

WEST VIRGINIA LEGISLATURE PUNTS LIVESTOCK LIVING CONDITIONS ISSUES TO STATE BOARD

*Whitney Morgan**

I.	INTRODUCTION.....	1
II.	PROBLEMATIC LIVING CONDITIONS AND STATE LEVEL IMPROVEMENTS.....	2
III.	CREATION OF STATE LIVESTOCK CARE STANDARDS BOARDS AND WEST VIRGINIA'S BOARD	4
IV.	WHY BOARDS UNNECESSARILY UNDERMINE PUBLIC INFLUENCE ON LEGISLATION.....	6
	A. <i>Consumer Autonomy Should Trump Farmer Autonomy</i>	6
	B. <i>Livestock Confinement Does Not Primarily Invoke Irrational Attention</i>	7
	C. <i>The Decision to Improve Livestock Living Conditions Is One the Public Can Make</i>	8
V.	CONCLUSION	10

I. INTRODUCTION

In West Virginia, chickens outnumber people almost eight to one.¹ Unfortunately for West Virginians, however, the creation of a state board in 2010 greatly reduced state citizens' say in how those chickens live.² This might not matter all that much if all chickens roosted in lovely red barns³ and were raised by farmers with at least as much concern for animal well-being as for personal profit. Nationwide, because this balance is distinctly *not* the case, several confinement practices—including the confinement of chickens to battery cages—have been questioned and banned in a handful of states.⁴

* J.D. Recipient, West Virginia University College of Law, Class of 2015.

¹ Including egg-laying hens and broiler chickens, West Virginia totaled 15.8 million chickens in 2012. Nat'l Agric. Statistics Serv., U.S. DEP'T OF AGRIC., <http://quickstats.nass.usda.gov/results/D3BFE745-A074-3ABD-B95B-1957F2BD1E43> (last visited Mar. 4, 2015); Nat'l Agric. Statistics Serv., U.S. DEP'T OF AGRIC., <http://quickstats.nass.usda.gov/results/D7C75641-FE49-37BE-B1AC-0CBC02629172> (last visited Mar. 4, 2015); State & County QuickFacts, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/54000.html> (last visited Apr. 17, 2015) (estimating West Virginia's population in 2014 at 1,850,326 people).

² W. VA. CODE § 19-1C-3(a) (2015).

³ See *Cage-Free vs. Battery-Cage Eggs: Comparison of Animal Welfare in Both Methods*, HUMANE SOC'Y OF THE U.S. (Sept. 1, 2009), http://www.humanesociety.org/issues/confinement_farm/facts/cage-free_vs_battery-cage.html.

⁴ See *infra* Part II.

If West Virginians were to decide that they too opposed the confinement of chickens or other livestock, they now have an additional burden above and beyond soliciting their state representatives to address the issue. Citizens either must convince the West Virginia Livestock Care Standards Board to promulgate new rules or convince the state legislature to bypass the board, something quite unlikely to happen given how contentious confinement improvements are; indeed, some have asserted that Livestock Care Standards Boards were created for the distinct purpose of removing power from the public to make laws on this subject matter.⁵ This Essay argues that Livestock Care Standards Boards unnecessarily remove power from the public because (1) consumer autonomy should trump farmer autonomy, (2) confinement issues evoke more than merely irrational attention, and (3) consumers are capable of making the primarily economic assessment involved in improving livestock living conditions.

II. PROBLEMATIC LIVING CONDITIONS AND STATE LEVEL IMPROVEMENTS

In the early 2000s, beginning with a state ballot initiative in Florida, the public started taking a closer look at a few farming practices related to the confinement of livestock.⁶ The Florida initiative targeted excessive confinement of sows in gestation crates.⁷ Soon after, several states, through either state ballot initiatives or through traditional legislation, passed laws aimed at ending the confinement practices of three different animals: gestation crates used for sows, veal crates used for calves, and battery cages used for egg-laying hens.

Although Florida jump-started meaningful discussion of sow confinement, not long after, Arizona and California followed suit with state ballot initiatives that expanded attention to veal crates and battery cages, respectively.⁸ Following success in those three states, Oregon,⁹ Maine,¹⁰ Colorado,¹¹ Michigan,¹² Ohio,¹³ and Rhode Island¹⁴ used

⁵ See generally Lindsay Vick, *Confined to a Process: The Preemptive Strike of Livestock Care Standards Boards in Farm Animal Welfare Regulation*, 18 ANIMAL L. 151 (2011).

