

# COMMENT

## CONFINED TO A PROCESS: THE PREEMPTIVE STRIKE OF LIVESTOCK CARE STANDARDS BOARDS IN FARM ANIMAL WELFARE REGULATION

By  
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*In recent years, livestock care standards boards have emerged as an innovative way for state agencies to regulate farm animal welfare. Far from improving farm animal welfare, however, these boards are frequently a way to codify existing industry standards. The Ohio Livestock Care Standards Board, for example, had a nominal mission to establish regulations governing the care and well-being of livestock and poultry. Other states have created similar mechanisms for regulating farm animal welfare. This Comment maintains that the Ohio Livestock Care Standards Board regulations merely codify the existing status quo on Ohio factory farms rather than improving the health and welfare of animals. This Comment also discusses the successes and failures of other livestock care standards boards. This Comment then considers ways that livestock care standards boards, or alternative methods, could improve farm animal welfare.*

I. INTRODUCTION .....	152
II. THE BEGINNING OF A TREND: THE OHIO LIVESTOCK CARE STANDARDS BOARD .....	154
A. <i>Enactment of the Board</i> .....	154
B. <i>Ohio's Livestock Care Standards</i> .....	156
1. <i>The Process</i> .....	156
2. <i>The First Set of Effective Standards</i> .....	159

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	3. <i>Species-Specific Standards</i> .....	162
III.	OTHER STATES .....	165
	A. <i>The New Jersey Standards</i> .....	165
	B. <i>Enacted Boards</i> .....	166
	C. <i>Other Related Legislation</i> .....	170
IV.	REFORM .....	172
V.	CONCLUSION .....	173

*THE QUESTION IS NOT, “CAN THEY REASON?” NOR, “CAN THEY TALK?” BUT RATHER, “CAN THEY SUFFER?”*<sup>1</sup>

*The question is not just, “Do they suffer?” nor, “Are their needs met?” but rather, “Do they have a life worth living?”*<sup>2</sup>

## I. INTRODUCTION

Livestock care standards boards,<sup>3</sup> which are created within state departments of agriculture, are an innovation in animal welfare regulation in the United States. Ostensibly, these state boards create a framework for improving living conditions for farm animals, and they do have this potential.<sup>4</sup> However, because of the political climates in many of the states that have formed these boards and the content of some of the regulations, livestock care standards boards often become a mechanism by which the agriculture industry seeks to codify the status quo on contemporary factory farms.<sup>5</sup>

The United Kingdom is home to the Farm Animal Welfare Committee (FAWC),<sup>6</sup> which is an administrative committee tasked with

<sup>1</sup> Jeremy Bentham, *Introduction to the Principles of Morals and Legislation* ch. XVII, 310 n.122 (Gaunt, Inc. 2001) (comprising a reprint of an edition published by Oxford Clarendon Press in 1823).

<sup>2</sup> Farm Animal Welfare Council, *Final Report*, <http://www.fawc.org.uk/pdf/fawc-final-report-2011-110324.pdf> (Mar. 2011) (accessed Nov. 20, 2011).

<sup>3</sup> Laura Allen, *Another Livestock Care Standards Board*, <http://www.animal-lawcoalition.com/farm-animals/article/1807> (last updated May 30, 2011) (accessed Nov. 20, 2011) (asserting that boards were created as a “way to give agri-business more, if not exclusive control, over how farm animals are treated”); Ohio Livestock Care Standards Bd., *FAQs, What Is the Purpose of the Board?*, <http://ohiolivestockcarestandard-board.gov/apps/faqs/faqs.aspx> (accessed Nov. 20, 2011) (stating that the board creates a uniform set of standards governing the care and well-being of livestock); *infra* pt. II(A) (discussing the development of livestock care standards boards).

<sup>4</sup> See Neil Thapar, *Taking (Live)Stock of Animal Welfare in Agriculture: Comparing Two Ballot Initiatives*, 22 *Hastings Women’s L.J.* 317, 332–33 (2011) (discussing the advantages of a “single-purpose” agency regulating livestock care).

<sup>5</sup> See Animal Welfare Inst. (AWI), *Factory Farming*, <http://www.awionline.org/content/factory-farming> (2011) (accessed Nov. 20, 2011) (defining factory farms as “industrialized facilities that have little semblance to traditional family farms, and maximize profits by treating animals not as sentient creatures, but as production units. Raised by the thousands at a single site, animals are confined in such tight quarters that they can barely move, let alone behave normally”).

<sup>6</sup> Dept. for Env., Food & Rural Affairs, *Farm Animal Welfare Committee*, <http://www.defra.gov.uk/fawc> (last updated Oct. 4, 2011) (accessed Nov. 20, 2011) (describing FAWC’s role as an expert committee providing farm animal welfare advice to the Department for Environment, Food and Rural Affairs and the Devolved Administrations).

promoting farm animal welfare. In the U.S., a committee similar to that of the FAWC, composed of experts rather than individuals with special industry interests, would produce real progress in farm animal welfare regulation.

In lieu of federal protection for farm animals, some states are gradually beginning to promote the welfare of farm animals through anti-confinement legislation.<sup>7</sup> Anti-confinement legislation seeks to eliminate the agricultural industry's worst confinement techniques. However, as a result of industry backlash against this legislation, other states have created industry-dominated livestock care standards boards.<sup>8</sup> These boards present an opportunity for animal advocates to expose the pecuniary motives that drive low welfare standards in animal agribusiness, and to influence administrative processes so welfare standards for farm animals improve.

Part II of this Comment provides background on the legislation creating the Ohio Livestock Care Standards Board (OLCSB), which has served as model legislation for other states, and analyzes the regulations promulgated by the OLCSB. Part III discusses livestock care standards boards in other states. Part IV presents two methods of reform that could ultimately create a higher standard of care for farm animals. This Comment concludes that animal advocates need to get involved in the administrative process of livestock care standards

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in Scotland and Wales); FAWC, *Annual Review 2009–2010*, <http://www.fawc.org.uk/pdf/annualreview09-10.pdf> (last updated 2010) (accessed Nov. 20, 2011) (describing events in 1965, in which the British government appointed a committee to examine the conditions of farm animal welfare); FAWC, *Five Freedoms*, <http://www.fawc.org.uk/freedoms.htm> (last updated Apr. 16, 2009) (accessed Nov. 20, 2011) (describing how a 1965 report containing a concept of “Five Freedoms” led to the creation of the Farm Animal Welfare Council, an independent advisory body established by the British government in 1979, and noting that the concept of the Five Freedoms has influenced high welfare farming standards across Europe); FAWC, *Homepage*, <http://www.fawc.org.uk/default.htm> (last updated Apr. 5, 2011) (accessed Nov. 20, 2011) (noting that the Farm Animal Welfare Council has since become the Farm Animal Welfare Committee (FAWC) due to agency reform in the United Kingdom).

<sup>7</sup> See Elizabeth R. Springsteen, *Farm Animal Confinement Laws*, <http://www.mnbar.org/sections/agricultural-law/Farm%20Animal%20Confinement%20Laws%20%5BRead-Only%5D.pdf> (accessed Nov. 20, 2011) [hereinafter Springsteen, *Farm Animal Confinement Laws*] (describing anti-confinement legislation as laws that “[t]ypically regulate space that certain farm animals must be allowed,” and noting that in the past nine years, seven states have enacted anti-confinement legislation regulating the space allowed for certain farm animals, either by means of a ballot initiative or through the legislature); see also Elizabeth R. Springsteen, *A Proposal to Regulate Farm Animal Confinement in the United States and an Overview of Current and Proposed Laws on the Subject*, 14 Drake J. Agric. L. 437, 440–55 (2009) [hereinafter Springsteen, *Proposal to Regulate*] (describing each state's anti-confinement legislation and the manner of enactment, and listing in order of enactment the seven states that have enacted anti-confinement legislation: Florida, Arizona, Oregon, Colorado, California, Maine, and Michigan).

<sup>8</sup> See Springsteen, *Farm Animal Confinement Laws*, *supra* n. 7, at Farm Animal Confinement Laws (stating that “several states have adopted related statutes in response to these [confinement] laws”).

boards to ensure that the lives of farm animals improve. This Comment also asserts that animal advocates need to continue to work toward federal regulations to create a farm animal welfare board, like the United Kingdom's FAWC, focused on implementing high-welfare farming methods.

## II. THE BEGINNING OF A TREND: THE OHIO LIVESTOCK CARE STANDARDS BOARD

The Ohio Livestock Care Standards Board (OLCSB) was the first livestock care standards board enacted in the U.S. This Part discusses the events that led up to the enactment of the board and discusses the board's composition and membership.

### A. *Enactment of the Board*

In 2009, Ohio amended the Ohio Constitution, creating the OLCSB.<sup>9</sup> Agribusiness advocates and the former Governor of Ohio, Ted Strickland, supported the measure, which was known as Issue 2.<sup>10</sup> Purportedly, the OLCSB's purpose is to establish standards "governing the care and well-being of livestock and poultry" in the state,<sup>11</sup> but the Issue 2 campaign revealed an underlying purpose behind the OLCSB. The crucial purpose of the board is to "preempt attempts by groups outside the state to impose standards on livestock and poultry production in the state."<sup>12</sup>

Such an attempt occurred in 2008 when California voters approved Proposition 2, a ballot initiative to create anti-confinement legislation regulating the confinement of veal calves, gestating sows, and egg-laying hens.<sup>13</sup> The Humane Society of the United States (HSUS) led the campaign for California's Proposition 2 and won voter approval for farm animal welfare regulation.<sup>14</sup> Some proponents of the agriculture industry view animal advocates, such as HSUS, as extremists who want to impose their values on the industry.<sup>15</sup> Thus, industry members want to act first to maintain control of livestock care stan-

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<sup>9</sup> Springsteen, *Proposal to Regulate*, *supra* n. 7, at 455–56.

