

# THE BUSINESS AND ETHICS OF LAYING HENS: CALIFORNIA'S GROUNDBREAKING LAW GOES INTO EFFECT ON ANIMAL CONFINEMENT

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## Introduction

Many of us enjoy a good omelet and some may even consider an omelet a more humanitarian dining option than a meal based on “full on” animal protein. What you might not know is that the hens that lay most of the eggs for such an omelet, at least in the United States, live in miserable, cramped conditions and never see the “light of day.”<sup>1</sup> Indeed, the cages used for most of the over 300 million hens in the U.S., commonly called “laying hens,”<sup>2</sup> provide each hen an amount of space that is about the size of a laptop computer.<sup>3</sup> In 2008, California voters approved Proposition 2, the “Prevention of Farm Animal Cruelty Act,” banning the use of these inordinately small cages, known as battery cages, as of January 2015.<sup>4</sup> Hen enclosures in California as of 2015 must provide enough space for hens to stand up, lie down, turn around freely, and fully extend their limbs.<sup>5</sup> The California legislature later extended these requirements by a 2010 Amendment to the Act, thus requiring all egg producers wishing to sell eggs in California – both within and without the state – to comply by January 2015.<sup>6</sup>

The 2010 Amendment extending the requirements to egg producers outside of California created quite a stir<sup>7</sup> and resulted in litigation to halt the enforcement of Proposition 2 and the corresponding 2010 Amendment.<sup>8</sup> Egg producers in Missouri urged that California had placed unfair and unconstitutional limitations on interstate commerce.<sup>9</sup> In its lawsuit (“the Missouri Complaint”), the State Attorneys General from Missouri, joined by Nebraska, Alabama, Oklahoma, Kentucky, and Iowa,<sup>10</sup> urged that new caging systems to meet these California restrictions would raise their producers’ egg prices and destroy a ready market, in violation of the Interstate Commerce Clause.<sup>11</sup> The Missouri Complaint also urged that if these egg producers outside of California were to abandon the California market, surpluses in their own states would

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<sup>1</sup> See Amy Mosel, *What About Wilbur? Proposing a Federal Statute Minimum Humane Living Conditions for Farm Animals Raised for Food Production*, 27 Dayton L. Rev 133 (2001) (hereinafter “*What About Wilbur*”); see also Sheila Rodriguez, *The Morally Informed Consumer: Examining Animal Welfare Claims on Egg Labels*, 30 Temp. J. Sci. Tech. & Envtl. L. 51, 52 (2011) (hereinafter “*The Morally Informed Consumer*”).

<sup>2</sup> Amy Mosel, *What About Wilbur*,” *supra* note 1 at 144.

<sup>3</sup> Clinical Professor of Law, Sheila Rodriguez devotes a paper to examining the conditions under which hens are raised to provide eggs, including those labeled, humane, Grade AA, Cage Free, Antibiotic Free, and Organic. See Rodriguez, *The Morally Informed Consumer*, *supra* note 1. Prof. Rodriguez urges that: “from a moral and a legal standpoint, consumers should avoid purchasing most eggs.” *Id.* at 51; see *infra* notes 185-230 and accompanying discussion.

<sup>4</sup> See Prevention of Farm Animal Cruelty Act of 2008, Cal. Health & Safety Code § 25990-25994 (“Proposition 2”)

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

<sup>6</sup> Cal Health & Saf. Code § 25996 (“2010 Amendment”).

<sup>7</sup> Koster Picks Up King’s Fight, Files Lawsuit Against CA Hen Standards, Agri-Pulse. (February 5, 2014), <http://www.agri-pulse.com/Koster-picks-up-Kings-fight-files-lawsuit-against-CA-hen-standards-02052014.asp>.

<sup>8</sup> Missouri ex rel. Koster v. Harris, No. 14-0067 (E.D. Cal., filed February 3, 2014).

<sup>9</sup> *Id.*

<sup>10</sup> Five States Join Missouri in Egg Lawsuit, Feedstuffs (March 6, 2014), <http://feedstuffs.com/story-nebraska-joins-missouri-egg-lawsuit-45-109587>.

<sup>11</sup> Missouri ex rel. Koster v. Harris, No. 14-0067 (E.D. Cal., filed February 3, 2014).

lower egg prices and drive farmers out of business,<sup>12</sup> and finally, that the amendment preempts uniform national egg standards under the federal Egg Products Inspection Act.<sup>13</sup>

The Eastern District of California's Justice Kimberly Mueller recently put an end to the uproar.<sup>14</sup> She threw out the suit brought by the Attorneys General of the six states, saying they lacked standing to sue on behalf of a small number of egg producers in their states.<sup>15</sup> Judge Mueller also admonished the complainants not to return on this matter anytime soon, ruling that the suit could not be amended.<sup>16</sup>

California had faced similar backlash in 2012 with a ban on the force feeding of birds to produce the gourmand's foie gras.<sup>17</sup> That ban likewise prohibited the in-state sale of foie gras produced by force feeding birds, even if produced outside of California.<sup>18</sup> Non-California foie gras producers Association des Éleveurs de Canards et d'Oies du Québec and HVFG LLC brought a lawsuit<sup>19</sup> against California and argued that California's ban likewise illegally restricted interstate commerce. The United States Court of Appeals for the Ninth Circuit similarly rejected that argument, finding that the statute only had indirect effects on interstate commerce,<sup>20</sup> that California's foie gras ban did not discriminate against private producers based on location, and that the state had enacted the law for the genuine purpose of reducing animal cruelty.<sup>21</sup>

California's Proposition 2 was likewise enacted to reduce animal cruelty and is significant because, in addition to applies to hens that produce all eggs sold in California, and also to all "covered" animals, including pigs, hens, and calves raised in California.<sup>22</sup> The measure thus has the potential to influence large producers nationwide as to "covered" animals, and to encourage egg producers nationwide to comply with California law as to all their laying hens, rather than create a patchwork state by state production plan.<sup>23</sup>

In light of this activist history in California, the legal battles it has spawned, and the groundbreaking nature of California's new animal confinement provisions, this article examines these laws and the battle over them as a backdrop to our ethical and legal obligations to the animals that produce our food. Part I thus discusses the economics and the existing conditions

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<sup>12</sup> Id.

<sup>13</sup> Id.

<sup>14</sup> *Missouri v. Harris*, No. 2:14-cv-00341-KJM-KJN, 2014 WL 4961473 (E.D.Cal. Oct. 2, 2014); Jacob Bunge, Judge Upholds California Law Requiring More Humane Housing of Hens, *The Wall Street Journal* (October 3, 2014), <http://online.wsj.com/articles/judge-upholds-california-law-on-more-humane-housing-of-hens-1412353791>.

<sup>15</sup> *Missouri v. Harris*, No. 2:14-cv-00341-KJM-KJN, 2014 WL 4961473 (E.D.Cal. Oct. 2, 2014).

<sup>16</sup> Id. The Ninth Circuit Court of Appeals recently likewise affirmed a district court's dismissal of a farmer's suit under Proposition 2 in February 2015. *Cramer v. Harris*, Civ. No. 12-56861 (9<sup>th</sup> Cir., Feb. 4, 2015). The farmer had claimed Proposition 2 was too vague because it did not state the exact dimensions required for each chicken. See also Carla Hall, Egg Laying Hens in California Win Another Court Battle, *LA Times* (February 4, 2015), <http://www.latimes.com/opinion/opinion-la/la-ol-egg-hens-california-court-20150204-story.html>.

<sup>17</sup> See Cal Health & Saf. Code § 25981; see generally Max Shapiro, A Wild Goose Chase: California's Attempt to Regulate Morality by Banning the Sale of One Food Product, 35 *Loy. L. A. Int'l & Comp. L. Rev.* 27 (2012).

<sup>18</sup> See Cal Health & Saf. Code § 25982.

<sup>19</sup> *Ass'n des Eleveurs de Canards et D'oies du Quebec v. Harris*, 729 F.3d 937 (9<sup>th</sup> Cir. 2013).

<sup>20</sup> Id.

<sup>21</sup> Id.

<sup>22</sup> Cal Health & Saf. Code § 25990. The Amendment extending Proposition 2 to all eggs from outside of California but for sale in California only applies to eggs and not other covered animals covered under Proposition 2. Cal. Health & Saf. Code § 25,990, 25996.

<sup>23</sup> See David Kesmodel, Latest Flap on Egg Farms: Whether to go Cage Free, *Wall Street Journal* (March 11, 2015), <http://www.wsj.com/articles/latest-flap-on-egg-farms-going-whole-hog-on-cage-free-1426100062>. Rose Acre Farms, for example, one of the largest egg producers in the U.S., has stated that it will go cage free in all of its new facilities as it upgrades existing systems. Id.

under which most laying hens are forced to live. Part II discusses current federal laws protecting (or not) farm animals and past agreements and proposals to change federal law in this area. Part III of this article examines the detail and history of California's Proposition 2, along with current developments in other state laws regarding farm animal confinement. This paper then compares U.S. law regarding laying hens to European law (the European Union banned the use of battery cages in 2012),<sup>24</sup> in Part IV and compares and examines the treatment of hens for organic egg production under the federal Organic Foods Production Act<sup>25</sup> in Part V. In line with what many call this "watershed" animal rights legislative movement,<sup>26</sup> the paper urges in Part VI that we have an ethical and ought to have a legal obligation to make the farming of animals a more humane business in all states, not just as to laying hens, and not just in California. Finally, in Part VII, the article suggests a framework for federal farm animal confinement and treatment law.

## I. The Laying Hen Business in the United States

### A. What is it like to be a Laying Hen in the United States?

In 2013, nearly 18 million California hens laid 5.4 billion eggs at a commercial value of 380 million dollars.<sup>27</sup> Nearly all of these hens were confined to cages with 67 - 86 square inches of space per hen.<sup>28</sup> To get an idea of how small a space this is, consider a legal casebook at ten inches by seven inches. Such a book would be just shy of the approximate lifetime living space for an average laying hen. In this limited space, hens have extreme difficulty and are largely unable to stand up, turn around, or extend their limbs.<sup>29</sup> The United Egg Producers Guidelines justify these limited space requirements by stating, "[s]cience has shown that additional space may be more stressful (for hens) as more aggressive tendencies become manifest."<sup>30</sup> However, the confinement creates its own stressors by preventing hens from engaging in natural tendencies such as dust bathing, foraging, and nesting.<sup>31</sup> Preventing the exercise of these tendencies with confinement is the most significant contributor to frustration for battery-caged hens.<sup>32</sup>

The cruelty of battery caging has implications beyond just crowded living quarters for these factory farmed hens. When hens are confined to small spaces, they tend to peck and injure each other as a survival instinct.<sup>33</sup> Battery caging induces this cannibalistic behavior, as hens do not naturally attack one another under more humane and spacious living conditions.<sup>34</sup> Indeed,

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<sup>24</sup> See California's Smart Egg Rules, Editorial, *New York Times*, 9 Mar. 2014, Late Edition, sec. 10.

<sup>25</sup> Organic Foods Production Act of 1990, § § 2102-2123, 7 U.S.C. § § 6501- 6522 (2012).

<sup>26</sup> See Jonathan Lovvorn & Nancy Perry, California Proposition 2: A Watershed Moment for Animal Law, 15 *Animal L.* 149 (2009).

<sup>27</sup> NAT'L AGRIC. STATISTICS SERV., 2012 CENSUS, <http://151.121.3.59/> for production values, see Poultry Production and Value 2013 Summary.

<sup>28</sup> See Jonathan Lovvorn & Nancy Perry, California Proposition 2: A Watershed Moment for Animal Law, *supra* note 26, at 152.

<sup>29</sup> See 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 (2009).

<sup>30</sup> See United Egg Producers, Animal Husbandry Guidelines For U.S. Egg Laying Flocks (2014), available at <http://www.unitedegg.org/information/pdf/UEP-Animal-Welfare-Guidelines-2014.pdf>.

<sup>31</sup> I.J.H. Duncan, The Pros and Cons of Cages, 57 *World's Poultry Sci. J.* 381, 385 (2001).

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

<sup>33</sup> Karen Davis, *Prisoned Chickens Poisoned Eggs: An Inside Look At The Modern Poultry Industry* 67 (1996).

