of the principles and objectives of animal welfare organizations. Moreover, this section provides an explanation of European policy and principles of animal welfare by examining the Five Freedoms, which have come to be known as the foundation of animal welfare reform. From there, part B of this section describes the current push for farm animal welfare reform, by looking at the political agenda of the most active animal welfare organization, HSUS. Next, part C of this section analyzes the current legislation, both state and federal, and its inability to extend protection to farm animals. Finally, part C of this section explains in detail the current fight at the ballot box to implement phase-out initiatives of intensive confinement practices, by looking at the arguments for and against such legislation.

### *A. Principles and History Behind Animal Welfare Reform*

“Because animals lack capacity for higher cognitive language and thinking that characterizes humans, they are not in a position to formally protest cruel treatment . . . [accordingly], [p]eople speak for animals.”<sup>28</sup> Advocates of the animal welfare movement have advanced numerous arguments and rationales for why society should extend protection to animals. To that end, proponents of the movement can be classified into three distinct groups based upon their respective ideologies and theories surrounding the

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<sup>28</sup> LUTHER TWEETEN, *TERRORISM, RADICALISM, AND POPULISM IN AGRICULTURE* 95 (Iowa State Press) (2003).

extent of protection that should be afforded to animals: (1) animal welfarists; (2) animal welfare activists; and (3) animal rightists.<sup>29</sup> First, animal welfarists, being the least extreme of the aforementioned groups, have a desire to see that animals are treated well.<sup>30</sup> This group encompasses most farmers and members of the agri-business.<sup>31</sup> Next, animal welfare activists are proponents of animal-care reform, and use “other nonconventional, nonviolent means as well as conventional means to bring animal-care reform.”<sup>32</sup> Finally, animal rightists argue that human rights should be extended to animals and will effectuate “almost any means, lawful or unlawful, to bring justice to animals.”<sup>33</sup>

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<sup>29</sup> *Id.* at 97.

<sup>30</sup> *Id.* (“Animal welfarists tend to rely on results from scientific research and information from traditional communication media to motivate and initiate changes in animal-care rules and regulations through the political process.”).

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

<sup>32</sup> *Id.* HSUS would be classified as an animal welfare activist organization. *See* Human Soc’y of U.S., Overview: About Us, *available at* <http://www.humanesociety.org/about/overview/>.

<sup>33</sup> TWEETEN, *supra* note 28 at 97 (“Animal rightists reject the utilitarian benefit-cost analysis of [animal welfarists and animal welfare activists], and feel the urgency to protect animal rights justifies peddling of misinformation, hate, and sometimes, violence to accomplish reform.”). People for the Ethical Treatment of Animals (PETA) is an example of an animal rightist group. Bruce Friedrich, PETA’s campaign coordinator, made the following statement demonstrating the acute need for reform which animal rightists possess:

These animals do have the same rights [as humans] to be free of pain and suffering at our hands . . . . And considering the level of the atrocity and level of the suffering, I think it would be a great thing if, you know, all of these factories and slaughter houses and the laboratories and the banks that fund them exploded tomorrow. I think it is perfectly appropriate for people to take bricks and toss them through the windows and, you know, everything else along the line. Alleluia to the people who are willing to do it.

*Id.* at 99-100; *see also* Brian Tubbs, *Political Radicalism and Animal Rights: People for the Ethical Treatment of Animals*, Capital Research Center – Organization Trends, Jan. 2003, *available at* <http://www.capitalresearch.org/pubs/pdf/x3762033950.pdf> (describing PETA’s aggressive tactics and arguing that PETA’s media stunts may do the animal rights movement more harm than good).

Despite the classification of animal welfare groups, the questions driving the movement, many of which go unanswered, remain the same. For example, do animals possess an intrinsic value beyond mere utility to humans?<sup>34</sup> Are animals capable of feeling pain? To what extent can animals experience fear, frustration, or excitement?<sup>35</sup> Peter Singer, a leader in the animal rights movement,<sup>36</sup> argued that a prerequisite to extending animals “interests” is having a capacity for suffering and enjoyment.<sup>37</sup> He believed that the proper analysis was not to extend “equal or identical treatment,” but to afford animals “equal consideration.”<sup>38</sup> Thus, according to Singer, equal consideration will differ between humans and animals based upon the respective interests attributable to each classification.<sup>39</sup>

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<sup>34</sup> See TWEETEN, *supra* note 28, at 97.

<sup>35</sup> See Lovvorn & Perry, *supra* note 2, at 151.

<sup>36</sup> See TWEETEN, *supra* note 28, at 97 (noting that Peter Singer is considered to have energized the animal rights movement).

<sup>37</sup> PETER SINGER, ANIMAL LIBERATION 7-8, (HarperCollins Publishers Inc. 2002) (1975) (“The capacity for suffering and enjoyment is, however, not only necessary, but also sufficient for us to say that a being has interests—at an absolute minimum, an interest in not suffering.”).

<sup>38</sup> *Id.* at 2. (“The basic principle of equality does not require equal or identical treatment; it requires equal consideration. Equal consideration for different beings may lead to different treatment and different rights.”).

<sup>39</sup> *Id.* at 2.

Singer contended that the principle of equality requires *consideration* of all interests of “equal” members of society but does not depend on attributes such as mental ability of a being. Thus, a pig is treated differently than a child not because their IQs differ but because a pig needs adequate room to run freely and the child needs schooling. Thus, all sentient species have rights but how those rights are expressed depends on the respective “interests” of the various species and subspecies.

TWEETEN, *supra* note 28, at 98.

Perhaps the earliest version of farm animal welfare reform is founded within the Brambell Committee Report, which set forth criteria to provide for the rights of farm animals consistent with their feelings and behavior.<sup>40</sup> After acknowledging that animals “can experience pain, suffering, and stress and such emotions as rage, fear, apprehension, frustration, and pleasure,” the committee established a Five-Freedoms Bill of animal rights which accounted for the physical and mental well-being of animals.<sup>41</sup> Initially, the Five Freedoms Bill required that, at a minimum, animals should have the ability to: (1) turn around; (2) groom itself; (3) get up; (4) lie down; and (5) stretch its legs.<sup>42</sup> More recently, the Five Freedoms have been revised by the Farm Animal Welfare Council (FAWC), which noted that the original Five Freedoms focused too readily on the movement of animals, to the exclusion of other important rights.<sup>43</sup> The new Five Freedoms seek to provide: (1) freedom from hunger and thirst; (2) freedom from discomfort; (3) freedom from pain, injury, or disease; (4) freedom to express normal behavior, and (5) freedom from fear and distress.<sup>44</sup> Accordingly, the new Five Freedoms

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<sup>40</sup> See Brambell, F.W.R. Report of Technical Committee to Enquire into the Welfare of Animals Kept under Intensive Husbandry Systems, Command Paper 2836 (London, UK: Her Majesty’s Stationery Officer, 1965).