⁶ See FLA. CONST. art. X, § 21.

⁷ *Id.*; see also Diana Lynne, *Pregnant Pigs on Florida Ballot*, WORLD NET DAILY (Oct. 16, 2002, 1:00 AM), <http://www.wnd.com/2002/10/15554/>.

⁸ ARIZ. REV. STAT. ANN. § 13-2910.07 (2015); CAL. HEALTH & SAFETY CODE § 25990 (2015); see also *Arizona Initiatives Proposition 204*, MICH. ST. UNIV. ANIMAL LEGAL & HIST. CENTER, <https://www.animallaw.info/statute/az-initiatives-proposition-204-inhumane-confinement> (last visited Mar. 4, 2015).

⁹ OR. REV. STAT. § 600.150 (2014).

¹⁰ ME. REV. STAT. ANN. tit. 7 §§ 1039, 4020 (2015).

¹¹ COLO. REV. STAT. ANN. § 35-50.5-102 (2015).

¹² MICH. COMP. LAWS § 287.746 (2014).

¹³ OHIO ADMIN. CODE 901:12-8-02, 901:12-9-03, 901:12-5-03 (2015).

¹⁴ R.I. GEN. LAWS § 4-1.1-3 (2015).

traditional legislation to address confinement; all six address sow and veal calf confinement, while Michigan and Ohio additionally address battery cages.

A typical confinement law requires that covered animals be given enough space to stand up, lie down, and turn around without touching the sides of their enclosures or other animals.¹⁵ In general, the laws allow a period of time to phase out confinement practices in order to provide farmers appropriate time to implement necessary changes.¹⁶ Further, most laws include exceptions for livestock fairs, rodeos, educational programs, and veterinary care.¹⁷

All three of the focal confinement practices are the quite practical result of crowded living conditions rampant in factory farming, which most often involves operations with over 10,000 animals.¹⁸ Gestation crates, for example, afford a full-grown sow space that measures only about two feet by seven feet.¹⁹ Sows often spend their *entire* “productive” years in these crates, not simply the more necessary time just before and right after birth.²⁰ For years, sows cannot walk or turn around, much less express a number of natural behaviors such as rooting, exploring, and socializing.²¹ Similarly, veal calves are tethered to the front of stalls that are only about two feet wide.²² So confined, they cannot assume their natural sleeping position, turn around, or engage in a number of other natural behaviors.²³ Even more shocking, egg-laying hens are placed in battery cages approximately the size of a small file cabinet with between five and eleven other

¹⁵ See, e.g., ME. REV. STAT. ANN. tit. 7 §4020 (2014); ME. REV. STAT. ANN. tit. 17 §1039 (2014) (“A person may not tether or confine a covered animal for all or the majority of a day in a manner that prevents the animal from: A. Lying down, standing up and fully extending the animal’s limbs; and B. Turning around freely.”).

¹⁶ See, e.g., OHIO ADMIN. CODE 901:12-5-03, 901:12-8-02, 901:12-9-03 (2015).

¹⁷ See, e.g., COLO. REV. STAT. § 35-50.5-102; ME. REV. STAT. ANN. tit. 7 § 4020, tit. 17 § 1039; OR. REV. STAT. § 600.150 (2014).

¹⁸ See *Quick Stats*, NAT’L AGRIC. STATISTICS SERV., U.S. DEP’T OF AGRIC., <http://151.121.3.59/results/D0C45A7E-B5D4-3FFC-BEB3-8122B5232465> (last visited Mar. 14, 2015) (providing figures, as of 2012, that show that hogs in the United States are more likely to be owned in quantities exceeding 10,000).

¹⁹ HUMANE SOC’Y OF THE U.S., AN HSUS REPORT: THE WELFARE OF INTENSELY CONFINED ANIMALS IN BATTERY CAGES, GESTATION CRATES, AND VEAL CRATES 5 (2012) [hereinafter *WELFARE OF INTENSELY CONFINED ANIMALS*], available at <http://www.humanesociety.org/assets/pdfs/farm/hsus-the-welfare-of-intensively-confined-animals.pdf>.

²⁰ *Pigs on Factory Farms*, ASPCA, <http://www.asPCA.org/fight-cruelty/farm-animal-cruelty/pigs-factory-farms> (last visited Mar. 16, 2015).