<sup>34</sup> *Id.*

hens are social and intelligent animals known to have strong family ties and language abilities in humane settings.<sup>35</sup>

The common industry practice to address antagonistic behavior in hens confined to battery cages or other small spaces is beak trimming.<sup>36</sup> The trade association, United Egg Producers, which represents 95% of egg producers in the United States, has established guidelines for the process.<sup>37</sup> The procedure involves using an automated beak trimmer to trim the tip of the beak on chicks less than 10 days old.<sup>38</sup> The process, usually performed without anesthesia,<sup>39</sup> involves trimming and damaging a layer of sensitive tissue between the bone and tip of the beak, causing the hen severe acute and chronic pain.<sup>40</sup> Treated hens then engage in less beak-related *natural* behavior for up to six weeks after the procedure, further contributing to the stress, pain and frustration of these hens.<sup>41</sup>

Adding to the evidence that such strict confinement has negative implications for laying hens, the lifespan of factory farm hens enduring such harsh conditions is 1-2 years, well short of the 20-year life span of the egg-laying hens living in more humane conditions.<sup>42</sup>

Additionally, battery caged hens can become stuck in the wire caging, sometimes between egg conveyor belt and cage.<sup>43</sup> Handlers may not help such trapped birds, who are then left to die in this position without food or water. In fact, in a documentary shot by Mercy for Animals shortly before Californians passed Proposition 2, such trapped birds were readily visible in the footage.<sup>44</sup> Moreover, handlers could be seen swinging birds to break their necks, and then tossing the live bird – neck broken – on a pile of dead hens.<sup>45</sup>

If a laying hen survives to the end of her useful life, when she no longer produces eggs, the hen is typically then transported in a truck, without protection from the elements and without food or water, to a slaughterhouse.<sup>46</sup> “The fully conscious hen is shackled upside down on a conveyer belt, whereupon her throat is cut.”<sup>47</sup>

In addition to these miserable and inhumane conditions suffered by the hens, battery caging also causes higher rates of egg contamination and creates health risks for the consumer. Battery

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<sup>35</sup> The Hidden Lives of Chickens, found at: <http://www.peta.org/issues/animals-used-for-food/factory-farming/chickens/hidden-lives-chickens/> (May 28, 2015); Layer Hens, found at: <http://www.rspca.org.au/campaigns/layer-hens> ; (May 28, 2015).

<sup>36</sup> Id.

<sup>37</sup> United Egg Producers, About Us, <http://www.unitedegg.org/> (July.2, 2014).

<sup>38</sup> See United Egg Producers, Animal Husbandry Guidelines For U.S. Egg Laying Flocks (2014), available at <http://www.unitedegg.org/information/pdf/UEP-Animal-Welfare-Guidelines-2014.pdf>

<sup>39</sup> See Jessica Braunschweig-Norris, The U.S. Egg Industry -- Not All It's Cracked Up To Be For The Welfare Of The Laying Hen: A Comparative Look At United States And European Union Welfare Laws, 10 Drake J. Agric. L. 511, 519-21 (2005).

<sup>40</sup> Id.

<sup>41</sup> Christoph Menke et al., Animal Health and Welfare in Organic Agriculture: Mutilations in Organic Animal Husbandry: Dilemmas Involving Animal Welfare, Humans and Environmental Protection 172 (M. Vaarst et al. eds., CABI Publ. 2004).

<sup>42</sup> Amy Mosel, What About Wilbur, supra note 1 at 146-47.

<sup>43</sup> Amy Mosel, What About Wilbur, supra note 1 at 146.

<sup>44</sup> Mercy for Animals, 2008 video shot at Norco Ranch in California by undercover workers. Found at: <http://norco.mercyforanimals.org/> (last visited March 25, 2015).

<sup>45</sup> Mercy for Animals, 2008 video shot at Norco Ranch in California by undercover workers. Found at: <http://norco.mercyforanimals.org/> (March 25, 2015).

<sup>46</sup> Sheila Rodriguez, The Morally Informed Consumer, supra note 1 at 57.

<sup>47</sup> Sheila Rodriguez, The Morally Informed Consumer, supra note 1 at 57.

caged hens commonly develop prolapsed uteruses,<sup>48</sup> which go untreated.<sup>49</sup> In addition to being a painful and bloody condition, hens with these open wounds produce bloodied eggs, which then move forward for processing on egg conveyer belts.<sup>50</sup> Moreover, salmonella infection occurs at a higher rate among battery-caged hens than with cage-free flocks.<sup>51</sup> Due to their confinement in tiny spaces, these caged hens are forced to defecate, eat, sleep, and lay eggs in the same area. The hens are thus more likely to spread disease to other hens due to their close proximity.<sup>52</sup> Furthermore, vaccination efforts to reduce the occurrence of Salmonella are less effective on battery-caged hens.<sup>53</sup> For these reasons, battery caging has contributed to the 50,000 to 110,000 Salmonella-infected egg sicknesses a year in America.<sup>54</sup>

Moreover, the larger ethical implications of factory farming egg laying hens are even broader in that neither egg laying operations nor broiler chicken farms have use for male chicks. “Common methods used to dispose of unwanted male chicks include maceration or grinding; carbon monoxide poisoning; cervical dislocation or manually dislocating the spinal column from the skull; or suffocation.”<sup>55</sup>

While the United Egg Producers (“UEP’s”) animal husbandry guidelines contain provisions for bird euthanasia and on-farm depopulations of entire flocks, the euthanasia standards within the UEP’s guidelines apply only to sick or injured birds, spent hens, and the emergency depopulation of an entire flock.<sup>56</sup> Indeed, the UEP’s published animal husbandry guidelines for laying hens, intended to be “science-based guidelines to improve the welfare of laying hens,”<sup>57</sup> are silent on the treatment of male chicks.

These provisions do, however, call for training and regular evaluation for involved workers,<sup>58</sup> and specify that methods that cause death “must lead to either rapid death or rapid loss of consciousness and that workers involved must also have regular evaluation.”<sup>59</sup> They further specify that if death is not rapid, it must be induced in a manner that does not cause pain or panic.<sup>60</sup> Additionally, birds must be confirmed dead prior to disposal.<sup>61</sup> There are also specific guidelines for the use of killing systems using CO<sub>2</sub> gas to kill birds.<sup>62</sup>

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<sup>48</sup> Factory Farming, Laying Hens, <http://www.mspca.org/programs/animal-protection-legislation/animal-welfare/farm-animal-welfare/factory-farming/chicken/eggs.html> (May 19, 2015); see also Fight Cruelty, Birds on Factory Farms, (May 19, 2015), <https://www.asPCA.org/fight-cruelty/farm-animal-cruelty/birds-factory-farms>.

<sup>49</sup>Fight Cruelty, Birds on Factory Farms, (May 19, 2015), <https://www.asPCA.org/fight-cruelty/farm-animal-cruelty/birds-factory-farms>. Sick hens are often left to die a slow and painful death. *Id.* Laying hens that stop producing are also often proscribed a two week starvation diet, which causes forced molting and then a brief renewed period of productivity before slaughter. *Id.*

<sup>50</sup> See Mercy for Animals, 2008 video shot at Norco Ranch in California by undercover workers. Found at: <http://norco.mercyforanimals.org/> (last visited March 25, 2015).

<sup>51</sup>Jonathan Lovvorn & Nancy Perry, California Proposition 2: A Watershed Moment for Animal Law, *supra* note 26, at 152.

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

<sup>53</sup> R. Davies, M. Breslin, Observations on Salmonella contamination of eggs from infected commercial laying flocks where vaccination for Salmonella enterica serovar Enteritidis had been used, *Avian Pathol.*, 33 (2) (2004), 133–144.

<sup>54</sup> See Jonathan Lovvorn & Nancy Perry, California Proposition 2: A Watershed Moment for Animal Law, *supra* note 26, at 152-53 (2009).

<sup>55</sup> Sheila Rodriguez, The Morally Informed Consumer, *supra* note 1, at 59.

<sup>56</sup> United Egg Producers, Animal Husbandry Guidelines For U.S. Egg Laying Flocks (2014), available at <http://www.unitedegg.org/information/pdf/UEP-Animal-Welfare-Guidelines-2014.pdf>.

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

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

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

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

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

Despite such guidelines seemingly requiring humane euthanasia for laying hens, farmers may not always follow these guidelines and punishment from state and federal animal cruelty laws is largely lacking.<sup>63</sup>

It is not surprising therefore that further extreme instances of cruelty in the egg production industry have been documented.<sup>64</sup> In Washington State in 2000, an egg farmer closed his battery-egg production and abandoned 50,000 hens on the farm.<sup>65</sup> After weeks without water or food, hundreds of hens passed away before the inhumane treatment was exposed by a local reporter.<sup>66</sup> The abandonment also led to an environmental disaster, as a slurry of manure, blood, and shell-less eggs from the farm polluted a local creek and eventually caused an e-coli outbreak in a nearby lake.<sup>67</sup> Similarly, in Missouri in 2005, ‘spent hens,’ or hens that have reached an age where they were no longer profitable for slaughter or laying eggs, were reportedly disposed of in a dumpster while still alive.<sup>68</sup>

## B. Economics of Non-Cage Production of Eggs

A 2008 University of California Agricultural Issues Center report predicted that when and if egg production in California shifted to a non-cage system, that egg prices would rise by 25% and that the cost of production would rise by 20%.<sup>69</sup> The Report essentially urged that California’s Proposition 2 (prior to the adoption of the law and corresponding amendment) would put California egg producers out of business.

Yet, data within the report seem to controvert these findings.<sup>70</sup> The Report found that the average per capita egg consumption hovered around 70 eggs per year or 1.34 eggs per week.<sup>71</sup> A family of four would thus consume about 5.36 eggs a week or one dozen eggs every two weeks.<sup>72</sup> In 2008, the average cost of a dozen eggs was \$1.67.<sup>73</sup> Were prices to rise by 25% as predicted in the 2008 California Agricultural Issues Center Report, the additional cost for a family of four to support the use of non-cage egg farming would be 42 cents on a bi-weekly basis.

There are also experts who believe that the price of eggs will not increase even as dramatically as those cited above. The agriculture and food consultancy, Agralytica, estimated in 2012 that the impact of a nationwide phase-in of “enriched cages” – cages with more humane

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<sup>63</sup> See Cheryl L. Leahy, *Large-Scale Farmed Animal Abuse And Neglect: Law And Its Enforcement*, 4 J. Animal L. & Ethics 63, 92-97 (2011) (hereinafter Leahy, “*Large-Scale Farmed Animal Abuse and Neglect*”).

<sup>64</sup> *Id.* at 92-97; see supra note 50, Mercy for Animals. Documenting multiple cases of animal cruelty involving farmed animals.

<sup>65</sup> Leahy, *Large-Scale Farmed Animal Abuse and Neglect*, supra note 63, at 93.

<sup>66</sup> *Id.* at 93.

<sup>67</sup> *Id.*

<sup>68</sup> Animal Abuse Alleged at Egg Plant, Lawrence Journal-World (July 13, 2005), [http://www2.ljworld.com/news/2005/jul/13/animal\\_abuse\\_alleged\\_egg\\_plant/](http://www2.ljworld.com/news/2005/jul/13/animal_abuse_alleged_egg_plant/).

<sup>69</sup> Daniel A. Sumner, J. Thomas Rosen-Molina, William A. Matthews, Joy A. Mench and Kurt R. Richter, *Economic Effects of Proposed Restrictions on Egg-laying Hen Housing in California* (2008), University of California Agricultural Issues Center, at ii-iii.

<sup>70</sup> Daniel A. Sumner, J. Thomas Rosen-Molina, William A. Matthews, Joy A. Mench and Kurt R. Richter, *Economic Effects of Proposed Restrictions on Egg-laying Hen Housing in California* (2008), University of California Agricultural Issues Center., Table III.6 at 87.

<sup>71</sup> Daniel A. Sumner, J. Thomas Rosen-Molina, William A. Matthews, Joy A. Mench and Kurt R. Richter, *Economic Effects of Proposed Restrictions on Egg-laying Hen Housing in California* (2008), University of California Agricultural Issues Center., Table III.6 at 87.