<sup>41</sup> Harold W. Gonyou, *Why the Study of Animal Behavior is Associated with Animal Welfare Issue*, 72 J. OF ANIMAL SCI. 2171, 2172 (1994), available at <http://jas.fass.org/cgi/reprint/72/8/2171.pdf>.

<sup>42</sup> See TWEETEN, *supra* note 28 ,at 99.

<sup>43</sup> *Assessment of Animal Welfare: The Five Freedoms*, Alberta Farm Animal Care, available at <http://www.afac.ab.ca/fivefreedoms.htm> (noting that the definitions of the original five freedoms concentrated too much on space requirements as only one aspect of animal behavior).

<sup>44</sup> In its entirety, the New Five Freedoms read as follows:

- (1) Freedom from thirst, hunger and malnutrition by ready access to fresh water and a diet to maintain full health and vigor.
- (2) Freedom from discomfort by providing a suitable environment, including shelter and a comfortable resting area.
- (3) Freedom from pain, injury, and disease by prevention or rapid diagnosis and treatment.
- (4) Freedom to express normal behavior or providing sufficient space, proper facilities,

reflect current notions of the rights of farm animals and have acted as an indispensable guideline on reform for many organizations.<sup>45</sup>

American notions on farm animal welfare reform have failed to match European initiatives. Of the new Five Freedoms, HSUS has sought to remedy merely one facet of the ‘fourth freedom,’ through legislative initiatives which would phase out intensive confinement practices.”<sup>46</sup> Based upon Europe’s recognition of intrinsic animal rights, it is clear that America has fallen behind Europe in the arena of affording farm animal’s adequate protection.<sup>47</sup>

#### *B. The Push for Farm Animal Welfare Reform and the Clash with Industrial Agricultural Productivity*

The rise of the industrial agricultural movement and the controversial tactics implemented within CAFOs have sparked an emergence of public concern among local communities and the nation at large.<sup>48</sup> Although the first successful farm animal welfare

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and company of the animal’s own kind. (5) Freedom from fear and distress by ensuring conditions that avoid mental suffering.

Gonyou, *supra* note 41, at 2172. Scholars find that freedoms from hunger and thirst, discomfort, and pain, injury or disease, have “traditionally been accepted and addressed by agriculturalists.” *Id.* However, the latter two freedoms merely demonstrate “the current concerns raised by society at large.” *Id.*

<sup>45</sup> See *Putting Meat on the Table*, *supra* note 2, at 35 (“[The Five Freedoms] . . . became the basis for guidelines and codes of practice for various organizations around the world.”).

<sup>46</sup> See Gonyou, *supra* note 41, at 2172. The fourth freedom contemplates that animals will be afforded “freedom to express normal behavior by providing sufficient space, proper facilities, and company of the animal’s own kind.” *Id.* HSUS’s legislative efforts would merely provide farm animals ‘sufficient space.’

<sup>47</sup> See William Reppy, Jr. & Jeff Welty, *Farm-Animal Welfare, Legislation, and Trade*, 70 ANIMAL L. & POLICY 325, 341-42 (2007) (“Much of the complacency in the United States towards factory farming may be due to the American public’s ignorance about farming conditions and practices . . . as well to the focus of American NGOs on laboratory animals, rather than on farm-animal welfare.”).

<sup>48</sup> See TWEETEN, *supra* note 28, at 104 (“Residents of local communities, states, and the nation are ambivalent about whether . . . regulations should . . . (1) reserve small farms and discourage large farms because ‘small is beautiful’ and ‘big is bad’; (2) internalize farming externalities such as flies, odors, and

initiative implemented on behalf of animal welfare organizations and HSUS did not take place until 2002,<sup>49</sup> concerns with intensive confinement resonated much earlier.<sup>50</sup> For example, prior to the phase-out plans of intensive confinement practices, opponents of CAFOs argued that the environment suffered based upon large industrial operations.<sup>51</sup> As a result, many states now require CAFOs to conform their operations to the requirements of Environmental Protection Agency regulations.<sup>52</sup>

Accordingly, HSUS and other animal rights organizations have been proactive in their efforts to inform the public of the controversial tactics implemented in CAFOs.<sup>53</sup> In particular, there are four farming practices implemented in this new regime of industrial farming which, it is argued, significantly affect animal welfare: (1) the overbreeding of birds; (2) the caging of hens; (3) the crating of pregnant sows; (4) and the tethering or crating of calves raised for veal.<sup>54</sup> Animal welfare groups have been using the political process to phase out the use of intensive confinement practices, while also pushing large carriers of egg, pork, and veal to cease selling products produced on CAFOs which

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water pollution; or (3) seek local ownership and control of farms.”); *see also* Reppy & Welty, *supra* note 47, at 329 (“The changes in farm animal production have created a number of welfare problems on the farm, during transport, and during slaughter.”).

<sup>49</sup> *See* Springsteen, *supra* note 14, at 440 (noting that Floridians for Humane Farms, which was strongly backed by HSUS, assisted in passing the first farm animal welfare law through ballot initiative in November 2002); *see also* FLA. CONST. art. X, § 21(a) (2002).

<sup>50</sup> *See* TWEETEN, *supra* note 28, at 104 (“[CAFOs] are anathema to animal rights activists”).

<sup>51</sup> *Id.* at 105.

<sup>52</sup> *Id.* at 104.

<sup>53</sup> *See, e.g.* The Humane Society of the United States, Cruel Confinement, *available at* [http://www.humanesociety.org/issues/confinement\\_farm/](http://www.humanesociety.org/issues/confinement_farm/) (describing the cruelty of intensive confinement through use of a video depicting battery cages); *see also* *The Welfare of Intensively Confined Animals in Battery Cages, Gestation Crates, and Veal Crates*, *supra* note 5.