²¹ *WELFARE OF INTENSELY CONFINED ANIMALS*, *supra* note 19, at 5–6.

²² *Id.* at 7.

²³ *Id.* at 7–8.

hens.²⁴ The birds literally live on top of each other, cannot spread their wings, and frequently incur physical injury.²⁵

As of 2012, West Virginia housed just over 1.1 million egg-laying hens, 85% of which lived on farms with over 10,000 animals.²⁶ Meanwhile, most hog farms in West Virginia are relatively small.²⁷ It is unclear how many veal calves are raised in West Virginia: approximately 45,000 calves were sold within the state in 2012, but that number does not necessarily indicate the prevalence of calves raised for veal.²⁸ Thus, of certain and prominent concern for West Virginians is the factory farming of egg-laying hens.

III. CREATION OF STATE LIVESTOCK CARE STANDARDS BOARDS AND WEST VIRGINIA'S BOARD

Recognizing the successful improvement of livestock living conditions in various states around the country, a handful of states with markedly different political climates opted to create state boards, referred to as Livestock Care Standards Boards ("LCSBs"), to purportedly address confinement issues.²⁹ A close look at the make-up of these boards indicates that their primary purpose is to remove or lessen the public's ability to effect change either through state ballot initiatives or through an accountable representative legislature.³⁰ Several concerns arguably necessitate LCSBs, some of which are the following: agricultural decisions should be left to farmers; the public has a tendency to

²⁴ See *id.* at 2.

²⁵ *Id.* at 2–3.

²⁶ *Quick Stats*, NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., <http://quickstats.nass.usda.gov/results/D7C75641-FE49-37BE-B1AC-0CBC02629172> (last visited Feb. 25, 2015).

²⁷ *Quick Stats*, NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., <http://quickstats.nass.usda.gov/results/478B6FF4-62B6-3E96-836E-1FE5FC63E5B9> (last visited Feb. 2, 2015).

²⁸ *Quick Stats*, NAT'L AGRIC. STATISTICS SERV., U.S. DEP'T OF AGRIC., <http://quickstats.nass.usda.gov/results/8470BDAA-F54D-3E50-B3F4-BC6A26608840> (last visited Feb. 2, 2015). It appears the USDA does not keep state-level records of veal calf rearing and slaughter. Only national statistics are available.

²⁹ Illinois, Indiana, Kentucky, Louisiana, Ohio, Rhode Island, Utah, Vermont, and West Virginia. 20 Ill. COMP. STAT. ANN. 5/5-525 (2015); IND. CODE § 15-17-3-23 (2015); KY. REV. STAT. ANN. § 257.192 (2015); LA. REV. STAT. ANN. § 3:2093 (2015); OHIO CONST. art. XIV, § 1; R.I. GEN. LAWS §§ 4-26-1 to 6 (2015); UTAH CODE ANN. § 4-2-7 (2015); VT. STAT. ANN. tit. 6, § 792 (2015); W. VA. CODE § 19-1C-3 (2015).

³⁰ Vick, *supra* note 5, at 169; see also Peggy Kirk Hall & Leah F. Finney, *Ohio Voters Approve Livestock Care Standards Board: Now What?*, 26 AGRIC. L. UPDATE 5, 5 (2009), available at <http://nationalaglawcenter.org/wp-content/uploads/assets/aala/10-09.pdf> ("The measure [creating the OLCBSB] is a direct attempt to preempt efforts by [HSUS], which met with Ohio farm leaders last spring to discuss its intent to propose laws that would prohibit certain livestock management practices in Ohio. Rather than negotiating with HSUS, Ohio's agricultural interests worked through the Ohio legislature to create an alternative approach to livestock care.").

become irrational about animal welfare; and, even if rational, the public is not equipped to understand the implications of improving livestock living conditions.³¹

LCSBs have been created in Illinois, Indiana, Kentucky, Louisiana, Ohio, Rhode Island, Utah, Vermont, and West Virginia, and all but the Rhode Island board drastically overrepresent agricultural interests.³² For example, the West Virginia board, modeled after the nation's first board, which was created in Ohio, is comprised of the following eleven members appointed by the Governor:

- (1) One member who is a veterinarian licensed in this state engaging in large animal practice, for a term of two years;
- (2) The dean of the agriculture department of a college or university located in this state, for a term of three years;
- (3) One member representing a county humane society that is organized under state law, for a term of four years;
- (4) One member who is knowledgeable about food safety in this state, for a term of five years;
- (5) Two members of the public representing West Virginia consumers, one for a term of two years and one for a term of four years;
- (6) Two members representing state agricultural organizations that represent farmers, one of whom must be a member of the largest organization in the state representing farmers for a term of three years, and the other must be a member of a statewide livestock organization, for a term of five years; and
- (7) Three members representing family farms engaged in animal production, at least two of whom are family farmers, for the following terms: one for three years, one for four years and one for five years.³³

The two members representing agricultural organizations, the three members representing family farms, and the member who is the dean of an agricultural department form a majority of the eleven members and arguably will adamantly represent farming interests.³⁴ Only the one member representing a county humane society is assuredly going

³¹ See, e.g., *Arizona Initiatives Proposition 204*, *supra* note 8; *Prop 2, Standards for Confining Farm Animals, Initiative Statute*, CAL. GEN. ELECTION OFFICIAL VOTER GUIDE INFO. (Nov. 4, 2008), <http://www.voterguide.sos.ca.gov/past/2008/general/argu-rebut/argu-rebutt2.htm> [hereinafter *Prop 2, California Voter Guide*].

³² See 20 ILL. COMP. STAT. ANN. 5/5-525; IND. CODE § 15-17-3-23; KY. REV. STAT. ANN. § 257.192; LA. REV. STAT. ANN. § 3:2093; OHIO CONST. art. XIV, § 1; R.I. GEN. LAWS §§ 4-26-1–6; UTAH CODE ANN. § 4-2-7; VT. STAT. ANN. tit. 6, § 792; W. VA. CODE § 19-1C-3.

³³ W. VA. CODE §§ 19-1C-3(b)(1)–(7).

³⁴ The dean is included because in all likelihood the agricultural department receives substantial funding from agricultural organizations with a strong interest in opposing any improvement to livestock living conditions. See PUBLIC RESEARCH, PRIVATE GAIN: CORPORATE INFLUENCE OVER UNIVERSITY AGRICULTURAL RESEARCH, FOOD & WATER WATCH (2012), available at <http://documents.foodandwaterwatch.org/doc/PublicResearchPrivateGain.pdf>.

to support improvements to confinement, while the other four members—a veterinarian, two consumers, and a food safety representative—could swing either way.

West Virginia's stated purposes in creating an LCSB are as follows: "(1) Establishing standards governing the care and well-being of livestock in this state; (2) Maintaining food safety; (3) Encouraging locally grown and raised food; and (4) Protecting West Virginia farms and families."³⁵ However, considering the motives of the members included in West Virginia's LCSB, it comes as little surprise that in its four and a half years of existence, there has been no voluntary improvement to livestock confinement in West Virginia; the same holds true for all states that have enacted a board structured such as West Virginia's.³⁶

IV. WHY BOARDS UNNECESSARILY UNDERMINE PUBLIC INFLUENCE ON LEGISLATION

Especially in light of LCSB inactivity, these boards unnecessarily undermine public influence on legislation: they overvalue farmer autonomy at the expense of consumer autonomy, remove influence from a public that is likely far more rational on the whole than board supporters represent, and do not fully consider that the decision to improve livestock living conditions is primarily an economic one that the general public can understand.

A. *Consumer Autonomy Should Trump Farmer Autonomy*

Opposition to improving livestock living conditions, especially confinement, often emphasizes farmer autonomy in making agricultural decisions.³⁷ Admittedly, the notion of farmer autonomy resonates well with our romanticized ideas about farm life.³⁸ However, farming may very well be past its days of being deserving of idealization as a quaint, harmless, or simple industry.³⁹ Some would argue that the agricultural industry is

³⁵ W. VA. CODE §§ 19-1C-1(a)(1)–(4).