<sup>72</sup> See *id.*

<sup>73</sup> *Id.*

space allotments – would increase real egg prices by only 6 cents per dozen in real terms by the time of full implementation, given that such would not occur until 2030.<sup>74</sup>

Although only time will tell what the long-term economic effect of California’s Proposition 2 and Amendment will be, egg prices have been volatile in California early this year following the January 1 implementation of the larger cage standard.<sup>75</sup> Egg prices in California and the spread between the prices of eggs in California and the Midwest initially rose sharply in January.<sup>76</sup> The price premium between California and the Midwest spiked at \$1.66 per dozen, relative to a typical 12 to 18 cents per dozen range in prior years.<sup>77</sup> By February, however, prices and spreads had fallen.<sup>78</sup> Industry sources have predicted that the premium between California compliant eggs and the Midwest quote may settle at about 40 cents per dozen.<sup>79</sup> In March, 2015, *The Wall Street Journal* reported that wholesale egg prices had initially risen to \$3.40 a dozen in California following the January implementation of Proposition 2, but have since fallen to \$2.00 a dozen.<sup>80</sup>

## II. Existing and Proposed U.S. Federal Laws

### A. Background

Three major areas of federal law regarding animals currently do a terrible job protecting all sorts of farm animals, and no job at all protecting laying hens.<sup>81</sup> The Animal Welfare Act only covers animals that are used for research, shows or as pets,<sup>82</sup> the Humane Slaughter Act covers

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<sup>74</sup> Economic Impacts of Converting US Egg Production to Enriched Cage Systems, Agralytica Consulting (January 22, 2013), [http://www.unitedegg.org/information/pdf/Promar\\_Study2014.pdf](http://www.unitedegg.org/information/pdf/Promar_Study2014.pdf). Such increases in egg prices of 6 cents per dozen would be relative to existing prices, taking into account investments that would be expected based on unchanged laws and regulations.

<sup>75</sup> Terrence O’Keefe, Initial Short Supply Causes Price Run-up for California Eggs, *Egg Industry Magazine* 6-7 (March 2015), <http://www.eggindustry-digital.com/201503/Default/0/0#&pageSet=4>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

<sup>78</sup> *Id.*

<sup>79</sup> *Id.*

<sup>80</sup> David Kesmodel, Latest Flap on Egg Farms: Whether to go Cage Free, *Wall Street Journal* (March 11, 2015), <http://www.wsj.com/articles/latest-flap-on-egg-farms-going-whole-hog-on-cage-free-1426100062>.

<sup>81</sup> See Lucinda Valero and Will Rhee, Local Food | Global Food: Do We Have What it Takes to Reinvent the U.S. Food System?, 65 *Me. L. Rev.* 651 (2013); Rodriguez, *The Morally Informed consumer*, *supra* note 1, at 56. Beef cattle live outside and get to stand up, even if in their own feces and they are fed corn feed, which does not agree with them and allows e coli strains to prosper in their waste and can get into food. Broilers are raised to grow so fast that they often cannot walk. These conditions, it might be argued, are better than those of laying hens. Andrew Freeman and Cristina Kharbartyan, 18 *Food, Inc. Facts Everyone Should Know*, found at <http://www.takepart.com/photos/food-inc-facts/impact-food-inc-lives> (May 28, 2015); *Food, Inc.*, A Film by Robert Kenner; Rodriguez, *The Morally Informed consumer*, *supra* note 1, at 56.

<sup>82</sup> Animal Welfare Act, 7 U.S.C. 2131 et seq. (1966).



cattle, calves, and horses, mules, sheep, swine and other livestock,<sup>83</sup> and the Egg Products Inspection Act<sup>84</sup> regulates (to a degree) egg quality.

Under the Animal Welfare Act, businesses and others that use the animals covered by the law (not laying hens) for research or exhibition purposes, or who hold them for sale as pets, must be licensed or registered, and they must adhere to minimum standards of care.<sup>85</sup> Laying hens are likewise not covered by the Humane Slaughter Act, which calls for the humane slaughter of, (but does not require the humane treatment of), cattle, calves, horses, mules, sheep, swine and “other livestock.”<sup>86</sup> Other livestock has been interpreted to include goats and “other equines,” but not poultry.<sup>87</sup> The only federal law thus covering laying hens, albeit tangentially, is the Egg Products Inspection Act, which focuses on the quality of the eggs produced and has nothing at all to do with the humane treatment of laying hens.<sup>88</sup>

Several pieces of congressional legislation proposed during the last few years, however, do relate to the welfare of laying hens, including the Prevention of Farm Animal Cruelty Act introduced in 2010, the Egg Products Inspection Act Amendments of 2012 and 2013, and the so-called King Amendment, which appears to have been an attempted federal end-run around any more rigorous state-based health and safety laws like California’s Proposition 2. The King Amendment would thus have prohibited states from imposing standards on agricultural products produced in other states,<sup>89</sup> but the final Agricultural Act of 2014, did not include this Amendment.<sup>90</sup>

In March 2010, two US representatives from Southern California had previously introduced the federal Prevention of Farm Animal Cruelty Act (H.R. 4733 in the 111<sup>th</sup> Congress). This federal law paralleled California’s law, and would have provided that covered animals be given adequate space to stand up, lie down and turn around freely, and fully extend all limbs.<sup>91</sup> Covered animals under the law included any pig during pregnancy, calves raised for veal, and egg-laying hens.<sup>92</sup> The law would notably have required federal agencies to buy meat from covered animals only if treated humanely.<sup>93</sup> Because the federal government spends more than \$1 billion annually purchasing animal products for a variety of programs and agencies,

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<sup>83</sup> Humane Slaughter Act, 7 U.S.C. 1901 et seq. (1958). Even the “Twenty Eight Hour Law” does not apply to laying hens. This federal provision requires handlers to unload animals transported over state lines for more than 28 hours for a five hour rest, to allow for feeding and water. 49 U.S.C. s. 80502 (2006). Originally passed in the 19<sup>th</sup> Century, it contains so many loopholes that it provides very little protection even for other farmed animals. *Id.* For example, animals may be confined for longer than 28 hours when traveling if such confinement is due to an “accident” or if the owner or handler requests in writing that the period without rest, food, or water be extended to 36 hours. *Id.*

<sup>84</sup> Egg Product Inspection Act Amendments of 2013, 21 U.S.C. 1031 -1056.

<sup>85</sup> Animal Welfare Act 7 U.S.C. 2131 et seq. (1966). The Congressional statement of policy related to the Animal Welfare Act indicates that “The Congress further finds that it is essential to regulate, as provided in this chapter, the transportation, purchase, sale, housing, care, handling, and treatment of animals by carriers or by persons or organizations engaged in using them for research or experimental purposes or for exhibition purposes or holding them for sale as pets or for any such purpose or use.”

<sup>86</sup> Humane Slaughter Act, 7 U.S.C. 1901 et seq. (1958).

<sup>87</sup> See 9 CFR 313.15 and 9 CFR 313.16. See also *Levine v. Conner*, 540 F.Supp.2d. 1113 (N.D. Cal. 2008), which held that “livestock” within the meaning of the Humane Slaughter Act did not include poultry.

<sup>88</sup> Egg Products Inspection Act Amendments of 2013, 21 U.S.C. 1031 -1056 (2013).

<sup>89</sup> Cathy Kangas, The Dangers of King’s Farm Bill Amendment, The Blog, The Huffington Post (January 24, 2014), [http://www.huffingtonpost.com/cathy-kangas/king-farm-bill\\_b\\_4651649.html](http://www.huffingtonpost.com/cathy-kangas/king-farm-bill_b_4651649.html).

<sup>90</sup> H.R. 2642, 113<sup>th</sup> Cong. (2014).

<sup>91</sup> H.R. 4733, 111<sup>th</sup> Cong. (2010).

<sup>92</sup> *Id.*

<sup>93</sup> Stewart Doan, Bipartisan ‘Prevention of Farm Animal Cruelty Act’ Introduced, Agri-Pulse (March 4, 2010), <http://www.agri-pulse.com/uploaded/20100304D1.pdf>.



including the National School Lunch Program, the Armed Services and the Bureau of Prisons,<sup>94</sup> this type of legislation could have had a major impact on the national treatment of farm animals. The proposed legislation, although referred to the House Oversight and Government Reform Committee and the House Agriculture Committee, was not enacted.<sup>95</sup>

## **B. Bipartisan Legislative Efforts Toward a More Humane Farming System**

In other more cooperative developments toward a humane egg production system, in June of 2011, the Humane Society of the United States (“HSUS”) and the United Egg Producers (“UEP”) announced an agreement to work together toward the enactment of new federal legislation covering all hens involved in US egg production. The two groups agreed upon treatment standards for laying hens and jointly asked Congress to enact federal legislation reflecting these standards.<sup>96</sup> On April 25, 2013, the Egg Products Inspection Act Amendments of 2013 (S. 820 and H.R. 1731) were thus introduced in the 113<sup>th</sup> Congress.<sup>97</sup> The bills would have codified more humane national standards for the housing of laying hens over a phase-in period, established more informative labeling requirements to disclose how eggs are produced, set air quality standards for hen housing, prohibited forced molting, and established laying hen euthanasia standards.<sup>98</sup>

The UEP-HSUS agreement and subsequent bills were the result of dialogue and compromise between the UEP and the HSUS, representing a significant shift of direction for both parties.<sup>99</sup> The UEP apparently believed that passing federal legislation could halt costly state-by-state battles over caged eggs standards that would result in a patchwork of different regulations.<sup>100</sup> And while the HSUS had long campaigned for cage-free egg production in the US, it now believed endorsing the use of enriched cages was a politically wise compromise that could have resulted in significant federal farm animal welfare legislation.<sup>101</sup>

Importantly, the latest iterations of these bills introduced in the 113<sup>th</sup> Congress also added provisions specific to California, relating to California’s phase in periods dependent on whether cages are new or existing, added a four-step phase-in period for California producers, and required that all eggs bought or sold in California meet the California-specific rules.<sup>102</sup>

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<sup>94</sup> Stewart Doan, Bipartisan ‘Prevention of Farm Animal Cruelty Act’ Introduced, Agri-Pulse (March 4, 2010), <http://www.agri-pulse.com/uploaded/20100304D1.pdf>.

<sup>95</sup> H.R. 4733, 111<sup>th</sup> Cong. (2010)

<sup>96</sup> Historic Agreement Hatched to Set National Standard for Nation’s Egg Industry, United Egg Producers and the Humane Society of the United States (July 7, 2011), [http://www.unitedegg.org/homeNews/UEP\\_Press\\_Release\\_7-7-11.pdf](http://www.unitedegg.org/homeNews/UEP_Press_Release_7-7-11.pdf).

<sup>97</sup> H.R. 1731, 113<sup>th</sup> Cong. (2013) and S. 820, 113<sup>th</sup> Cong. (2013). These latest bills are nearly identical to earlier bills introduced during the 112<sup>th</sup> Congress (S. 3239 and H.R. 3798). See H.R. 3798, 112<sup>th</sup> Cong. (2012) and S. 3239, 112<sup>th</sup> Cong. (2012).

<sup>98</sup> H.R. 1731, 113<sup>th</sup> Cong. (2013) and S. 820, 113<sup>th</sup> Cong. (2013); *see generally*, Carolyn Greenshields, Kimberly White LaDuca, Legislative Review: 2012 Federal Legislative Review, 19 Animal L. 457, 476 (2013).

<sup>99</sup> Historic Agreement Hatched to Set National Standard for Nation’s Egg Industry, United Egg Producers and the Humane Society of the United States (July 7, 2011), [http://www.unitedegg.org/homeNews/UEP\\_Press\\_Release\\_7-7-11.pdf](http://www.unitedegg.org/homeNews/UEP_Press_Release_7-7-11.pdf).

<sup>100</sup> Historic Agreement Hatched to Set National Standard for Nation’s Egg Industry, United Egg Producers and the Humane Society of the United States (July 7, 2011), [http://www.unitedegg.org/homeNews/UEP\\_Press\\_Release\\_7-7-11.pdf](http://www.unitedegg.org/homeNews/UEP_Press_Release_7-7-11.pdf).

<sup>101</sup> Joel L. Greene and Tadlock Cowan, Table Egg Production and Hen Welfare: Agreement and Legislative Proposals, Congressional Research Service (2014), <https://www.fas.org/sgp/crs/misc/R42534.pdf>.