<sup>54</sup> Reppy & Welty, *supra* note 47, at 330.

operate these caging devices.<sup>55</sup> Through these efforts, animal welfare groups seek to inform the public about the dangers of intensive confinement practices. To that end, the increase in public awareness of the conditions implemented through confinement agriculture has led to a startling increase in consumer demand for changes.<sup>56</sup> Some statistics show that 75% of the public would like to see government mandates for basic animal welfare measures.<sup>57</sup> Moreover, it is evident that consumers are willing to pay more for products which are labeled with welfare assurances.<sup>58</sup> For example, consumers indicated that they would be willing to pay five to ten percent more for eggs which contained the label “Animal Care Certified,” even without having any information about what the label represented.<sup>59</sup>

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<sup>55</sup> The Humane Society of the United States, *Maine Becomes Sixth U.S. State to Ban Extreme Confinement*, May 13, 2009, available at [http://www.hsus.org/farm/news/ournews/maine\\_bans\\_veal\\_gestation\\_crates\\_051309.html](http://www.hsus.org/farm/news/ournews/maine_bans_veal_gestation_crates_051309.html) (Noting that major national retailers, such as Safeway and Burger King, are phasing in crate-free and cage-free products due to consumer demand, while Smithfield Foods, Strauss Veal, and Marcho Farms have also begun to phase out crates and opt instead for group housing systems for pigs and calves); see also *Putting Meat on the Table*, *supra* note 2, at 31 (“Possibly as a defensive response, the food animal industry has made changes that are easily marketed and that are aimed at changing public perception.”).

<sup>56</sup> See *Putting Meat on the Table*, *supra* note 2, at 31.

<sup>57</sup> See *id.* (citing Oklahoma State Univ. and the Am. Farm Bureau Federation, available at <http://asp.okstate.edu/baileynorwood/aw2/aw2main.htm>; see also Amy Mosel, comment, *What About Wilbur? Proposing A Federal Statute to Provide Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 UNIV. OF DAYTON L. REV. 133, 161 (2001)

Statistics on the organic food industry’s success proves that consumers care about the quality of life that animals raised for food production have before slaughter. People are willing to pay slightly higher prices for the comfort of knowing that animals were not mistreated while alive. Some consumers are unwilling to sacrifice their values by purchasing meat that was raised under cruel conditions. Treating farm animals humanely provides justification for their subsequent slaughter and consumption that is important to many people.

<sup>58</sup> Reppy and Welty, *supra* note 47, at 347 (“In a 2004 Zogby poll, three-quarters of respondents said they were willing to spend two cents more for a fried-chicken meal with animal-welfare assurances.”); see also *supra* note 57.

<sup>59</sup> *Id.* at 348.

Apart from the public response to taking animal welfare measures, the subject briefly passed before the Supreme Court of the United States in *Winter v. Natural Resources Defense Council*.<sup>60</sup> There, in a vehement dissent authored by Justice Ginsburg and joined by Justice Souter, Justice Ginsburg argued that matters of behavioral disturbances and injuries to mammals are matters which should not be “lightly dismissed.”<sup>61</sup> Accordingly, animal welfare organization initiatives on the legislative front, voluntary actions on behalf of large industries, and the inherent recognition of animal rights, albeit through dissent, within the Supreme Court, have brought the issue of intensive confinement practices to the forefront of concern within America.

However, the efforts of HSUS and animal welfare groups have not gone unchallenged. Despite the questionable practices of CAFOs, it is nearly undisputed that CAFOs are more efficient than smaller farms.<sup>62</sup> More specifically, CAFOs operate at a lower cost of production; thus, these lower costs are passed directly to consumers.<sup>63</sup> To achieve this end, CAFOs also have a positive effect on the local labor market and have

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<sup>60</sup> 129 S. Ct. 365 (2008).

<sup>61</sup> *Id.* at 393. In *Winter*, the Court was asked to look at the ability of the United States Navy to use sonar with the Pacific Ocean. Justice Ginsburg observed that sonar has been linked to “mass strandings of marine mammals, hemorrhaging around the brain and ears, acute spongiotic changes in the central nervous system, and lesions in vital organs.” *Id.* at 392. Accordingly, Justice Ginsburg argued that the “likely harm-170,000 behavioral disturbances, including 8,000 instances of temporary hearing loss; . . . including 436 injuries to a beaked whale population numbering only 1,121-*cannot be lightly dismissed*, even in the face of an alleged risk to the effectiveness of the Navy’s 14 training exercises.” *Id.* at 392. One can easily equate Justice Ginsburg’s reasoning in *Winter* and apply the same to the current practices of intensive confinement practices within industrial agricultural farming.

<sup>62</sup> TWEETEN, *supra* note 28, at 105.

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

the ability to offer higher employment positions than smaller farms.<sup>64</sup> Moreover, while some opponents of CAFOs argue that CAFOs raise critical environmental concerns, others believe that larger operations have the means to convert animal waste into productive means.<sup>65</sup> Phasing out of intensive confinement practices does not mean that CAFOs must also be eliminated; however, the implementation of cage-free practices would have a dramatic economic effect on industrial agricultural America.<sup>66</sup>

Given the potential for CAFOs to produce a wide range of jobs, operate more efficiently than small farming operations, and their ability to pass lower-costs of production onto consumers, the productivity advantages of CAFOs clash directly with the initiatives of animal welfare organizations. Even though the “worst animal welfare problems” are attributable to CAFOs, efforts to “achieve earlier and faster growth, greater production per individual, efficient feed conversion and partitioning, and increased prolificacy”<sup>67</sup> are matters which are equally important to consumers. Thus, it is accepted that when productivity matches up against animal welfare concerns, “the welfare of the

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<sup>64</sup> *See Id.* (“Blue-collar workers are especially likely to find employment opportunities they would not have on small family farms . . . Input supply such as veterinarian services and farm commodity processing facilities such as packing plants made feasible by CAFOs provide local jobs and may provide services to sustain local small family farms.”).

<sup>65</sup> *See Id.* (“By spreading high equipment (overhead) costs of waste disposal over many unites of production, larger operations can have lower per unit costs to convert waste into methane gas for fuel, and ash or compost for low-cost storage, transport, and injection into soil for fertilizer.”).

<sup>66</sup> *See* The OSU College of Food, Agriculture, and Environmental Sciences, *supra* note 9.

Animal welfare and environmental regulations are unlikely to eliminate the current cost advantage of large farms over small farms . . . .  
[h]owever, experts . . . conclude that unit production costs would be lower on large farms than on small farms even if all externalities were internalized . . . [yet], risk increases with scale of operations.”).