<sup>10</sup> Rod Smith, Feedstuffs, *Issue 2 Passes in Ohio*, <http://www.feedstuffs.com/ME2/Default.asp>; search "Issue 2 Passes in Ohio," select Issue 2 Passes in Ohio (last updated Nov. 4, 2009) (accessed Nov. 20, 2011).

<sup>11</sup> Ohio Const. art. XIV, § 1.

<sup>12</sup> Rod Smith, Feedstuffs, *Language Approved for Issue for Ohio Animal Care Board*, <http://www.feedstuffs.com> (Aug. 17, 2009) (accessed Nov. 20, 2011); see also Jack Palmer, The Crescent News, *Issue 2 Touted as a High Stakes, Pre-emptive Strike*, <http://www.crescent-news.com/news/article/4691391> (Oct. 18, 2009) (accessed Nov. 20, 2011) (quoting a state official as saying "[w]e don't want out-of-state activists telling Ohio farmers how to care for their animals") (on file with *Animal Law*).

<sup>13</sup> See Springsteen, *Proposal to Regulate*, *supra* n. 7, at 447–48 (discussing the enactment of California's anti-confinement legislation).

<sup>14</sup> *Id.* at 447.

<sup>15</sup> See Farm & Dairy, *Ohio's Political Rivals—Strickland and Kasich—Denounce HSUS Ballot Plan*, <http://www.farmanddairy.com/news/ohios-political-rivals-strickland-and-kasich-denounce-hsus-ballot-plan/14320.html> (Feb. 24, 2010) (accessed Nov.

dards in each state; the industry succeeded in Ohio.<sup>16</sup> Farm animal advocates need to get involved in livestock care standards boards so a voice speaking for the interests of farm animals can be heard over the din created by the agriculture industry.

Pursuant to constitutional amendment, the OLCSB is a bipartisan, thirteen-member board with no more than seven members from the same political party.<sup>17</sup> The OLCSB includes the Director of the Ohio Department of Agriculture as chairperson, one family farmer appointed by the Speaker of the House of Representatives, and one family farmer appointed by the President of the Senate.<sup>18</sup> The Governor appoints the remaining ten members with the advice and consent of the Senate.<sup>19</sup> There is no requirement that the members be experts in their particular fields, except that two members must be licensed veterinarians and one member must be a dean of an agriculture department of a college or university.<sup>20</sup> One member must merely be “knowledgeable” about food safety;<sup>21</sup> other members are representatives of special interests.<sup>22</sup> Moreover, although the statute calls for the appointment of three family farmers, it does not define “family farmer.”<sup>23</sup> This ambiguity has the potential to mislead the public about the true composition of the OLCSB.<sup>24</sup> For example, the public is likely to be unaware that a “family farmer” could be an individual who runs a family-owned corporation raising thousands of animals.<sup>25</sup>

On its face, Ohio’s amendment appears benign. However, most of the OLCSB’s members represent the agriculture industry, which is interested in “healthy” animals, but not necessarily in those animals’

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20, 2011) (referring to HSUS “extremism” and stating that both candidates agree that it is wrong for HSUS to attempt to overturn the will of Ohio voters).

<sup>16</sup> See Peggy Kirk Hall & Leah F. Finney, *Ohio Voters Approve Livestock Care Standards Board: Now What?* 26 Agric. L. Update 5 (2009) (available at [www.nationalaglawcenter.org/assets/aala/10-09.pdf](http://www.nationalaglawcenter.org/assets/aala/10-09.pdf) (Oct. 2009) (accessed Nov. 20, 2011)) (“The measure [creating the OLCSB] is a direct attempt to preempt efforts by . . . [HSUS], which met with Ohio farm leaders last spring to discuss its intent to propose laws that would prohibit certain livestock management practices in Ohio. Rather than negotiating with HSUS, Ohio’s agricultural interests worked through the Ohio legislature to create an alternative approach to livestock care.”).

<sup>17</sup> Ohio Const. art. XIV, § 1(A)(1), (4).

<sup>18</sup> *Id.* at § 1(A)(1), (3)–(4).

<sup>19</sup> *Id.* at § 1(A)(2) (allowing the governor to appoint ten members: “(a) One member representing family farms; (b) One member who is knowledgeable about food safety . . . ; (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 the state; (g) Two members of the public representing Ohio consumers; and (h) One member representing a county humane society”).

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

<sup>21</sup> *Id.* at § (1)(A)(2)(b).

<sup>22</sup> *Id.* at § (1)(A)(2)(a)–(h) (including, for example, “two members of the public representing Ohio consumers”).

<sup>23</sup> Thapar, *supra* n. 4, at 334.

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

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

welfare or behavioral needs.<sup>26</sup> The inclusion on the board of one member of a local humane society is an accommodating gesture; however, local humane societies usually do not work with farm animals, instead focusing on dogs, cats, and pet adoption.<sup>27</sup> Thus, animal advocates, particularly in Ohio, need to be involved in the OLCSB administrative process every step of the way.

### B. Ohio's Livestock Care Standards

The OLCSB has the authority to draft and promulgate rules, and it also holds public hearings. This Section discusses the board's rulemaking procedures. Also, this Section analyzes the first set of effective standards promulgated by the board and provides an in depth analysis of the species-specific standards pertaining to pigs, egg-laying hens, and veal calves.

#### 1. The Process

Before the OLCSB adopted its first set of standards on October 5, 2010,<sup>28</sup> Ohio Governor Ted Strickland, the Executive Vice President of the Ohio Farm Bureau Federation, and other livestock producers reached a compromise with HSUS in June 2010 regarding particular livestock care standards.<sup>29</sup> The purpose of this agreement was to ward off a ballot initiative by HSUS during the 2010 election.<sup>30</sup> The agreement required the signatories to recommend that the OLCSB take action on four critical provisions: downer cattle and humane euthanasia

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<sup>26</sup> See Animal Agric. Alliance, *Myths & Facts*, [http://www.animalagalliance.org/search/Commonly Heard Myths, select Myths & Facts](http://www.animalagalliance.org/search/Commonly%20Heard%20Myths,%20select%20Myths%20&%20Facts) (last updated 2011) (accessed Nov. 20, 2011) (discussing how healthy animals are more efficient and how animals in confinement are healthier because they are "protected," but completely disregarding any consideration of the animals' behavioral needs and ignoring the negative effects of intensive confinement on farm animal welfare); see also Thapar, *supra* n. 4, at 334 ("[T]hey speak on behalf of the interests of farmers, not animals.").

<sup>27</sup> Patrick Healy, *NBC Los Angeles: Pulling Back the Curtain to Reveal Who's Attacking the Humane Society*, <http://www.nbclosangeles.com/news/Pulling-Back-the-Curtain-To-Reveal-Whos-Attacking-the-Humane-Society-123294683.html> (June 7, 2011) (accessed Nov. 20, 2011); see Ohio St. U. College of Veterinary Med., *2004 Ohio Survey of Animal Care and Control Agencies*, 4–17, <http://vet.osu.edu/assets/pdf/depts/prevMed/research/2004AnimalCareSurvey.pdf> (2006) (accessed Nov. 20, 2011) (reporting that local humane societies rated "stray/feral cats," "overpopulation," "cruelty/neglect," and "spay/neuter" as the most important animal welfare issues in their communities).

<sup>28</sup> Ohio Dept. of Agric., *Ohio Livestock Care Standards Board Passes Vote on Euthanasia Standards*, [http://ohiolivestockcarestandardsboard.gov/public\\_docs/news/10-05-10%20OLCSB%20Euthanasia%20Standards.pdf](http://ohiolivestockcarestandardsboard.gov/public_docs/news/10-05-10%20OLCSB%20Euthanasia%20Standards.pdf) (Oct. 5, 2010) (accessed Nov. 20, 2011).

<sup>29</sup> Kristy Foster, *Farm & Dairy, Compromise Reached: HSUS Will Not Be Heading to the Ballot this November*, <http://www.farmanddairy.com/news/compromise-reached-hsus-will-not-be-heading-to-the-ballot-this-november/15258.html> (June 30, 2010) (accessed Nov. 20, 2011); Caroline E. Wellman, *Negotiated Regulation: The Ohio Livestock Care Standards Board as a Model Regulatory Process*, 93–94 (M.P.A. thesis proposal, Wright State U. 2011) (available at <http://etd.ohiolink.edu/send-pdf.cgi/Wellman%20Caroline.pdf?wright1302375241> (accessed Nov. 20, 2011)).