<sup>102</sup> Joel L. Greene and Tadlock Cowan, Table Egg Production and Hen Welfare: Agreement and Legislative Proposals, Congressional Research Service (2014), <https://www.fas.org/sgp/crs/misc/R42534.pdf>.

Despite the UEP's support, some farm groups criticized the proposed legislation.<sup>103</sup> The new standards for laying hens would have been the first ever federal standards mandating production practices for farm animals, and opponents were concerned that the proposed legislation could set a precedent for other farm animals.<sup>104</sup> Opponents also argued that the new cage requirements were not science-based, and that codifying cage standards today ignores innovations that could occur in the future.<sup>105</sup> Finally, some opponents warned of the capital cost that would be required to implement the new standards.<sup>106</sup>

Ultimately, although UEP, HSUS, and other supporters favored moving egg legislation through the farm bill process, other livestock groups strongly and vocally opposed this route.<sup>107</sup> Thus, while the Senate version of the Egg Products Inspection Act Amendments of 2013 (S. 820) was considered for inclusion in the Senate Agricultural Committee 2013 farm bill draft, it was not ultimately included.<sup>108</sup> In early 2014, the UEP and HSUS finally decided to end their memorandum of understanding.<sup>109</sup> This followed the passage of the farm bill (the Agricultural Act of 2014), *without inclusion of the laying hen legislation that both groups had desired.*<sup>110</sup>

### III. Detail of California Law and Related Developments in State Animal Confinement Laws

California's Proposition 2, known as the Prevention of Farm Animal Cruelty Act, applies to all "covered animals."<sup>111</sup> The Act defines covered animals as pregnant sows, veal calves, and laying hens. Proposition 2 specifically prevents any person from tethering or confining any "covered animal for all or the majority of any day, in a manner that prevents such animal from lying down, standing up and fully extending his or her limbs: and turning around freely."<sup>112</sup> The law and regulations pursuant to the 2010 Amendment created major controversy by extending the reaches of Proposition 2 to any egg producer who sells or contracts to sell a shelled egg for human consumption in California.<sup>113</sup> The Amendments also provide that a hen laying enclosure containing nine or more egg laying hens must provide at least 116 square inches of floor space per animal.<sup>114</sup> Further, the regulations under the Amendment provide that the enclosure must allow access to drinking water and feed without restriction.<sup>115</sup> As they go into effect this year,

<sup>103</sup> Jacqui Fatka, Livestock Industry Divided on Need for Egg Bill, Farm Futures (August 27, 2012), <http://farmfutures.com/blogs-livestock-industry-divided-need-egg-bill-3554>.

<sup>104</sup> Jacqui Fatka, Livestock Industry Divided on Need for Egg Bill, Farm Futures (August 27, 2012), <http://farmfutures.com/blogs-livestock-industry-divided-need-egg-bill-3554>.

<sup>105</sup> Egg Legislation Replaces Science with Politics, American Farm Bureau Federation, (January 24, 2012), <http://www.fb.org/index.php?action=newsroom.news&year=2012&file=nr0124.html>.

<sup>106</sup> Joel L. Greene and Tadlock Cowan, Table Egg Production and Hen Welfare: Agreement and Legislative Proposals, Congressional Research Service (2014), <https://www.fas.org/sgp/crs/misc/R42534.pdf>.

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

<sup>108</sup> *Id.* Senator Feinstein's submitted egg bill amendment (S. Amdt. 1057) was likewise not considered during the Senate farm bill (S. 954) floor debate. *Id.*

<sup>109</sup> Dudley W. Hoskins, National Association of State Departments of Agriculture, United Egg Producers Declines to Renew MOU with HSUS (February 19m 2013), found at: <http://www.agweek.com/event/article/id/22738/> May 7, 2015).

<sup>110</sup> Jacqui Fatka, UEP Abandons HSUS Egg Deal, Farm Futures (February 21, 2014), <http://farmfutures.com/blogs-uep-abandons-hsus-egg-deal-8186>.

<sup>111</sup> Cal. Health & Safety Code § 25990-25994.

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

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

<sup>114</sup> *Id.*; 3 Cal. Admin. Code sec. 1350 (d)(2010). Regulations under the 2010 Amendment also provide a formula for minimum floor space for enclosures containing less than nine birds. Cal. Admin. Code sec. 1350 (d)(2010).

<sup>115</sup> Cal. Health & Safety Code § 25990.

the Act, related Amendments, and regulations thereunder, potentially change the tide of animal treatment in the US. At the very least, the new California regulations end the worst practices associated with battery hen caging.<sup>116</sup>

Following California's lead, in September 2009, Michigan became the second state to restrict the use of conventional battery cages for laying hens.<sup>117</sup> The Michigan law<sup>118</sup> applies to gestating sows, calves raised for veal and egg-laying hens on farms. It prohibits Michigan farmers from tethering or confining these "covered animals" in a manner that prevents the animal from lying down, standing up, fully extending its limbs, or turning around freely.<sup>119</sup> The Michigan law further states that "[i]n the case of egg-laying hens, fully extending its limbs means fully spreading both wings without touching the side of an enclosure or other egg-laying hens and having access to at least 1.0 square feet of usable floor space per hen." The California law, by contrast, does not specify a minimum amount of space per hen, but rather provides for 116 square inches per hen when the cage has more than nine laying hens.<sup>120</sup> The Michigan law is scheduled to take effect 10 years following its enactment on October 12, 2009.<sup>121</sup>

Washington and Oregon similarly followed suit, passing legislation related to laying hens during 2011.<sup>122</sup> Washington's law provides that licensed entities providing eggs or egg products for intrastate commerce must currently comply with the UEP's animal husbandry guidelines, and must comply with American humane association protocols for enriched colony housing by 2026.<sup>123</sup> Enriched colony housing is slightly more spacious and must allow for hens to engage in natural behaviors.<sup>124</sup> Oregon's law similarly requires current laying hen cages to meet UEP guidelines, with a progressive implementation of enriched colony facility standards through 2026.<sup>125</sup> Many animal rights groups in Oregon felt that these laws did not go far enough, especially with regard to the long time period to phase in the new caging standards.<sup>126</sup> Others felt that since UEP guidelines are not particularly humane,<sup>127</sup> mandating enriched cages as an endpoint in and of itself didn't go far enough, and that legislation should be enacted to support cage-free laying hen standards.<sup>128</sup>

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<sup>116</sup>See supra notes 111 to 115 and accompanying discussion.

<sup>117</sup> Joel L. Greene and Tadlock Cowan, Table Egg Production and Hen Welfare: Agreement and Legislative Proposals, Congressional Research Service (2014), <https://www.fas.org/sgp/crs/misc/R42534.pdf>.

<sup>118</sup> Michigan Compiled Laws, § 287.746.

<sup>119</sup> Id.

<sup>120</sup> Cal. Health & Safety Code § 25990-25994, 25996.

<sup>121</sup> Id. Michigan Compiled Laws, sec 287.746(7) specifies that "The provisions of this section do not apply to egg-laying hens and gestating sows until 10 years after the enactment date of the amendatory act that added this section."

<sup>122</sup> Or. Rev. Stat. §§ 632.835 - 632.850; and Wash. Rev. Code – 69.25.

<sup>123</sup> American Veterinary Medical Association, Confinement Rearing – State Ballot Initiatives, Legislation and Court Activity (July 2013), <https://www.avma.org/Advocacy/StateAndLocal/Pages/sr-confinement-rearing.aspx>.

<sup>124</sup> The Washington law, for example, requires eggs and egg products to be produced by housing facilities approved under the American humane association facility system plan for enriched colony housing. Full compliance with these standards is required by January 1, 2026. All new facilities built after January 1, 2012 must also be constructed in accordance with these standards. In addition, there is an intermediate standard for eggs produced after January 1, 2017. These intermediate standards require 116.3 square inches per hen and access to areas for nesting, scratching and perching. See Wash. Rev. Code §§ 69.25.065; 69.25.107.

<sup>125</sup> The Oregonian Editorial Board, Over Easy or Scrambled?, The Oregonian (May 26, 2011), [http://www.oregonlive.com/opinion/index.ssf/2011/05/over\\_easy\\_or\\_scrambled.html](http://www.oregonlive.com/opinion/index.ssf/2011/05/over_easy_or_scrambled.html).

<sup>126</sup> Id.

<sup>127</sup> See supra notes 56-62 and accompanying discussion.

<sup>128</sup> Jayme Fraser, Animal Rights Groups Disagree, Scramble to Define 'Humane' in Egg Debate, The Oregonian (July 6, 2011), [http://www.oregonlive.com/politics/index.ssf/2011/07/animal\\_rights\\_groups\\_disagree.html](http://www.oregonlive.com/politics/index.ssf/2011/07/animal_rights_groups_disagree.html).

It is worth highlighting that many of these state laws, while related to the humane housing of laying hens, also cover the living conditions of pregnant sows and veal calves.<sup>129</sup> Florida also first amended its constitution in 2002 to prohibit the inhumane caging of pigs during pregnancy.<sup>130</sup> Voters in Arizona similarly passed a proposition limiting confinement for both pregnant sows and calves raised for veal in 2006.<sup>131</sup> Oregon, Colorado, Maine, and Rhode Island likewise passed legislation limiting animal confinement (for animals other than hens) between 2007 and 2012.<sup>132</sup> Oregon's anti-confinement law applied to gestating sows, while Colorado, Maine and Rhode Island's state laws applied to pregnant sows and calves raised for veal.

Likewise, Ohio and Kentucky have both recently reached non-legislative compromises between animal rights groups and farmers on the issue of animal confinement. Both states have legislatively-appointed "Livestock Care Standards Boards" that establish and maintain standards governing the care and well-being of on-farm livestock.<sup>133</sup> In 2010, Ohio farmers agreed with the HSUS to phase out veal calf crates by 2017 and remove gestation stalls for sows by 2025.<sup>134</sup> Kentucky approved new standards for the care of farm animals in 2013 that included the phasing out of crates for veal calves by 2017.<sup>135</sup> These Kentucky standards did not address battery cages for laying hens or penning sows in gestation crates.<sup>136</sup>

#### IV. European Union Law

In contrast to the patchwork of somewhat limited US laws regarding animal confinement described above, European law is much more protective of animals in confinement.<sup>137</sup> Article 13 of the Treaty on the Functioning of the European Union recognizes animals as sentient beings and requires full regard be given to the "welfare requirements of animals while formulating and

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<sup>129</sup> The New Jersey legislature passed a law seemingly modeled after the California law, making illegal the use of crates for pregnant sows, but Governor Christie vetoed the measure. Jill Colvin, *Christie Vetoes Pig Crate Bill In Controversial Move*, Huffington Post (November 28, 2014), [http://www.huffingtonpost.com/2014/11/28/christie-vetoes-pig-bill\\_n\\_6238926.html](http://www.huffingtonpost.com/2014/11/28/christie-vetoes-pig-bill_n_6238926.html). Interestingly, the New Jersey law would have had little to no effect in New Jersey, where New Jersey's 300 plus pig farmers do not use gestation crates, but would have had a big impact in Iowa, home to one of the Presidential caucuses, and where it may not have been favored by Iowa voters. *Id.*

<sup>130</sup> Amendment 10 to the Florida Constitution; Florida Constitution Article 10, Section 21.

<sup>131</sup> Arizona Revised Statutes § 13-2910.07-.08.

<sup>132</sup> Oregon Revised Statutes § 600.150. Colorado Revised Statutes §§ 35-50.5-101 to -103. Maine Revised Statutes Annotated Title 7 § 4020 and title 17 Section 1039. Rhode Island General Laws §§ 4-1.1-1 to -6.

<sup>133</sup> Ohio Rev. Code Sections 904.01-904.09, and Ky. Rev. Stat. Ann. § 257.192. See generally Lindsay Vick, *Confined to a Process: The Preemptive Strike of Livestock Care Standard boards in Farm Animal Welfare Regulation*, 18 *Animal L.* 151 (2011).

<sup>134</sup> Rumley, Elizabeth, *Legal Issues in Animal Agriculture: Regulating Living Space*, National Agricultural Law Center, University of Arkansas, May 2012.