<sup>67</sup> Lovvorn & Perry, *supra* note 2, at 162 (citing Donald M. Broom, Does Present Legislation Help Animal Welfare?, [www.agriculture.de/acms1/conf6/ws5alegisl.htm](http://www.agriculture.de/acms1/conf6/ws5alegisl.htm)).

individual animal is ignored.”<sup>68</sup> As Dr. Joy Mench notes, “[i]t is now generally agreed that good productivity and health are not necessarily indicators of good welfare . . . . [p]roductivity is often measured at the level of the unit . . . , and individual animals may be in a comparatively poor state of welfare even though productivity within the unit maybe high.”<sup>69</sup> Accordingly, many consumers and producers are willing to sacrifice the welfare of farm animals based upon these convincing productivity arguments.<sup>70</sup> While most Americans would like to see animals treated humanely, arguably without intensive confinement practices, many are willing to sacrifice the rights of animals for a reduction in production costs which are seen at the market.<sup>71</sup>

### C. *Current Legislation and Its Failure to Afford Adequate Protection to Farm Animals*

#### 1. State Regulation and Legislation

One of the reasons for the current legislative initiatives implemented on behalf of animal welfare organizations is the failure for state legislation to adequately protect the interests of farm animals. All states have implemented some form of legislation prohibiting animal cruelty.<sup>72</sup> Generally, animal cruelty is defined as “every act,

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<sup>68</sup> *Id.* (citing Bernard E. Rollin, Farm Factories, <http://www.religion-online.org/showarticle.asp?title=2194>).

<sup>69</sup> *Id.* (citing The Humane Society of the United States, *An HSUS Report: The Welfare of Animals in the Meat, Egg, and Dairy Industries*).

<sup>70</sup> *See* Reppy & Welty, *supra* note 47, at 328. (“When animal welfare competes with economics, economics usually wins.”).

<sup>71</sup> *See id.* (“[W]hen animals are no longer productive - - that is, when animals are sick, injured, or ‘spent’ - - there is no economic incentive for producers to care for them. It is typically cheaper to let these animals die than to provide treatment.”).

<sup>72</sup> *See* Springsteen, *supra* note 14, at 439 (“[W]hile all fifty states have enacted some form of legislation prohibiting cruelty to animals, about thirty states exempt, ‘common,’ ‘normal’ or ‘customary’ farm animal husbandry practices from coverage under the law.”); *see generally* Fox, *supra* note 2 (describing the development of animal protection law from the middle ages to modern legislation).

omission, or neglect whereby unjustifiable pain or suffering, and . . . death, is caused or permitted.”<sup>73</sup> Accordingly, at issue with animal anti-cruelty statutes is whether intensive confinement practices employed in CAFOs amount to animal cruelty.<sup>74</sup> Exacerbating the problem, many state statutes exclude “normal” or “customary” farm animal practices from coverage under the law.<sup>75</sup> For example, Pennsylvania’s animal cruelty statute exempts “activity undertaken in normal agricultural operation,”<sup>76</sup> which are defined as “[n]ormal activities, practices and procedures that farmers adopt, use or engage in year after year in the production and preparation for market of poultry, livestock and their products in the production and harvesting of agricultural, agronomic, horticultural, silvicultural and aquicultural crops and commodities.”<sup>77</sup> Similarly, Nevada included a provision within its animal cruelty statute excluding “established methods of animal husbandry, including the raising, handling, feeding, housing and transporting of livestock or farm animals.”<sup>78</sup> Thus, the ambiguity as to whether intensive confinement practices

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<sup>73</sup> 4 AM. JUR. 2D *Animals* § 26 (2010). Moreover, the unnecessary “abuse of an animal by beating it, and other various acts of willful abuse, such as burning, castrating, shooting, maiming, and otherwise needlessly injuring an animal, constitute cruelty within the contemplation of such a statute.” *Id.* While it is not necessarily an offense under animal cruelty statutes to kill an animal, some statutes limit the “method” and “specify” the manner in which an animal *may not* be killed. *Id.*

<sup>74</sup> See Springsteen, *supra* note 14, at 439 (“Proponents of state regulation claim that the cages amount to animal cruelty, while the opponents argue that they are merely engaging in normal animal husbandry.”).

<sup>75</sup> See *infra*, note 78.

<sup>76</sup> 18 PA. STAT. ANN. § 5511(c) (2009).

<sup>77</sup> *Id.* § 5511(q) (2009).

<sup>78</sup> NEV. REV. STAT. § 574.200(6) (2001); *but see* 11 DEL. CODE. ANN. tit. 11 § 1325 (6) (2007) (“Cruelty to animals” includes mistreatment of any animal or neglect of any animal under the care and control of the neglecter, whereby unnecessary or unjustifiable physical pain or suffering is caused. By way of example this includes: Unjustifiable beating of an animal; overworking an animal; tormenting an animal; abandonment of an animal; failure to feed properly or give proper shelter or veterinary care to an animal.).

rise to the level of animal cruelty under state laws and the explicit exemption in the majority of states of traditional animal husbandry practices from animal cruelty statutes evidences the reasons for the increasing rise in concern shared by numerous animal welfare organizations.

## 2. Federal Legislation and Regulation

Federal animal anti-cruelty legislation provides even less protection than state legislation to farm animals. In particular, there are only two federal laws which explicitly provide for the protection of farm animal welfare.<sup>79</sup> First, the Humane Slaughter Act (hereinafter “HMSA”) states that “the slaughtering of *livestock* and the handling of *livestock* in connection with slaughter shall be carried out only by humane methods.”<sup>80</sup> While the policy behind the HMSA incorporates important ideals and extends some protection to animals, the Act applies only to “livestock.”<sup>81</sup> Accordingly, the United States Department of Agriculture (hereinafter “USDA”), the agency charged with

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<sup>79</sup> See Uralde, *supra* note 2, at 202-203. Although the Animal Welfare Act is the most recognized federal animal-protection law, it only extends to farm animals when they are used for “research, testing, and teaching.” Reppy & Welty, *supra* note 47, at 334.

<sup>80</sup> Humane Methods of Slaughter Act, 7 U.S.C.A. § 1901 (emphasis added).

The Congress finds that the use of humane methods in the slaughter of livestock prevents needless suffering; results in safer and better working conditions for persons engaged in the slaughtering industry; brings about improvement of products and economies in slaughtering operations; and produces other benefits for producers, processors, and consumers which tend to expedite an orderly flow of livestock and livestock products in interstate and foreign commerce.