<sup>30</sup> Foster, *supra* n. 29, at Why cut a deal?

issues; elimination of veal crates by 2017; prohibition on the issuance of permits for new pork operations using gestation crates; and prohibition on new operations that use battery cage systems for egg-laying hens.<sup>31</sup> Veal crates, gestation crates for pregnant sows, and battery cages for egg-laying hens are methods of confinement that animal advocates often target as the most inhumane systems on factory farms,<sup>32</sup> and they are the only three methods of confinement addressed by anti-confinement legislation.<sup>33</sup>

The OLCSB's extensive rulemaking process involves several steps before rule adoption.<sup>34</sup> First, the OLCSB informs the Technical Research Advisory Committee (TRAC) of its research and informational needs.<sup>35</sup> The TRAC is a group of experts in the fields of veterinary medicine and animal science that works with species subcommittees to provide species-specific information and recommendations to the OLCSB.<sup>36</sup> Pursuant to OLCSB's governing statute, the OLCSB has the authority to adopt rules.<sup>37</sup> However, rules proposed by the OLCSB must also go through the Joint Committee on Agency Rule Review (JCARR) process after the rules are posted on the OLCSB's website for a two-week public comment period.<sup>38</sup> After the JCARR rule-review process, the agency may formally adopt a rule, or JCARR can recom-

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<sup>31</sup> Farm & Dairy, *State Agreement with HSUS Calls for these Recommendations*, <http://www.farmanddairy.com/news/state-agreement-with-hsus-calls-for-these-recommendations/15273.html> (July 1, 2010) (accessed Nov. 20, 2011) (noting that the parties also agreed to recommend to the legislature that it consider stronger puppy mill regulations, stronger cockfighting legislation, and stronger regulation against the breeding and possession of exotic wildlife); Foster, *supra* n. 29, at The deal (asserting that no more permits will be issued for new pork operations using gestation crates).

<sup>32</sup> Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 L. & Contemp. Probs. 325, 331 (2007) (describing the inhumane conditions pregnant sows suffer when kept in gestation crates, which are "individual, concrete-floored stalls . . . measuring seven feet long by two feet wide—too small for sows to turn around . . . [where] nearly all of a sow's sixteen-week pregnancy is spent [in the crate]"); AWI, *supra* n. 5, at Chickens (describing how "[f]our or more hens are packed into a battery cage, a wire enclosure so small that none can spread her wings"); HSUS, *Veal*, [http://www.humanesociety.org/issues/confinement\\_farm/facts/veal.html](http://www.humanesociety.org/issues/confinement_farm/facts/veal.html) (Aug. 19, 2010) (accessed Nov. 20, 2011) (describing how veal calves, separated from their mothers when they are only a few days old, are tethered by their necks in tiny, individual crates that do not allow them to turn around for nearly their entire five-month lives).

<sup>33</sup> See Springsteen, *Proposal to Regulate*, *supra* n. 7, at 440–55 (noting that only three animals have been legally protected from confinement throughout the U.S.: pregnant pigs, veal calves, and egg-laying hens).

<sup>34</sup> *Id.* at 456; see also Jt. Comm. on Agency Rule Rev. (JCARR), *Procedures Manual*, 16, <https://www.jcarr.state.oh.us/images/stories/manual.pdf> (last updated Sept. 7, 2011) (accessed Nov. 20, 2011) (discussing JCARR approval process for each rule proposed by OLCSB).

<sup>35</sup> OLCSB, *Process Design*, [http://ohiolivestockcarestandardsboard.gov/public\\_docs/docs/flowchart.pdf](http://ohiolivestockcarestandardsboard.gov/public_docs/docs/flowchart.pdf) (accessed Nov. 20, 2011).

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

<sup>37</sup> Ohio Rev. Code Ann. § 904.03(A) (West 2011).

<sup>38</sup> *Id.* at § 904.04(A)(3)(a).

mend the rule for validation or invalidation by the General Assembly.<sup>39</sup>

The primary way animal advocates can represent farm animal welfare interests during the OLCSB's rulemaking process is to actively submit comments.<sup>40</sup> Given that the OLCSB is purportedly dedicated to maintaining a transparent rulemaking process,<sup>41</sup> this is a crucial opportunity for animal advocates to voice farm animal welfare interests. Animal advocates can write letters, send public comments to the agency, send emails to legislators, make phone calls, solicit letters, emails, and phone calls from other animal advocates in the state, and attend the public hearings to voice concerns.<sup>42</sup> Although at times these efforts may seem futile, commenting can effect change, and active participation on the part of animal advocates and constituents helps ensure that the rulemaking process remains democratic.<sup>43</sup>

The story behind the adoption of the OLCSB's veal standard serves as an excellent example of the competing interests at stake in farm animal welfare regulation, and of how active participation in the OLCSB's administrative process can influence the board to adopt or withdraw a rule. On March 1, 2011, the OLCSB reneged on an animal welfare agreement with HSUS,<sup>44</sup> which provided that individual veal crates would be phased out by 2017.<sup>45</sup> The OLCSB voted instead to continue permitting the confinement of veal calves in crates—restricting their ability to turn around.<sup>46</sup> After receiving approximately 4,700 public comments against the vote, the OLCSB reversed its decision, proposing that veal crates be phased out by December 31, 2017.<sup>47</sup>

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<sup>39</sup> JCARR, *supra* n. 34, at 16.

<sup>40</sup> See e.g. Dave Harding, *Ohio Livestock Care Standards Board Votes to Phase Out Veal Crates*, <http://www.progressohio.org/blog/2011/04/ohio-livestock-care-standards-board-votes-to-phase-out-veal-crates.html> (Apr. 5, 2011) (accessed Nov. 20, 2011) (noting that 4,700 public comments urged the board to change its decision on veal regulations).

<sup>41</sup> OLCSB, *Welcome to the Ohio Livestock Care Standards Board*, <http://ohiolivestockcarestandardsboard.gov/> (accessed Nov. 20, 2011) (“Through an open and transparent process, the [OLCSB] is eager to hear from Ohio citizens regarding [livestock care standards]. By doing so, the board is hopeful to strengthen the connection between Ohio’s farm families and its consumers.”).

<sup>42</sup> See e.g. Register of Ohio, *Public Notice*, [http://www.registerofohio.state.oh.us/pdfs/phn/901\\$12\\_NO\\_137099\\_20110509\\_1259.pdf](http://www.registerofohio.state.oh.us/pdfs/phn/901$12_NO_137099_20110509_1259.pdf) (May 9, 2011) (accessed Nov. 20, 2011) (indicating that the Ohio Department of Agriculture will consider comments on new rules).

<sup>43</sup> E.g. Harding, *supra* n. 40 (demonstrating the impact that public comments can have).

<sup>44</sup> *Id.*

<sup>45</sup> See Farm & Dairy, *supra* n. 31 (noting that the Ohio Department of Agriculture will recommend that the OLCSB adopt the American Veal Association agreement).

<sup>46</sup> See Harding, *supra* n. 40 (noting that OLCSB “reversed a vote taken on March 1 that sanctioned confinement of veal calves in crates so small they’re unable to turn around for more than half of their lives before slaughter”).

<sup>47</sup> See *id.* (noting that OLCSB reversed the vote after receiving “approximately 4,700 public comments” and that “[t]he [new] agreement stipulates that all calves must be kept in group housing starting in 2017”).

At a July 2011 JCARR hearing on the proposed rules, one Ohio veal farmer presented comments and testimony against the elimination of individual veal crates.<sup>48</sup> The lone veal farmer also presented an affidavit signed by thirty-two other Ohio veal producers stating that if the veal standard was passed, they were not likely to continue to raise veal in Ohio after the phase-out date.<sup>49</sup> After that hearing, JCARR delayed consideration of the standard for a month.<sup>50</sup>

In August 2011, the OLCSB resubmitted the veal standard unchanged, although it presented more thorough supporting information.<sup>51</sup> On August 11, 2011, the Ohio Agriculture Director announced that all of the proposed OLCSB standards, including the disputed veal standard, would become effective on September 29, 2011.<sup>52</sup> Thus, despite much back and forth due to comments and testimony at public hearings, individual veal crates will be phased out in Ohio after 2017. The events that led to the adoption of the OLCSB's veal standard demonstrate that public comments and testimony can make a difference.

## 2. *The First Set of Effective Standards*

Before September 2011, Ohio had four effective livestock standards in its administrative code: section 901:12-1 regulated euthanasia of livestock and poultry; section 901:12-2 provided civil penalties; section 901:12-3 provided general considerations for the care and welfare of livestock; and section 901:12-4 provided requirements governing the treatment of disabled and distressed livestock.<sup>53</sup> Revised section 901:12-1 provides acceptable species-specific euthanasia methods in detail, complete with diagrams similar to those found in humane-handling textbooks.<sup>54</sup> Generally, the new regulations duplicate the legal framework already in place, only adding more detailed instructions about existing farm animal husbandry practices.<sup>55</sup> The acceptable eu-

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<sup>48</sup> Kyle Sharp, *Ohio Livestock Care Board Veal Standards Put on Hold, for Now*, <http://ocj.com/livestock/care-board-veal-standards-put-on-hold-for-now> (July 14, 2011) (accessed Nov. 20, 2011).

<sup>49</sup> *Id.*

<sup>50</sup> *See id.* (indicating that approved veal standards “have been put on hold, at least temporarily” by the board).