<sup>135</sup> Janet Patton, *Agriculture Board Approves Livestock Care Standards Despite Objections*, Lexington Herald-Leader (March 27, 2013), <http://www.kentucky.com/2013/03/27/2576490/agriculture-board-approves-livestock.html>.

<sup>136</sup> Janet Patton, *Agriculture Board Approves Livestock Care Standards Despite Objections*, Lexington Herald-Leader (March 27, 2013), <http://www.kentucky.com/2013/03/27/2576490/agriculture-board-approves-livestock.html>.

<sup>137</sup> See Jessica Braunschweig-Norris, *The U.S. Egg Industry -- Not All It's Cracked Up To Be For The Welfare Of The Laying Hen: A Comparative Look At United States And European Union Welfare Laws*, 10 *Drake J. Agric. L.* 511, 512-13 (2005).

enforcing” EU policies.<sup>138</sup> There also exists a European Commission Council Directive related to the welfare of farmed animals generally.<sup>139</sup> The Council Directive lays down minimum standards for the protection of farm animals among Member States.<sup>140</sup> These include general provisions related to staffing, inspection, record keeping, animals’ freedom of movement, animal accommodations, equipment, feed and water, mutilations and breeding.<sup>141</sup> Additional legislation protects farmed animals during transport<sup>142</sup> and at the time of slaughter.<sup>143</sup> Other Council Directives, specifically protecting farm animals during their lives, include provisions regarding calves,<sup>144</sup> pigs,<sup>145</sup> broilers,<sup>146</sup> and laying hens.<sup>147</sup>

Specifically as to hens, the European Union announced the passage of Council Directive 1999/74/EC on June 17, 1999, laying down minimum standards for the protection of laying hens in establishments that house greater than 350 birds.<sup>148</sup> For establishments to whom the standards do apply, the Directive phased out the use of battery cages for laying hens over a 13 year period.<sup>149</sup> The phase-out period was meant to allow egg farmers time to implement the Directive.<sup>150</sup>

Egg production in the EU thus now allows only non-cage systems, such as free-roaming or barn systems, or enriched caging systems.<sup>151</sup> Similar to enriched caging requirements under Washington and Oregon state law, enriched cages in the EU (also known as colony cages) have a small perch, a litter area for scratching, and a nesting box.<sup>152</sup> These cages are slightly higher than a conventional battery cage and have more space per hen.<sup>153</sup> In particular, the enriched cages suitable for use in the EU have at least 750 cm.<sup>2</sup> of cage area per hen, with a cage height of at least 20 cm. at every point.<sup>154</sup> The 1999 EU Directive regarding laying hens also specifies that in addition to a litter, nest and appropriate perches, each hen must have a feed trough with a length of 12 cm. per hen in the cage.<sup>155</sup>

Evidencing what appears to be a concern for the humane treatment of animals, several countries within the EU banned the use of conventional battery cages ahead of the 2012 deadline,

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<sup>138</sup> European Commission, Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee on the European Union Strategy for the Protection and Welfare of Animals 2012-2015, February 5, 2012.

<sup>139</sup> Council Directive 98/58/ EC of July 20, 1998 concerning the protection of animals kept for farming purposes.

<sup>140</sup> Council Directive 98/58/ EC of July 20, 1998 concerning the protection of animals kept for farming purposes.

<sup>141</sup> Council Directive 98/58/ EC of July 20, 1998 concerning the protection of animals kept for farming purposes.

<sup>142</sup> Council Regulation No 1/2005 on the protection of animals during transport.

<sup>143</sup> Council Directive 93/119/EC on the protection of animals at the time of slaughter or killing.

<sup>144</sup> Council Directive 2008/119/EC laying down minimum standards for the protection of calves.

<sup>145</sup> Council Directive 2008/120/EC, laying down minimum standards for the protection of pigs.

<sup>146</sup> Council Directive 2007/43/EC, laying down minimum standards for the protection of chickens kept for meat production.

<sup>147</sup> Council Directive 1999/74/EC laying down minimum standards for the protection of laying hens.

<sup>148</sup> Council Directive, 1999/74, art. 1, 1999 OJ (L 203) 53 (EC).

<sup>149</sup> Joel L. Greene and Tadlock Cowan, Table Egg Production and Hen Welfare: Agreement and Legislative Proposals, Congressional Research Service 24-25(2014), available at: <https://www.fas.org/sgp/crs/misc/R42534.pdf>.

<sup>150</sup> James Andrews, European Union Bans Battery Cages for Egg-Laying Hens, Food Safety News 25 (January 19, 2012) available at: <http://www.foodsafetynews.com/2012/01/european-union-bans-battery-cages-for-egg-laying-hens/>.

<sup>151</sup> Joel L. Greene and Tadlock Cowan, Table Egg Production and Hen Welfare: Agreement and Legislative Proposals, Congressional Research Service 24-25(2014) available at: <https://www.fas.org/sgp/crs/misc/R42534.pdf>.

<sup>152</sup> Joel L. Greene and Tadlock Cowan, Table Egg Production and Hen Welfare: Agreement and Legislative Proposals, Congressional Research Service 24 (2014) available at: <https://www.fas.org/sgp/crs/misc/R42534.pdf>.

<sup>153</sup> Id.

<sup>154</sup> Council Directive 1999/74, art. 6, 1999 OJ (L 203) 53 (EC).

<sup>155</sup> Council Directive 1999/74, Art. 6, 1999 OJ (L 203) 53 (EC).

including Sweden by the end of 2002, Austria by the end of 2008, and Germany by the end of 2009.<sup>156</sup> And as of January 1, 2012, the ban on battery cages was officially and fully implemented in the EU,<sup>157</sup> with all but Italy, Greece and Cyprus, reported to be complying as of November 2012.<sup>158</sup> Although not a member of the EU, Switzerland had banned battery cages in 1992.<sup>159</sup>

It is worth noting that there is no current ban on the import of battery cage eggs into the EU from non-EU countries,<sup>160</sup> allowing distributors to potentially do an end-run around existing European regulation meant to protect animal welfare. However, under EU marketing rules for eggs in place since 2007, imported eggs do require a country-of-origin label and must indicate if the farming method used to produce the eggs was “non-EC standard.”<sup>161</sup>

## V. Organic Egg Production in the U.S. Under the Organic Foods Production Act

The United States thus lags far behind Europe in terms of any coherent implementation of more humane laying hen farming laws.<sup>162</sup> However, one type of federally regulated food production that might be considered humane is U.S. Department of Agriculture (“USDA”) organic food production. Organic Food production in the United States is regulated by the Organic Foods Production Act of 1990 (the “OFPA”)<sup>163</sup> and corresponding regulations.<sup>164</sup> Under the OFPA, Congress has emphasized that “organic food” is produced “by farmers who emphasize the use of renewable resources and the conservation of soil and water to enhance environmental quality for future generations.”<sup>165</sup> Farmers engaged in raising “organic” animals, including laying hens producing eggs, must use only 100 percent organic feed, and must not provide hormones or antibiotics to their animals, except in cases of illness.<sup>166</sup> The OFPA and

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<sup>156</sup> James Andrews, European Union Bans Battery Cages for Egg-Laying Hens, Food Safety News 26 (January 19, 2012), found at: <http://www.foodsafetynews.com/2012/01/european-union-bans-battery-cages-for-egg-laying-hens/>

<sup>157</sup> *Id.*

<sup>158</sup> Joel L. Greene and Tadlock Cowan, Table Egg Production and Hen Welfare: Agreement and Legislative Proposals, Congressional Research Service, 1, 24-25 (2014), <https://www.fas.org/sgp/crs/misc/R42534.pdf>.

<sup>159</sup> James Andrews, European Union Bans Battery Cages for Egg-Laying Hens, Food Safety News 26 (January 19, 2012), <http://www.foodsafetynews.com/2012/01/european-union-bans-battery-cages-for-egg-laying-hens/>.

<sup>160</sup> Joel L. Greene and Tadlock Cowan, Table Egg Production and Hen Welfare: Agreement and Legislative Proposals, Congressional Research Service 25 (2014), <https://www.fas.org/sgp/crs/misc/R42534.pdf>.

<sup>161</sup> *Id.*

<sup>162</sup> See *supra* notes 137-55 and accompanying discussion.

<sup>163</sup> Organic Foods Production Act of 1990 § 2102, U.S.C. §§ 6501 - 6522 (2000). For a detailed discussion of the Organic Foods Production Act and corresponding regulations, see V. Watnick, The Organic Foods Production Act, the Process/Product Distinction, and a Case for More End Product Regulation in the Organic Foods Market, 32(1) UCLA J. of Env'tl. L.40 (2014).

<sup>164</sup> 7 C.F.R. § 205 (2000).

<sup>165</sup> *Id.* The OFPA called for the Secretary of the USDA to administer the National Organic Program (“NOP”) and to form the National Organic Standards Board. See 7 U.S.C. § 6503 6518 (2013). Under the NOP, the Agricultural Marketing Service (the “AMS”) oversees national standards for the production and handling of organically produced agricultural products. See

<http://www.ams.usda.gov/AMSV1.0/ams.fetchTemplateData.do?template=TemplateA&navID=NationalOrganicProgram&page=NOPNationalOrganicProgramHome&resultType=&topNav=&leftNav=NationalOrganicProgram&acct=noop> (last visited November 19, 2013). Those producing organic food are required to submit an organic plan that must be approved by a third party certifying agent and if one exists, by the state’s organic program. 7 U.S.C. § 6513 (2013).

<sup>166</sup> 7 U.S.C. § 6509 (2013). Livestock that is to be labeled and sold as “USDA Organic” must also be under organic management from the last third of gestation, with the exception of poultry, which must be under organic



corresponding regulations generally also provide that organic livestock producers must provide conditions that allow for exercise, freedom of movement, and reduction of stress appropriate to the species.<sup>167</sup> Producers must establish minimum livestock living conditions that accommodate the “health and natural behavior” of the animals, and that include access to the outdoors.<sup>168</sup> However, in the case of laying hens, the use of beak trimming *is* permitted in organic farming, with its abusive and painful results for hens.<sup>169</sup> Moreover, organic regulations are loosely worded and often open to interpretation, which may not always ensure humane animal husbandry.<sup>170</sup> For example, while federal organic regulations require that animals be given access to the outdoors, but they also allow confinement due to “inclement weather” or “the animal’s stage of life.”<sup>171</sup> Various interpretations of these loosely worded organic regulations thus allow practices that may not always be in the best interests of the animals.<sup>172</sup>

In the well-known “Country Hen” case, for example, *Massachusetts Independent Certification, Inc., v. Johanns*, a Massachusetts District Court considered the living conditions of so called “organic” laying hens.<sup>173</sup> In *Country Hen*, a certifier had denied organic certification for laying hens where the producer had simply added porches to existing hen houses to provide access to the outdoors, but had made little other change to the living environment when converting to an organic operation.<sup>174</sup> *Country Hen* appealed the denial of organic certification to the Administrator of the Agricultural Marketing Service under the National Organic Program.<sup>175</sup> The Administrator of the Agricultural Marketing Service sustained *Country Hen*’s appeal and allowed an organic certification.<sup>176</sup> The certifier then sued the Administrator, claiming that he, the certifier, had a stake in the outcome of the case, as the outcome would affect the certifier’s business and its future certification of organic animals.<sup>177</sup> While the Massachusetts District Court held that the certifier did have standing,<sup>178</sup> the district court upheld the Administrator’s decision, thus allowing *Country Hen*’s certification as “organic,” because the Administrator’s decision had not been arbitrary and capricious.<sup>179</sup>

In the wake of *Country Hen*, many industrial egg producers followed suit by adding porches and making other minor changes to their hen houses to convert them to “organic” operations:<sup>180</sup> changes that did not provide real access for the affected birds. A small porch for

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management from the first days of life. *Id.*; Barbara Robinson, Value Through Verification: *USDA National Organic Program*, U.S. Dep’t of Agric.,

<http://www.ams.usda.gov/AMSV1.0/getfile?dDocName=STELDEV3049688&acct=noppub>.

<sup>167</sup> 7 C.F.R. § 205.238 (a)(4) (2013).

<sup>168</sup> 7 C.F.R. § 205.239(a)(1) (2013).