³⁶ There has been no involuntary improvement in West Virginia, but there has been involuntary improvement in Ohio. Ohio's confinement improvements were passed as part of a deal facilitated by a successful ballot initiative: If proponents agreed to drop the well-supported proposition and permit the formation of the Ohio Livestock Care Standards Board, the board would agree to address sow, veal calf, and egg-laying hen confinement. The board followed through on its end of the bargain, but has made no further improvements to livestock welfare since then. Further, Rhode Island's board has successfully passed livestock confinement laws to improve welfare, but its board is significantly more balanced. Elizabeth R. Springsteen, *A Proposal To Regulate Farm Animal Confinement in the United States and an Overview of Current and Proposed Laws on the Subject*, 14 DRAKE J. AGRIC. L. 437, 440 (2009) ("Ohio, decided to take preemptive action to the threatened ballot proposal."); see also R.I. GEN. LAWS §§ 4-26-1 to -6.

³⁷ *Arizona Initiatives Proposition 204*, *supra* note 8.

³⁸ See Peter J. Wall, *Land Use and Agricultural Exceptionalism*, 16 SAN JOAQUIN AGRIC. L. REV. 219, 222–23 (2007).

³⁹ See *id.*

just that, an industry, much more like any other industry, especially in its modern form.⁴⁰ As such, farming, namely factory farming, would inherently deserve no more autonomy than any other industry.⁴¹

What farming most certainly does inherently “deserve” is more consumer scrutiny and autonomy, especially because food is a consumer product that is particularly intimate, a quality only heightened when it involves food derived from living animals.⁴² Some have pointed out that food choice has close ties with a number of constitutionally protected interests.⁴³ Further, common sense reveals that food quality is legitimately of utmost concern to consumers: unlike the vast majority of consumer products, food is one of the few that we put into our bodies for it to become a part of us.⁴⁴ Therefore, when LCSBs overrepresent agricultural interests, they do not accurately reflect the proper balance of consideration between farmer autonomy and consumer autonomy.

B. Livestock Confinement Does Not Primarily Invoke Irrational Attention

One primary concern that board supporters advocate is that the public has a tendency to become over-impassioned and irrational when it comes to animal welfare, which, if true, would make the industry-influenced boards necessary.⁴⁵ The first flaw with this assessment is that it focuses on only one end of the spectrum as being irrational. There are groups at both ends of the animal welfare spectrum that take irrational views regarding animals—at the one end, there are individuals who place animal welfare in such high regard that they fail to recognize which goals regarding animal welfare are realistically achievable.⁴⁶ Equally troubling, though, are individuals who ignore the science-based evidence regarding the extent to which animals experience suffering⁴⁷—some in this camp deny that animals have the capacity to suffer at all, something most people would regard as preposterous.⁴⁸

⁴⁰ See *id.* at 228–29.

⁴¹ See *id.* at 236–37.

⁴² See Whitney R. Morgan, Note, *The Prohibition of Mooshine: A Consumer Protection Analysis of Raw Milk in Interstate Commerce*, 117 W. VA. L. REV. 385 (2014).

⁴³ See generally Kammi L. Rencher, *Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?*, 12 NEV. L.J. 418 (2012).

⁴⁴ See Morgan, *supra* note 42, at 415–16.

⁴⁵ See *Arizona Initiatives Proposition 204*, *supra* note 8.

⁴⁶ See Gary L. Francione, *Animal Rights and Animal Welfare*, 48 RUTGERS L. REV. 397 (1996).

⁴⁷ See WELFARE OF INTENSELY CONFINED ANIMALS, *supra* note 19.

⁴⁸ Jeff Leslie & Cass R. Sunstein, *Animal Rights Without Controversy*, 70 L. & CONTEMP. PROBS. 117, 118 (2007).

Almost everyone agrees that animal suffering matters, and that it is legitimate to take steps to reduce it. In a 1995 poll, for example, two-thirds of Americans agreed with the following statement: “An animal’s right to live free of suffering should be just as important as a person’s right to be free of suffering.” This statement of equivalence almost certainly does not adequately reflect people’s reflective judgments; but it is surely true

Based on the *actual* responses to animal confinement, both legislatively and commercially, it is far more likely that the public is taking a balanced, mindful approach in improving livestock welfare. For example, the California and Arizona state ballot initiatives were passed by a wide margin—over 60% of voters in both states supported anti-confinement laws.⁴⁹ Moreover, many major food retailers have conveyed to their producers that they will no longer purchase animal products resulting from certain confinement practices.⁵⁰ The most profound example of this market resistance has occurred with sows and gestation crates: McDonald's, Burger King, Wendy's, Subway, Oscar Mayer, Kroger, Safeway, Costco, Denny's, Jack in the Box, Carl's Jr., Hardee's, Sodexo, Sysco, Aramark, Compass Group, Heinz, Campbell Soup, Baja Fresh, Wienerschnitzel, and Harris Teeter are all responding to consumer demand to stop the use of gestation crates.⁵¹ Widespread market support at these levels hardly represents the impassioned or irrational few.

