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WHAT DOES A REFORMED TSCA MEAN FOR PRIVATE RIGHTS OF ACTION UNDER STATE LAW?

Thomas R. Smith
January 27, 2017

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TSCA Preemption: 15 U.S.C. § 2617(a)

- No statutes or administrative actions regarding information development of a chemical substance after EPA has issued a rule, etc. related to testing;
- No statutes, administrative actions, or criminal penalties prohibiting manufacture, distribution, processing after EPA has made a finding that a chemical substance either does or does not pose an unreasonable risk;
- No statutes or administrative actions necessitating notification of use of a chemical substance when EPA already has done so.

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Potential EPA Actions

- Prohibit/restrict manufacturing or distribution in commerce or manner or method of commercial use;
- Limit the amount of the substance that may be processed;
- Prohibit/restrict manufacturing for a particular use/in a concentration in excess of an EPA-spec'd level;
- Limit amount that may be distributed for a particular use/above a specified concentration.
- Require minimum warnings and instructions with respect to the substances.
- 15 U.S.C. § 2605(a)

If EPA finds a chemical poses an "unreasonably risk," then it establishes a rule (1) prohibiting and/or restricting use of the chemical; (2) stating effects of the chemical on human health and the environment, magnitude of exposure, benefits of the chemical, and economic consequences of the rule; and (3) potential alternatives available as a substitute. (15 U.S.C. § 2605(c))

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Preemption: Savings

- No preemption of state or federal common law or statutory rights and remedies
- "Clarification of no preemption"
- EPA action cannot be dispositive in a civil action
- Court retains authority with respect to admission of evidence

- Why did Congress include this provision?
- SCOTUS, reading preemption and savings clauses together, along with reviewing Congressional history, has arrived at different results based on the language therein

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Savings: Why Did Congress Include this Provision

- Public Cigarette Smoking Act of 1969
  - *Cipollone v. Liggett Group*
  - Act preempted common law tort claims relying on failure to warn b/c would have greater requirements than statutorily mandated warning label
- Federal Insecticide, Fungicide, and Rodenticide Act
  - *Bates v. Dow Agrisciences, LLC*
  - Common law failure to warn claims preempted by labeling requirements, depending on state requirement equivalency
- Medical Device Act
  - *Riegel v. Medtronic, Inc.*
  - Common law claims challenging device safety receiving premarket approval preempted by federal law
- Federal Food, Drug, and Cosmetic Act
  - *Mut. Pharm. Co. v. Bartlett*
  - State law design defect cause of action based on inadequate warning preempted by FDA approval of drug

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Savings: Why Did Congress Include this Provision?

- Federal Boat Safety Act of 1971
  - *Sprietsma v. Mercury Marine*
  - Narrow preemption, broad savings → no preemption of state common law actions
- Federal Motor Vehicle Safety Standard
  - *Geier v. American Honda Co.*
  - Narrow preemption, broad savings → implied preemption

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Savings: The Act

- Legislative history demonstrates keen awareness of this background
- Congressional Record contains explicit reference to preemption/savings:
  - Clarifying Congress' intent that no express, implied, or actual conflict exists between the Act/any federal regulatory action and state federal, or maritime tort
    - (*Geier v. American Honda Motor Co.*)
  - Ensuring EPA imposes only *minimum* requirements for warnings so that a "reasonable" person can always do more
    - (*Wyeth v. Levine*)

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Savings: What does it mean for litigators and litigants in toxic tort cases?

- Even though Congress went to great lengths to clarify what it meant by "preemption" and "savings" in the Act, it would be a mistake to conclude that EPA actions under the Act will be irrelevant to the litigation of state law toxic tort claims.
- The Act explicitly grants courts final authority on the admission into evidence or any other use of the Act and/or manifestations of its implementation

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How will EPA actions under the Act impact a trial?

- Potential Rulings
  - Finding on unreasonable risk is:
    - Admissible or inadmissible altogether
    - Admissible for certain issues, limiting instructions
  - Failure to warn claims and minimum labeling
- Plaintiff and defense attorneys each will be motivated to use EPA findings under the Act to their client's benefits, but, as the Act states, such use cannot be dispositive in any action

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Relevance

- Will an EPA finding on unreasonable risk have any tendency to make a fact of consequence in determining the action more or less probable than without the evidence?
  - For what is it being offered?
- Example: *Parker v. Mobil Oil Corp.*: "[S]tandards promulgated by regulatory agencies as protective measures are inadequate to demonstrate legal causation."

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Prejudicial v. Probative

- Would the probative value of an EPA finding on unreasonable risk be substantially outweighed by potential for prejudice, confusion, misleading the jury, undue delay, waste of time, or cumulative evidence?
- Congress's Intent: EPA determination shall not be interpreted as "in either the plaintiff's or defendant's favor dispositive in any action"

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How Will the Evidence be Offered?

- Federal Court: FRE 803(8) – Public record exception to the rule against hearsay
  - Conclusions and opinions are admissible if satisfying trustworthiness requirement
- New York: Limited express public records exception, common law
- *Daubert* Line of Attack

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Expert Testimony

- Expert testimony likely will be a vehicle to admit EPA findings and studies, even if hearsay, because experts may reasonably rely on inadmissible evidence if normally relied upon in their field to come to conclusions
- Challenge the expert's qualifications or the use of EPA evaluations and findings in connection with a particular case

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Motion in Limine

- A preliminary determination, made near or at the beginning of trial, for a ruling on evidence – should it be admitted, excluded, limited, etc.
- Could determine the likelihood of success at trial
- Could lead to settlement of a case

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Cautionary Instruction

- A court may admit EPA findings, but with a cautionary instruction, usually based on prejudicial-probative arguments
- Most likely where a court is faced with the Congressional Record's admonition of permitting EPA findings to be dispositive in court, but the evidence is highly relevant and probative
- Can a cautionary instruction mitigate the risks?

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Minimum Labeling Requirements

- Congress had *Wyeth v Levine* in mind
- Sets the stage for trial judges admitting compliance with EPA requirements, but with an instruction that compliance is not conclusive regarding duty to warn
- Has *Wyeth* been limited in a way that could impact this outcome?
  - What did EPA *actually* review?

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As the Act is implemented, these issues will evolve.

For further information on TSCA, and other toxic tort-related matters, visit https://www.bsk.com/practices/toxic-tort-environmental-litigation-pubtype1

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The Legal Conundrums Presented by the Use of Pesticides in the Cultivation of Marijuana

Telisport W. Putsavage, Moderator
New York State Bar Association
Environment Section Annual Meeting Program
January 27, 2017

Social Evolution: Majority Support for Legalization

Pew Research Center [October 16, 2016]
57% of adults favor legalization v 37% opposed
10 years earlier: 32% in favor v 60% opposed

Gallup Poll Social Series [October 19, 2016]
60% of adults favor legalization
47 year trend favoring legalization

State Legalization of Marijuana

Routes to Legalization

- Medicinal: Legislative

  Adult use: Referenda except DC where legislative; in CO referendum amended state constitution

- Medicinal:

  States: 29 plus DC

  Method of Administration: oral, ingestible, edible, smokeable

- Adult Use (Recreational):

  Personal cultivation: 8 states plus DC

  Commercial Sales: 4 states

Source of Legal Conflicts Over Marijuana

Controlled Substances Act, 21 USC 812(b)(1): Schedule 1 Narcotic

(A) The drug has a high potential for abuse.

(B) The drug has no currently accepted medical use in treatment in the United States.

(C) There is a lack of accepted safety for use of the drug under medical supervision.

Manufacture, possession and distribution are prohibited.

Areas of Legal Conflicts Over Marijuana

- Legal Representation
- Banking
- FIFRA and State Pesticide Law
- National Organic Program
- Local Land Use Regulation
- Neighboring State Objections:
  Oklahoma and Nebraska v. Colorado,
  [U.S. Supreme Court Original Case No. 144]

Federal Criminal Responses to State Marijuana Legalization

Department of Justice Memoranda from Deputy Attorney General Cole to All United States Attorneys: Guidance on Marijuana Enforcement
June 11, 2011; August 29, 2013; February 14, 2014

Department of the Treasury Financial Crimes Enforcement Network Guidance
FIN-2014-G001, February 14,2014

- Set priorities for marijuana related prosecutions under the Controlled Substances Act and the Bank Secrecy Act;
- Should not prosecute where conduct is in compliance with a strong and effective state regulatory system

Congressional Response to State Legalization of Marijuana

- Rohrabacher (R-CA) - Farr (D-CA) Amendment to the Consolidated Appropriations Act [Effective through April 28, 2017]
- No expenditure of Federal Funds for enforcement against conduct compliant with state medical marijuana program
- US v McIntosh, _ F 3rd _ (9th Cir. August 16, 2016): Expenditure prohibition precludes prosecutions of individuals in the medical marijuana business
- US v Nixon, _ F 3rd _ (9th Cir. October 17, 2016): Expenditure prohibition does not preclude characterizing use of medical marijuana as probation violation

EPA Response Pesticide Use in State Marijuana Programs

- Environmental Protection Agency Policy Statement: Pesticide Use on Marijuana January 27, 2016
- Letter from Director of the EPA Office of Pesticide Programs to the Colorado Department of Agriculture
  May 19, 2015

Conclusion: States may issue Special Local Needs registrations to address needs of local marijuana programs

New York Bar Response to Enactment of NY Compassionate Care Act

New York State Bar Association Ethics Opinion 1024:
Counseling Clients in Illegal Conduct; Medical Marijuana Law
[September 29, 2014]

In light of current Federal enforcement policy, the NY Rule of Professional Conduct permit a lawyer to assist a client in conduct designed to comply with state medical marijuana law, notwithstanding that Federal narcotics law prohibits the delivery, sale, possession and use of marijuana and makes no exception for medical marijuana. [emphasis added]

New York Compassionate Care Act

- Only specified diagnoses qualify; chronic pain recently added
- Ingestible oil and vapors only
- Mandatory vertical integration: cultivate, process, dispense
- 5 Registered Organizations; 20 authorized dispensaries [4 each]
- 750 doctors authorized to order; must undergo pre-training
- 10,730 patients who must register with State Health Department

Pesticide Issue: The Label is the Law

- Every pesticide product must be registered with EPA and states
- Products may be used only on target plants listed on the label
- Due to Schedule 1 classification, no registered pesticide is labeled for application to marijuana.
- Federal and state law mandate compliance with product label in using a pesticide
- Thus no pesticide may be lawfully applied to marijuana

Thank you

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Medical Marijuana and Pesticide Use

January 27, 2017

Marijuana

- Federally illegal
  - Marijuana is considered a Schedule I drug
  - Same class as heroin and LSD
- EPA will not register pesticide labels for marijuana use

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Medical Marijuana

- Legal in New York State
- Regulated by DOH
- DEC is responsible for proper pesticide use
- Discussions at the national level
  - Many states allow marijuana use

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Medical Marijuana

- No pesticides registered specifically for cannabis
- Use in NYS requires registered pesticides or Minimum Risk Pesticides
  - Work closely with DOH and Registered Organizations
- EPA recommends Special Local Need (SLN) registrations for pesticides with similar uses

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Federal Guidance

Any SLN request must be for a pesticide with the following:

- Food-tolerances or exemptions
- Same or similar type of application method
- Similar crops - to protect workers entering areas of pesticide application
- Similar use site/structure - to protect handlers applying pesticides

SLN registrations have not been requested in New York State

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Current Products for Medical Marijuana

- Follow other states and recognize the SLN recommendations
  - Colorado has a list of products
- Similar uses on food crops and crops with similar characteristics to cannabis
  - Hops, mint, tobacco
- Similar application methods and use patterns
- For example a product for use in a greenhouse with a tolerance exemption

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Example Product

- 5% Pyrethrin product
- OMRI Listed, tolerance exempt, PPE and WPS
- Labeled for use in a greenhouse
- Large list of target insects
- Broad label statements:
  - Crop groupings include the phrase “including, but not limited to” and then lists a number of crops

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Medical Marijuana - Compliance Concerns

- Requests for non-pesticide products to be used as pesticides
  - Rubbing alcohol, hydrogen peroxide as antimicrobials
  - Not allowed under the statute and regulations
- Crop tolerance or exempt from tolerances
  - Most Minimum Risk Pesticides are exempt from tolerances, but not all
  - Worker Protection Standard labeling

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Medical Marijuana Pesticide Certification

- Private applicator certification for RUPs
- No certification needed for general use pesticides or minimum risk pesticides
- Handler and worker training
- Recordkeeping required by DEC and DOH

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Future of Medical Marijuana

- As program expands, registrants will want to market to the pesticide users
- Registrants will seek SLN registrations
- Start with biopesticides, neem oil and other “softer” active ingredients

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Questions?