<sup>169</sup> See *supra* notes 33 to 41 and accompanying discussion; see also Rodriguez, *The Morally Informed Consumer*, *supra* note 1, at 52-57, 73.

<sup>170</sup> See Aurora Paulsen, *Welfare Improvement for Organic Animals: Closing Loopholes in the Regulation of Organic Animal Husbandry*, 17 *Animal L.* 337,343-73 (2011), hereinafter, Paulsen, “Welfare Improvement.”

<sup>171</sup> 7 C.F.R. § 205.239(b)(1)-(2).

<sup>172</sup> See *infra* notes 173 to 182 and accompanying discussion; see generally Paulsen, *Welfare Improvement*, *supra* note 170.

<sup>173</sup> *Massachusetts Indep. Certification, Inc. v. Johanns*, 486 F. Supp.2d 105 (D. Mass. 2007).

<sup>174</sup> *Id.* at 112.

<sup>175</sup> *Id.* at 113.

<sup>176</sup> *Id.* at 113.

<sup>177</sup> *Id.* at 115.

<sup>178</sup> *Id.*

<sup>179</sup> *Id.* at 119-20.

<sup>180</sup> Jill Richardson, *Are Organic Eggs Really Healthier and Tastier and from Happier Chickens than Conventional Eggs?* ALTERNET (Oct. 5, 2010),

[http://www.alternet.org/story/148408/Are\\_organic\\_eggs\\_really\\_healthier\\_and\\_tastier\\_and\\_from\\_happier\\_chickens\\_than\\_conventional\\_eggs?](http://www.alternet.org/story/148408/Are_organic_eggs_really_healthier_and_tastier_and_from_happier_chickens_than_conventional_eggs?)



example, for hundreds of caged birds, would not really allow meaningful access to the out of doors. Country Hen therefore remains an important ruling that has significantly muddied the waters in the multimillion-dollar organic egg industry. Consumers do not know and cannot always ascertain the actual treatment of laying hens or the true quality of the eggs they are buying when they buy “organic.”<sup>181</sup>

While certainly thus not airtight regarding humane animal standards, federal organic standards make clear that laying hens, and any organic farm animals, must have some access to the outdoors and that accommodations must be made for the health and “natural behavior” of the animals.<sup>182</sup> At a minimum, the organic production standards potentially eliminate some of the very worst conditions for animals, and in theory at least, impose decent and humane conditions for farm animals, including laying hens.<sup>183</sup> An examination of how these regulations could be strengthened is beyond the scope of this article, but the fact that they need strengthening to better protect the welfare of animals certainly bears mentioning at this juncture.<sup>184</sup>

## **VI. Factory Farms and our Moral and Ethical Obligation to Animals**

### **A. The Factory Farm and the Costs to Humans: An Instrumental Argument Against the Factory Farm**

The over 300 million factory farmed hens<sup>185</sup> and millions of other animals<sup>186</sup> in the United States do not live the bucolic life depicted on egg cartons, butter wrappers and other packaging.<sup>187</sup>

Factory farmed beef cows stand in their own feces and are fed corn because it is abundant and inexpensive, even though there is evidence that it disrupts certain physiological mechanisms, including their ability to digest their intake.<sup>188</sup> These disruptions can in turn cause the production of harmful bacteria in the cattle’s liver and digestive tract,<sup>189</sup> making the animals extremely uncomfortable and increasing the risk of e coli contamination for consumers.<sup>190</sup> Indeed, cows that eat only corn, rather than grass prior to slaughter, are more likely to spread e

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<sup>181</sup> Id. at 2-3; see 7 C.F.R. § 205.239(a)(1) (2013); see generally Paulsen, Welfare Improvement, supra note 170.

<sup>182</sup> See supra notes 172 to 184 and accompanying discussion.

<sup>183</sup> See supra notes 165 to 170 and accompanying discussion. But see, Sheila Rodriguez, The Morally Informed consumer: Examining Animal Welfare Claims on Egg Labels, 30 Temp. J. Sci. Tech. & Envtl. L. 51, 52 (2011). In her compelling law review article, Professor Rodriguez makes the case that from a moral and legal standpoint, consumers should avoid eating most eggs.

<sup>184</sup> See generally Paulsen, Welfare Improvement, supra note 170.

<sup>185</sup> <https://www.asPCA.org/fight-cruelty/farm-animal-cruelty/birds-factory-farms> (May 8, 2015).

<sup>186</sup> Id.

<sup>187</sup> Food, Inc., a film by Robert Kenner. As of 2010, Food and Water Watch estimated that factory farms had grown in the five years prior by twenty percent. <http://www.factoryfarmmap.org/press/factory-farm-nation-pr/> last visited 3/24/15).

<sup>188</sup> <http://www.pbs.org/wgbh/pages/frontline/shows/meat/interviews/pollan.html> (interview with Michael Pollan and other experts).

<sup>189</sup> American Association For the Advancement of Science, Diet and Disease in Cattle: High-Grain Feed May Promote Illness and Harmful Bacteria, Science Daily (May 11, 2001), found at: <http://www.sciencedaily.com/releases/2001/05/010511074623.htm>.

See also R. Jason Richards, Cheap Meat: How Factory Farming is Harming our Health, the Environment, and the Economy, 4 Ky. J. Equine, Agric. & Nat. Resources L. 31 at 47-50; <http://www.factoryfarmmap.org/press/factory-farm-nation-pr/> last visited 3/24/15); see generally Michael Pollan, Omnivore’s Dilemma: A Natural History of Four Meals, 317 (Penguin, 2007).

<sup>190</sup> Food, Inc., a film by Robert Kenner.

coli and other bacterial ills, especially if they stand in closely packed stalls surrounded by other beef cows and their manure.<sup>191</sup> Likewise, similar food contamination risks exist in the factory farming of laying hens as the risk of salmonella dramatically increases from factory farmed eggs.<sup>192</sup>

In addition to the relationship between factory farming and food borne illnesses, such as incidences of e coli and other poisonings in the U.S. food supply,<sup>193</sup> the factory farms themselves also negatively affect human health in terms of pollution and antibiotic resistance.<sup>194</sup> Factory farmed hens, and other animals living in such cramped enclosed quarters, are prophylactically given antibiotics to reduce the spread of bacterial infection and promote growth.<sup>195</sup> This use has in turn been linked to the emergence of antibiotic-resistant microbes that can be passed from animals to humans.<sup>196</sup> Factory farm workers thus often develop antibiotic resistance.<sup>197</sup>

Such resistance has led to the development of dangerous “superbugs” in people that defy treatment with existing antibiotics.<sup>198</sup> Professor of Medicine, microbiology and molecular biology, Stuart Levy, testifying before Congress, noted the rapid development of antibiotic resistant strains of bacteria in farm animals when they were given “sub-therapeutic” antibiotics in their feed.<sup>199</sup> Importantly, this terminology “sub-therapeutic,” belies the real meaning for such antibiotics as they are not really “therapeutic”<sup>200</sup> at all. Rather, sub-therapeutic antibiotic use refers to providing feed containing antibiotics as a provisional measure,<sup>201</sup> not to treat an illness.

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<sup>191</sup> *Id.*

<sup>192</sup> Lovvorn and Perry, *supra* note 28 at 151, 152-53 (citing European Food Safety Auth., Report of the Task Force on Zoonoses Data Collection on the Analysis of the Baseline Study on the Prevalence of Salmonella in Holdings of Laying hen Flocks of Gallus gallus, The EFSA Journal 97 ( 2007) (available at [http://www.efsa.europa.eu/EFSA/efsa\\_locale-11786207538121178620761896.htm](http://www.efsa.europa.eu/EFSA/efsa_locale-11786207538121178620761896.htm)); Harriet Namat et al, Salmonella in Belgian Laying Hens: An Identification of Risk Factors, 83 Preventative Veterinary Med., 323, 323-24 (2008).

<sup>193</sup> See 18 Food, Inc. Facts Everyone Should Know, May 4, 2015, found at: <http://www.takepart.com/photos/food-inc-facts/foodborne-illness-becoming-more-widespread>.

<sup>194</sup> Workers also suffer injury from factory farms, including developing antibiotic resistance to injury from animals or machinery. Emily Kolbe, “Won’t You be My Neighbor: Living with Concentrated Animal Feeding Operations,” 99 Iowa L.Rev. 415, 425, 26-27 (2013).

<sup>195</sup> US Government Accountability Office, GAO-04-490, Antibiotic Resistance: Federal Agencies Need to Better Focus Efforts to Address Risk to Humans from Antibiotic Use in Animals 10 (April 2004), <http://www.gao.gov/assets/250/242186.pdf>. ; see also Pew Commission on Industrial Farm Animal Production , Putting Meat on the Table: Industrial Farm Animal Production in America 11-13 (April 2008), [http://www.ncifap.org/\\_images/pcifapfin.pdf](http://www.ncifap.org/_images/pcifapfin.pdf).

<sup>196</sup> US Government Accountability Office, GAO-04-490, Antibiotic Resistance: Federal Agencies Need to Better Focus Efforts to Address Risk to Humans from Antibiotic Use in Animals 10 (April 2004),; <http://www.gao.gov/assets/250/242186.pdf>. ; see also Pew Commission on Industrial Farm Animal Production , Putting Meat on the Table: Industrial Farm Animal Production in America 11-13 (April 2008), [http://www.ncifap.org/\\_images/pcifapfin.pdf](http://www.ncifap.org/_images/pcifapfin.pdf).

<sup>197</sup> Emily Kolbe, “Won’t You be My Neighbor: Living with Concentrated Animal Feeding Operations,” 99 Iowa L.Rev. 415, 425, 26-27 (2013).

<sup>198</sup> Testimony of Prof. Stuart B. Levy, Distinguished Professor of Molecular Biology and Microbiology and Professor of Medicine, Tufts University School of Medicine, before Subcommittee on Health for the U.S. House Committee on Energy and Commerce, July 10, 2010, 111th Congress found at <http://www.tufts.edu/med/apua/policy/7.14.10.pdf> .

<sup>199</sup> *Id.*

<sup>200</sup> Merriam Webster Dictionary defines therapeutic as “1- of or relating to the treatment of disease or disorders by remedial agents or methods...2 providing or assisting in a cure.” (May 28, 2015), found at: <http://www.merriam-webster.com/dictionary/therapeutic> .

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

Thus, antibiotics on the factory farm are given to promote growth and ward off disease,<sup>202</sup> -- *not to treat any existing condition* -- in the often tight, dirty conditions in which the animals must live.<sup>203</sup> Importantly, the European Union has phased out the sub-therapeutic agricultural use of antibiotics,<sup>204</sup> and Johns Hopkins University and the PEW Charitable Trusts have likewise recommended that the U.S. follow suit.<sup>205</sup>

Additionally, factory farms are dangerous places for farm workers themselves and exact enormous tolls on surrounding communities.<sup>206</sup> Workers often toil in dangerous conditions in that the air they breathe is laced with poisonous gases and toxins.<sup>207</sup> These workers, who are also frequently immigrants to the U.S. without adequate access to health care,<sup>208</sup> also suffer injury from excessive noise on the job, the animals themselves and/or machinery at the plant.<sup>209</sup> And, this problem is indeed on the rise as the ratio of workers to animals is decreasing as factory farms, known as Concentrated Animal Feeding Operations (“CAFOs”), continue to grow in size.<sup>210</sup>

To compound these negative, direct effects on human health, factory farming of eggs also results in large quantities of air and water pollution to surrounding areas.<sup>211</sup> In a lawsuit against Olivera Egg Ranch in California’s Central Valley, the local community alleged that contrary to the claims of the defendants that cramming hens in cages was good for the birds and the environment, the Ranch was having a devastating effect on the local community, polluting the air and causing upper respiratory sickness in the surrounding community.<sup>212</sup>

Factory farming of other “covered” animals, such as cows, pigs, and veal calves, in the U.S. similarly contributes to massive water and air pollution. Experts have indeed reported that as a result of voluminous discharges into the Gulf of Mexico of common pollutants from manure, portions of the Gulf are so lacking in oxygen that they cannot support sea life.<sup>213</sup> Experts have dubbed these areas, so polluted that life cannot thrive, “dead zones.”<sup>214</sup>

Factory farms also pollute the environment in that their operation requires an enormous expenditure of fossil fuels.<sup>215</sup> Unlike production in a traditional farm setting for grazing animals such as cows, where cows eat grass, fertilize the grass, and require no import of food or export of

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<sup>202</sup> Sudeshna Ghosh & Timothy M. LaPara, The effects of Subtherapeutic Antibiotic Use in Farm Animals on the Proliferation and Persistence of Antibiotic Resistance Among Soil Bacteria, 1 ISMEJ. 191, 171-203 (2007) available at: <http://www.nature.com/ismej/journal/v1/n3/full/ismej200731a.html> ; see also Antibiotic Resistance and the Threat to Public Health: Hearing Before the Subcomm. On Health of the H. comm. on Energy and Commerce, 111<sup>th</sup> Cong. (2010) (testimony of Doctor Thomas Frieden, Director, Centers for Disease Control and Prevention) available at <http://www.cdc.gov/washington/testimony/2010/t20100428.htm>

<sup>203</sup> See David DeGrazia, Moral Vegetarianism from Very Broad Basis, 6 J. of Moral Phil. 143, 153-55 (2009).