C. *The Decision to Improve Livestock Living Conditions Is One the Public Can Make*

Possibly the strongest of board supporters' arguments is that the public is not equipped with the knowledge required to make laws on livestock confinement practices.⁵² Managing animals, in many ways, requires specific knowledge of their needs and tendencies.⁵³ Even so, in the first place, the agricultural industry on the whole gets the

that a social consensus supports the view that in deciding what to do, both private and public institutions should take animal suffering into account.

Id. (footnotes omitted) (citing David Foster, *Animal Rights Gain Support, Poll Shows*, SEATTLE TIMES, Dec. 3, 1995, at A4, available at <http://community.seattletimes.nwsources.com/archive/?date=19951203&slug=2155853>).

⁴⁹ STATE OF ARIZ., STATE OF ARIZONA OFFICIAL CANVASS 15 (2006), available at <http://www.azsos.gov/election/2006/General/Canvass2006GE.pdf>; HUFFMAN, BILL ANALYSIS ON SHELLED EGGS: SALE FOR HUMAN CONSUMPTION: COMPLIANCE WITH ANIMAL CARE STANDARDS A.B. 1437 (Feb. 27, 2009), available at http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_1401-1450/ab_1437_cfa_20090615_204633_sen_comm.html; *California Proposition 2, Standards for Confining Farm Animals* (2008), BALLOTPEdia, http://ballotpedia.org/California_Proposition_2,_Standards_for_Confining_Farm_Animals_%282008%29 (last visited Apr. 19, 2015).

⁵⁰ *Crammed Into Gestration Crates: Life for America's Breeding Pigs*, HUMANE SOC'Y OF THE U.S. (Feb. 19, 2014), http://www.humanesociety.org/issues/confinement_farm/facts/gestation_crates.html.

⁵¹ *Id.* This level of support manifests even when estimates show that it will require between \$1.87 billion and \$3.24 billion to shift all confined sows to group housing. Tim Carman, *Pork Industry Gives Sow Room To Move*, WASH. POST, May 29, 2012, available at http://www.washingtonpost.com/lifestyle/food/pork-industry-gives-sows-room-to-move/2012/05/25/gJQAISlxyU_story.html.

⁵² See *Arizona Initiatives Proposition 204*, *supra* note 8.

⁵³ See, e.g., HEATHER PICKETT, CONTROLLING FEATHER PECKING & CANNIBALISM IN LAYING HENS WITHOUT BEAK TRIMMING, A COMPASSION IN WORLD FARMING REPORT (2009), available at http://www.ciwf.org.uk/includes/documents/cm_docs/2009/c/controlling_feather_pecking_and_cannibalism_

animal welfare assessment wrong. Practically speaking, farmers are not necessarily motivated by animal welfare, but they certainly are motivated by profit;⁵⁴ this notion is reflected in how the farming industry gauges animal welfare—by physical productivity.⁵⁵ Typically, the industry’s assessment of welfare focuses on how many animals survive and how big those animals get, something easily assessed by how much meat is derived from a herd.⁵⁶ The more meat produced, the healthier the animals are, presumably. This type of physical-oriented herd assessment, however, gives no weight to the emotional or mental well-being of individual animals and, in effect, does not necessarily acknowledge animal suffering at all—the equally preposterous other end of the spectrum.

A much more complete assessment of animal welfare, as provided by the Humane Society of the United States, gauges welfare based on whether animals have the ability to express natural behaviors.⁵⁷ Confinement practices clearly undermine the expression of virtually *any* natural behavior.⁵⁸ Instead, they lead to distinctly unnatural behavior, such as sows exhibiting stereotypies⁵⁹ and chickens cannibalistically pecking each other.⁶⁰ The agricultural industry, which is largely regulated by self-established standards⁶¹ and would like to keep it that way, addresses animal welfare in a self-servingly limited manner and has little pressure to change but for consumer-citizen efforts.