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Thank You

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PESTICIDES AND MARIJUANA

Working with the NY Regulations

Keeley Peckham
CHO, Etain LLC

Overview

- Marijuana Basics
- New York Regulations
- Realities of the MMJ Industry
- Effective and Safe Pest Control
- Complications
- National Implications

Marijuana Basics

- **Variable Growth Time**
- **Two Stages of Growth**
  - Vegetative (24 hours of light)
  - Flower (12 hours of light)
- **Uptake Capabilities**
  - Heavy Metals
  - Pesticides

Marijuana Basics

Flower/Bud

- Aesthetics Matter
  - Large flowers mean long growth times
- Low Pesticide and Heavy Metal Concentration
- Irregular Cannabinoid Concentration

Concentrates

- Focus on Oil Concentration
  - Not all marijuana is created equal
- All Components Are Concentrated
- Consistent Product

Marijuana Basics

Flower/Bud

Concentrates

New York Regulations

- **§1004.10.c.8.i – General Requirements**
  - Maintain Records for 5 Years
- §**1004.11.e.3 – Manufacturing Requirements**
  - RO's must use only NYS approved pesticides
- **§1004.14.g - Lab Testing Requirements**
  - NYS Lab will test for residual contaminates

Realities of the MMJ Industry

- Most Grows Lack Oversight and Accountability
- Lack of Federal Approval
  - Halts Development and Progress
  - Inhibits Attempts to Enforce Accountability
- High Risk + High Cost = Overreaction to Pests

Effective and Safe Pest Control

- Strain Choice
- Utilize IPM
- Minimal Harm Pesticides
- Application Timing
- Avoid Systemics
- Test Excipients

Complications

- **Heavy Metals**
  - "Bud Boosters"
- **Carbenzadim**
  - Earthworm Castings
- **Myclobutanil**
  - Coconut Coir

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National Implications

- Market Size
- Increased Regulations
- 3rd Party Testing
- Scientific Influence
- Progress for Patients

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New York State Bar Association
Annual Meeting Environmental Section Program
Legal Conundrums Presented by the Use of Pesticides in the Cultivation of Marijuana
Supporting Documents

Department of Justice Memorandum from Deputy Attorney General Cole to All United States Attorneys: Guidance on Marijuana Enforcement, June 11, 2011
https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/dag-guidance-2011-for-medical-marijuana-use.pdf

Department of Justice Memorandum from Deputy Attorney General Cole to All United States Attorneys: Guidance on Marijuana Enforcement, August 29, 2013
https://www.justice.gov/iso/opa/resources/3052013829132756857467.pdf

Department of Justice Memorandum from Deputy Attorney General Cole to All United States Attorneys: Guidance on Marijuana Enforcement, February 14, 2014
https://www.justice.gov/sites/default/files/usao-wdwa/legacy/2014/02/14/DAG%20Memo%20-%20Guidance%20Regarding%20Marijuana%20Related%20Financial%20Crimes%202%2014%2014%20(2).pdf

Department of the Treasury Financial Crimes Enforcement Network Guidance, FIN-2014-G001, February 14,2014
https://www.fincen.gov/sites/default/files/shared/FIN-2014-G001.pdf

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https://www.epa.gov/pesticide-registration/pesticide-use-marijuana

Letter from Director of the EPA Office of Pesticide Programs to the Colorado Department of Agriculture, May 19, 2015
https://www.epa.gov/sites/production/files/2016-01/documents/epa_letter_to_cda_5-19-15_slns_for_marijuana.pdf

New York State Bar Association Ethics Opinion 1024 [September 29, 2014]: Counseling Clients in Illegal Conduct; Medical Marijuana Law
http://www.nysba.org/CustomTemplates/Content.aspx?id=52179

The National Academies of Science, Engineering and Medicine: *The Health Effects of Cannabis and Canabinoids: The Current State of Evidence and Recommendations for Research* [January 2017]
http://nationalacademies.org/hmd/reports/2017/health-effects-of-cannabis-and-cannabinoids.aspx

Continuing Legal Education Materials

Emergence of a Vibrant Animal Law Dynamic - Moving to Cooperative Co-Existence and Sustainability

Friday, January 27, 2017
10:50 – 11:40 a.m.

Co-sponsored by the New York City Bar Association Animal Law Committee

Moderator:	**Lori Barrett, Esq.,** Chair, New York City Bar Association Animal Law Committee
Speaker:	**Michael Dulong, Esq.,** Staff Attorney, Hudson Riverkeeper: ***CAFOs - Meeting the Clean Water Requirements***
Speaker:	**Elinor Molbegott, Esq.,** Law Office of Elinor Molbegott: ***The Intersection of New York's Animal Cruelty Law and the Environmental Conservation Law***
Speaker:	**David Wolfson, Esq.,** Partner and Executive Director, Milbank, Tweed, Hadley & McCloy, LLP: ***Farmed Animals and the Environment***

Speaker Biographies

Lori Barrett (animallawcommittee@hotmail.com) is chair of the New York City Bar Association Animal Law Committee. As a member of the NYC Bar, she has written several reports advocating for legislation to protect animals and has spoken on several panels about the law and animals. Lori is Senior Counsel in the Contracts & Real Estate Division of the New York City Law Department; a 2015 recipient of the NYC Bar Municipal Affairs Award; and a 2004 graduate of New York University School of Law.

Michael Dulong (mdulong@riverkeeper.org) joined Riverkeeper in May 2012 as a staff attorney with the Watershed Program. His work focuses on a range of watershed protection issues, including monitoring agency compliance under the New York City Watershed Agreement; ensuring the operation of New York City's reservoirs and infrastructure has minimal impact on local ecosystems and communities; and investigating and developing citizen pollution complaints. He also performs advocacy for Riverkeeper's campaign to prevent irresponsible industrial gas extraction and development in New York with a particular focus on gas development's adverse socioeconomic impacts.

Mr. Dulong received his J.D. from UCLA School of Law in 2011. While there he was an active member of the Moot Court Honors Program, reaching semifinals at the Pace National Environmental Moot Court Competition and serving on the Journal of Environmental Law and Policy. He held clerkships at the Environmental Protection Agency Region II in New York and at the Department of Justice Environmental Enforcement Section in Washington, D.C. Prior to law school, Michael received his B.A., cum laude, from The University of Massachusetts and his M.A. in British and American literature from New York University.

Elinor Molbegott (ElinorM328@aol.com) maintains a law practice in East Williston, New York, focused on animal rights/protection. She is Legal Counsel/Animal Issues for the Humane Society of New York and represents North Shore Animal League America as well as other humane organizations. In addition to advising North Shore Animal League America on various legal matters, Elinor authors the Pet Legal Advice column on the League's website. She is also a trustee for the Albert Schweitzer Animal Welfare Fund. Elinor served as chair of the Nassau County Bar Association's Animal Law Committee and as a board member of the Mayor's Alliance for New York City's Animals and Animal Rights International. She was the first General Counsel for The American Society for the Prevention of Cruelty to Animals (ASPCA) where she established the Society's legislative program. She was Adjunct Professor of Law at Pace University Law School where she taught an animal law course, one of the first of its kind. Elinor was chair and founder of the first American Bar Association's Animal Protection Committee and edited the ABA's Animal Law Report. She served on the Animals and the Law Committee of the New York State Bar Association and is a life fellow of the American Bar Foundation. Elinor earned her undergraduate degree from Boston University, magna cum laude, and her law degree from Albany Law School of Union University.

Elinor drafted and worked for passage of numerous animal protection bills that have been enacted into law, including laws extending rights of tenants with companion animals, expanding humane education, requiring shelters to spay/neuter prior to adoption, establishing an animal population control fund to help subsidize low-income individuals to have their dogs and cats spayed and neutered, regulating pet dealers and groomers, increasing penalties for cruelty to animals, banning piercing and design tattoos on companion animals, allowing veterinarians to satisfy continuing education requirements by providing free spay/neuter of shelter animals, and regulating horses used for rental purposes.

David J. Wolfson (dwolfson@milbank.com) is a partner and Executive Director of Milbank, Tweed, Hadley & McCloy, LLP. He has practiced extensively in the field of animal protection on a pro bono basis, and has represented organizations such as HSUS, MFA and Farm Sanctuary. He currently teaches Animal Law at NYU Law School, and Animal Protection and Public Policy at NYU, and has previously taught at Columbia Law School and Harvard Law School. He has published in the area, with a focus on farmed animal issues.

I. *The Intersection of New York's Animal Cruelty Law and the Environmental Conservation Law – Elinor Molbegott*

A. Recommended Reading:

1. David Favre, *Wildlife Jurisprudence*, 25 JOURNAL OF ENVIRONMENTAL LAW & LITIGATION 459 (2010), http://digitalcommons.law.msu.edu/cgi/viewcontent.cgi?article=1172&context=facpubs.
    - Abstract: Historically, wildlife have not had independent standing in the legal system. Rather, the legal system has presumed that wildlife are available for use and consumption by humans, thus their lower legal status as "things." But as this Article explores, human views toward wildlife have recently been evolving. It is time to take full measure of where wildlife presently stand within the realm of jurisprudence, as well as what is possible for the future. As humanity comes to accept that we share this earth with other species as part of a global community, and that an ethical duty exists toward wildlife, the necessity of change within jurisprudence becomes stronger. The historical human attitude of unlimited consumption of wildlife, or even the more benign attitude of live and let live—do no harm—is unsupportable in a world of seven billion human beings who possess an ever-increasing appetite for the consumption of material goods. The ecosystems of the Earth are being destroyed at a historically alarming rate. Assuming a level of ethical duty toward wildlife, it is clear that to fulfill our obligations toward wildlife, humans must adopt an agenda that goes beyond a passive attempt to save existing ecosystems. This duty supports an obligation to both protect and actively restore the ecosystems where wildlife live. The realization of these goals should be accomplished by allowing wildlife an enhanced presence in the legal system and by making their interests more visible when humans make decisions impacting wildlife and their habitat. The enhanced presence of wildlife on the stage of jurisprudence will give greater weight to their interests in the everyday balancing of interests that is the bread and butter of the legal process.
    - "Our legal system can and should provide for (1) the presence of individual animals as persons in the legal system, (2) the direct, intentional balancing of the interests of wildlife versus human interests, (3) restraints against the unnecessary killing of wildlife, and (4) enhancements for the creation and protection of habitat."

2. Lee Hall, *Beyond a Government-the-Hunter Paradigm: Challenging Government Policies on Deer in a Critical Ecological Era*, 30 JOURNAL OF ENVIRONMENTAL LAW & LITIGATION 255 (2015), https://scholarsbank.uoregon.edu/xmlui/bitstream/handle/1794/18935/Hall.pdf?sequence=1&isAllowed=y

- Abstract: This Article examines the current forcible model of deer control sweeping the United States and proposes another model in its stead: one that adapts and works symbiotically with natural processes. Effective resource management and sound environmental ethics are supported by a shift away from heavy-handed animal control. A shift in management perspective makes sense when the presence of deer is officially treated as a "pest" problem. Although, with time and patience, a natural balance could be achieved. Moreover, forcible animal control can diminish biodiversity and exacerbate climate change in ways science is just beginning to understand. Emerging research results indicate the need for policy changes.
- "State anticruelty laws recognize and attach legal significance to animals' suffering—one element of consciousness. A parallel concept need not be missing from law and policy pertaining to animals in natural settings, as it is missing today."
- Praises the NYS Department of Environmental Conservation website about human-coyote coexistence: Coyote Conflicts, N.Y. STATE DEP'T OF ENVT'L CONSERVATION, http://www.dec.ny.gov/animals/6971.html

3. Joseph Simpson, *Extra! Extra! New Housing Developments Lead Coyotes to Homelessness and Violence*, 22 Animal Law 249 (2016)
    - Summary: As city sprawl spreads into less-developed rural regions, these new residents enjoy living close to nature but also put their pets and children at risk of encountering dangerous wildlife, such as coyotes. Cities have a variety of options, legal and otherwise, to regulate human and coyote behavior in order to reduce conflict. This Article analyzes the situation in the cities of Chino Hills and Yorba Linda, two southern California communities on the edge of Chino Hills State Park that have received local media attention for human-coyote interactions. Growing cities can use zoning to separate coyotes from humans and avoid drawing coyotes into cities, but land-use planners will be limited due to existing uses and possible takings claims from landowners. Cities can regulate the human behavior that draws coyotes into a city, or they can regulate the coyotes themselves through relocation, hazing, or hunting. This Article concludes by encouraging municipalities to use their police power to take early action, therefore preventing coyotes from habituating to humans by regulating human behavior and city development and also adopting coyote management plans that educate their citizens.

4. Devin Kenney, *Aesthetic Danger: How the Humane Need for Light and Spacious Views Kills Birds and What We Can (and Should) Do to Fix this Invisible Hazard*, 11 JOURNAL OF ANIMAL & NATURAL RESOURCE LAW 137, https://www.animallaw.info/sites/default/files/jouranimallawvol11.pdf
    - Summary: Despite national and international protections, migratory birds are in decline. Interestingly, on e of the most insidious of these

hazards is glad. This Article suggests best practices to staunch the continuing loss to threatened and endangered bird populations, addresses potential criticism of those protections and finally calls on public and private entities to undertake the research necessary to do so.

5. Peter L. Fizgerald, *Good Badger, Bad Badger: The Impact of Perspective on Wildlife Law and Policy*, 10 JOURNAL OF ANIMAL & NATURAL RESOURCE LAW 41 (2014), https://www.animallaw.info/sites/default/files/Good%20Badger%2C%20Bad%20Badger%20The%20Impact%20of%20Perspective.pdf

- Summary: The Law Commission of England and Wales is examining how the country's rich patchwork of wildlife laws might be updated. At the same time the government, advocates, and the public are in the midst of a vigorous debate over whether badgers should be culled in an effort to control the spread bovine tuberculosis within the United Kingdom. Both of these efforts highlight how divergent views regarding our relationship to wildlife and the natural environment in the 21st century influence both broad questions regarding the structure of laws and regulations affecting wildlife, generally, as well as how to approach very specific problems and issues. While these sorts of debates over wildlife are not new, the vast majority of the population in the U.K. and many other industrialized countries has lost much of its connection to the wild as urbanization has continued to grow. Accordingly, what is new in today's world is the degree to which popular support for one or another position advanced by interested parties depends not upon actual experience with nature and wildlife but rather with the popular public image of the wildlife at issue—and whether they are perceived as either "good" or "bad".