<sup>51</sup> Kyle Sharp, *Ohio Livestock Care Standards to Take Effect September 29, 2011*, <http://ocj.com/livestock/livestock-care-standards-take-effect-september-29/> (Aug. 11, 2011) (accessed Nov. 20, 2011).

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

<sup>53</sup> *See* OLCSB, *Effective Standards*, [http://www.agri.ohio.gov/LivestockCareStandards/docs/Livestock%20Care%20Standards%20\(EFFECTIVE\).pdf](http://www.agri.ohio.gov/LivestockCareStandards/docs/Livestock%20Care%20Standards%20(EFFECTIVE).pdf) (accessed Nov. 20, 2011) (listing only these standards).

<sup>54</sup> Ohio Admin. Code Ann. § 901-12-1; *see also* Temple Grandin & Mark Deesing, *Humane Livestock Handling: Understanding Livestock Behavior and Building Facilities for Healthier Animals* 77 ((Rebekah Boyd-Owens et al. eds., Storey Publg. 2008) (describing euthanasia methods with diagrams).

<sup>55</sup> *Compare* Ohio Admin. Code Ann. § 901-12-1 (regulating euthanasia methods) with Grandin & Deesing, *supra* n. 54, at 75–79 (describing existing euthanasia methods).

thanasia methods the regulation adopted are already the industry standards, such as death by carbon dioxide, captive bolt gun, blunt force trauma, gunshots, decapitation, electrocution, or maceration.<sup>56</sup> Thus, the regulation essentially codifies routine practices on factory farms.<sup>57</sup>

The Animal Welfare Institute (AWI), an animal advocacy organization,<sup>58</sup> submitted comments to the OLCSB with several recommendations, including bans on death by electrocution or gunshot, and the suggestion that the American Veterinary Medical Association's conditionally acceptable euthanasia methods (electrocution, gunshot, and cervical dislocation in poultry, and a blow to the head for young pigs) be prohibited for routine killing.<sup>59</sup> However, the OLCSB did not implement these suggestions.<sup>60</sup>

Section 901:12-3-01(K) of the regulation defines "humane" as "the care and handling of livestock that seeks to minimize distress through utilization of the standards established by this chapter."<sup>61</sup> This definition is weak and ineffective because any animal husbandry practice that seeks to minimize distress can qualify as "humane."<sup>62</sup> For example, under this definition, tail docking and castration of pigs can be "humane" even if performed without anesthetic<sup>63</sup> as long as the procedures seek to minimize animals' distress.<sup>64</sup>

Section 901:12-3 also provides that handling and sorting devices must be "used humanely,"<sup>65</sup> that Livestock Management Procedures found in the Administrative Code "must be performed humanely,"<sup>66</sup> that "[a]ll practices and procedures pertaining to health/medical treatment of livestock must be done humanely,"<sup>67</sup> and that handling of livestock during transport "must be done humanely."<sup>68</sup> Section 901:12-3-

<sup>56</sup> See Ohio Admin. Code Ann. § 901-12-1 (permitting these euthanasia methods).

<sup>57</sup> See Grandin & Deesing, *supra* n. 54, at 77 (describing euthanasia methods with diagrams).

<sup>58</sup> See AWI, *Who We Are*, <http://www.awionline.org/about-awi/who-we-are/who-we-are> (accessed Nov. 20, 2011) (indicating that the Animal Welfare Institute's goal is to "alleviate the suffering inflicted on animals by people").

<sup>59</sup> Ltr. from Dena Jones, Farm Animal Program Manager, AWI, to Members of the OLCSB, Ohio Dept. of Agric., *Euthanasia of Farm Animals* 3-6 (June 22, 2010) (available at <http://www.awionline.org/>; search Comments to Ohio, select Farm Animal Policy, select Comments to Ohio Livestock Care Standards Board on Euthanasia (accessed Nov. 20, 2011)).

<sup>60</sup> *E.g.* Ohio Admin. Code Ann. § 901-12-1 (allowing these euthanasia methods).

<sup>61</sup> *Id.* at § 901-12-3-01(K).

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

<sup>63</sup> David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 *Animal L.* 123, 134 (1996).

<sup>64</sup> See Ohio Admin. Code Ann. § 901-12-3-01(K) ("handling of livestock that seeks to minimize distress"); see also Ohio Admin. Code Ann. § 4741-1-13(B) (listing "Livestock Management Practices" that must be performed humanely under current regulations).

<sup>65</sup> Ohio Admin. Code Ann. § 901-12-3-03(B).

<sup>66</sup> *Id.* at § 901-12-3-03(G).

<sup>67</sup> *Id.* at § 901-12-3-05(C).

<sup>68</sup> *Id.* at § 901-12-3-06(C).

03 allows for the use of electric prods,<sup>69</sup> as well as dragging disabled or non-ambulatory livestock if “the animal’s position does not permit lifting or another method of movement”<sup>70</sup>—actions that can hardly be labeled as seeking to minimize distress in any animal.<sup>71</sup>

Section 901:12-4 concerns ambulatory and non-ambulatory disabled livestock.<sup>72</sup> While this section provides a fairly elaborate standard governing the treatment of non-ambulatory livestock, it lacks a number of prohibitions necessary to ensure farm animal welfare. For example, AWI submitted public comments to the OLCSB recommending, among other things, that the OLCSB include in its non-ambulatory livestock standard the following requirements: a prohibition on accepting non-ambulatory animals for marketing; a prohibition on transporting non-ambulatory animals to slaughter; a requirement that markets have written policies and equipment to handle non-ambulatory animals; a requirement that non-ambulatory animals be promptly and humanely euthanized or treated; and a requirement that non-ambulatory animals be segregated.<sup>73</sup> However, the OLCSB did not heed these recommendations: the effective standard does not require segregation of non-ambulatory animals;<sup>74</sup> there is no prohibition on accepting non-ambulatory animals for marketing, nor on transporting non-ambulatory animals to slaughter;<sup>75</sup> there is no requirement that

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<sup>69</sup> *Id.* at § 901-12-3-03(D).

<sup>70</sup> *Id.* at § 901-12-3-03(E).

<sup>71</sup> See Global Animal Partnership, *5-Step Animal Welfare Rating Standards for Beef Cattle*, <http://www.globalanimalpartnership.org/wp-content/uploads/2011/01/5-Step-Animal-Welfare-Rating-Standards-for-Beef-Cattle.pdf> (Aug. 4, 2009) (accessed Nov. 20, 2011) (allowing electric prods for use on cattle only “if it is absolutely necessary for the welfare of the animal or the safety of the handler,” forbidding routine use of prods, and allowing the use of prods only on the muscle of the hindquarters); see also Global Animal Partnership, *5-Step Animal Welfare Rating Standards for Pigs*, <http://www.globalanimalpartnership.org/wp-content/uploads/2011/01/5-Step-Animal-Welfare-Rating-Standards-for-Pigs.pdf> (Aug. 13, 2009) (accessed Nov. 20, 2011) (prohibiting use of electric prods on pigs).

<sup>72</sup> Ohio Admin. Code Ann. § 901-12-4 (describing feed and water, management, and health of “ambulatory disabled, non-ambulatory disabled, or distressed livestock”). The section governing treatment of non-ambulatory livestock became part of the OLCSB’s standards as a result of the agreement between HSUS and the agriculture industry. See Farm & Dairy, *supra* n. 31 (describing the agreement between HSUS and the agriculture industry).

<sup>73</sup> Ltr. from Dena Jones, Farm Animal Program Manager, to OLCSB, Ohio Dept. of Agric. *Re: Nonambulatory Animals* 3–4 (July 29, 2010) (available at <http://www.awionline.org>; search Ohio Nonambulatory Animals, select Farm Animal Policy, select Comments to Ohio Livestock Care Standards Board on Nonambulatory Animals (accessed Nov. 20, 2011)).

<sup>74</sup> Ohio Admin. Code Ann. § 901-12-3.

<sup>75</sup> See *id.* at § 901-12-4-03(B)(5) (the regulation does imply that cattle cannot be transported to slaughter because it states that “non-ambulatory disabled livestock must be . . . [e]xcept for cattle, transported to an inspected slaughter plant or a state custom exempt slaughter plant.” The only prohibition on transporting non-ambulatory animals provides that they “must not be loaded for transport to a non-terminal market or collection facility,” which does not include slaughter houses or packing plants.); see also Jim Reynolds, *Treatment of Sick and Injured Animals: Should They Be Moved and If So*,

non-ambulatory animals be promptly euthanized or treated;<sup>76</sup> and there is no requirement that markets have equipment and written policies to handle non-ambulatory animals.<sup>77</sup> The standard provides that “[h]andling and moving of ambulatory disabled, non-ambulatory disabled or distressed livestock must be done in a humane manner.”<sup>78</sup> However, given the practically meaningless definition of “humane” within the regulation,<sup>79</sup> this provision does little to guarantee humane handling and treatment of non-ambulatory animals.

Overall, the first set of standards adopted by the OLCSB lays a foundation upon which later species-specific standards can build. Although not necessarily detrimental to the future of farm animal welfare regulation, Ohio’s standards are not substantial improvements upon the status quo on contemporary factory farms. Nevertheless, although legislation opposing intensive confinement may be more beneficial to farm animal welfare, livestock care standards boards are actively shaping farm animal welfare regulation. Animal advocates should use each board’s rulemaking process to the extent possible to bring about higher welfare standards for farm animals.