<sup>204</sup> Amy Pruden, Antibiotic Resistance Associated with CAFO’s in Hormones and Pharmaceuticals Generated by Concentrated Animal Feeding Operations 71, 71 (Lawrence S. Shore & Amy Prudent (2009).

<sup>205</sup> Id; The American Medical Association, the American Society for Microbiology and the American Public Health Association have also all recommended a ban on subtherapeutic animal antibiotic use. Id.

<sup>206</sup> See infra notes 207 to 210 and accompanying discussion.

<sup>207</sup> Kolbe, supra note 197, “Won’t you be My Neighbor,” at 427.

<sup>208</sup> Kolbe, supra note 197, “Won’t you be My Neighbor,” at 426.

<sup>209</sup> Kolbe, supra note 197, “Won’t you be My Neighbor,” at 426.

<sup>210</sup> Kolbe, supra note 197, “Won’t you be My Neighbor,” at 426.

<sup>211</sup> California Locals vs. Lake of Chicken Waste, found at: [http://www.nbcnews.com/id/35474921/ns/us\\_news-environment/t/calif-locals-vs-lake-chicken-waste/#.VWdAlvC-2ew](http://www.nbcnews.com/id/35474921/ns/us_news-environment/t/calif-locals-vs-lake-chicken-waste/#.VWdAlvC-2ew) (May 28, 2015); Kolbe, supra note 197, “Won’t you be My Neighbor,” at 419-22, 426-27.

<sup>212</sup> Humane Society of the United States, et.al vs. Olivera Egg Ranch, LLC, Case No. 08-1220 (Cal. E.D. Oct. 20, 2008); Lovvorn and Perry, supra note 28 at 164.

<sup>213</sup> Kolbe, supra note 197, “Won’t you be My Neighbor,” at 422.

<sup>214</sup> Kolbe, supra note 197, “Won’t you be My Neighbor,” at 422.

<sup>215</sup> Food, Inc., a Robert Kenner Film.

waste, in a factory farm setting, animal food must be brought in and waste must in turn be exported.<sup>216</sup> The import of food to the farm and export of waste expends excess fossil fuels, thereby burning non-renewable energy and contributing to rising CO2 emissions in the world.<sup>217</sup>

## **B. Our Moral and Ethical Obligation to the Animals: An Ethical Argument to Improve the Treatment of Farm Animals**

### **1. Shocking Developments in California and a Call to Action**

In addition to the environmental and human health concerns discussed above, factory farming in the U.S. adds stress and misery to the animals that provide our food,<sup>218</sup> and a strong argument exists that it is morally wrong.<sup>219</sup>

Indeed, California's Proposition 2 was at least in part borne of moral outrage over events discovered at Norco Ranch in Riverside County and in Chino, California in 2008.<sup>220</sup> In the Norco Ranch incident, Mercy for Animals documented the despicable conditions at an egg production factory farm in Menifee, Riverside County, California. The documentary showed birds with open bleeding wounds, workers breaking the necks of chickens and leaving them writhing in pain, alive, on piles of dead hens, alongside caged birds unable to reach water or food.<sup>221</sup>

In Chino, California, at the federally inspected Hallmark Meat Packing company and Westland Meat Company, Inc. (the second largest supplier of beef to the National School Lunch Program), a U.S. Humane Society employee also documented instances of animal abuse: capturing video footage of animals too sick to walk to slaughter being prodded with sharp instruments, in some cases in the eye, to get them to walk to their own end,<sup>222</sup> as well as animals being tortured with electrical shocks and high pressure water hoses to force them to slaughter.<sup>223</sup>

In the midst of this Chino, California scandal, the HSUS filed suit under the federal False Claims Act, claiming that the business had defrauded the public by selling food to the federal government, violating the terms of its contracts, which specifically required the humane treatment of farm animals.<sup>224</sup> The suit sought 150 million dollars against Hallmark.<sup>225</sup> The District Attorney intervened, and District Attorney Ramos, in prosecuting the workers shown on the video, stated that his office would take "all cases involving animal cruelty very seriously" and that "unnecessary cruelty" [would] not be tolerated and [would] be prosecuted to the fullest extent allowed by law."<sup>226</sup> These cases in Chino and at Norco Ranch, taken together, served as a backdrop against which the public voted on California's Proposition 2 in 2008.

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<sup>216</sup> Food, Inc., a Robert Kenner Film.

<sup>217</sup> Id.

<sup>218</sup> See David DeGrazia, *supra* note 203, at 151-53 (describing typical lives of factory farmed hogs, cows and hens, noting that male pigs are often castrated at ten days of age without anesthesia).

<sup>219</sup> See *infra* notes 244 to 255 and accompanying discussion.

<sup>220</sup> Lovvorn and Perry, *supra* note 28 at 156.

<sup>221</sup> Howard Blume, *L.A. Times*: Mercy For Animals Releases Footage of Norco Egg Ranch in California, October 14, 2008; video at <http://www.mercyforanimals.org/norco/> (released 2008).

<sup>222</sup> Lovvorn, *supra* note 28, at 156-57.

<sup>223</sup> Lovvorn *supra* note 28, at 156-57.

<sup>224</sup> Id. at 158.

<sup>225</sup> Id.

<sup>226</sup> Statement of San Bernadino District Attorney, Michael C. Ramos on Hallmark Meat Packing Case, (undated) available at:

<http://www.sbcountyda.org/ServicesInformation/AnimalCrueltyTaskForce/HallmarkMeatPackingCase.aspx>

The public got behind Proposition 2,<sup>227</sup> even though it was hotly contested by industry, who continued to claim that factory farming is good for animals and that only healthy animals “produce.”<sup>228</sup> Controverting these claims, Mercy for Animals had released the Norco Ranch video,<sup>229</sup> showing that Norco Ranch was still a productive enterprise, producing thousands of eggs every day, despite the deplorable and inhumane conditions there.<sup>230</sup>

The “rest is history” -- as we know California voters overwhelmingly supported Proposition 2: more California voters voted yes on Proposition 2 than on any of the other 11 measures on the ballot that day.<sup>231</sup> And overall, when polled, Americans overwhelmingly support reform of our animal treatment laws: three quarters believe that there should be effective federal law outlawing inhumane treatment of farm animals.<sup>232</sup> More so, the vast majority of Americans believe that there should be federal inspections of U.S. farms to ensure that animals are treated humanely.<sup>233</sup>

## 2. Philosophies of Animal Rights and Ethics

Legal ethicists and philosophers have long contemplated the appropriate framework to consider the welfare and rights of animals. Scholars have thus considered whether animals should not have a property status,<sup>234</sup> should have rights as part of our integrated world,<sup>235</sup> should have a different level of rights, or whether more humane treatment will provide animals the respect they deserve.<sup>236</sup> Others have discussed the notion that animals be given more or less rights depending on their level of understanding.<sup>237</sup>

For centuries, humans have indeed been questioning whether, as a starting analysis, they should be eating animals for food. Vegetarianism existed as early as 3,200 B.C. and it is believed that renowned philosophers such as Plato have subscribed to the theory that it is morally wrong to eat animals.<sup>238</sup> Even if one were to dispense with this first point and start from a place where the eating of animals is philosophically acceptable and necessary to human health,<sup>239</sup> one’s analysis would almost certainly raise the question of what our moral and ethical obligations are to the animals that provide this food.<sup>240</sup>

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<sup>227</sup> See Lindsay Vick, Confined to a Process: The Preemptive Strike of Livestock Care Standards Boards in Farm Animal Welfare Regulation, 18 Animal L. 151, 154-55 (2011).

<sup>228</sup> Lovvorn and Perry, supra note 28, at 161.

<sup>229</sup> Id. at 161-62.

<sup>230</sup> Mercy for Animals Video, August, Sept. 2008 found at: <http://norco.mercyforanimals.org/>

<sup>231</sup> Lovvorn and Perry, supra note 28, at 167.

<sup>232</sup> Lovvorn and Perry, supra note 28, at 153.

<sup>233</sup> Id.

<sup>234</sup> See Thomas G. Kelch, Toward a Non-Property Status for Animals, 6 N.Y.U. Envtl. L. J. 531 (1998).

<sup>235</sup> See Taimie L. Bryant, Animals Unmodified: Defining Animals / Defining Human Obligations to Animals, 2006 U Chic. Legal F. 137, 173 (2006).

<sup>236</sup> See Taimie L. Bryant, Animals Unmodified: Defining Animals / Defining Human Obligations to Animals, 2006 U Chic. Legal F. 137, 175 (2006).

<sup>237</sup> See Thomas G. Kelch, Toward a Non-Property Status for Animals, 6 N.Y.U. Envtl. L. J. 531, 564-69 (1998).

<sup>238</sup> Rodriguez, supra note 1, at 58.

<sup>239</sup> Of course, many experts do not believe that eating animal protein is necessary or even best for human health. See e.g., Mayo Clinic, Meatless Meals, The Benefits of Eating Less Meat, (May 28, 2015), found at: <http://www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/in-depth/meatless-meals/art-20048193?pg=2>.

<sup>240</sup> In England, in 1965, the Brambell Report had laid out five freedoms for all animals.<sup>240</sup> These freedoms include and are now widely recognized as the international standard upon which we base our treatment of farm animals:

Freedom from hunger and thirst, by ready access to water and a diet to maintain health and vigour.



Animal rights philosophers of the most recent Century might be said to fall into categories whereby they categorize animals as having equal rights to humans (the animal rights camp), some level of consideration due them from a utilitarian point of view, or no consideration due them at all as per a Kantian ethical point of view. At least one scholar has urged that older “no consideration” views as might be considered under a Kantian ethical framework, where our only obligation would be to ensure a humane death, can no longer be considered appropriate or current.<sup>241</sup> This seems to be particularly true, given the drastic status change of our farming operations in the past century from small, local farm utopias to factory farms.<sup>242</sup>

Peter Singer, in his 1975 book, *Animal Liberation*,<sup>243</sup> proposed the moral concept that animals and people ought to be given the same consideration under a utilitarian analysis allowing for “each to count for one, none for more than one,” but not allotted “rights” per se.<sup>244</sup> In a contrasting view, Tom Regan, made academic waves in his 1989 essay, *The Case for Animal Rights*.<sup>245</sup>

And another U.S. scholar, Professor Thomas Kelch, in what might be considered an alternative view, has proposed that animals ought not to have a property status at all.<sup>246</sup> Our right to control them thus eliminated, Kelch argues under the common law, all factors would seem to require a complete re-envisioning of our treatment of animals as property.<sup>247</sup>

At least one philosopher has recently argued persuasively that neither assuming that animals have rights or are deserving of a particular level of consideration, that at least they have

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Freedom from discomfort, by providing an appropriate environment. Freedom from pain, injury and disease, by prevention or rapid diagnosis and treatment.

Freedom to express normal behaviour, by providing sufficient space, proper facilities and appropriate company of the animal’s own kind.