6. Diana Norris, *et al.*, Fund for Animals, *Canned Hunts: Unfair at Any Price* (2002), https://www.animallaw.info/article/canned-hunts-unfair-any-price.

- Summary: This article explores the issues surrounding "canned hunts." Section I provides an introduction and overview; explores the ethical objections to canned hunts based on standards generally accepted by the sport hunting community; raises questions about the appropriate legal analogy that should be applied to canned hunts; and discusses the serious animal health and public health issues raised by canned hunts. Section II catalogs the relevant statutes and regulations of each state with an example of a model ordinance relating to the regulation of canned hunts.

7. N.Y.S. Department of Environmental Conservation, *Pheasant Propagation Program Overview*, http://www.dec.ny.gov/outdoor/49071.html

- Summary: The pheasant propagation program reaches thousands of New Yorker's by providing hunting and viewing opportunities. First and foremost, it provides sportsmen and sportswomen the opportunity

to enjoy an open field hunting experience that is gradually disappearing with changing land use patterns across the state. The program provides access to thousands of acres of old fields and cropland where hunters can go afield and hunt pheasants. Many hunters across the state own and care for hunting dogs that are specially trained to hunt pheasants or other game birds of open fields. The cooperator programs also provide a means for youth and adults to learn about the husbandry and natural history of pheasants, with an incentive to expand areas open for public hunting and to improve habitat for grassland wildlife species. Youth and adults spend hours caring for and releasing birds propagated through the state cooperator programs. The state propagation program provides quality disease-free birds and outstanding customer service to its constituents.

B. Laws:

1. New York Environmental Conservation Law § 11-0523. Destructive or menacing wildlife; taking without permit

1. Owners and lessees and members of their immediate families actually occupying or cultivating lands, and persons authorized in writing and actually employed by them in cultivating such lands, may take (a) unprotected wildlife other than birds and (b) starlings, common crows and, subject to section 11-0513, pigeons, when such wildlife is injuring their property or has become a nuisance thereon. Such taking may be done in any manner, notwithstanding any provision of the Fish and Wildlife Law, except section 11-0513, or the Penal Law or any other law.

2. Any bear killing or worrying livestock on land occupied or cultivated, or destroying an apiary thereon, may be taken or killed, at any time, by shooting or device to entrap or entice on such land, by the owner, lessee or occupant thereof, or any member of the owner's, lessee's or occupant's immediate family or by any person employed by such owner, lessee or occupant. The owner or occupant of such lands shall promptly notify the nearest environmental conservation officer and deliver to such officer the carcass of any bear killed pursuant to this subdivision. The environmental conservation officer shall dispose of the carcass as the department may direct.

3. Red-winged blackbirds, common grackles and cowbirds destroying any crop may be killed during the months of June, July, August, September and October by the owner of the crop or property on which it is growing or by any person in his employ.

4. Varying hares, cottontail rabbits and European hares which are injuring property on occupied farms or lands may be taken thereon, at any time, in any manner, except by the use of ferrets, fitch-ferrets or fitch, by the owners or

occupants of such farms or lands or by a person authorized in writing by them and actually employed by them in cultivating such farm lands.

5. Skunks injuring property or which have become a nuisance may be taken at any time in any manner.

6. Raccoons, *muskrats*, coyotes or fox injuring private property may be taken by the owner, occupant or lessee thereof, or an employee or family member of such owner, occupant or lessee, at any time in any manner.

7. Whenever black, grey and fox squirrels, opossums or weasels are injuring property on occupied farms or lands or dwellings, they may be taken at any time in any manner, by the owners or occupants thereof or by a person authorized in writing by such owner or occupant.

8. No license or permit from the department is required for any taking authorized by this section.

9. Varying hares, cottontail rabbits, skunks, black, grey and fox squirrels, raccoons, *muskrats*, opossums or weasels taken pursuant to this section in the closed season or in a manner not permitted by section 11-0901 shall be immediately buried or cremated. No person shall possess or traffic in such skunks or raccoons or the pelts thereof or in such varying hares or cottontail rabbits or the flesh thereof.

2. New York Environmental Conservation Law § 11-0524. Nuisance wildlife control operators

1. No person shall charge a fee to take, possess, transport or release wildlife whenever it becomes a nuisance pursuant to section 11-0505, 11-0507, 11-0521, or 11-0523 of this title unless such person has been issued a nuisance wildlife control operator license by the department.

2. No person shall be issued a license by the department under this section unless he or she provides evidence satisfactory to the department, that he or she has completed nuisance wildlife control training. In addition to any other requirements of the department, such training shall include training in site evaluation, methods of resolving common nuisance wildlife problems, including, but not limited to, non-lethal methods; exclusion methods; habitat modification; and capture and handling techniques.

3. The department may issue a revocable nuisance wildlife control operator license and adopt regulations concerning the qualifications for such license and the terms and conditions of such license provided, however, that any such regulations, terms and conditions include training requirements consistent with subdivision two of this section.

4. The fee for a nuisance wildlife control operator license shall be fifty dollars paid annually to be deposited in the conservation fund established pursuant to section eighty-three of the state finance law, provided, however, that a municipality shall not be subject to this fee.

5. Any person licensed pursuant to this section shall submit annually a report to the department which specifies each client's name and address, the date work was performed, the species controlled, the abatement method used, the disposition of the animal, and any other information as required by the department. The department shall annually update a list of nuisance wildlife control operators and make it available to the public in both printed and electronic formats.

3. New York Environmental Conservation Law § 11-0513. Pigeons

1. No person shall at any time, by any means or in any manner capture, kill or attempt to capture or kill any Antwerp or homing pigeon, wearing a ring or seamless leg band with its registered number stamped thereon; nor shall any person remove such mark. No person except the lawful owner shall detain, possess, or transport Antwerp or homing pigeons wearing a ring or seamless leg band with the registered number thereon.

2. Notwithstanding any other law to the contrary, the local legislative body of any city, town or village, or in the city of New York the Department of Health may take or issue a permit to any person to take pigeons at any time and in any humane manner in such municipality, whenever such body or administration finds that pigeons within such municipality are or may become a menace to public health or a public nuisance; provided, however, that no pigeon may be taken in a manner which will endanger other animal life, persons or property.

4. New York Environmental Conservation Law § 11-0531. Bounties prohibited.

Notwithstanding any other provision of this chapter, or any other law, rule or regulation to the contrary, it shall be unlawful for any department or division of this state, or any political subdivision thereof to pay bounties on the taking of wildlife, except when the state Department of Health, or any local health authorities, determine that a given type or class of animals constitute a health hazard as carriers or potential carriers of disease.

5. New York Environmental Conservation Law § 11-1904. Canned shoots prohibited.

1. No person who owns, operates or manages a facility that harbors non-native big game mammals shall knowingly permit:

a. The taking on such premises by any person who pays a fee to take a live non-native big game mammal by any of the following means:

(1) the shooting or spearing of a non-native big game mammal that is tied or hobbled;
(2) the shooting or spearing of a non-native big game mammal that is staked or attached to any object;
(3) the shooting or spearing of a non-native big game mammal that is confined in a box, pen, cage or similar container of ten or less contiguous acres from which there is no means for such mammal to escape;
(4) the deliberate release of a non-native big game mammal that is confined in a box, pen, cage or similar container of ten or less contiguous acres in the presence of any person who is, or will be, shooting or spearing such non-native big game mammal.
b. For purposes of this section:
(1) shooting shall mean the discharge of any type of firearm or bow and arrow; and
(2) spearing shall mean the use of any hand or mechanically propelled single or multiple pronged pike, blade, or harpoon.

2. Nothing contained in this section shall be deemed to prohibit:

a. The lawful taking, hunting or trapping of an animal as provided in this chapter or other law, rule or regulation of the state of New York; or

b. The lawful slaughtering of an animal as provided in the agriculture and markets law of New York state or as permitted by the United States Department of Agriculture; or c. The killing of an animal that is menacing in a manner likely to cause serious injury or death to human beings.

6. New York Agriculture & Markets Law § 353. Overdriving, torturing and injuring animals; failure to provide proper sustenance.

A person who overdrives, overloads, tortures or cruelly beats or unjustifiably injures, maims, mutilates or kills any animal, whether wild or tame, and whether belonging to himself or to another, or deprives any animal of necessary sustenance, food or drink, or neglects or refuses to furnish it such sustenance or drink, or causes, procures or permits any animal to be overdriven, overloaded, tortured, cruelly beaten, or unjustifiably injured, maimed, mutilated or killed, or to be deprived of necessary food or drink, or who willfully sets on foot, instigates, engages in, or in any way furthers any act of cruelty to any animal, or any act tending to produce such cruelty, is guilty of a class A misdemeanor and for purposes of paragraph (b) of subdivision one of section 160.10 of the criminal procedure law, shall be treated as a misdemeanor defined in the penal law.

Nothing herein contained shall be construed to prohibit or interfere with any properly conducted scientific tests, experiments or investigations, involving the use of living animals, performed or conducted in laboratories or institutions,

which are approved for these purposes by the state commissioner of health. The state commissioner of health shall prescribe the rules under which such approvals shall be granted, including therein standards regarding the care and treatment of any such animals. Such rules shall be published and copies thereof conspicuously posted in each such laboratory or institution.

The state commissioner of health or his duly authorized representative shall have the power to inspect such laboratories or institutions to insure compliance with such rules and standards. Each such approval may be revoked at any time for failure to comply with such rules and in any case the approval shall be limited to a period not exceeding one year.

7. New York Agriculture & Markets Law § 353-a. Aggravated cruelty to animals.

1. A person is guilty of aggravated cruelty to animals when, with no justifiable purpose, he or she intentionally kills or intentionally causes serious physical injury to a companion animal with aggravated cruelty. For purposes of this section, "aggravated cruelty" shall mean conduct which: (i) is intended to cause extreme physical pain; or (ii) is done or carried out in an especially depraved or sadistic manner.

2. Nothing contained in this section shall be construed to prohibit or interfere in any way with anyone lawfully engaged in hunting, trapping, or fishing, as provided in article eleven of the environmental conservation law, the dispatch of rabid or diseased animals, as provided in article twenty-one of the public health law, or the dispatch of animals posing a threat to human safety or other animals, where such action is otherwise legally authorized, or any properly conducted scientific tests, experiments, or investigations involving the use of living animals, performed or conducted in laboratories or institutions approved for such purposes by the commissioner of health pursuant to section three hundred fifty-three of this article.

3. Aggravated cruelty to animals is a felony. A defendant convicted of this offense shall be sentenced pursuant to paragraph (b) of subdivision one of section 55.10 of the penal law provided, however, that any term of imprisonment imposed for violation of this section shall be a definite sentence, which may not exceed two years.

NEW YORK State of Opportunity | Department of Environmental Conservation

LICENSE DURATION
October 1 _____ to
September 30 _____

Page _____ of _____

Nuisance Wildlife Control
Log

For more information on this license visit www.dec.ny.gov/permits/28635.html

- ☐ Pursuant to condition 25 on the Nuisance Wildlife Control Operator License, the licensee shall keep and maintain an accurate log on a weekly basis.
- ☐ Pursuant to condition 26 on the Nuisance Wildlife Control Operator License, the licensee shall submit an accurate log as part of the license renewal process.
- ☐ Please make additional copies of this log if more entries are needed.
- ☐ Please read the instruction sheet for directions on filling in log.
- ☐ Sign and date the form in the spaces provided.

APPLICANT INFORMATION

Name: 1. Last _____ First _____ MI _____

Address: 2. Street Address _____ 3. City _____ 4. State _____ 5. Zip _____

(_____) _____ - _____ 6. Telephone Number

7. NWCO License Number _____

8. DEC Region _____

9. County of Residence _____

PLEASE READ ALL INSTRUCTIONS BEFORE COMPLETING LOG

10. Name and address of complainant	11. Data performed	12. Nuisance species	13. Complaint type	14. Abatement method	15. Area of complaint	16. Number of traps	17. Species and number taken	18. Disposition of animal

II. *Farmed Animals and the Environment – David J. Wolfson*

A. Recommended Reading:

1. DAVID J. WOLFSON & MARIANN SULLIVAN, FOXES IN THE HEN HOUSE – ANIMALS, AGRIBUSINESS AND THE LAW: A MODERN AMERICAN FABLE, ANIMAL RIGHTS: CURRENT DEBATES AND NEW DIRECTIONS 205 (Cass R. Sunstein & Martha C. Nussbaum, eds., 2004,), http://www.animalwelfareadvocacy.org/externals/Foxes%20in%20the%20Henhouse.pdf
    - Summary: This chapter explores the use of animals for food and the realities of farmed-animal law. It shows how farmed animals receive no effective legal protection in the U.S.A., and details how the law to determine whether or not a farming practice is illegally cruel has been altered to transfer the power from the court to the farmed-animal industry. The chapter provides a concrete sense of the extent of the problem and of what should be done about it.