### 3. *Species-Specific Standards*

On September 29, 2011, several proposed regulations dealing with the care of livestock became effective in Ohio.<sup>80</sup> An in-depth analysis of each species-specific regulation is beyond the scope of this Comment, but it will discuss regulations regarding pig gestation crates, battery cages, and veal crates, which all contain provisions that follow the trend of recent anti-confinement legislation.<sup>81</sup> The regulation regarding gestation crates provides the following:

(4) Gestation stalls can be used in all existing facilities until December 31, 2025; *after which breeding/gestation stalls can only be used* post weaning for a period of time that seeks to maximize embryonic welfare and allows for the confirmation of pregnancy;

(5) After the effective date of this rule, any new construction designed to house breeding/gestating sows, including new construction on an existing facility, *must not utilize gestation stalls*, except to allow sows to be housed

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*How?* 28, <http://jrdairymanagementcontest.pbworks.com/f/ReynoldsDownCow.pdf> (accessed Nov. 20, 2011) (briefly defining “terminal market” and “non-terminal market”).

<sup>76</sup> See Ohio Admin. Code Ann. § 901-12-4-03(B) (requiring that non-ambulatory animals be provided care and treatment, but not that care or treatment be prompt).

<sup>77</sup> *Id.* at § 901-12-4; see also *id.* at § 901-12-3-03(D)(4), (E) (allowing for the dragging of non-ambulatory animals).

<sup>78</sup> *Id.* at § 901-12-4-02(B).

<sup>79</sup> *Id.* at § 901-12-3-01(K).

<sup>80</sup> Sharp, *supra* n. 51 (stating that the OLCSB’s proposed rules will become effective on September 29, 2011).

<sup>81</sup> Compare Ohio Admin. Code Ann. § 901-12-8-02 and Ohio Admin. Code Ann. § 901-12-9-03 with Cal. Health & Safety Code § 25990-25995 (West 2010 & Supp. 2011) and Mich. Comp. Laws Ann. § 287.746 (West Supp. 2010).

in breeding/gestation stalls for a period of time that seeks to maximize embryonic welfare and allows for the confirmation of pregnancy.<sup>82</sup>

Notably, the standard implements a phase-out of routine use of gestation crates as housing for pregnant sows. The standard also implicitly prohibits turn-around crates, which are alternatives to gestation crates,<sup>83</sup> because the standard defines “gestation stall” as a housing system that “does not allow [the sow] to turn around and freely enter or exit.”<sup>84</sup> Since turn-around crates allow the sow to turn around, but not to exit, Ohio does not permit this housing system after the phase-out period.<sup>85</sup>

Allowing gestation crates only for “post weaning for a period of time that seeks to maximize embryonic welfare and allows for the confirmation of pregnancy” is a vague standard that is potentially difficult to enforce.<sup>86</sup> Because gestation crates are still allowed on farms, inspectors may not be able to determine if sows are kept in the crates only post weaning and for confirmation of pregnancy.<sup>87</sup> Overall, the OLC SB standard phasing out gestation crates is a positive change for farm animal welfare, but this single change is not enough. Further, the other OLC SB standards do not implement changes that are so positive.<sup>88</sup>

In amending the rules governing the use of battery cages for laying hens, the OLC SB standard does not set a phase-out date for the battery cage system, as other states have.<sup>89</sup> Instead, it mandates the following:

(F) Conventional battery cage systems must meet the following requirements:

...

(3) Systems installed on existing farms after the effective date of this rule must provide for a minimum of 67 square inches per layer;

(4) For systems installed prior to the effective date of this rule, house/barn averaging must result in a minimum average of 67 square inches per layer five years after the effective date of this rule;

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<sup>82</sup> Ohio Admin. Code Ann. § 901-12-8-02 (emphasis added).

<sup>83</sup> See Mindy Ward, Missouri Farmer Today, *Producer Installs Turn-Around Crates for Man and Beast* (available at [http://www.missourifarmertoday.com/news/producer-installs-turn-around-crates-for-man-and-beast/article\\_c341923b-f19a-5e51-9b82-f9459ecaf08d.html](http://www.missourifarmertoday.com/news/producer-installs-turn-around-crates-for-man-and-beast/article_c341923b-f19a-5e51-9b82-f9459ecaf08d.html) (Oct. 1, 2010) (accessed Nov. 20, 2011)) (discussing one farmer’s transition to turn-around crates).

<sup>84</sup> Ohio Admin. Code Ann. § 901-12-8-01(B).

<sup>85</sup> See HSUS, *An HSUS Report: Welfare Issues with Gestation Crates for Pregnant Sows* 6, <http://www.humanesociety.org/assets/pdfs/farm/HSUS-Report-on-Gestation-Crates-for-Pregnant-Sows.pdf> (accessed Nov. 20, 2011).

<sup>86</sup> Ohio Admin. Code Ann. § 901-12-8-02.

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

<sup>88</sup> *Id.*

<sup>89</sup> Compare *id.* at § 901-12-9-03 with Cal. Health & Safety Code § 25990-25995 and Mich. Comp. Laws Ann. § 287.746.

(6) Conventional battery cage systems may not be installed, after the effective date of the rule, on any farm not defined as an existing farm.<sup>90</sup>

This regulation appears to phase out battery cages in Ohio because it actually prohibits a new farm acquired or formed *after the effective date* of the rule from installing battery cages.<sup>91</sup> However, the rule permits existing farms to expand their current battery cage systems.<sup>92</sup> Thus, it is possible that this could create a battery cage monopoly in Ohio, where a few large egg farms consolidate with smaller battery cage farms that go out of business or switch to other housing systems. In the end, this regulation may do little to actually phase out battery cages in Ohio.

The addition of section 901:12-5-03 is an improvement with respect to veal crates because it calls for a phase-out of individual crates by December 31, 2017.<sup>93</sup> Specifically, the regulation provides: “Veal calves will be permitted to be tethered or non-tethered in stalls of a minimum [twenty-four] inches wide and [sixty-six] inches long until December 31, 2017.”<sup>94</sup> Beginning January 1, 2018, tethering calves is permissible to “prevent naval and cross sucking and restraint for examinations, treatments and transit.”<sup>95</sup> Also, the calf must be able to stand, rest in natural postures, groom, eat, lie down comfortably, and turn around.<sup>96</sup> Finally, “[a]fter December 31, 2017, veal calves must be housed in group pens by [ten] weeks of age.”<sup>97</sup> While it would have been a greater improvement for the OLCSB to prohibit individual veal crates within a shorter phase-out period, this regulation makes a reasonable compromise between the wishes of the agriculture industry and animal advocates by implementing a five-year phase-out period for individual veal crates.

The OLCSB was intended in part to be a preemptive measure warding off ballot initiatives concerning farm animal welfare.<sup>98</sup> Moreover, livestock care standards boards generally create an illusion of re-

<sup>90</sup> Ohio Admin. Code Ann. § 901-12-9-03(F)(3), (4), (6).

<sup>91</sup> *Id.* at § 901-12-9-03(F)(6). Notably, Oregon and Washington have each passed legislation requiring a phase-out of battery cages and a complete conversion to larger colony cages for egg-laying hens by 2026. Or. S. 805, 76th Legis. Assembly (2011); Wash. S. 5487, 62nd Legis., Reg. Sess. (Mar. 18, 2011).

<sup>92</sup> Ohio Admin. Code Ann. § 901-12-9-03(F)(5).

<sup>93</sup> *Id.* at § 901-12-5-03(C). With the adoption of this standard, Ohio will be the sixth state, along with Arizona, California, Colorado, Maine, and Michigan, to phase out veal crates. See Springsteen, *Farm Animal Confinement Laws*, *supra* n. 7, at Where Are These Laws in Place. Ohio is also following the recommended policy of the American Veal Association by setting its phase-out completion date for December 31, 2017. See Rod Smith, Feedstuffs Food Link, *Group Veal Pens Called Win-Win*, <http://www.feedstuffsfoodlink.com/ME2/Default.asp>; search Veal Pens, select Group Veal Pens (May 8, 2008) (accessed Nov. 20, 2011) (asserting that veal producers commit to well-being of calves).

<sup>94</sup> Ohio Admin. Code Ann. § 901-12-5-03(C).

<sup>95</sup> *Id.* at § 901:12-5-03(E)(1).

<sup>96</sup> *Id.* at § 901-12-5-03(C), (E).

<sup>97</sup> *Id.* at § 901-12-5-03(C)(4).

<sup>98</sup> *Supra* pt. II(A).

form that may appease some animal advocates and the general public, but do little to change the plight of farm animals on factory farms. The vague definition of “humane” in section 901:12-3 displays how the OLCSB seeks to simultaneously appease those who want to see humane living conditions for farm animals and those who wish to codify the status quo.<sup>99</sup> The OLCSB’s standards are the product of an agreement between the agriculture industry and animal advocates.<sup>100</sup> However, while compromise is admirable and democratic, much more change must occur before farm animals in Ohio have lives worth living.

### III. OTHER STATES

Like Ohio, other states have enacted versions of a livestock care standards board. This Part analyzes statutes creating livestock care standards boards in other states, and it reviews proposed legislation that would create livestock care standards boards.