Arguably, individuals divorced from profit motives are in a better position to objectively gauge animal welfare. Regardless, the public can easily understand that there are many ways to rear animals and that there are varying costs associated with the different methods. What the factory farmers seem to actually be arguing is that the public does not understand that the industry cannot produce the same amount of food at the same price and improve confinement practices. However, this assertion is on its face a

without_beak_trimming.pdf; Michael J. Gentle & John Breward, *The Bill Tip Organ of the Chicken*, 145 J. ANAT. 79 (1986); Ashley Capps, *Debeaking Video Shows Standard Practice on Free Range Egg Farms*, FREE FROM HARM (June 11, 2013), <http://freefromharm.org/animal-cruelty-investigation/debeaking-video-shows-standard-practice-on-free-range-egg-farms/#sthash.DRitlp0H.dpuf>.

⁵⁴ See WELFARE OF INTENSELY CONFINED ANIMALS, *supra* note 19, at 1.

⁵⁵ See *id.*

⁵⁶ See *id.*

⁵⁷ *Id.* at 2.

⁵⁸ See *id.*

⁵⁹ Stereotypies are “movements or behaviors that are abnormal, repetitive, and seemingly have no function or goal.” *Id.* at 6. (for example, “bar-biting, head-weaving, pressing their drinkers without drinking, and making chewing motions with an empty mouth (sham or vacuum chewing)”).

⁶⁰ See PICKETT, *supra* note 53.

⁶¹ See, e.g., MICH. DEP’T OF AGRIC. & RURAL DEV., GENERALLY ACCEPTED AGRICULTURAL AND MANAGEMENT PRACTICES FOR THE CARE OF FARM ANIMALS 1 (2015), available at http://www.michigan.gov/documents/mdard/2015_CARE_OF_FARM_ANIMALS_GAAMPs_480521_7.pdf.

ridiculous affront to common sense and ultimately brings to light the real question: Are we willing to pay more for food in order for animals to be treated more humanely?

The answer to this question is not necessarily abstract: one estimate found that eggs may cost only one to three cents more per egg when produced by chickens that are not confined to battery cages.⁶² In addition, a general movement in ethical food preference indicates that the public is more than willing to pay this increased cost.⁶³ Therefore, to the extent LCSBs hope to justify their existence on a need for expertise, they err twofold: (1) the agriculture industry runs as much, if not more, on self-interest than on expertise, at least insofar as animal welfare is concerned; and (2) reliance on expertise misses the real question of whether consumers are willing to pay more for food in exchange for improvement in animal welfare—in fact, many are.

V. CONCLUSION

The focus of this Essay is not to assert that West Virginians should eliminate the battery cages that house some portion of its 1.1 million egg-laying hens. What this Essay does hope to effectively convey is that West Virginians are capable of deciding for themselves whether confining hens to file-cabinet size battery cages with five to eleven other birds is worth slightly cheaper eggs and, further, that West Virginians should be allowed to collaborate with their legislative representatives to effect change without the burden of an LCSB. West Virginia's LCSB, like many others, overrepresents agricultural interests, undermines consumer autonomy, and misrepresents lack of consumer awareness as justification for its formation. The board appears to be, in effect, an effort to help factory farmers avoid change and, more so, to allow the legislature to avoid dealing with the topic altogether—it is no more than a convenient punt.

⁶² “[O]ne free-range egg costs 2.6 Eurocents more to produce than a battery egg, and a barn egg costs 1.3 Eurocents more to produce than a battery egg.” HEATHER PICKETT, COMPASSION IN WORLD FARMING, ALTERNATIVES TO THE BARREN BATTERY CAGE FOR THE HOUSING OF LAYING HENS IN THE EUROPEAN UNION 27 (2007), *available at* <http://www.ciwf.org.uk/media/3818829/alternatives-to-the-barren-battery-cage-in-the-eu.pdf>. The total cost increase to consumers is estimated to be somewhere between 5.5 and 11 Eurocents per week (roughly 7 to 18 cents per week in the United States), arguably something that the public would be willing to fork up in exchange for humanely produced eggs.

⁶³ *See* CONTEXT MARKETING, ETHICAL FOOD: A RESEARCH REPORT ON THE ETHICAL CLAIMS THAT MATTER MOST TO FOOD SHOPPERS AND HOW ETHICAL CONCERNS INFLUENCE FOOD PURCHASES 2 (2010), *available at* <http://www.contextmarketing.com/sources/feb28-2010/ethicalfoodreport.pdf>.