2. David N. Cassuto, *Environment, Ethics, and the Factory Farm*, 54 SOUTH TEXAS LAW REVIEW 579 (2013), http://digitalcommons.pace.edu/cgi/viewcontent.cgi?article=1967&context=lawfaculty

3. Brian Machinova *et al.*, *Biodiversity conservation: The Key is Reducing Meat Consumption*, 536 SCIENCE OF THE TOTAL ENVIRONMENT 419 (2015), http://www.cof.orst.edu/leopold/papers/Machovina_2015.pdf
    - Abstract: The consumption of animal-sourced food products by humans is one of the most powerful negative forces affecting the conservation of terrestrial ecosystems and biological diversity. Livestock production is the single largest driver of habitat loss, and both livestock and feedstock production are increasing in developing tropical countries where the majority of biological diversity resides. Bushmeat consumption in Africa and southeastern Asia, as well as the high growth-rate of per capita livestock consumption in China are of special concern. The projected land base required by 2050 to support livestock production in several megadiverse countries exceeds 30–50% of their current agricultural areas. Livestock production is also a leading cause of climate change, soil loss, water and nutrient pollution, and decreases of apex predators and wild herbivores, compounding pressures on ecosystems and biodiversity. It is possible to greatly reduce the impacts of animal product consumption by humans on natural ecosystems and biodiversity while meeting nutritional needs of people, including the projected 2–3 billion people to be added to human population. We suggest that impacts can be remediated through several solutions: (1) **reducing demand for animal-based food products and increasing proportions of plant-based foods in diets, the latter**

ideally to a global average of 90% of food consumed; (2) replacing ecologically-inefficient ruminants (e.g. cattle, goats, sheep) and bushmeat with monogastrics (e.g. poultry, pigs), integrated aquaculture, and other more-efficient protein sources; and (3) reintegrating livestock production away from singleproduct intensive, fossil-fuel based systems into diverse, coupled systems designed more closely around the structure and functions of ecosystems that conserve energy and nutrients. Such efforts would also impart positive impacts on human health through reduction of diseases of nutritional extravagance

4. J. Nicholas Hoover, *Can't You Smell That Smell?,* CLEAN AIR ACT FIXES FOR FACTORY FARM AIR POLLUTION, 6 STANFORD JOURNAL OF ANIMAL LAW AND POLICY 1 (2013), https://journals.law.stanford.edu/sites/default/files/print/issues/hoover_1.pdf
    - Abstract: Massive facilities that keep large numbers of livestock have overtaken small, independent farms as the primary source of meat, eggs, and dairy in the United States. These concentrated animal feeding operations ("CAFOs") compare more to industrial manufacturing operations than to traditional farms, and emit huge quantities of air pollutants that are harmful to public health, sickening people and damaging the environment. The Environmental Protection Agency ("EPA") possesses statutorily provided tools under the Clean Air Act that it uses to regulate other polluting industries. However, this article – after reviewing the rise of CAFOs, examining the threats they pose, and surveying current regulation – suggests that the EPA's approach to CAFOs is grossly inadequate. The article Jargues that the agency, under the Clean Air Act, should regulate the emissions of hydrogen sulfide and ammonia, two pollutants for which factory farms are major sources. This approach is incomplete, however. Pollutant-based regulation is both overbroad in that it will regulate other sources of these pollutants and underbroad because CAFO air pollution includes more than just these pollutants. The EPA should therefore additionally or alternatively rely on a more thorough and flexible pollution source-specific tool, the New Source Performance Standards ("NSPS"). NSPS are analogous to the rigorous source-specific approach used to regulate CAFO water pollution under the Clean Water Act, and will provide a comprehensive antidote to the ills of modern, industrial animal agriculture.

5. David E. Solan, *Et Tu Lisa Jackson? An Economic Case for Why the EPA's Sweeping Environmental Regulatory Agenda Hurts Animal Welfare on Factory Farms,* 8 JOURNAL OF ANIMAL & NATURAL RESOURCE LAW 27 (2012), https://www.animallaw.info/sites/default/files/Journal%20of%20Animal%20Law%20Vol%208%20no%20illus.pdf
    - Summary: Over the last several years, animal protection groups have increasingly partnered with environmentalists to ratchet up the environmental regulation of factory farms. This alliance has manifested

itself in two primary ways: first, leading animal protection groups have supported the bold activism of Lisa Jackson, the Administrator of the EPA, in seeking to lasso factory farms into compliance with environmental laws; and second, these groups have engaged in a litigation strategy of suing factory farms under environmental statutes.

The Article aims to challenge the popular wisdom among the animal protection community that increased collaboration with the environmental movement confers mutual benefits. On the contrary, it seems misplaced to view Jackson as a champion of animal welfare, and misguided to view the environmental movement as a reliable ally. Upon closer inspection, it appears that the animal protection movement and the environmental movement have divergent interests, and Jackson's activism could in fact pose a great threat to animal welfare on factory farms.

The Article argues that each of the three major goals of the animal protection movement in the realm of the farmed animal industry may be undermined by increased environmental regulation. To the contrary, the EPA's activism could fail to change consumption patterns, lead to a reduction of animal welfare, and empower big factory farms at the expense of small farmers. Lastly, the Article concludes that a better approach would be for the animal protection movement to focus its fire on state-level laws and/or ballot initiatives that directly enhance animal welfare.

6. PEW COMMISSION ON INDUSTRIAL FARM ANIMAL PRODUCTION, PUTTING MEAT ON THE TABLE: INDUSTRIAL FARM ANIMAL PRODUCTION IN AMERICA (2008), http://www.pewtrusts.org/~/media/legacy/uploadedfiles/peg/publications/report/pcifapfinalpdf.pdf
    - Summary: Over the last 50 years, the method of producing food animals in the United States has changed from the extensive system of small and medium-sized farms owned by a single family to a system of large, intensive operations where the animals are housed in large numbers in enclosed structures that resemble industrial buildings more than they do a traditional barn. That change has happened primarily out of view of consumers but has come at a cost to the environment and a negative impact on public health, rural communities, and the health and well-being of the animals themselves.

      The Pew Commission on Industrial Farm Animal Production (PCIFAP) was funded by a grant from The Pew Charitable Trusts to the Johns Hopkins Bloomberg School of Public Health to investigate the problems associated with industrial farm animal production (IFAP) operations and to make recommendations to solve them. Fifteen Commissioners with diverse backgrounds began meeting in early 2006 to start their evidence-based review of the problems caused by IFAP.

7. Gidon Eshel and Pamela A. Martin, *Diet Energy, and Global Warming*, 10 EARTH INTERACTIONS 1 (2006), http://journals.ametsoc.org/doi/pdf/10.1175/EI167.1
    - Abstract: The energy consumption of animal- and plant-based diets and, more broadly, the range of energetic planetary footprints spanned by reasonable dietary choices are compared. It is demonstrated that the greenhouse gas emissions of various diets vary by as much as the difference between owning an average sedan versus a sport-utility vehicle under typical driving conditions. The authors conclude with a brief review of the safety of plant-based diets, and find no reasons for concern.

8. Stefan Schwarzer, *United Nations Environment Programme, Growing greenhouse gas emissions due to meat production*, UNEP GLOBAL ENVIRONMENTAL ALERT SERVICE (Oct. 2012), http://www.unep.org/pdf/unep-geas_oct_2012.pdf
    - Summary: Both intensive (industrial) and non-intensive (traditional) forms of meat production result in the release of greenhouse gases (GHGs), contributing to climate change. As meat supply and consumption increase around the world, more sustainable food systems must be encouraged.

9. CARRIE HRIBAR, NATIONAL ASSOCIATION OF LOCAL BOARDS OF HEALTH, UNDERSTANDING CONCENTRATED ANIMAL FEEDING OPERATIONS AND THEIR IMPACT ON COMMUNITIES (2010), https://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf

10. HUMANE SOCIETY INTERNATIONAL, AN HSI REPORT: THE IMPACT OF ANIMAL AGRICULTURE ON GLOBAL WARMING AND CLIMATE CHANGE (2011), http://www.humanesociety.org/assets/pdfs/farm/hsus-the-impact-of-animal-agriculture-on-global-warming-and-climate-change.pdf

B. Laws:

1. Humane Methods of Slaughter Act (7 U.S.C. §§ 1901-1907)

2. Humane Slaughter of Livestock Regulations (9 C.F.R. Part 313)

3. 28-Hour Rule (49 U.S.C. § 80502)

III. *CAFOs - Meeting the Clean Water Requirements – Michael Dulong*

A. Recommended Reading:

1. KARL CZYMMEK, ET AL., CORNELL UNIVERSITY, ANIMAL SCIENCE PUBLICATION SERIES NO. 240, MANURE MANAGEMENT GUIDELINES FOR LIMESTONE BEDROCK/KARST AREAS OF GENESEE COUNTY, NEW YORK: PRACTICES FOR RISK REDUCTION, (2011), http://nmsp.cals.cornell.edu/publications/files/Karst_2_15_2011.pdf.

2. KARL CZYMMEK, ET AL., CORNELL UNIVERSITY, ANIMAL SCIENCE PUBLICATION SERIES NO. 245, REVISED WINTER AND WET WEATHER MANURE SPREADING GUIDELINES TO REDUCE WATER CONTAMINATION RISK (DEC. 2015), http://nmsp.cals.cornell.edu/publications/files/WinterSpreadingGuidelines2015.pdf.

3. NATURAL RESOURCES CONSERVATION SERVICE, NEW YORK, CONSERVATION PRACTICE STANDARD, NUTRIENT MANAGEMENT CODE 590 (JAN. 2013), http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs144p2_027006.pdf.

4. Joint letter from Michael Dulong, Riverkeeper, Inc. and Eve C. Gartner & Tucker Wisdom-Stack, Earthjustice, to Douglas Ashline, N.Y.S. Department of Environmental Conservation, Division of Water, re: Comments on Draft SPDES General Permits for Concentrated Animal Feeding Operations Permit Nos. GP-0-16-001 and GP-0-16-002 (Feb. 12, 2016), https://www.riverkeeper.org/wp-content/uploads/2016/03/CCE-et-al-CAFO-General-Permits-Comments-02-122016-with-appendices-1.pdf.

5. New York State Department of Environmental Conservation, Draft Environmental Conservation Law Concentrated Animal Feeding Operations Permit, http://www.dec.ny.gov/docs/water_pdf/cafogp016001ecl.pdf.

6. New York State Department of Environmental Conservation, Draft Clean Water Act Concentrated Animal Feeding Operations Permit, http://www.dec.ny.gov/docs/water_pdf/cafogp016002cwa.pdf.

B. Cases and Laws:

1. *Waterkeeper Alliance, Inc. v. E.P.A.*, 399 F.3d 486 (2d Cir. 2005)

2. *Nat'l Pork Producers Council v. U.S. E.P.A.*, 635 F.3d 738 (5th Cir. 2011)

3. 33 U.S. Code § 1362(14)

The term "point source" means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, or vessel or other floating craft, from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

4. 40 C.F.R. § 122.23 Concentrated animal feeding operations (applicable to State NPDES programs, see § 123.25)

(a) Scope. Concentrated animal feeding operations (CAFOs), as defined in paragraph (b) of this section or designated in accordance with paragraph (c) of this section, are point sources, subject to NPDES permitting requirements as provided in this section. Once an animal feeding operation is defined as a CAFO for at least one type of animal, the NPDES requirements for CAFOs apply with respect to all animals in confinement at the operation and all manure, litter, and process wastewater generated by those animals or the production of those animals, regardless of the type of animal.

(b) Definitions applicable to this section:

(1) Animal feeding operation ("AFO") means a lot or facility (other than an aquatic animal production facility) where the following conditions are met:

(i) Animals (other than aquatic animals) have been, are, or will be stabled or confined and fed or maintained for a total of 45 days or more in any 12-month period, and

(ii) Crops, vegetation, forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

(2) Concentrated animal feeding operation ("CAFO") means an AFO that is defined as a Large CAFO or as a Medium CAFO by the terms of this paragraph, or that is designated as a CAFO in accordance with paragraph (c) of this section. Two or more AFOs under common ownership are considered to be a single AFO for the purposes of determining the number of animals at an operation, if they adjoin each other or if they use a common area or system for the disposal of wastes.

(3) The term land application area means land under the control of an AFO owner or operator, whether it is owned, rented, or leased, to which manure, litter or process wastewater from the production area is or may be applied.

(4) Large concentrated animal feeding operation ("Large CAFO"). An AFO is defined as a Large CAFO if it stables or confines as many as or more than the numbers of animals specified in any of the following categories:

(i) 700 mature dairy cows, whether milked or dry;

(ii) 1,000 veal calves;

(iii) 1,000 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(iv) 2,500 swine each weighing 55 pounds or more;

(v) 10,000 swine each weighing less than 55 pounds;

(vi) 500 horses;

(vii) 10,000 sheep or lambs;

(viii) 55,000 turkeys;

(ix) 30,000 laying hens or broilers, if the AFO uses a liquid manure handling system;

(x) 125,000 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(xi) 82,000 laying hens, if the AFO uses other than a liquid manure handling system;

(xii) 30,000 ducks (if the AFO uses other than a liquid manure handling system); or

(xiii) 5,000 ducks (if the AFO uses a liquid manure handling system).

(5) The term manure is defined to include manure, bedding, compost and raw materials or other materials commingled with manure or set aside for disposal.