Freedom from fear and distress, by ensuring conditions and treatment, which avoid mental suffering.<sup>240</sup>

The British Farm Animal Welfare Council, convened in 1979 to provide advice to Government on Animal Welfare, issued a new 2009 report summarizing the status of animal welfare over the next 20 years and laying out a proposed British strategy for the next 20 years.<sup>240</sup> What is so remarkable about this report and its recommendations, is the recognition it evinces, as early as 1965 in England, that farm animals ought to be treated in a certain humane manner. The Report recognizes animals as sentient beings, and that man has a duty to provide for the needs of farm animals.<sup>240</sup> It calls for ethical decision making and an examination of whether an animal has a good life and/or a life worth living from the animal’s perspective

<sup>241</sup> Rodriguez, supra note 1, at 58. Under ancient Kosher laws, the obligation to treat animals humanely specifically applies to the required killing of the animal in one fast cut to the carotid artery with a “nick-free” knife. Leviticus 12:21; see Michelle Hodkin, *When Ritual Slaughter Isn’t Kosher: An Examination of Shechita and the Humane Methods of Slaughter Act*, 1 J. of Animal L. 129, 135 (2005) available at:

[https://www.animallaw.info/sites/default/files/jouranimallawvol1\\_p129.pdf](https://www.animallaw.info/sites/default/files/jouranimallawvol1_p129.pdf)

Under the Humane Slaughter Act of modern times, kosher slaughter is indeed recognized as humane. 7 U.S.C. §1902 (1978). An argument can also be made based upon a reading of the Jewish law that animals must also be treated humanely in all of life. Id; Talmud B.M. 32a (requiring animals to be treated with kindness and compassion).

<sup>242</sup> Mayo Clinic, *Meatless Meals, The Benefits of Eating Less Meat*, (May 28, 2015), found at:

<http://www.mayoclinic.org/healthy-lifestyle/nutrition-and-healthy-eating/in-depth/meatless-meals/art-20048193?pg=2> .

<sup>243</sup> Peter Singer, *Animal Liberation* (Harper Perennial 2009).

<sup>244</sup> Id.

<sup>244</sup> Id.

<sup>245</sup> Tom Regan, *The Case for Animal Rights* (Tom Regan, Peter Singer, *Animal Rights and Human Obligation*, Prentice Hall, 2d. Ed. 1989).

<sup>246</sup> Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. Envtl. L. J. 531 (1998).

<sup>247</sup> See Thomas G. Kelch, *Toward a Non-Property Status for Animals*, 6 N.Y.U. Envtl. L. J. 531 (1998).

“some moral status” under both utilitarian and rights based animal theories.<sup>248</sup> Thus, philosopher and Professor David DeGrazia makes a strong case that the rights camp and the utilitarian camp have more in common than one might expect.<sup>249</sup> Laying out existing philosophical frameworks and assuming a “weak moral imperative,” Professor DeGrazia makes a strong case for a consumer’s obligation never to buy factory processed animal products.<sup>250</sup> He urges that, barring any concrete assumption about the moral status of animals and without an assumption that animals have rights per se or entitlement to equal consideration, sentient animals have “at least some moral status”<sup>251</sup> and ought not to have to endure the miseries of the factory farm.<sup>252</sup>

Professor DeGrazia goes on to suggest that since vegetarians enjoy their diet and thrive as well as, and perhaps better than, carnivorous humans, eating animals is unnecessary.<sup>253</sup> From here, he urges that because there is no necessity for raising the animals in the first instance; and that because they will endure nontrivial harms on the way to the slaughterhouse and at slaughter itself; that therefore, it is not even morally defensible to eat even animals raised on smaller what, what he calls, family farms.<sup>254</sup> DeGrazia thus concludes “[o]ne need not be a strong champion of animal protection...to embrace moral vegetarianism.”<sup>255</sup>

### 3. Ethical and Legal Action

While I find the arguments in favor of vegetarianism personally quite persuasive, the time is ripe for a more practical argument for humane federal legislation in the laying hen industry and beyond. In the context of the existing lack of regulation<sup>256</sup> and abominable conditions on factory farms today,<sup>257</sup> whether one chooses a rights based, utilitarian theory, or only accepts the weak proposition that cruelty to animals is wrong, the inhumane treatment of factory farmed hens and other “covered” factory farmed animals must be considered morally and ethically wrong.

Professor of Law Jedidiah Purdy has stated: “[w]e create and control the suffering of animals in [the factory farm setting], and that fact is the prompt for ethical reflection.”<sup>258</sup> There is simply no real argument, assuming just the very weak moral imperative that animals have some sort of status, that it is right to subject animals to a tortuous life, whereby they are caged for the entirety of their lives, in cages in which they cannot stretch their limbs, sit up or turn around.<sup>259</sup>

New federal legislation should be passed immediately so that we may begin to behave as a civilized society with regard to the animals that produce our food. To embrace this mandate,

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<sup>248</sup> David DeGrazia, *supra* note 203 at 45.

<sup>249</sup> See David DeGrazia, *supra* note 203, at 145.

<sup>250</sup> See David DeGrazia, *supra* note 203, at 159 (urging that people should make “every reasonable effort not to provide financial support to institution or practices that cause extensive, unnecessary harm.”).

<sup>251</sup> *Id.*

<sup>252</sup> See David DeGrazia, *supra* note 203, at 150-54.

<sup>253</sup> See David DeGrazia, *supra* note 203 at 154, 156.

<sup>254</sup> See David DeGrazia; *supra* note 203 at 160-64.

<sup>255</sup> *Id.*

<sup>256</sup> See *supra* notes 81 to 110 and accompanying discussion.

<sup>257</sup> See *supra* notes 1 to 2, 185 to 91, 218 to 226 and accompanying discussion.

<sup>258</sup> See Jedidiah Purdy, *Our Place in the World: A New Relationship for Environmental Ethics and Law*, 62 *Duke L. J.* 857, 911 (2013).

<sup>259</sup> *Id.*



one only need embrace the simple moral assumption that animals have some moral status,<sup>260</sup> and that we thus have a moral and ethical obligation to treat our farm animals humanely. Such humane treatment assumes a humane and painless death, *along with* the avoidance of unnecessary pain and torture in life. Given the deplorable state of farm animal welfare in this country, this article is most concerned, with, at a bare minimum, urging that Congress pass new federal legislation that insures basic improvements in our treatment of farm animals.<sup>261</sup>

## VII. Outline of Proposed Federal Legislation for Farm Animals

Given developments in state laws and the number of states that have begun to adopt new laws requiring more humane treatment of farm animals,<sup>262</sup> the author believes the time has come for federal legislators to act. At the outset, Congress should amend and strengthen the Humane Slaughter Act to expressly cover all farm animals, including laying hens,<sup>263</sup> and ensure that slaughter is truly humane and painless. Federally mandated methods of slaughter must be improved and inspections toward compliance with this end must be required.<sup>264</sup>

Additionally, Congress should also pass new federal legislation that requires farmers to treat animals in humanely in life and that expressly prohibits animal cruelty<sup>265</sup> – as there is sadly no current federal legislation that lays out these two simple standards.<sup>266</sup> As a starting point, humane treatment must include providing farm animals with the ability to stand up, turn around and move about freely to stretch limbs fully and move at will toward food and water. Federal legislation closely mirroring California’s Proposition 2<sup>267</sup> should be passed as to all “covered” farm animals so that farm animals have, at a minimum, places to live that allow for stretching, turning, and moving, and ready access to food and water. Moreover, all such federal humane farm animal treatment legislative proposals must expressly cover cows, pregnant sows, pigs, calves *and laying hens*, but must not exempt any farmed animal in the United States. The penning of pregnant sows and veal calves should also be expressly and immediately outlawed.

Normatively, in the long run, federal legislation would also require that animals have access to the outdoors<sup>268</sup> and contain provisions requiring that farm animals be raised in conditions that allow them to engage in their natural behaviors.<sup>269</sup> In the case of laying hens, for example, they engage in dust bathing, so that they may, surprisingly, keep themselves clean.<sup>270</sup>

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<sup>260</sup>See *generally* David DeGrazia, Moral Vegetarianism from Very Broad Basis, 6 J. of Moral Phil. 143 (2009).

<sup>261</sup> See *infra* notes 262 to 271 and accompanying discussion.

<sup>262</sup> See *supra* notes 111 to 136 and accompanying discussion.

<sup>263</sup> See *supra* notes 86 to 87 and accompanying discussion (noting that the federal Humane Slaughter Act does not currently cover laying hens).

<sup>264</sup> Slaughterhouse employees report that animals are frequently not even rendered unconscious before they are slaughtered: placed upside down, in scalding water, or left to bleed out and suffer butchering alive. See U.S. General Accounting Office, ‘Humane Methods of Slaughter Act: USDA Has Addressed Some Problems but Still Faces Enforcement Challenges,’ released 30 January 2004 (<http://www.gao.gov/new.items/d04247.pdf>)

<sup>265</sup> New federal legislation should prohibit intentional animal cruelty and exact stiff civil and criminal penalties for those who do not comply.

<sup>266</sup> See *supra* notes 81 to 88 and accompanying discussion.

<sup>267</sup> See *supra* notes 4 to 6, 111 to 116 and accompanying discussion.

<sup>268</sup> See *supra* notes 168 and accompanying discussion (noting that organic regulations require that organic animals have access to the outdoors).

<sup>269</sup>See *supra* note 168 and accompanying discussion (noting that organic regulations require that animals live in conditions that accommodate their “health and natural behavior”).

<sup>270</sup> See Lovvorn and Perry, *supra* note 28, at 151; Vermont Farm Heart, Providing Suitable Dust Bath Areas for your Chickens, April 2013, found at: <https://vermontfarmheart.wordpress.com/2013/04/19/providing-suitable-dust-bath-areas-for-your-chickens/>.

Providing appropriate amounts of living space would also obviate the need for many of the inhumane and gruesome practices in animal husbandry, including beak trimming for laying hens,<sup>271</sup> painful tail cutting and ear notching, without anesthesia, for hogs,<sup>272</sup> and other such barbaric practices. Finally, transportation methods should keep animals sheltered from the elements, even on the way to slaughter.

## Conclusion

Proposition 2, banning the use of battery cages, and cages for covered animals that do not allow an animal to sit up, turn around or extend its limbs, has been called a watershed moment for animal law and a turning point in the way in which we treat farm animals. Battery cages offer a miserable life for the over 300 million intelligent and social laying hens that spend their lives in cramped conditions and often suffer horrible and inhumane deaths due to their confinement. While there is currently no federal legislation that prohibits animal cruelty or requires humane treatment of laying hens and other farmed animals in life, a few states have followed California's lead and have begun to pass more humane farm animal legislation.

California's Proposition 2 and the related Amendment extending its reaches to eggs produced outside California, but for sale in California, were passed in response to documented abuses in California in the egg laying and other factory farming industries. The law reflects that most Americans support federal legislation that would ban inhumane treatment of farm animals, would require some reasonable level of decent conditions for farm animals, and would require federal inspection of factory farms.

In contrast to existing U.S. law, EU law requires more humane treatment of laying hens and prohibits the use of battery cages. Likewise, the Organic Foods Production Act requires that organically raised farm animals be given access to the outdoors and that provisions be made for the animals' natural behavior, although the organic regulations contain loopholes.

In general, factory farming has negative effects on the environment and contributes to animal and ultimately human suffering. Farm factory workers suffer accidents and the effects of toxic air, and often develop antibiotic resistance. Additionally, factory farms pollute surrounding air and water and contribute to the development of antibiotic resistant "superbugs."

Various frameworks exist for considering the morality of factory farming and battery cages for laying hens, including rights based, utilitarian, and Kantian theory. Assuming only that animals have some moral status and that animal cruelty is wrong, one must conclude that factory farming as it exists today is morally wrong in a civilized society.

This paper thus concludes that Congress should amend and strengthen the Humane Slaughter Act to cover laying hens and to require more stringent federal inspections, pass new federal law that is modeled after California's Proposition 2 and that expressly prohibits animal cruelty, and lays out strict penalties where it is found. This morally and ethically sound legislative framework will have the added advantage of avoiding a patchwork of state legislation regarding laying hens and other farm animals, and will in the end, inure to the benefit of all those associated with the egg and farming industry, including animals, farmers, workers, and you.

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<sup>271</sup> See David DeGrazia; *supra* note 203, at 15.

<sup>272</sup> See David DeGrazia; *supra* note 203, at 151-53.