*Id.*

<sup>81</sup> Specifically, the HMSA extends protection to “cattle, calves, horses, mules, sheep, swine, and other livestock.” 7 U.S.C.A. § 1902(a).

enforcing the HMSA,<sup>82</sup> has excluded poultry from the HMSA's coverage.<sup>83</sup> HSUS has vigorously contested this exclusion. In *Levine v. Conner*,<sup>84</sup> HSUS, along with several other organizations, brought suit against the United States Department of Agriculture (hereinafter "USDA"), challenging the USDA's exclusion of poultry from the HMSA.<sup>85</sup> After determining that the term "livestock" is ambiguous,<sup>86</sup> the Northern District of California reasoned that the legislative intent behind the Act was to include a limited definition of "livestock."<sup>87</sup> However, the Ninth Circuit Court of Appeals overturned the Northern District of California's ruling, holding that HSUS and other organizations lacked standing to challenge the USDA's interpretation of livestock.<sup>88</sup> As a result, animal welfare organizations argue that due to the exclusion of chickens, turkeys, and other birds from the USDA's definition of livestock, the USDA has "eviscerated over 90% of [the HMSA]."<sup>89</sup>

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<sup>82</sup> See Reppy & Welty, *supra* note 47, at 334.

<sup>83</sup> See Treatment of Live Poultry Before Slaughter, 70 Fed. Reg. 56,624 (Sept. 28, 2005)

Although there is no specific federal humane handling and slaughter statute for poultry, under the PPIA, poultry products are more likely to be adulterated if, among other circumstances, they are produced from birds that have not been treated humanely, because such birds are more likely to be bruised or to die other than by slaughter.

<sup>84</sup> 540 F. Supp. 2d 1113 (N.D. Cal. 2008).

<sup>85</sup> *Id.* at 1113.

<sup>86</sup> *Id.* at 1117.

<sup>87</sup> *Id.* at 1120.

<sup>88</sup> *Levine v. Vilsack*, 587 F. 3d 986 (9th Cir. 2009) (holding that plaintiff's injuries were not redressable by way of lawsuit).

<sup>89</sup> See Press Release, Humane Soc'y of the U.S., *Still a Jungle Out There: The HSUS takes USDA to Court to Ensure a Humane End for Birds* (Nov. 21, 2005), available at [http://www.hsus.org/farm/news/ournews/still\\_a\\_jungle\\_out\\_there.html](http://www.hsus.org/farm/news/ournews/still_a_jungle_out_there.html).

Besides the HMSA, the only other Federal Law which extends protection to farm animals is the Twenty-Eight Hour Law.<sup>90</sup> Like the HMSA, the USDA acts as the enforcement agency for the Twenty-Eight Hour Law.<sup>91</sup> Similar to the controversy surrounding the interpretation of ‘livestock,’ the USDA enforcement of the Twenty-Hour Law was recently challenged. Prior to 2006, trucks were not included in the definition of a ‘vehicle.’<sup>92</sup> Because of this exclusion, it was a permissible practice for farm animals to be transported for more than twenty-eight hours without receiving food, rest, or water.<sup>93</sup> However, in response to a petition filed by numerous animal welfare organizations,<sup>94</sup> the USDA issued a letter stating that “[w]e agree that the plain meaning of the statutory term

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USDA's exclusion of chickens, turkeys, and other birds means that only a tiny fraction of the billions of animals raised on farms are protected under the federal humane slaughter law of 1958," said Jonathan Lovvorn, vice president of animal protection litigation for The HSUS. "By protecting cows, pigs, and sheep, but ignoring all other livestock, USDA has eviscerated more than 90% of the act."

*See also* Reppy & Welty, *supra* note 47, at 335 (“[The] HMSA protects only one percent of farm animals from being slaughtered while fully conscious.”).

<sup>90</sup> The 28 Hour Law states that:

[A] rail carrier, express carrier, or common carrier (except by air or water), a receiver, trustee, or lessee of one of those carriers, or an owner or master of a vessel transporting animals from a place in a State, the District of Columbia, or a territory or possession of the United States through or to a place in another State, the District of Columbia, or a territory or possession, may not confine animals in a vehicle or vessel for more than 28 consecutive hours without unloading the animals for feeding, water, and rest.

49 U.S.C.A. § 80502 (1994).

<sup>91</sup> *See* Reppy & Welty, *supra* note \_\_\_\_ at 335.

<sup>92</sup> *See* 49 U.S.C.A. § 80502 (1994).

<sup>93</sup> *See* Reppy & Welty, *supra* note 47, at 335.

<sup>94</sup> *See* Press Release, Humane Soc’y of the U.S., *Loophole on Wheels: Trucks and the 28-Hour Law*, Oct. 4, 2005, available at [http://www.hsus.org/farm/news/ournews/28-hour\\_law.html](http://www.hsus.org/farm/news/ournews/28-hour_law.html); *see also* Petition Before the United States Department of Agriculture, available at <http://www.hsus.org/web-files/PDF/farm/28hr-petition-Mon-Oct-3.pdf>.

‘vehicle’ in the Twenty-Eight Hour law includes trucks.”<sup>95</sup> Despite this victory, the Twenty-Eight Hour Law, like the HMSA, fails to extend protection to poultry.<sup>96</sup>

Given the clash between the agenda of animal welfare organizations to phase-out intensive confinement practices, the resistance of CAFOs to adopt these measures, and the ambiguity as to what constitutes animal cruelty, it is surprising that Congress has not implemented legislation to remedy this problem.<sup>97</sup> To the contrary, numerous legislative proposals to extend more protection under federal law to farm animals have failed.<sup>98</sup>

*D. HSUS and CAFOs: The Match Up at the Ballot Box and the Debate Surrounding Intensive Confinement Practices*

The expansion of industrial agricultural farming practices and Congress’ inability to adequately provide farm animals protection has led to the strong participation of animal welfare organizations in the political movement to eliminate CAFOs use of intensive confinement. As previously noted, consumers have demonstrated an interest in seeing that the welfare of animals are advanced through corrective measures.<sup>99</sup> Since 1990, animal welfare organizations have enacted twenty-eight ballot initiatives, though

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<sup>95</sup> Press Release, Humane Soc’y of the U.S., USDA Reverses Decades-Old Policy on Farm Animal Transport, *available at* [http://www.hsus.org/farm/news/ournews/usda\\_reverses\\_28\\_hour\\_policy.html](http://www.hsus.org/farm/news/ournews/usda_reverses_28_hour_policy.html).

<sup>96</sup> Some scholars argue that this limitation exempts 98% of farm animals from the protection of the Twenty-Eight Hour Law. *See* Reppy & Welty, *supra* note 47, at 335.