(6) Medium concentrated animal feeding operation ("Medium CAFO"). The term Medium CAFO includes any AFO with the type and number of animals that fall within any of the ranges listed in paragraph (b)(6)(i) of this section and which has been defined or designated as a CAFO. An AFO is defined as a Medium CAFO if:

(i) The type and number of animals that it stables or confines falls within any of the following ranges:

(A) 200 to 699 mature dairy cows, whether milked or dry;

(B) 300 to 999 veal calves;

(C) 300 to 999 cattle other than mature dairy cows or veal calves. Cattle includes but is not limited to heifers, steers, bulls and cow/calf pairs;

(D) 750 to 2,499 swine each weighing 55 pounds or more;

(E) 3,000 to 9,999 swine each weighing less than 55 pounds;

(F) 150 to 499 horses;

(G) 3,000 to 9,999 sheep or lambs;

(H) 16,500 to 54,999 turkeys;

(I) 9,000 to 29,999 laying hens or broilers, if the AFO uses a liquid manure handling system;

(J) 37,500 to 124,999 chickens (other than laying hens), if the AFO uses other than a liquid manure handling system;

(K) 25,000 to 81,999 laying hens, if the AFO uses other than a liquid manure handling system;

(L) 10,000 to 29,999 ducks (if the AFO uses other than a liquid manure handling system); or

(M) 1,500 to 4,999 ducks (if the AFO uses a liquid manure handling system); and

(ii) Either one of the following conditions are met:

(A) Pollutants are discharged into waters of the United States through a man-made ditch, flushing system, or other similar man-made device; or

(B) Pollutants are discharged directly into waters of the United States which originate outside of and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(7) Process wastewater means water directly or indirectly used in the operation of the AFO for any or all of the following: spillage or overflow from animal or poultry watering systems; washing, cleaning, or flushing pens, barns, manure pits, or other AFO facilities; direct contact swimming, washing, or spray cooling of animals; or dust control. Process wastewater also includes any water which comes into contact with any raw materials, products, or byproducts including manure, litter, feed, milk, eggs or bedding.

(8) Production area means that part of an AFO that includes the animal confinement area, the manure storage area, the raw materials storage area, and the waste containment areas. The animal confinement area includes but is not limited to open lots, housed lots, feedlots, confinement houses, stall barns, free stall barns,

milkrooms, milking centers, cowyards, barnyards, medication pens, walkers, animal walkways, and stables. The manure storage area includes but is not limited to lagoons, runoff ponds, storage sheds, stockpiles, under house or pit storages, liquid impoundments, static piles, and composting piles. The raw materials storage area includes but is not limited to feed silos, silage bunkers, and bedding materials. The waste containment area includes but is not limited to settling basins, and areas within berms and diversions which separate uncontaminated storm water. Also included in the definition of production area is any egg washing or egg processing facility, and any area used in the storage, handling, treatment, or disposal of mortalities.

(9) Small concentrated animal feeding operation ("Small CAFO"). An AFO that is designated as a CAFO and is not a Medium CAFO.

(c) How may an AFO be designated as a CAFO? The appropriate authority (i.e., State Director or Regional Administrator, or both, as specified in paragraph (c)(1) of this section) may designate any AFO as a CAFO upon determining that it is a significant contributor of pollutants to waters of the United States.

(1) Who may designate?

(i) Approved States. In States that are approved or authorized by EPA under Part 123, CAFO designations may be made by the State Director. The Regional Administrator may also designate CAFOs in approved States, but only where the Regional Administrator has determined that one or more pollutants in the AFO's discharge contributes to an impairment in a downstream or adjacent State or Indian country water that is impaired for that pollutant.

(ii) States with no approved program. The Regional Administrator may designate CAFOs in States that do not have an approved program and in Indian country where no entity has expressly demonstrated authority and has been expressly authorized by EPA to implement the NPDES program.

(2) In making this designation, the State Director or the Regional Administrator shall consider the following factors:

(i) The size of the AFO and the amount of wastes reaching waters of the United States;

(ii) The location of the AFO relative to waters of the United States;

(iii) The means of conveyance of animal wastes and process waste waters into waters of the United States;

(iv) The slope, vegetation, rainfall, and other factors affecting the likelihood or frequency of discharge of animal wastes manure and process waste waters into waters of the United States; and

(v) Other relevant factors.

(3) No AFO shall be designated under this paragraph unless the State Director or the Regional Administrator has conducted an on-site inspection of the operation and determined that the operation should and could be regulated under the permit program. In addition, no AFO with numbers of animals below those established in paragraph (b)(6) of this section may be designated as a CAFO unless:

(i) Pollutants are discharged into waters of the United States through a manmade ditch, flushing system, or other similar manmade device; or

(ii) Pollutants are discharged directly into waters of the United States which originate outside of the facility and pass over, across, or through the facility or otherwise come into direct contact with the animals confined in the operation.

(d) NPDES permit authorization.--(1) Permit Requirement. A CAFO must not discharge unless the discharge is authorized by an NPDES permit. In order to obtain authorization under an NPDES permit, the CAFO owner or operator must either apply for an individual NPDES permit or submit a notice of intent for coverage under an NPDES general permit.

(2) Information to submit with permit application or notice of intent. An application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(3) Information to submit with permit application. A permit application for an individual permit must include the information specified in § 122.21. A notice of intent for a general permit must include the information specified in §§ 122.21 and 122.28.

(e) Land application discharges from a CAFO are subject to NPDES requirements. The discharge of manure, litter or process wastewater to waters of the United States from a CAFO as a result of the application of that manure, litter or process wastewater by the CAFO to land areas under its control is a discharge from that CAFO subject to NPDES permit requirements, except where it is an agricultural storm water discharge as provided in 33 U.S.C. 1362(14). For purposes of this paragraph, where the manure, litter or process wastewater has been applied in accordance with site specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter or process wastewater, as specified in § 122.42(e)(1)(vi)-(ix), a precipitation-related discharge of manure, litter or process wastewater from land areas under the control of a CAFO is an agricultural stormwater discharge.

(1) For unpermitted Large CAFOs, a precipitation-related discharge of manure, litter, or process wastewater from land areas under the control of a CAFO shall be considered an agricultural stormwater discharge only where the manure, litter, or process wastewater has been land applied in accordance with site-specific nutrient management practices that ensure appropriate agricultural utilization of the nutrients in the manure, litter, or process wastewater, as specified in § 122.42(e)(1)(vi) through (ix).

(2) Unpermitted Large CAFOs must maintain documentation specified in § 122.42(e)(1)(ix) either on site or at a nearby office, or otherwise make such documentation readily available to the Director or Regional Administrator upon request.

(f) By when must the owner or operator of a CAFO have an NPDES permit if it discharges? A CAFO must be covered by a permit at the time that it discharges.

(g) [Reserved]

(h) Procedures for CAFOs seeking coverage under a general permit. (1) CAFO owners or operators must submit a notice of intent when seeking authorization to discharge under a general permit in accordance with § 122.28(b). The Director must review notices of intent submitted by CAFO owners or operators to ensure that the notice of intent includes the information required by § 122.21(i)(1), including a nutrient management plan that meets the requirements of § 122.42(e) and applicable effluent limitations and standards, including those specified in 40 CFR part 412. When additional information is necessary to complete the notice of intent or clarify, modify, or supplement previously submitted material, the Director may request such information from the owner or operator. If the Director makes a preliminary determination that the notice of intent meets the requirements of §§ 122.21(i)(1) and 122.42(e), the Director must notify the public of the Director's proposal to grant coverage under the permit to the CAFO and make available for public review and comment the notice of intent submitted by the CAFO, including the CAFO's nutrient management plan, and the draft terms of the nutrient management plan to be incorporated into the permit. The process for submitting public comments and hearing requests, and the hearing process if a request for a hearing is granted, must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the general permit, an appropriate period of time for the public to comment and request a hearing that differs from the time period specified in 40 CFR 124.10. The Director must respond to significant comments received during the comment period, as provided in 40 CFR 124.17, and, if necessary, require the CAFO owner or operator to revise the nutrient management plan in order to be granted permit coverage. When the Director authorizes coverage for the CAFO owner or operator under the general permit, the terms of the nutrient management plan shall become incorporated as terms and conditions of the permit for the CAFO. The Director shall notify the CAFO owner or operator and inform the public that coverage has been authorized and of the terms of

the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(2) For EPA-issued permits only. The Regional Administrator shall notify each person who has submitted written comments on the proposal to grant coverage and the draft terms of the nutrient management plan or requested notice of the final permit decision. Such notification shall include notice that coverage has been authorized and of the terms of the nutrient management plan incorporated as terms and conditions of the permit applicable to the CAFO.

(3) Nothing in this paragraph (h) shall affect the authority of the Director to require an individual permit under § 122.28(b)(3).

5. 40 C.F.R. § 122.42(e)(6)

Changes to a nutrient management plan. Any permit issued to a CAFO must require the following procedures to apply when a CAFO owner or operator makes changes to the CAFO's nutrient management plan previously submitted to the Director:

(i) The CAFO owner or operator must provide the Director with the most current version of the CAFO's nutrient management plan and identify changes from the previous version, except that the results of calculations made in accordance with the requirements of paragraphs (e)(5)(i)(B) and (e)(5)(ii)(D) of this section are not subject to the requirements of paragraph (e)(6) of this section.

(ii) The Director must review the revised nutrient management plan to ensure that it meets the requirements of this section and applicable effluent limitations and standards, including those specified in 40 CFR part 412, and must determine whether the changes to the nutrient management plan necessitate revision to the terms of the nutrient management plan incorporated into the permit issued to the CAFO. If revision to the terms of the nutrient management plan is not necessary, the Director must notify the CAFO owner or operator and upon such notification the CAFO may implement the revised nutrient management plan. If revision to the terms of the nutrient management plan is necessary, the Director must determine whether such changes are substantial changes as described in paragraph (e)(6)(iii) of this section.

(A) If the Director determines that the changes to the terms of the nutrient management plan are not substantial, the Director must make the revised nutrient management plan publicly available and include it in the permit record, revise the terms of the nutrient management plan incorporated into the permit, and notify the owner or operator and inform the public of any changes to the terms of the nutrient management plan that are incorporated into the permit.

(B) If the Director determines that the changes to the terms of the nutrient management plan are substantial, the Director must notify the public and make the proposed changes and the information submitted by the CAFO owner or operator

available for public review and comment. The process for public comments, hearing requests, and the hearing process if a hearing is held must follow the procedures applicable to draft permits set forth in 40 CFR 124.11 through 124.13. The Director may establish, either by regulation or in the CAFO's permit, an appropriate period of time for the public to comment and request a hearing on the proposed changes that differs from the time period specified in 40 CFR 124.10. The Director must respond to all significant comments received during the comment period as provided in 40 CFR 124.17, and require the CAFO owner or operator to further revise the nutrient management plan if necessary, in order to approve the revision to the terms of the nutrient management plan incorporated into the CAFO's permit. Once the Director incorporates the revised terms of the nutrient management plan into the permit, the Director must notify the owner or operator and inform the public of the final decision concerning revisions to the terms and conditions of the permit.

(iii) Substantial changes to the terms of a nutrient management plan incorporated as terms and conditions of a permit include, but are not limited to:

(A) Addition of new land application areas not previously included in the CAFO's nutrient management plan. Except that if the land application area that is being added to the nutrient management plan is covered by terms of a nutrient management plan incorporated into an existing NPDES permit in accordance with the requirements of paragraph (e)(5) of this section, and the CAFO owner or operator applies manure, litter, or process wastewater on the newly added land application area in accordance with the existing field-specific permit terms applicable to the newly added land application area, such addition of new land would be a change to the new CAFO owner or operator's nutrient management plan but not a substantial change for purposes of this section;

(B) Any changes to the field-specific maximum annual rates for land application, as set forth in paragraphs (e)(5)(i) of this section, and to the maximum amounts of nitrogen and phosphorus derived from all sources for each crop, as set forth in paragraph (e)(5)(ii) of this section;

(C) Addition of any crop or other uses not included in the terms of the CAFO's nutrient management plan and corresponding field-specific rates of application expressed in accordance with paragraph (e)(5) of this section; and

(D) Changes to site-specific components of the CAFO's nutrient management plan, where such changes are likely to increase the risk of nitrogen and phosphorus transport to waters of the U.S.

(iv) For EPA-issued permits only. Upon incorporation of the revised terms of the nutrient management plan into the permit, 40 CFR 124.19 specifies procedures for appeal of the permit decision. In addition to the procedures specified at 40 CFR 124.19, a person must have submitted comments or participated in the public hearing in order to appeal the permit decision.

6. **New York Environmental Conservation Law § 3-0301, General functions, powers and duties of the department and the commissioner**

7. **New York Environmental Conservation Law § 17-0101, Declaration of policy**

It is declared to be the public policy of the state of New York to maintain reasonable standards of purity of the waters of the state consistent with public health and public enjoyment thereof, the propagation and protection of fish and wild life, including birds, mammals and other terrestrial and acquatic [aquatic] ** life, and the industrial development of the state, and to that end require the use of all known available and reasonable methods to prevent and control the pollution of the waters of the state of New York.

8. **New York Environmental Conservation Law § 17-0103, Statement of purpose**

It is the purpose of this article to safeguard the waters of the state from pollution by preventing any new pollution and abating pollution existing when the predecessor of this chapter was enacted, under a program consistent with the declaration of policy stated in section 17-0101.

9. **New York Environmental Conservation Law § 17-0105, Definitions applicable to portions of this article**

When used in titles 1 to 11, inclusive, and titles 14 and 19 of this article:

1. “Person” or “persons” means any individual, public or private corporation, political subdivision, government agency, municipality, industry, co-partnership, association, firm, trust, estate or any other legal entity whatsoever.

2. “Waters” or “waters of the state” shall be construed to include lakes, bays, sounds, ponds, impounding reservoirs, springs, wells, rivers, streams, creeks, estuaries, marshes, inlets, canals, the Atlantic ocean within the territorial limits of the state of New York and all other bodies of surface or underground water, natural or artificial, inland or coastal, fresh or salt, public or private (except those private waters which do not combine or effect a junction with natural surface or underground waters), which are wholly or partially within or bordering the state or within its jurisdiction.