#### A. *The New Jersey Standards*

New Jersey enacted a statute governing “standards for humane treatment of domestic livestock.”<sup>101</sup> Like the Ohio regulations establishing that state’s livestock care standards board, regulations implementing the New Jersey statute include only minor improvements to welfare standards for farm animals.<sup>102</sup>

The New Jersey regulations provide species-specific standards,<sup>103</sup> giving the impression that the standards are more comprehensive—and thus, more humane. The regulations define “humane” as “marked by compassion, sympathy, and consideration for the welfare of animals.”<sup>104</sup> However, each species-specific section contains an exception for “routine husbandry practices,” which are “those techniques commonly taught by veterinary schools, land grant colleges, and agricultural extension agents.”<sup>105</sup> The regulations also permit mutilations

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<sup>99</sup> *Supra* pt. II(B)(ii).

<sup>100</sup> *Supra* pt. II(B)(i).

<sup>101</sup> N.J. Stat. Ann. § 4:22-16.1 (1998).

<sup>102</sup> *Compare id.* at § 4:22-16.1 with Ohio Admin. Code Ann. §§ 901:12-5, 901:12-8, 901:12-9.

<sup>103</sup> N.J. Admin. Code § 2:8 (West 2011).

<sup>104</sup> *Id.* at § 2:8-1.2(a).

<sup>105</sup> *Id.*; see generally *id.* at § 2:8 (listing the mutilations that are categorized as routine husbandry practices for each species). In *New Jersey Society for the Prevention of Cruelty to Animals v. New Jersey Department of Agriculture*, the New Jersey Supreme Court held that the term “routine husbandry practices” was arbitrary and capricious as defined by the regulations because there was no evidence that the New Jersey Department of Agriculture considered whether the techniques taught at the identified institutions were humane or “have any focus other than expedience or maximization of productivity.” 955 A.2d 886, 905-07 (N.J. 2008). Though the New Jersey Department of Agriculture has proposed new rules eliminating the use of the term “routine husbandry practices,” the substance of the New Jersey regulations pertaining to farm animals

that allow many animals to be housed closely together without causing significant harm to one another.<sup>106</sup>

### B. *Enacted Boards*

Illinois, Indiana, Kentucky, Louisiana, Utah, Vermont, and West Virginia have all either followed Ohio's lead and enacted their own version of a statute creating a livestock care standards board or delegated the authority to establish or recommend livestock care standards to a specified governmental body.<sup>107</sup> As of August 2011, only the Indiana board and the Ohio Livestock Care Standard Board (OLCSB) have proposed standards and taken public comments.<sup>108</sup> Kentucky's Livestock Care Standards Commission has met several times, and it is likely to adopt Ohio's standards for the sake of financial efficiency.<sup>109</sup>

Although many of the boards appear to create a seat at the table for animal interests by including a member of a local humane society, including representatives of humane societies may actually do little for farm animal welfare; many humane societies are not familiar with caring for these species and thus lack the expertise necessary to discuss farm animal issues.<sup>110</sup> Also, the inclusion of only one member representing animal interests among many others representing interests contrary to animals' interests does not provide adequate representation of animal welfare concerns.

Rather than follow Ohio's model, Indiana granted an existing board the authority to adopt livestock care standards. The statute granting that authority, effective January 1, 2011, simply states, "The [Board of Animal Health] may adopt rules to establish standards governing the care of livestock and poultry."<sup>111</sup> When adopting standards, the Indiana Board of Animal Health (BOAH) may consider the following:

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largely remains the same, except for the fact that the new regulations prohibit the tail docking of cows. 2011 N.J. Register 246526 (Jan. 3, 2011).

<sup>106</sup> See e.g. N.J. Admin. Code § 2:8-7.7(d) (allowing tail docking, which is done because animals in close confinement bite each other's tails).

<sup>107</sup> 20 Ill. Comp. Stat. Ann. 5/5-525 (West 2010); Ind. Code Ann. § 15-17-3-23 (Lexis Supp. 2010); Ky. Rev. Stat. Ann. § 257.192 (Lexis 2010); La. Rev. Stat. Ann. § 3:2093 (West Supp. 2011); Utah Code Ann. § 4-2-7 (Lexis 2006); Vt. Stat. Ann. tit. 6, § 792 (Supp. 2010); W. Va. Code Ann. § 19-1C-3 (Lexis 2011).

<sup>108</sup> See Ind. St. Bd. of Animal Health, *Board Actions*, <http://www.in.gov/boah/2349.htm> (accessed Nov. 20, 2011); see also Ind. Reg. LSA Doc. No. 11-88, <http://www.in.gov/legislative/register/irtoc.htm>; search LSA Doc. # 11-88 (June 30, 2011) (accessed Nov. 20, 2011).

<sup>109</sup> The Farmer's Pride, *Livestock Board Reviews Ohio Program*, <http://thefarmer-pride.com/?p=352> (Apr. 8, 2011) (accessed Nov. 20, 2011).

<sup>110</sup> See e.g. Humane Socy. of W. Mont., *Admissions Policy*, [http://www.myhswm.org/services/surrender\\_animal.htm](http://www.myhswm.org/services/surrender_animal.htm); select Click here to read more about admissions policy (accessed Nov. 20, 2011) (noting that the Humane Society of Western Montana does not accept farm animals).

<sup>111</sup> Ind. Code Ann. § 15-17-3-23.

(1) [t]he health and husbandry of the livestock and poultry, (2) [g]enerally accepted farm management practices, (3) [g]enerally accepted veterinary standards and practices, (4) [t]he economic impact the standards may have on: (A) livestock and poultry farmers; (B) the affected livestock and poultry sector; and (C) consumers.<sup>112</sup>

BOAH's proposed standards do much less than the OLCSB's to improve the living conditions of farm animals. For example, one of the proposed standards provides: "A person responsible for caring for livestock or poultry must provide the animals with an environment that can reasonably be expected to maintain the health of animals of that species, breed, sex and age, raised using the applicable production method."<sup>113</sup> This rule does not provide for a specific standard of care, so it will be very difficult to enforce.

The Animal Welfare Institute (AWI) submitted comments to BOAH concerning these standards, stating:

The Indiana draft standards appear to have been written in order to codify conventional industry practices and not for the purpose of providing for farm animal health and welfare. In fact, the addition of the phrase "raised using the applicable production method" to each section of the regulation ensures that just about any treatment practiced by more than one farmer will be considered acceptable.<sup>114</sup>

The AWI comments also recommended four specific standards.<sup>115</sup> More comments and participation are necessary so administrative entities, such as BOAH, will take high-welfare recommendations seriously and implement meaningful welfare improvements for farm animals.

Of all the state boards assembled, Vermont's Livestock Care Standards Advisory Council has the potential to be the most effective at addressing farm animal welfare. Vermont's Livestock Care Standards Advisory Council was created by a statute effective on June 3, 2010, following HSUS's undercover investigation at a veal calf slaughterhouse, which revealed horrible abuse of the calves.<sup>116</sup>

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

<sup>113</sup> I.R. 11-88.

<sup>114</sup> Dena Jones, *Comments to Indiana Board of Animal Health on Care Standards for Livestock and Poultry 2*, <http://www.awionline.org/search> Comments to Indiana, *select Farm Animal Policy, select Comments to Indiana Board* (June 7, 2011) (accessed Nov. 20, 2011).

<sup>115</sup> *Id.* at 3-6.

<sup>116</sup> See Brandon Bosworth, *Vermont Takes On Livestock Abuse*, <http://news.change.org/stories/vermont-takes-on-livestock-abuse> (Apr. 29, 2010) (accessed Nov. 20, 2011) (documenting one of the most disturbing examples of abuse at Bushway Packing, Inc., the slaughterhouse where the undercover investigation took place: "[T]he co-owner of the plant shocks and then heaves a downed calf to his feet saying, 'There's nothing wrong with you, Shitbox.' The infant animal, covered in his own diarrhea, staggers and falls hard into the side of the trailer."); see also HSUS, *Petition for Rulemaking 31-37*, [http://www.fsis.usda.gov/PDF/Petition\\_HSUS\\_Humane\\_Handling.pdf](http://www.fsis.usda.gov/PDF/Petition_HSUS_Humane_Handling.pdf) (accessed Nov. 20, 2011) (documenting specifically all of the abuses observed during the HSUS undercover investigation).

Although membership on Vermont's council is industry-dominated like the other state boards, this council provides for membership of both a representative from a local humane society and a "person with experience investigating charges of animal cruelty involving livestock."<sup>117</sup> The inclusion of two animal advocates makes Vermont's council slightly more balanced in terms of representing farm animal welfare interests.<sup>118</sup> In particular, having a member with investigative experience in animal cruelty matters gives Vermont's council an advantage over other state boards.<sup>119</sup> However, if animal advocates remain silent and do not actively participate in the Vermont council's administrative process, this potential for farm animal welfare improvement may never come to fruition.<sup>120</sup> Vermont's council serves only in an advisory capacity, making recommendations and proposing legislation concerning the care and handling of livestock.<sup>121</sup> Thus, it is important for animal advocates to voice their concerns about farm animal welfare so the council knows where many members of the public stand on the issue.