<sup>97</sup> *See* Uralde, *supra* note 2, at 210-12 (arguing that the potential reasons for Congress’ failure to enact animal welfare legislation include (1) lack of public concern regarding the issue; (2) it may be too costly for the government; and (3) economic concerns).

<sup>98</sup> *See* Springsteen, *supra* note 14, at 439 (“As of [Fall 2009], eleven states and the federal government have tried and failed to pass some form of legislation overriding [the exemption of farm-animals from animal cruelty statutes] and controlling the living conditions through regulation or through purchasing power.”); *see also* *Putting Meat on the Table*, *supra* note 2, at 38 (“All other attempts to pass federal laws setting standards for farm animal housing, transport, or slaughter have been unsuccessful.”).

<sup>99</sup> *See supra* p. 12 and note 56.

not all successful, to remedy animal welfare concerns.<sup>100</sup> Since 2002, HSUS, together with other animal welfare organizations, has put forth three successful ballot campaigns to phase out the use of intensive confinement practices.<sup>101</sup>

Acting as an advocate on behalf of farm animals, HSUS has used numerous compelling arguments to raise public awareness about the practices of CAFOS in order to capture votes. HSUS argues that “extensive scientific evidence shows that intensively confined farm animals are frustrated, distressed, and suffering.”<sup>102</sup> HSUS goes on to argue that “[t]he welfare of these intensively confined hens, sows, and calves is significantly impaired, as the animals are denied the ability to exercise, fully extend their limbs or simply turn their bodies, or perform integral instinctual, natural behaviors.”<sup>103</sup>

Opponents of HSUS’ initiatives have raised several arguments to the contrary. While acknowledging the concerns of animal welfare groups, opponents argue that confinement practices actually advance the welfare of farm animals.<sup>104</sup> For example, opponents argue that confinement protects farm animals from extreme temperatures, dangerous predators, and soil-borne diseases and parasites.<sup>105</sup> Moreover, confinement grants producers the ability to closely monitor animal health, which would not be as

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<sup>100</sup> Lovvorn & Perry, *supra* note 47, at 154.

<sup>101</sup> *See supra* pp. 2-4 and notes 11-19.

<sup>102</sup> *The Welfare of Intensively Confined Animals*, *supra* note 5, at 1.

<sup>103</sup> *Id.* at 2.

<sup>104</sup> The OSU College of Food, Agriculture, and Environmental Sciences, *supra* note 9.

<sup>105</sup> *Id.*

easily achievable in a cage-free environment.<sup>106</sup> Finally, opponents argue that confinement practices use “less land, labor, and other resources per animal unit.”<sup>107</sup>

Just as HSUS has sought to appeal to public emotion, large organization and industry proponents have argued, by appealing to the economic interests of the public, that adopting HSUS’ proposals will have an adverse effect on consumers. For example, opponents argue that the impact of California’s recent legislation<sup>108</sup> phasing-out the use of intensive confinement practices will result in the elimination of egg production in California, with consumers seeing direct increases in prices as a result.<sup>109</sup>

The battle between animal welfare organizations and the proponents of CAFO practices played out before the public eye in California’s 2008 election, in which HSUS put forth a ballot initiative to phase-out intensive confinement practices. The effort to enact this legislation, termed “Proposition 2,” was described as the “largest mobilization of animal advocates in the history of the humane movement.”<sup>110</sup> Proposition 2 passed

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<sup>106</sup> *Id.*

<sup>107</sup> *Id.*

<sup>108</sup> *See* CAL. HEALTH & SAFETY CODE § 25990 (West 2009).

<sup>109</sup> DANIEL A. SUMNER, *et al*, *Economic Effects of Proposed Restrictions on Egg-Laying Hen Housing in California*, University of Cal. Ag. Issues Center, July 2008; *see also infra*, pp. 28-29.

<sup>110</sup> Lovvorn & Perry, *supra* note 2, at 160.

The YES! On Prop 2 campaign received 25,000 individual donations from contributors across the nation. Thousands of volunteers worked countless hours to collect signatures, distribute literature, and get out the vote for Proposition 2. Taking a page from President Barack Obama’s election campaign, proponents of Proposition 2 also relied heavily on social networking sites like Facebook and Twitter to communicate their message and organize supporters. The sites also helped proponents raise the massive funding needed to take on the agriculture industry at the ballot box.

*Id.*

with 63.5% of the vote on November 4, 2008.<sup>111</sup> Accordingly, effective January 1, 2015,<sup>112</sup> California will prohibit the cruel confinement of any pregnant pig, calf raised for veal, or egg-laying hen.<sup>113</sup> This was a huge victory for HSUS, given that California is the nation's fifth largest producer of eggs.<sup>114</sup> As a result, HSUS established a firm presence in the arena of animal welfare reform, forcing other states with large production rates in the targeted areas to pay attention these legislative efforts by reforming their current animal welfare laws.<sup>115</sup>

Currently, HSUS is focusing its efforts at reforming the recent legislation enacted in Ohio. Ohio, which is also a ballot initiative state,<sup>116</sup> decided instead to proactively create its own legislation to deal with the recent stir of animal welfare legislation, rather than to adopt HSUS' proposed legislation at the ballot box.<sup>117</sup> Accordingly, Ohio has

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<sup>111</sup> See <http://www.ballotmeasuredomains.com/domains/yesonprop2com.aspx>.

<sup>112</sup> CAL. HEALTH & SAFETY CODE § 25990.

<sup>113</sup> *Id.* at § 25991.

<sup>114</sup> See Hinnman, *supra* note 11.

<sup>115</sup> *Id.* ("Mr. Pacelle basically said, 'This is what we're going to do. You can help us or fight us.' Well, it's not a negotiation when somebody says, 'These are the terms of your surrender!'").

<sup>116</sup> See *supra*, note 23.

<sup>117</sup> See Hinnman, *supra* note 11.