3. “Marine district” shall include the waters of the Atlantic ocean within three nautical miles from the coast line and all other tidal waters within the state, except the Hudson river northerly of the south end of Manhattan Island.

4. “Sewage” means the water-carried human or animal wastes from residences, buildings, industrial establishments or other places, together with such ground water infiltration and surface water as may be present. The admixture with sewage as above defined of industrial wastes or other wastes as hereafter defined, shall also be considered “sewage” within the meaning of this article.

5. “Industrial waste” means any liquid, gaseous, solid or waste substance or a combination thereof resulting from any process of industry, manufacturing, trade, or business or from the development or recovery of any natural resources, which may cause or might reasonably be expected to cause pollution of the waters of the state in contravention of the standards adopted as provided herein.

6. “Other wastes” means garbage, refuse, decayed wood, sawdust, shavings, bark, sand, lime, cinders, ashes, offal, oil, tar, dyestuffs, acids, chemicals, ballast and all other discarded matter not sewage or industrial waste which may cause or might reasonably be expected to cause pollution of the waters of the state in contravention of the standards adopted as provided herein.

7. “Standard” or “Standards” means such measure of purity or quality for any waters in relation to their reasonable and necessary use as may be established by the department pursuant to section 17-0301.

8. “Sewer system” or “sewerage system” means pipe lines or conduits, pumping stations, and force mains, and all other constructions, devices, and appliances appurtenant thereto, used for conducting sewage, industrial waste or other wastes to a point of ultimate disposal.

9. “Treatment works” means any plant, disposal field, lagoon, pumping station, constructed drainage ditch or surface water intercepting ditch, incinerator, area devoted to sanitary land fills, or other works not specifically mentioned herein, installed for the purpose of treating, neutralizing, stabilizing or disposing of sewage, industrial waste or other wastes.

10. “Disposal system” means a system for disposing of sewage, industrial waste or other wastes, and including sewer systems and treatment works.

11. “Outlet” means the terminus of a sewer system, or the point of emergence of any water-borne sewage, industrial waste or other wastes or the effluent therefrom, into the waters of the state.

12. “Shellfish” includes oysters, scallops, claims [clams], ** mussels, and other aquatic mollusks, and lobsters, shrimp, crawfish, crabs and other aquatic crustaceans.

13. “State Pollutant Discharge Elimination System” or “SPDES” means the system established pursuant hereto for issuance of permits authorizing discharges to the waters of the state.

14. “National Pollutant Discharge Elimination System” or “NPDES” means the national system for the issuance of permits under the Federal Water Pollution Control Act.

15. “Effluent standard and/or limitation” means any restriction on quantities, quality, rates and concentrations of chemical, physical, biological, and other constituents of effluents which are discharged into or allowed to run from an outlet or point source into waters of the state promulgated by the federal government.

16. “Point source” means any discernible, confined and discrete conveyance, including but not limited to any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, vessel or other floating craft, or landfill leachate collection system from which pollutants are or may be discharged. This term does not include agricultural stormwater discharges and return flows from irrigated agriculture.

17. “Pollutant” means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand and industrial, municipal, and agricultural waste discharged into water; and ballast which may cause or might reasonably be expected to cause pollution of the waters of the state in contravention of the standards adopted as provided herein.

18. “Schedule of compliance” means a schedule of remedial measures including an enforceable sequence of actions or operations leading to compliance with an effluent limitation, other limitation, prohibition, or standard.

19. “Toxic pollutant” means those pollutants, or combination of pollutants, including disease-causing agents which after discharge and upon exposure, ingestion, inhalation or assimilation into any organism, either directly from the environment or indirectly through food chains, will, on the basis of information available to the department, cause death, disease, behavorial [behavioral] ** abnormalities, cancer, genetic mutations, physiological malfunctions, including malfunctions in reproduction, or physical deformations, in such organisms or their offspring.

20. “New source” means any source, the construction of which is commenced after the publication of a standard or performance applicable to such source under the provisions of the Act, provided such standard is thereafter promulgated and adopted.

21. “Standard of performance” means a standard for the control of the discharge of pollutants which reflects the greatest degree of effluent reduction which the federal government determines to be achievable through application of the best available demonstrated control technology, processes, operating methods, or other alternatives, including, where practicable, a standard permitting no discharge of pollutants.

22. “Toxic and pretreatment effluent standard” means standards adopted by the federal government pursuant to section 307 of the Act.

23. “Tanker” means any watercraft of more than three hundred gross tons and having a fully loaded draft of seven feet or more used to carry any liquid cargo, including petroleum, oil or water.

10. New York Environmental Conservation Law § 17-0803, SPDES permits; application

Except as provided by subdivision five of section 17-0701 of this article, it shall be unlawful to discharge pollutants to the waters of the state from any outlet or point source without a SPDES permit issued pursuant hereto or in a manner other than as prescribed by such permit. The department shall, by rule and regulation, require that every applicant for a permit to discharge pollutants into the waters of the state shall file such information at such times and in such form as the department may reasonably require to execute the provisions of this article. Rules and regulations adopted hereunder may provide that in lieu of issuance of such permit the department may accept as compliance herewith a permit duly issued by the federal government or an agency thereof pursuant to the provisions of the Act.

FOXES IN THE HEN HOUSE

Animals, Agribusiness and the Law: A Modern American Fable

by

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The views expressed by the authors in this chapter are solely their own.

Acknowledgments

The authors would like to thank Sara Amundson, Lydia Antoncic, Gene Bauston, Ellen Celnik, Len Egert, Kendra Fershee, Mary Finelli, Joseph S. Genova, Eva Hanks, Jane E. Hoffman, Michelle Jewett, Michael Markarian, Wayne Pacelle, Nancy Perry, Alan Rothstein, Peter Stevenson, Cass Sunstein, Amy Trakinski, Meredith Weisshaar and Steven M. Wise for their support and their assistance in connection with the preparation of this chapter.

The juxtaposition could not have been more telling. In the left column of the May 21, 2002 World Briefing section of The New York Times was a short story entitled, "Germany: Equal Rights For Animals." The German lower house of Parliament, the Times declared, "has voted overwhelmingly to amend the Constitution to protect animals." If approved by the upper house, the amendment would include animals in a clause obliging the state to respect and protect their dignity. In the opposite column on the same page was a picture of a bald chicken next to the headline, "Building A Better Chicken." The story described how scientists are developing a new breed of "featherless chicken" to allow farmers to produce birds faster and cut down on the processing of their bodies. The hope was that such chickens would grow faster, "save farmers money because less ventilation will be needed, be less fatty and will not have to be plucked after being killed."[1] Intentional or not, the presentation of these stories says much about our current legal treatment of farmed animals as compared to other animals.

There can be no doubt that change is in the air in relation to the legal status of animals. The philosophical debate is growing, and there is increased acceptance of the idea that the law must recognize that animals have intellectual, emotional and physical attributes which entitle them to certain basic rights beyond protection from egregious cruelty. In the most scholarly annals of the law, there is serious discussion over whether animals should continue to be legally classified as property, whether animals should have legal standing to enforce the federal Animal Welfare Act, and even whether it is possible for a chimpanzee to appear in court on her own behalf or receive constitutional protection. Underlying this debate is a presumption that the law currently provides some basic legal protection for animals, even if there is skepticism about its effectiveness or enforcement. In fact, in the United States, this presumption is to a large extent false.

Legal scholarship has failed to recognize that only a tiny percentage of animals with whom humans interact are *not* raised for food, and that the legal status of farmed animals is dramatically different from that of other animals. While non-farmed animals do have certain protections, albeit inadequate and poorly enforced, upon which future legal developments can be based, it is not unfair to say that, as a practical matter, farmed animals have no legal protection at all. As far as the law is concerned, they simply do not exist. One reason for this reality is the obvious fact that people do not like to think about how farmed animals are raised and killed.

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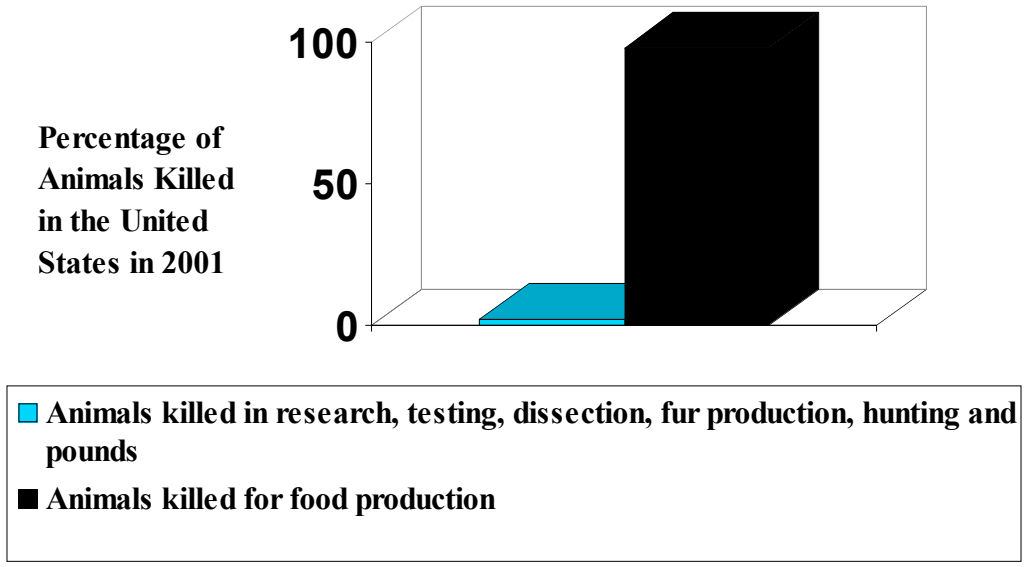
1 N.Y. Times, May 21, 2002, at A6.

This natural reluctance has been used by the farmed animal industry to perform an extraordinary legal sleight of hand – it has made farmed animals disappear from the law.

It is almost impossible to effectively describe the number of farmed animals. Approximately 9.5 billion animals die annually in food production in the United States. This compares with some 218 million killed by hunters and trappers, in animal shelters, in biomedical research, product testing, dissection and fur farms, *combined*. Approximately 23 million chickens and some 268,000 pigs are slaughtered every 24 hours in the United States. That's 266 chickens per second, 24 hours a day, 365 days a year. From a statistician's point of view, since farmed animals represent 98% of all animals (even including companion animals and animals in zoos and circuses) with whom humans interact in the United States, all animals are farmed animals; the number who are not is statistically insignificant.[2]



[2] In 2002, the United States Department of Agriculture's National Agricultural Statistics Service reported that approximately 8.9 billion animals were slaughtered for food in the United States: 36.6 million cattle and calves; 98 million pigs; 3.3 million sheep and lambs; 8.4 billion "broiler" chickens; 160 million laying hens and breeding chickens; 268 million turkeys and 24.5 million ducks. In addition, an uncounted, but, at a minimum, 600 million, farmed animals die annually in process before being slaughtered, e.g., approximately 210 million male chicks are killed at birth every year since they are of no use to the egg industry. These numbers do not include farmed fish. Although exact numbers are difficult to ascertain, it is believed that the number of animals killed in research in the United States ranges from 20-60 million per year, and an additional 6 million animals per year are killed in teaching and education. Furthermore, approximately 8-10 million animals per year are killed for fur, 135 million animals per year are killed in hunting and 5-7 million animals per year in pounds. See, Introduction to Animal Rights, Your Child or the Dog?, Gary L. Francione, Temple University Press (2000); "Body Count: The Death Toll in America's War on Wildlife," April 2000, The Fund for Animals (http://fund.org/library/documentviewer.asp?ID=85&leude=documents).

Certainly, making this many animals disappear from the law is an enormous task. It has been accomplished, in significant part, through the efforts of the industry which owns these animals to obtain complete control, in one way or another, over the law which governs it. While this is not an unusual effort on the part of industry generally, the farmed animal industry's efforts have been exceptionally successful. The industry has devised a legally unique way to accomplish its purpose: it has persuaded legislatures to amend criminal statutes that purport to protect farmed animals from cruelty so that it cannot be prosecuted for any farming practice that the industry itself determines is acceptable, with no limit whatsoever on the pain caused by such practices. As a result, in most of the United States, prosecutors, judges and juries no longer have the power to determine whether or not farmed animals are treated in an acceptable manner. The industry alone defines the criminality of its own conduct.

The purpose of this chapter is to educate the reader as to the realities of farmed animal law. It will demonstrate how farmed animals receive no effective legal protection in the United States and detail how the law has been altered to transfer the power to determine whether or not a farming practice is illegally cruel from the court to the farmed animal industry. In addition, this chapter will briefly discuss customary farming practices and describe how many of such practices are not only outside the reach of courts in the United States, but cruel, as determined by an English court and European legislatures.

While the discussion of legal rights of animals is of undoubted importance, any discussion must take place with a clear understanding of a legal reality whereby nearly every animal in the United States has no real legal protection whatsoever, even though there is an assumption that such protection actually exists. There is a desperate need to focus on that simple fact – to look at where our feet are actually planted. The overwhelming majority of animals in the United States not only need viable legal rights, they need the most basic legal protection.

Federal Law

In the case of farmed animals, federal law is essentially irrelevant. The Animal Welfare Act, which is the primary piece of federal legislation relating to animal protection and which sets certain basic standards for their care, simply exempts farmed animals, thereby making something of a mockery of its title.[3] No other federal law applies to the *raising* of farmed

[3] 7 U.S.C. §§ 2132(g) (2001).

animals, and, consequently, the United States Department of Agriculture has no statutory authority to promulgate regulations relating to the welfare of farmed animals on farms.