West Virginia's statute creating a livestock care standards board, which became effective on July 1, 2010, is almost identical to that of Ohio.<sup>122</sup> The membership of each board is essentially the same, but West Virginia's statute is not as detailed as Ohio's with respect to the administrative structure of its board.<sup>123</sup>

Kentucky and Utah stray a bit from the model set by Ohio and West Virginia.<sup>124</sup> Both Kentucky and Utah created advisory boards rather than independent entities with authority to adopt and propose regulations.<sup>125</sup> Kentucky's statute created the Kentucky Livestock Care Standards Commission, coming into effect on July 15, 2010.<sup>126</sup> Utah actually created its Agricultural Advisory Board in 1979, but

<sup>117</sup> Vt. Stat. Ann. tit. 6, § 792.

<sup>118</sup> *Id.*; see also Ky. Rev. Stat. Ann. § 257.192; Utah Code Ann. § 4-2-7(1). The Kentucky and Utah boards lack a member representing a local humane society or any other representative of farm animal welfare interests.

<sup>119</sup> The bill creating Vermont's council also amended section 3306 to include a provision giving the Secretary of Agriculture the authority to impose video monitoring on any slaughter facility that includes false statements on a license application or that fails to comply with any other law under that chapter. Vt. Sen. 295, 2009–2010 Legis. Sess. 19 (Mar. 16, 2010).

<sup>120</sup> At least one animal advocacy organization in Vermont declares on its website that it submits comments to the council, and hopefully others already do the same or will follow suit. See Green Mt. Animal Defenders, *Recent Accomplishments for Helping Animals*, <http://www.greenmountainanimaldefenders.org/accomplishments.php> (accessed Nov. 20, 2011).

<sup>121</sup> Vt. Stat. Ann. tit. 6, § 793.

<sup>122</sup> Compare W. Va. Code Ann. § 19-1C-3, 19-1C-4 with Ohio Rev. Code Ann. § 904.02–03.

<sup>123</sup> Compare W. Va. Code Ann. § 19-1C-4 with Ohio Rev. Code Ann. § 904.02–03.

<sup>124</sup> Compare W. Va. Code Ann. § 19-C-4 with Ky. Rev. Stat. Ann. § 257.192 and Utah Code Ann. § 4-2-7.

<sup>125</sup> Ky. Rev. Stat. Ann. § 257.192; Utah Code Ann. § 4-2-7.

<sup>126</sup> Ky. Rev. Stat. Ann. § 257.192.

amended it in 2010 to give the board authority to recommend livestock care standards.<sup>127</sup> The Kentucky Livestock Care Standards Commission only “make[s] recommendations to the board [of agriculture] to establish, maintain, or revise standards governing the care and well-being of on-farm livestock and poultry.”<sup>128</sup> Meanwhile, Utah amended its statute to delegate to the advisory board the duty only to “advise the commissioner [of the department of agriculture and food] regarding . . . the establishment of standards governing the care of livestock and poultry.”<sup>129</sup> Both entities lack a member representing a local humane society or any other potential representative of farm animal welfare interests.<sup>130</sup> Thus, the compositions of the boards in Kentucky and Utah are least favorable in terms of farm animal welfare reform.

Louisiana has taken action similar to that of Utah, delegating to a previously established state board the authority to adopt rules and establish standards governing the care and well-being of livestock.<sup>131</sup> Louisiana’s statute, effective June 8, 2010, grants authority to the Louisiana Board of Animal Health to “adopt such rules and regulations as may be necessary to establish standards governing the care and well-being” of livestock.<sup>132</sup> The factors the board may consider when establishing such rules are essentially identical to those of Indiana.<sup>133</sup> However, Louisiana goes one step further, preempting any “municipality, parish, local governmental entity or governing authority of any group or association, private or public, having jurisdiction over a specific geographic area” from enacting laws or regulations “establishing standards applicable to the care and well-being” of livestock.<sup>134</sup> Instead, such civic bodies may only request the adoption or amendment of rules and regulations.<sup>135</sup>

Finally, the Illinois Advisory Board of Livestock Commissioners, which became effective on July 12, 2010, consists of twenty-five members, none of whom represent farm animal welfare interests.<sup>136</sup> Rules and regulations pertaining to the care and well-being of livestock are submitted to the Illinois board for approval.<sup>137</sup> The Illinois statute provides the least amount of information regarding the duties and powers of the board.<sup>138</sup>

Absent involvement of animal advocates, the boards and councils established in the wake of the OLCSB are obstacles to reform of farm animal welfare regulation on contemporary factory farms. The boards

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<sup>127</sup> Utah Code Ann. § 4-2-7.

<sup>128</sup> Ky. Rev. Stat. Ann. § 257.196.

<sup>129</sup> Utah Code Ann. § 4-2-7(2)(b).

<sup>130</sup> *Id.* at § 4-2-7; Ky. Rev. Stat. Ann. § 257.192.

<sup>131</sup> La. Rev. Stat. Ann. § 2093.

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

<sup>133</sup> Compare *id.* at § 2093 with Ind. Code Ann. § 15-17-3-23.

<sup>134</sup> La. Rev. Stat. Ann. § 2095.1.

<sup>135</sup> *Id.*

<sup>136</sup> 20 Ill. Comp. Stat. Ann. 5/5-525.

<sup>137</sup> *Id.*

<sup>138</sup> See *id.* (lacking provisions included in other states’ statutes).

and councils give the impression that action is being taken to assure that farm animals are treated humanely; however, the boards act primarily as a preemptive measure against further anti-confinement legislation and ballot initiatives regarding farm animal living conditions.<sup>139</sup> Nevertheless, these boards are not going away, and it is likely that more states will create similar boards. For example, during the 2011 legislative session, Maryland, Massachusetts, Oklahoma, and Texas each considered bills that would have created livestock care standards boards, but each bill failed to pass.<sup>140</sup> Thus, it is imperative that animal advocates lobby state legislatures to draft bills in which animal welfare is actually improved and participate in the administrative process of each board, because they can assert farm animal interests with the hope that one day high-welfare farming becomes the predominant U.S. farming method.

### C. Other Related Legislation

A few other states have recently enacted legislation preempting local ordinances or regulations governing livestock care standards. In May and June of 2009, Georgia, Oklahoma, and South Carolina passed legislation preempting local and municipal rules that would regulate animal husbandry practices or the care and handling of livestock.<sup>141</sup> On April 21, 2010, Alabama passed similar legislation, reserving to the Department of Agriculture and Industries “the entire subject matter concerning the care and handling of livestock and animal husbandry practices involved in the production of agricultural and farm products on private property.”<sup>142</sup> Wyoming has passed a bill declaring that nothing in that state’s legislation pertaining to the protection of livestock prohibits “[t]he use of Wyoming industry accepted agricultural or livestock management practices or any other commonly practiced animal husbandry procedure used on livestock animals.”<sup>143</sup>

Two bills currently pending in the Massachusetts state legislature and a bill that just died in the New York state legislature are also notable.<sup>144</sup> The two bills in Massachusetts are particularly interesting because they are competing with one another: one bill proposes a Live-

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<sup>139</sup> *Supra* pt. II(A).

<sup>140</sup> See Md. Sen. 254, 2011 Legis., 428th Sess. Gen. Assembly 1 (Jan. 28, 2011); Mass. Sen. 335, 187th Gen. Court, Reg. Sess. (Jan. 19, 2011); Okla. H. 1306, 53rd Sess., 1st Reg. Sess. (Feb. 7, 2011); Tx. H. 334, 82d Legis., Reg. Sess. (Feb. 15, 2011). Oregon had a proposed bill to create a Dairy Animal Welfare Board, but it also failed to pass. Or. H. 3006, 76th Legis. Assembly, Reg. Sess. (Mar. 28, 2011). Additionally, in 2010, Maine enacted legislation requiring the Commissioner of Agriculture, Food, and Rural Resources to develop best management practices for poultry production. S. Res. 267, 124th Legis., 1st Reg. Sess. (May 21, 2009).

<sup>141</sup> See Springsteen, *Proposal to Regulate*, *supra* n. 7, at 457–58.

<sup>142</sup> 2010 Ala. Laws 977, 978.

<sup>143</sup> Wyo. S. File 10, 61st Legis., 2011 Gen. Sess. (2011).

<sup>144</sup> Mass. S. 335, 187th Gen. Court, Reg. Sess.; Mass. S. 786, 187th Gen. Court, Reg. Sess. (2011); N.Y. Assembly 2118, 234th Annual Legis. Sess. (Jan. 13, 2011).

stock Care and Standards Board;<sup>145</sup> the other is an anti-confinement bill titled, “An Act to Prevent Farm Animal Cruelty.”<sup>146</sup> The bill proposing a Massachusetts livestock care standards board is much like the legislation creating the other state boards in terms of membership and duties.<sup>147</sup>

The Massachusetts anti-confinement legislation currently pending contains language similar to that in the California, Maine, and Michigan anti-confinement statutes.<sup>148</sup> The bill declares it unlawful to “tether or confine any covered animal . . . in a manner that prevents such animal from: (1) [l]ying down, standing up, and fully extending his or her limbs; and (2) [t]urning around freely.”<sup>149</sup> These provisions are modest improvements, similar to the improvements made in other states, but the New York bill that just died sought to make even greater improvements.