For a long time, the ag industry didn't seem to see a way to slap away the Humane Society's whip hand. But within the past year, through social media, influence peddling and, most recently, preemptive political maneuvering, farmers big and small have begun to circle the wagons to protect their livelihood. In Ohio last year, for instance, commodity groups organized to pass a ballot measure instituting a politically appointed board with regulatory authority over all farm-animal welfare issues. The tactic was a direct response to the Humane Society's announcement that it intended to make Ohio its next battleground.

created a Livestock Care Standards Board to establish standards for “governing the care and well-being of livestock and poultry.”<sup>118</sup> The Board is to be comprised of thirteen members which will seek to adequately address the concerns of both farmers and animal welfare organizations.<sup>119</sup>

However, HSUS has voiced its vehement disapproval with Ohio’s legislation.<sup>120</sup> Wayne Pacelle, President of HSUS, stated that Ohio’s efforts “provokes us to do a ballot initiative. . . it almost forces our hand to seek a measure for November 2010 on confinement practices.”<sup>121</sup> Accordingly, Ohio may very well be the next state to undergo

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<sup>118</sup> Livestock Care Standards Board, OH CONST. ART. XIV, § 1 (2009). The board is to consider the following attributes of livestock welfare: [F]actors that include, but are not limited to, agricultural best management practices for such care and well-being, biosecurity, disease prevention, animal morbidity and mortality data, food safety practices, and the protection of local, affordable food supplies for consumers.

*Id.*

<sup>119</sup> The board is to be comprised of the following members:

- (1) The director of the state department that regulates agriculture who shall be the chairperson of the Board;
- (2) Ten members appointed by the Governor with the advice and consent of the Senate. The ten members appointed by the Governor shall be residents of this state and shall include the following:
  - (a) One member representing family farms;
  - (b) One member who is knowledgeable about food safety in this state;
  - (c) Two members representing statewide organizations that represent farmers;
  - (d) One member who is a veterinarian who is licensed in this state;
  - (e) The State Veterinarian in the state department that regulates agriculture;
  - (f) The dean of the agriculture department of a college or university located in this state;
  - (g) Two members of the public representing Ohio consumers;
  - (h) One member representing a county humane society that is organized under state law.
- (3) One member appointed by the Speaker of the House of Representatives who shall be a family farmer;
- (4) One member appointed by the President of the Senate who shall be a family farmer. Not more than seven members appointed to the Board at any given time shall be of the same political party.

*Id.*

<sup>120</sup> See Kinney, *supra*, note 22..

<sup>121</sup> *Id.*; Wayne Pacelle also noted that, while the Humane society didn’t spend any money trying to oppose the create of Ohio’s Livestock Care Standards Board, HSUS did not look favorably on the initiative. “[The HSUS] thought it was clearly an attempt to block a constitutional freedom and an attempt

the vigorous political movement implemented in Florida, Arizona, and California.<sup>122</sup>

Similar to California, this would have a profound economic effect on Ohio's ability to compete in the agri-business with other states, as Ohio is the nation's second largest egg-producer and ranks ninth in the production of pork.<sup>123</sup>

### III. THE IMPACT OF ANIMAL WELFARE LEGISLATION: THE FUTURE OF PENNSYLVANIA FARMING

Based upon the recent animal welfare laws phasing out the use of intensive confinement practices across the nation, it is important to consider the impact that these initiatives will have on other states. In particular, two concerns are raised by the implementation of this recent legislation: (1) will HSUS target other states to implement similar legislative farm animal welfare reform; and (2) how will the reform implemented in other states affect the economic markets in poultry, veal, and pork in other states? To that end, this section will consider whether Pennsylvania is likely to enact similar animal welfare legislation, while conducting an analysis of the economic impact these legislative initiatives will have on Pennsylvania's markets in egg, veal, and pork.

#### A. *Pennsylvania and HSUS*

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to lock up existing practices . . . [Ohio] spent \$4 million passing it, and there's still a [ballot] measure." Hinnman, *supra* note 11; *see also* The OSU College of Food, Agriculture, and Environmental Sciences, *supra* note 9 ("Disappointed with outcomes, the Humane Society of the United States . . . seeks public intervention in Ohio with government regulation to reach its animal welfare objectives well beyond what market labeling and voluntary industry reforms have achieved.").

<sup>122</sup> *See* discussion *supra*, pp. 2-4; *see also* Hinnman, *supra* note 9 (quoting one farmer who stated "Look at Ohio, . . . I absolutely don't like the way Humane Society rolled into that state and basically ignored the people doing things the right way.").

<sup>123</sup> *See* Hinnman, *supra* note 9.

Because Pennsylvania is not a ballot initiative state,<sup>124</sup> HSUS will not be able to directly force farm animal welfare reform as has been done in Florida, Arizona, and California.<sup>125</sup> However, Pennsylvania could follow in the footsteps of the four other states which have voluntarily adopted similar farm animal welfare reform without pressure from HSUS.<sup>126</sup> Yet, this seems unlikely to happen in the near future. For example, Pennsylvania is one of the numerous states which excludes traditional animal husbandry practices from its animal cruelty statute.<sup>127</sup>

Pennsylvania also has the luxury, if desired, to create legislation similar that of Ohio, in which Pennsylvania would be able to establish a board consisting of a variety of different members, each representing the interests advanced by animal welfare organizations and the larger farming community.<sup>128</sup> Although Ohio's adoption of a livestock standards care board has been rejected as *inadequate* by HSUS, this option would act as a compromise between animal welfare groups and the farming industry

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<sup>124</sup> See *supra*, note 26.

<sup>125</sup> See *supra*, pp. 2-4.

It won't be possible for the Humane Society to win over the entire nation via its current tactic, because 26 U.S. states don't permit ballot initiatives. As the nonprofit continues to strategize, Pacelle is tight-lipped on details. "It's like chess," he says. "You have to see what the other guy does before you make your move."

Hinnman, *supra* note 9.

<sup>126</sup> See *supra*, pp. 3-4.

<sup>127</sup> See *supra*, notes 76-78 and accompanying text. It should be noted, however, that Maine, Michigan, Colorado, and Oregon, all, at one time, excluded traditional husbandry practices from their animal cruelty statutes. See generally David J. Wolfson, *Beyond the Law: Agribusiness and the Systematic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123 (1996).

<sup>128</sup> See Hinnman, *supra*, note 9 (noting that at least nine other states are considering boards similar to that implemented in Ohio).

within Pennsylvania. Moreover, this would be beneficial for Pennsylvania, as such an initiative would be seen as propelling the state as a martyr for animal welfare reform, without compromising all of its traditional animal husbandry practices in the arenas of egg, veal, and pork.

### *B. The Economic Impact on Pennsylvania*

Pennsylvania has an economic stake in all three markets which are impacted by legislation reforming intensive confinement practices. More specifically, Pennsylvania has one of the top producing markets in the country of pork,<sup>129</sup> it has ranked as high as fifth in the production of eggs,<sup>130</sup> and it is considered to be one of the top six producing states in the market of veal.<sup>131</sup> This information is significant, as several of Pennsylvania's competitors in these markets have been effected by intensive confinement reform.<sup>132</sup> For example, Michigan, which ranks seventh in the production of eggs,<sup>133</sup> is a top producing pork state, and is also considered to be one of the top is producing states in the market of veal,<sup>134</sup> has until 2012 to phase-out their confinement practices.<sup>135</sup>

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<sup>129</sup> See National Pork Producers Council, *Pork Statistics* (2008) available at <http://www.nppc.org/aboutus/porkstatistics.htm> [hereinafter National Pork Producers Council].