As a result, the Humane Slaughter Act is the primary federal legislation affecting farmed animals. It requires that livestock slaughter "be carried out only by humane methods" to prevent "needless suffering." Astoundingly, the statute exempts poultry, the result of which is that over 95% of all farmed animals (approximately 8.5 billion slaughtered per year) have no federal legal protection from inhumane slaughter.[4] Even given its limited applicability, the Humane Slaughter Act would constitute a significant imposition on industry except for a lack of penalties and enforcement. There are no fines or penalties available for violation of the statute; the only sanction, rarely used, is that the slaughter line can be stopped at the discretion of a USDA employee. There also can be little doubt that the Act is not being effectively enforced. As Senator Robert Byrd (D-WV) recently stated on the floor of the Senate:

> The law clearly requires that these poor creatures be stunned and rendered insensitive to pain before this process [i.e., by which they are cut, skinned and scalded] begins. Federal law is being ignored. Animal cruelty abounds. It is sickening. It is infuriating. Barbaric treatment of helpless, defenseless creatures must not be tolerated even if these animals are being raised for food – and even more so, more so.[5]

In 2002, Congress determined that the lack of enforcement was so problematic that it passed a resolution entitled, "Enforcement of the Humane Slaughter Act of 1958," whereby it stated that "it is the sense of the Congress that the Secretary of Agriculture should fully enforce [the Act]" and that "it is the policy of the United States that the slaughtering of livestock and the handling of livestock in connection with slaughter shall be carried out only by humane methods, as provided in [the Act]."[6] This be may one of the few occasions where Congress has felt the need to effectively re-enact an existing statute, though it did not increase the likelihood of compliance by enacting fines or other penalties for violations. The whole affair brings to mind Robin Williams' comment on the ability of the British police to impact criminal

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4 7 U.S.C. §§ 1901-1906 (2001); 9 C.F.R. § 301.2(qq).

5 147 Cong. Rec. S7310 (daily. ed. July 9, 2001) (statement of Sen. Byrd). Subsequent to Senator Byrd's speech, Congress authorized some additional funding for increased enforcement of the Humane Slaughter Act.

6 Farm Security and Rural Investment Act of 2001 § 10305.

behavior without carrying guns – "Stop! Or I'll say 'Stop' again!"

Finally, there is also a little known statute entitled the Twenty-Eight Hour Law, enacted in 1877, which provides that animals cannot be transported across state lines for more than 28 hours by a "rail carrier, express carrier, or common carrier (except by air or water)" without being unloaded for at least five hours of rest, watering, and feeding.[7] While on an initial reading the statute appears to be an attempt to limit farmed animal abuse, the United States Department of Agriculture has determined that the statute and its regulations were "written to apply only to transport by a railcar … [and that] the Twenty-Eight Hour Law does not apply to transport by trucks."[8] Of course, trucks are today's overwhelmingly preferred method of farmed animal transport. The law is rarely, if ever, enforced, and even if a conviction occurs, the maximum penalty is only $500.

Given this ineffective federal legal protection, and the fact that no federal statute governs the treatment of farmed animals on the "farm," the only hope for legal protection is at the state level. In this context, the only significant protection for farmed animals are criminal anti-cruelty statutes which are intended to prohibit "unjustifiable" and/or "unnecessary" suffering to animals; in fact, many of such statutes were originally enacted to protect farmed animals. Thus, the question is simple: do state criminal anti-cruelty statutes protect farmed animals from cruelty? The answer is no. Most importantly, while these laws have never worked well to protect farmed animals, there is a fast growing trend to ensure that farmed animals are, as a practical matter, removed from the reach of these statutes entirely.

State Criminal Anti-Cruelty Statutes

State anti-cruelty statutes are criminal statutes that apply generally to all animals and not simply farmed animals.[9] Thus, they are usually worded in very broad and largely undefined terms, and do not require specific affirmative acts, such as adequate exercise, space, light, ventilation, and clean living conditions. For many reasons, there are substantial problems inherent in the effective governance of an industry's conduct by means of a very general criminal

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7 49 U.S.C. § 80502 (2001).

8 60 F.R. 48362, 48365.

9 Various categories of animals are often excluded from such statutes, e.g., animals who are hunted or used in research.

statute, rather than a regulatory statute.

Contrary to regulatory schemes generally set up by legislatures to govern industry conduct, criminal anti-cruelty statutes which govern the farming industry's treatment of animals do not provide for the promulgation of specific regulations to govern animal welfare, and the farming industry is not subject to any sort of regulatory enforcement of farmed animal welfare standards, does not undergo any inspections to determine whether farmed animals are being afforded appropriate treatment, and is not answerable to any governmental administrative agency (federal or state) on the subject of farmed animal welfare. In addition, the burden of proof on the prosecution is very high, i.e., beyond a reasonable doubt.

Moreover, unlike regulatory statutes, criminal anti-cruelty statutes also necessarily require that the prosecution demonstrate a mental state on the part of the defendant that may be hard to prove. Thus, a recent New Jersey conviction of an egg producer was vacated on appeal because the evidence failed to show that the company, which had been found guilty of cruelty for having discarded two sick, but living, hens in a garbage bin containing dead hens, had "knowingly" done so since, "keeping in mind someone is dealing with an awful lot of these chickens . . . I can perhaps see how it could have been overlooked" that the chickens were alive when they were discarded. The court went on:

> It's hard for this Court to determine whether there was an attempt at vertebrae dislocation [i.e., euthanization of the chickens by wringing their necks] which was unsuccessful or whether in fact perhaps vertebrae dislocation was negligently done or attempted in this case or whether the employee in this case believed the chickens were even already dead and neglected to do it at all. And even if that was the case, I suppose it raises a doubt as to whether there was knowledge there necessary to establish beyond a reasonable doubt that there was cruelty.[10]

While regulatory schemes are generally enforced by governmental agencies with experience in the particular area, the enforcement of anti-cruelty statutes, like other criminal statutes, is left primarily to the police and public prosecutors, who have substantial other obligations to which they may assign a higher priority. While, in some states, limited

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[10] State of New Jersey v ISE Farms, Inc. (Sup. Ct. Warren Co., March 8, 2001 (John F. Kingfield, J.)) (unreported decision on the record).

enforcement powers are also granted to private Societies for the Prevention of Cruelty to Animals, such Societies generally receive no public funding and do not view farmed animal welfare as within their purview. To the extent that there is enforcement of these laws, it is largely directed at dogs, cats and horses, rather than farmed animals. A New York court eloquently summarized this situation:

> The reluctance or inability on the part of the defendant ASPCA as set forth above, raises serious questions, vis-a-vis the effectiveness of our present procedure for dealing with allegations of cruelty to farm animals on the large scale. However, refinement or amendment of this procedure is in the province of the legislature rather than this court . . . . It's ironic that the only voices unheard in this entire proceeding are those of innocent, defenseless animals.[11]

Consequently, convictions are infrequent and generally limited to minimal fines; for example, Alabama, Delaware and Maine have a maximum fine of $1000, and Oklahoma and Rhode Island have a maximum fine of $500, for general cruelty to animals.[12] And while a great deal of attention has been placed on recently enhanced anti-cruelty statutes that have felony penalties, little has been written about the fact that only six of the 33 felony statutes enacted to date apply to farmed animals.[13]

Even if the police and prosecutors were eager to enforce criminal anti-cruelty statutes, it is virtually impossible for enforcement agents to ascertain what occurs on the average farm because a farm is private property. Without any regulatory inspection powers, police and law enforcement officers associated with SPCAs and humane societies must demonstrate probable cause to obtain a warrant to search private property for evidence of abuse. Unless the agency is informed by someone "on the inside," it is extremely difficult for information to be discovered, and evidence obtained without a valid warrant will be suppressed. In certain states the obstacles are even greater; for example, in Tennessee, the anti-cruelty statute specifically

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[11] County of Albany v. American Soc. for Prevention of Cruelty to Animals, 112 Misc. 2d 829 (Sup. Ct. Albany Co. 1982).

[12] Ala. Code § 13A-11-14 (2001); Del. Code Ann. tit. 11, § 1325 (2001); Me. Rev. Stat. Ann. tit. 7, §4016 (2001); Okla. Stat. tit. 21, § 1625 (2001); R.I. Gen. Laws § 4-1-2 (2001).

[13] California, Delaware, Florida, New Hampshire, Oklahoma and Rhode Island.

states that although the SPCA is statutorily authorized to investigate animal abuse, it cannot do so in the case of farmed animals. Instead, law enforcement investigations relating to farmed animals, and entries onto farms, can only be conducted following an examination by "the county agricultural extension agent of such county, a graduate of an accredited college of veterinary medicine specializing in livestock practice or a graduate from an accredited college of agriculture with a specialty in livestock."[14] A small animal veterinarian does not make the cut.

In the rare case when evidence of cruelty is nevertheless found, it does not mean that a conviction will be secured. Recently, an Idaho sheriff declined to pursue charges against a local dairy farmer in spite of a report by the Idaho Dairy Bureau that the dairy did not provide "reasonable care or sustenance to crippled or sick animals" and subjected cows to "needless suffering and inflicted unnecessary cruelty by dragging, lifting and burying live animals." The sheriff opined that farmed animal cruelty cases cannot be prosecuted unless there are "a substantial number of witnesses." Since the lack of witnesses meant there was no actual proof that the dairy's owner was involved in or ordered the abuse, according to the sheriff, the evidence was insufficient to support a criminal prosecution.[15] This is particularly troubling given that the modern factory farm generally has an incredibly large number of animals managed by a remarkably small number of people, e.g., 200,000 chickens may be monitored by only two people.[16]

Criminal anti-cruelty statutes are also generally worded in ways that leave the court extraordinary discretion. By including in the definition of "cruelty" the otherwise undefined requirement that the conduct must be unjustifiable or unnecessary, the law may invite the conclusion that a practice, though capable of causing great suffering, is not legally cruel if it

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14 Tenn. Code. Ann. § 39-14-211 (2001).

15 Jennifer Sandman, "Dairy Investigation Reports Animal Cruelty ... Officials Decide Not to Pursue Criminal Charges Against Dairy Owner," The Times News, Twins Fall, Idaho, January 30, 2003.

16 See State of New Jersey v. ISE Farms, Inc., supra note 10. See also, Dominion: The Power of Man, The Suffering of Animals, The Call to Mercy, Matthew Scully, St. Martin's Press (2002). "Standing outside a factory farm, the first question that comes to mind is not a moral but a practical one. Where is everybody? Where are the owners, the farmers, the livestock managers, the extra hands, anybody? I have been driving around the North Carolina countryside on a Thursday afternoon in January 2001, pulling in at random to six hog farms, and have yet to find a single farmer or any other living soul. It is as if one of those vengeful hurricanes that pound the Carolinas has been spotted, and I am the only one who didn't get the word. Who runs these places? Why aren't they here? Who's looking after the animals?"

is related, in any way, to food production. As one court stated:

> It must have come to the attention of many that the treatment of "animals" to be used for food while in transit to a stockyard or to a market is sometimes not short of cruel and, in some instances, torturable. Hogs have the nose perforated and a ring placed in it; ears of calves are similarly treated; chickens are crowded into freight cars; codfish is taken out of the waters and thrown into barrels of ice and sold on the market as "live cod"; eels have been known to squirm in the frying pan; and snails, lobsters and crabs are thrown into boiling water . . . still no one has raised a voice in protest. These practices have been tolerated on the theory, I assume, that, in the cases where these living dull and cold-blooded organisms are for food consumption, the pain, if any, would be classed as "justifiable" and necessary.[17]

Similarly, in *Lock v Falkenstine*, the Oklahoma Appellate Court determined that the statute's use of the general word, "animal," afforded it substantial discretion. As a result, the court determined that the legislature, in precluding cruelty to animals, did not intend to include "fowl" within that proscription, noting, *inter alia*, that fowl were referred to separately in Genesis 2.19 ("And out of the ground the Lord God formed every beast of the field and every fowl of the air"), and stating:

> Though we respect those courts that have held that various kinds of fowl fall within that category [i.e., "animals"], and likewise agree that the science of Biology holds them to be such; however, we are charged with the duty of concluding whether the man of "ordinary intelligence" would consider a rooster an animal. Surely, we would not expect a man of ordinary intelligence to fathom the law on the same footing as a learned Judge, or be as well versed in genetics as a student of biology. We feel that the Statute is not explicit, nor is it certain. And that persons of ordinary intelligence would have difficulty understanding what it attempts to prohibit.[18]

The Rise of the "Customary Farming Exemption"

While, for all of these reasons, it is hard to argue that state criminal anti-cruelty statutes present a significant obstacle for the farmed animal industry in its pursuit of any practice that is economically expedient, the industry has, nevertheless, decided that these statutes are an

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[17] People ex. rel. Freel v. Downs, 136 N.Y.S. 444, 445 (N.Y. Magis. Ct. 1911).

[18] Lock v Falkenstine, 1963 OK CR 32, 380 P2d 238 (Ok. Ct. Crim. App. 1963).

unacceptable risk. In a rapidly growing trend, as farming practices have become more and more industrialized and possibly less and less acceptable to the average person, the farmed animal industry has persuaded the *majority* of state legislatures to actually amend their criminal anti-cruelty statutes to simply exempt all "accepted," "common," "customary," or "normal" farming practices.[19] Since 1990, 14 states have joined the growing majority of jurisdictions that have enacted such amendments. It is hard to imagine any reason for this aggressive legislative agenda on the part of industry other than a fear on its part that it is using farming methods that might be considered illegal under prior criminal law. Farmed animals within these states do not have even the illusion of legal protection from institutionalized cruelty.