The New York bill did more than assure that farm animals could lie down, stand up, fully extend their limbs, and turn around freely<sup>150</sup>—it also prohibited excessive breeding, force-feeding and gavage techniques, and overcrowding.<sup>151</sup> This was the third time New York attempted to pass its Prevention of Farm Animal Cruelty Act.<sup>152</sup> Given the recent success of legislation creating livestock care standards boards and the waning of anti-confinement legislation, it is likely that bills creating livestock care standards boards will have more success in the future.<sup>153</sup>

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<sup>145</sup> Mass. S. 335, 187th Gen. Court, Reg. Sess.

<sup>146</sup> Mass. S. 786, 187th Gen. Court, Reg. Sess.

<sup>147</sup> Mass. S. 335, 187th Gen. Court, Reg. Sess.

<sup>148</sup> Compare Mass. S. 786, 187th Gen. Court, Reg. Sess. with Cal. Health & Safety Code § 25990 and Me. Rev. Stat. Ann. 7 § 4020 and Mich. Comp. Laws Serv. § 287.746.

<sup>149</sup> Mass. S. 786, 187th Gen. Court, Reg. Sess.

<sup>150</sup> N.Y. Assembly 2118, 234th Annual Legis. Sess.

<sup>151</sup> *Id.* That this bill sought to prohibit force-feeding is critical because this technique is primarily used in the production of foie gras, which is the fatty liver of ducks and geese used primarily in pâté. HSUS, *An HSUS Report: The Welfare of Animals in the Foie Gras Industry 1*, <http://www.humanesociety.org/assets/pdfs/farm/HSUS-Report-on-Foie-Gras-Bird-Welfare.pdf> (accessed Nov. 20, 2011). There are only four producers of foie gras in the U.S., and two of those producers are in New York. *Id.* Thus, this law would have had the effect of ending the cruel practice of force-feeding for more than half of the birds (more than 250,000 annually) presently produced in the U.S. foie gras industry. *Id.* California has banned the sale and production of force-fed foie gras in that state effective July 1, 2012. See Cal. S.1520, 2004 Reg. Sess. (Sept. 29, 2004) (to be codified commencing with Cal. Health & Safety Code § 25980).

<sup>152</sup> In 2009 and 2010, the New York legislature tried to pass its Prevention of Farm Animal Cruelty Act, but these bills died when each legislative session ended. See N.Y. Assembly 8597, 233d Annual Legis. Sess. (Jan. 19, 2010) (sending the bill to committee); N.Y. Assembly 8597, 232d Legis. Sess. (May 29, 2009).

<sup>153</sup> See *supra* pt. III(B) (discussing the livestock care standards boards recently enacted or amended between 2010 and 2011).

## IV. REFORM

A federal administrative entity tasked with establishing high-welfare farming standards would likely improve farm animal welfare in the U.S. This entity could create care, handling, and housing standards for livestock, considering the particular behavioral needs of each species.

In 2010, Congress considered anti-confinement legislation that would have reformed farm animal welfare regulation.<sup>154</sup> However, the proposed legislation did not pass, and it does not appear that it would pass if proposed again in the near future. The 111th Congress introduced the Prevention of Farm Animal Cruelty Act on March 2, 2010; it would have required federal agencies to purchase animal food products “only from sources that raised the animals free from cruelty and abuse.”<sup>155</sup> However, the bill died in the Subcommittee on Livestock, Dairy, and Poultry within the Committee on Agriculture after having made it successfully through the Committee on Oversight and Government Reform.<sup>156</sup> This bill likely failed because the Committee on Agriculture favors the interests of the agriculture industry.<sup>157</sup>

Nevertheless, a remarkable development has rendered federal anti-confinement legislation a real possibility. In July 2011, the Humane Society of the U.S. and United Egg Producers, a cooperative that represents the majority of the nation’s egg producers,<sup>158</sup> reached an agreement to jointly lobby Congress for federal legislation imposing a transition from battery cage housing systems to colony cage housing.<sup>159</sup> It may be unlikely that a federal bill will actually be introduced and passed as a result of this agreement. However, the overall implications of the agreement are positive for farm animal welfare because the fact that these two historically opposing groups were capable of

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<sup>154</sup> H.R. 4733, 111th Cong. (Mar. 2, 2010) (information about the status of the Prevention of Farm Animal Cruelty Act is available at <http://www.govtrack.us/congress/bill.xpd?bill=h111-4733> (accessed Nov. 20, 2011)).

<sup>155</sup> *Id.*

<sup>156</sup> *Id.*

<sup>157</sup> See Wolfson, *supra* n. 63, at 145–46 (discussing how the agribusiness “industry giants” are powerful and efficient lobbyists and have great influence over the legislature).

<sup>158</sup> See United Egg Producers, *About Us*, <http://www.unitedegg.org/> (accessed Nov. 20, 2011) (stating that the cooperative represents “the ownership of approximately 95% of all the nation’s egg-laying hens”).

<sup>159</sup> See Rod Smith, Feedstuffs, *HSUS, UEP Reach Agreement to Transition to Colonies*, <http://www.feedstuffs.com/ME2/Default.asp>; search “Transition to Colonies, select HSUS, UEP Reach Agreement to Transition to Colonies (July 7, 2011) (accessed Nov. 20, 2011) (noting that colony cages provide more space per bird, allowing between 124 square inches and 144 square inches per bird, rather than the industry standard of approximately 67 square inches per bird); see also Press Release, HSUS *HSUS, Egg Industry Agree to Promote Federal Standards for Hens* [http://www.humanesociety.org/news/press\\_releases/2011/07/egg\\_agreement.html](http://www.humanesociety.org/news/press_releases/2011/07/egg_agreement.html) (July 7, 2011) (accessed Nov. 20, 2011) (discussing legislation aimed at expanding the space hens are currently allotted in large egg production facilities).

reaching an agreement concerning farm animal welfare legislation makes the passage of such legislation a more palpable possibility.

Alternatively, a federal mandate establishing an administrative entity focused on high-welfare farming standards could become part of the Farm Bill. The Farm Bill, approved every five years, governs much of the nation's food and agriculture policy. The Farm Bill governs agricultural commodity and conservation programs, as well as trade, nutrition, and rural development.<sup>160</sup> The Farm Bill's impact cannot be overstated because its policies directly affect public health, the economy, the environment, and potentially animal welfare.<sup>161</sup> It is also principally to blame for the factory farming methods that govern agriculture in the U.S. today.<sup>162</sup> However, the Farm Bill could transform from the source of problems in the agriculture sector to the solution if it mandated better farm animal housing systems and provided assistance to farmers. For example, assistance with the transition from current confinement systems to high-welfare housing systems could follow the example of current environmental conservation funding measures in the bill.<sup>163</sup>

## V. CONCLUSION

Livestock care standards boards are politically effective, and they have the power to either negatively or positively affect the lives of farm animals. These boards will likely prevent the enactment of further state anti-confinement legislation. However, if animal advocates stay involved with the administrative process, rigorous and dedicated advocacy for farm animal welfare could lead the state livestock care standards boards to enact high-welfare regulations.

Recent state legislation pertaining to farm animal welfare suggests that many citizens find contemporary animal husbandry practices unacceptable.<sup>164</sup> Animal confinement systems on today's factory farms do not reflect the traditional animal husbandry practices that existed decades ago.<sup>165</sup> Immobilizing animals through confinement and painfully altering animals through mutilation is not how humans ought to relate to the billions of living beings they consume as food

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<sup>160</sup> See William S. Eubanks II, *A Rotten System: Subsidizing Environmental Degradation and Poor Public Health with Our Nation's Tax Dollars*, 28 *Stan. Envtl. L.J.* 213, 248 (2009); see also e.g. H.R. 2419, 110th Cong. (May 22, 2008) (enacted).

<sup>161</sup> See Eubanks II, *supra* n. 160, at 214–15 (noting that the Farm Bill has “far-reaching implications for the most salient issues facing our nation today”).

<sup>162</sup> See *id.* at 223–25 (discussing the “Get Big or Get Out” Farm Bill policy under the Nixon Administration).

<sup>163</sup> See H.R. 2419, §§ 2701–2711, 110th Cong. (May 22, 2008) (describing funding measures for environmental conservation).

<sup>164</sup> See Springsteen, *Farm Animal Confinement Laws*, *supra* n. 7, at Where Are These Laws in Place? (listing the states that have enacted confinement laws).

<sup>165</sup> See Pew Commn. on Indus. Farm Animal Prod., *Putting Meat on the Table: Industrial Farm Animal Production in America Executive Summary* 1, [http://www.ncifap.org/\\_images/PCIFAPSmry.pdf](http://www.ncifap.org/_images/PCIFAPSmry.pdf) (2008) (accessed Nov. 20, 2011).

each year.<sup>166</sup> It is time to recognize that farm animals deserve to get up, turn around, lie down, groom themselves, and stretch their limbs—in short, to have lives worth living.

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<sup>166</sup> See HSUS, *Farm Animal Statistics: Slaughter Totals*, [http://www.humanesociety.org/news/resources/research/stats\\_slaughter\\_totals.html](http://www.humanesociety.org/news/resources/research/stats_slaughter_totals.html) (Nov. 7, 2011) (accessed Nov. 20, 2011).