<sup>130</sup> See United Egg Producers: A National Egg Producer Organization, *General United States Statistics* (2010), available at [http://www.unitedegg.org/useggindustry\\_generalstats.aspx](http://www.unitedegg.org/useggindustry_generalstats.aspx) [hereinafter United Egg Producers].

<sup>131</sup> See The Veal Farm, *Industry Information*, available at <http://www.vealfarm.com/industry-info/facts.asp> [hereinafter The Veal Farm].

<sup>132</sup> See Uralde, *supra* note 2 (“[E]ven producers who believe in semi-extensive agricultural practices are often forced to violate such practices in order to remain competitive.”).

<sup>133</sup> See United Egg Producers, *supra* note 130.

<sup>134</sup> See The Veal Farm, *supra* note 131.

<sup>135</sup> See *supra* note 18.

Similarly, Colorado, which is also considered to be a top pork producing state,<sup>136</sup> has until January 1, 2018 to phase-out their confinement practices.<sup>137</sup> This reality is also a chief concern in Ohio, which will likely be HSUS' next target to phase-out confinement practices, despite Ohio's efforts in implementing a Livestock Standards Care Board.<sup>138</sup> There, Ohio ranks second in the production of eggs,<sup>139</sup> is a top pork producing state,<sup>140</sup> and is considered to be one of the top six producing states in the market of veal.<sup>141</sup> Finally, the California egg market, which ranks fifth in the nation,<sup>142</sup> will also be affected when its phase-out initiatives are completed in 2015.<sup>143</sup>

Because the aforementioned states, which are top producers in the markets of pork, eggs, and veal, will be effected in the near future by legislative phase-out initiatives, it is likely that Pennsylvania's market will be effected in a positive manner should it decide *not* to implement similar legislation. For example, the University of California recently completed an analysis of the economic effects of the egg market in California, with startling findings.<sup>144</sup> The committee believes that the phase-out of confinement practices in California will result in the "almost complete elimination of egg

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<sup>136</sup> See National Pork Producers Council, *supra* note 129.

<sup>137</sup> See *supra* note 16.

<sup>138</sup> See *supra* note 118.

<sup>139</sup> See United Egg Producers, *supra* note 130.

<sup>140</sup> See National Pork Producers Council, *supra* note 129.

<sup>141</sup> See The Veal Farm, *supra* note 131.

<sup>142</sup> See United Egg Producers, *supra* note 130.

<sup>143</sup> See *supra* note 13.

<sup>144</sup> See SUMNER, *supra* note 109.

production in California within the . . . adjustment period,” arguing that “non-cage production costs are simply too far above the costs of the cage systems used in other states to allow California producers to compete with imported eggs in the conventional market.”<sup>145</sup> Most important to the analysis of Pennsylvania’s market in egg production, the committee notes that “producers outside California may be able to use the scale economies of their production using cage systems to produce non-cage eggs at lower costs than the remaining format that would be only allowed to specialize in this very small segment of the market.”<sup>146</sup> Moreover, the committee notes that the phase-out of confinement practice will also have a severe effect on consumers within the targeted state. For California’s egg market, the committee believes that consumer costs would rise substantially, arguing that a 25 percent increase, or even higher, should be expected.<sup>147</sup>

Applying the startling findings of the committee to pork production and the market for veal, Pennsylvania’s market in agriculture would almost certainly be impacted negatively by any dramatic phase-out of confinement practices.<sup>148</sup> However, should

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<sup>145</sup> *Id.* at iv.

<sup>146</sup> *Id.* at iv – v. The committee goes on to note that:

Thus, the impact of the initiative would not affect *how* eggs would be produced, only *where* eggs would be produced. Furthermore, because out-of-state eggs are already a major share of the California market, and many producers compete actively in this market, no significant consumer prices increase would be expected.

<sup>147</sup> *Id.* at vi.

<sup>148</sup> Bernard E. Rollin argues that “it is socially and economically impossible to return completely to fully extensive but husbandry-oriented management systems for farm animals.” BERNARD E. ROLLIN, *Farm Animal Welfare: Societal, Bioethical, and Research Issues* 24 (1995). See also Uralde, *supra* note 2, at 210.

Pennsylvania decide to implement such procedures, it would be extremely beneficial for Pennsylvania to wait until after some of the other top producing states' initiatives go into effect.<sup>149</sup>

In order for Pennsylvania to remain competitive in the industries of pork, veal, and eggs, while satisfying the agenda of animal welfare organizations, it appears that the best compromise would be for Pennsylvania to adopt a resolution similar to that employed in Ohio.<sup>150</sup> That way, Pennsylvania could adopt a livestock standards care board which would determine what the best management practices are for both the interests of Pennsylvania, its consumers, farmers, and animals.<sup>151</sup>

#### IV. THE FUTURE OF ANIMAL WELFARE REFORM

It is unlikely that HSUS will cease its initiatives to phase-out intensive confinement practices. Given the progress that the organization has made since its first ballot initiative in Florida, the ability of animal welfare organizations to bring public awareness to the issue, the voluntary response of many state legislatures, and response from large agricultural industry groups to eliminate the controversial industry practices, it appears that a shift back to the tactics of traditional American farming is on the horizon. With these initiatives, however, the nation will arguably see an increase in consumer prices and the elimination of the market of some of the nation's top producers in egg,

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<sup>149</sup> See discussion *supra* pp. 27-28.

<sup>150</sup> Glen Schmidt, a professor at Ohio State University's department of animal sciences, recommends that "U.S. livestock and poultry producers should 'examine whether they can make their practices more animal-friendly if they want to head off European-style animal welfare directives that dictate how farm animals are raised.'" Uralde, *supra* note 2.

<sup>151</sup> See discussion *supra* pp. 26-27.

pork, and veal. The slaughterhouse is no longer concealed “in the graceful distance of miles,” but playing out for the nation to see at the ballot box.<sup>152</sup>

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<sup>152</sup> Ralph Waldo Emerson (“You have just dined, and however scrupulously the slaughterhouse is concealed in the graceful distance of miles, there is complicity.”).