The overwhelming majority of such states simply prohibit the application of the criminal anti-cruelty statute to all customary farming practices. What is considered a customary practice? Most often there is no statutory definition, although Pennsylvania has provided the remarkably broad definition of "normal activities, practices and procedures that farmers adopt, use or engage in year after year in the production and preparation for market of poultry and livestock."[20] A practice will be considered customary if a majority, or perhaps even a significant minority, of the animal industry follows it. In Wisconsin, for example, the statute specifies with respect to shelter requirements that such requirements merely be customary within the county.[21] Tennessee (which already limits cruelty investigations as described in the preceding section, and which also exempts customary farming practices) provides that a customary farming practice is whatever a "college of agriculture *or* veterinary medicine" says it is.[22]

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19 The following states have exempted all customary farming practices: Arizona; Colorado; Connecticut; Idaho; Illinois; Indiana; Iowa; Kansas; Maryland; Michigan; Missouri; Montana; Nebraska; Nevada; New Mexico, North Carolina; Oregon; Pennsylvania; South Carolina; South Dakota; Tennessee; Texas, Utah; Washington; West Virginia; and Wyoming. In addition, South Carolina exempts fowl; Louisiana exempts fowl and the herding of domestic animals; New Jersey creates a legal presumption that certain practices to be specified by the Department of Agriculture are exempt, but such practices have never been specified; Ohio exempts farmed animals from requirements for wholesome exercise, a change of air and shelter prior to slaughter; Vermont exempts farmed animals from its Animal Welfare Act and the provision in its anti-cruelty statute that makes it illegal to tie, tether or restrain an animal in an inhumane or detrimental manner; Virginia exempts the dehorning of cattle; and Wisconsin requires farmed animals to be only provided with shelter requirements that are customary in the county.

20 Pa. Stat. Ann. Tit 18, § 5511(c)(q) (2001).

21 Wis. Stat. Ann. § 951.14 (2001).

22 Tenn. Code Ann. § 39-14-202 (e)(1) (2001).

North Carolina has a bizarre provision which exempts all "lawful activities conducted for . . . purposes of production of livestock or poultry" even though no other North Carolina statute forbids any farming practice on the basis of cruelty.[23] In the absence of any legal authority specifying what is or is not a "lawful activity," the circularity of the statute makes it impossible to understand whether the statute exempts everything or nothing. Georgia's criminal anti-cruelty statute creates similar confusion. The anti-cruelty statute does not apply to "conduct otherwise permitted under the laws of this state … including … animal husbandry … nor … limit in any way the authority or duty of the Department of Agriculture."[24] It is unclear what the consequences of this provision are given that Georgia's statutes do not provide any other guidelines as to farmed animal welfare.

Certain states exempt only specific practices instead of all customary farming practices. This results in some surreal legal admissions. For example, Ohio exempts farmed animals from requirements for "wholesome exercise and a change of air" and Vermont exempts farmed animals from the section in its criminal anti-cruelty statute that deems it illegal to "tie, tether and restrain" an animal in a manner that is "inhumane or detrimental to its welfare."[25] One cannot help but assume that, in Ohio, farmed animals are denied wholesome exercise and a change of air, and, in Vermont, farmed animals are tied, tethered or restrained in a manner that is inhumane or detrimental to their welfare. In California, if we step outside of the criminal anti-cruelty statutes for a moment, there is the provision that live vertebrate animals in public elementary and high schools cannot, as part of a scientific experiment or for any other purpose, be experimentally medicated or drugged in a manner as to cause painful reactions or injury; these provisions, however, "are not intended to prohibit or constrain vocational instruction in the normal practices of animal husbandry."[26] And, in 2001, in an eyebrow raising move, the legislature of Maine felt the need to exempt "normal and accepted practices of animal husbandry" from the bestiality provision of its criminal anti-cruelty statute; apparently, the

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[23] N.C. Gen. Stat. § 14-360(c)(2)(2A) (2001).

[24] Ga. Code. Ann. § 16-12-4 (2001).

[25] Ohio Rev. Code Ann. § 959.13(A)(4) (2001); Vt. Stat. Ann. Tit 13 § 352(3) (2001).

[26] Cal. Educ. Code § 51540 (2001).

farming community felt somewhat insecure about prosecutorial discretion in connection with a provision which prohibits the sexual stimulation of an animal by "any part of the person's body or an object."[27]

In an interesting twist, New Jersey amended its criminal anti-cruelty statute in 1995 to provide that the "raising, keeping, care, treatment, marketing and sale of domestic livestock" is legally presumed to not be cruel if farmed animals are kept in accordance with "humane" standards to be developed and adopted by the "State Board of Agriculture and the Department of Agriculture in consultation with the New Jersey Agricultural Experiment Station."[28] The legislature directed that the standards be promulgated within six months. Unlike all the other statutes described in this section, this statute, on its face, appears to promote humaneness, although whether by design or mistake is unknown; what is clear is that the New Jersey Department of Agriculture appears to be unable to produce a list of humane farming practices since, eight years later and in denial of the statutory mandate and repeated requests by animal protection advocates, no standards have appeared, although rumors suggest standards may surface in the near future. In the meantime, New Jersey prosecutors have no guidance as to what is or is not an appropriate farming practice.

The limited case law that has developed under these statutes reflects their extreme nature. In Pennsylvania, individuals accused of starving horses argued that the practice of denying nutrition to horses who were no longer wanted and were to be sold for meat was a "normal agricultural operation." The defendants elicited testimony from witnesses that it was normal "to neglect . . . horses for sale . . . for meat." Such horses, the defendants argued, are commonly denied veterinary care and sufficient nutrition, and are placed in so-called "killer pens." Witnesses also stated that "various practices in the farming industry . . . might be considered cruel except for the fact that they are practices within the industry." While the court did convict the defendants of cruelty, it decided to do so only because the defendants failed to establish sufficient testimony as to the pervasiveness of the practice, and no testimony "indicat[ed] that in fact they were in the business of raising horses to be sold for dog food or that they had formed the definite intention of sending the horses in question to 'killer pens' for that

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[27] Me. Rev. Stat. Ann. Tit. 17, § 1031(I) (2001).

[28] N.J. Stat. Ann. § 4:22-16.1 (2001).

purpose."[29]

The case highlights the ramifications of the exclusion of customary farming practices from criminal anti-cruelty statutes. If the defendants had successfully shown with additional testimony that the practice of starving horses was a normal business practice and that they were in that business, the criminal statute would not have applied to this act and the court could not have found the defendants criminally liable. The defendants' problem was not that they starved horses, but that they could not prove that enough people were doing the same thing. Clearly, if enough people do it, anything is possible under the new statutes.[30]

Ultimately, the impact of all this legislative maneuvering is a devastation of the existing, albeit weak, legal protection for farmed animals. State legislatures have endowed the farmed animal industry with complete authority to define what is, and what is not, cruelty to the animals in their care. There is no legal limit to institutionalized cruel practices to farmed animals who live in states with customary farming exemptions, which constitute a growing majority of states; if a certain percentage of the farming community wants to institute a new practice of raising a farmed animal, that is the end of the matter, and the hands of the judge, prosecutor or local SPCA are tied. The customary farming exemptions are not only an example of a powerful industry evading a criminal law that applies to everyone else, they are a unique development in that they delegate criminal enforcement power to the industry itself. It is difficult to imagine another non-governmental group possessing such influence over a criminal legal definition; for example, a law that provided that chemical corporations have not polluted (and, consequently, violated criminal law) so long as they released pollutants in amounts "accepted" or viewed as "customary" by the chemical industry. In effect, state legislators have granted agribusiness a license to treat animals as it wishes.

Ironically, the current legal reality has allowed the industry to claim that it should not be accused of treating animals improperly since it is, in fact, in compliance with the law. For

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29 Commonwealth v. Barnes, 629 A.2d 123 (Penn 1993).

30 In the last two years, there have been at least two successful criminal state prosecutions for particularly heinous fatal beatings of pigs at farms or slaughterhouses. It appears that, in these cases, either the particular jurisdiction did not have a customary farming exemption, or no attempt was made to argue that the brutal beating of pigs was a customary farming practice. However, if brutally beating pigs were shown to be a common farming practice in a state with a customary farming practice exemption, the court would apparently have no choice but to acquit the defendant.

example, a letter issued by the Consumer Affairs Department of egg producer Foster Farms reassured a consumer troubled about animal welfare issues with the statement, "With regard to our poultry slaughtering practices, Foster Farms slaughters chickens and turkeys in accordance with all pertinent State and Federal Regulations."[31] Inasmuch as there are no federal regulations governing the welfare of chickens and turkeys during slaughter, and 47 states do not have any slaughter regulations that relate to chickens and turkeys, its compliance is presumably not overly burdensome.[32]

Similarly, according to the American Meat Institute, "Federal laws govern animal health and humane treatment of animals."[33] As noted, the only Federal laws governing the humane treatment of farmed animals apply solely during shipment (but not by trucks) and at the slaughterhouse (but not chickens). Still, the American Meat Institute states, "The government also plays a role in ensuring the humane treatment of animals. A federal animal welfare law passed in 1958 governs the U.S. meat industry and includes important rules that every meat plant must follow . . . . [I]f you are one of the millions of people who enjoy our products, you should know that the meat industry, together with the government and academic researchers, are constantly seeking new ways to enhance animal welfare."[34]

The result of these obfuscations/legal deficiencies is not only a harsh reality for the animals themselves, but turns on its head one of the most fundamental purposes of the law – to set appropriate standards by which conduct may be judged. Supreme Court Justice Oliver Wendell Holmes described as "a commonplace of the law" the principle that, "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not."[35] Similarly, Justice Learned Hand, in determining whether a tugboat company had violated the law in failing to equip its

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31 Letter on file with Authors.

32 Only California, Indiana and Utah have regulations which relate to the slaughter of poultry.

33 MeatAMI.com, American Meat Institute (http:/www.meatami.com/Template.cfmSection=AnimalWelfare&NavMenu ID = 374).

34 Animal Welfare in the Meat Industry, January 2001, American Meat Institute (http://www.meatami.com/Template.cfm?Section=BrochuresandOtherPublications&NavMenu ID=375).

35 Texas and Pacific Railway Company v. Behmeyer, 189 U.S. 468, 470 (1903).

tugboats with radios, responded to the argument that other companies had similarly failed:

> There are yet, no doubt, cases where courts seem to make the general practice of the calling the standard of proper diligence . . . . Indeed, in most cases reasonable prudence is common prudence; but strictly it is never its measure; a whole calling may have unduly lagged in the adoption of new and available devices. It may never set its own tests, however persuasive be its usages. Courts must in the end say what is required; there are precautions so imperative that even their universal disregard will not excuse their omission.[36]

In the area of farmed animal law, which is predominantly criminal law, this is simply not the case. Courts are now irrelevant.

Customary Farming Practices

Regardless of one's opinion as to whether or not customary farming practices are, or are not, cruel, the farming industry's control over criminal statutes is by itself cause for concern. The law, as it currently stands, allows the industry to create horrifyingly cruel farming practices without limitation if it so chooses. These legal developments have occurred in a cultural realm within which there is little public debate about the appropriate treatment of farmed animals and no apparent widespread awareness on the part of the public of the conditions under which animals are raised and slaughtered. As The Economist has noted:

> It is all very well to say that individuals must wrestle with their conscience (but only if their consciences are awake and informed). Industrial society alas, hides animals' suffering. Few people would themselves keep a hen in a shoebox for her egg-laying life; but practically everyone will eat smartly packaged "farm fresh" eggs from battery hens.[37]

It is also difficult to avoid the conclusion that, perhaps, the reason for all of the legal maneuvering described in this chapter is a fear on the part of industry that the methods by which farmed animals are raised and slaughtered may not be acceptable to a significant percentage of people.

In fact, farmed animals live out their short lives in a shadow world. The vast majority never experience sunshine, grass, trees, fresh air, unfettered movement, sex, or many

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[36] T.J. Hooper, et. al. v. Same, 60 F.2d 737, 739 (1932).

[37] What Humans Owe To Animals, The Economist, August 19, 1995, at 12.

other things that make up most of what we think of as the ordinary pattern of life on earth. They are castrated without anesthesia, on occasion deliberately starved, live in conditions of extreme and unrelieved crowding and suffer physical deformities as a result of genetic manipulation. Is this system cruel? Opinions vary. One Missouri legislator, in support of a bill that would make it a felony to enter a livestock facility without authorization and photograph the animals with the intent to harm the enterprise, said, "The [animals] never had it so good."[38] On the other hand, an Illinois legislator, confronted with videotapes of chickens on a modern egg farm, exclaimed, "It's incredible – if you see this –the hens are put into these positions, and there's seven or eight of them in these cages. It's dreadful."[39] In even greater detail, Senator Byrd declared:

> Our inhumane treatment of livestock is becoming widespread and more and more barbaric. Six hundred-pound hogs – they were pigs at one time – are raised in two foot wide metal cages called gestation crates, in which the poor beasts are unable to turn around or lie down in natural positions, and this way they live for months at a time. On profit-driven factory farms, veal calves are confined to dark wooden crates so small that they are prevented from lying down or scratching themselves. These creatures feel; they know pain. They suffer pain just as we humans suffer pain. Egg-laying hens are confined to battery cages. Unable to spread their wings, they are reduced to nothing more than egg-laying machines.[40]

Intensive confinement systems such as those described by Senator Byrd have been instituted in every sector of the farmed animal industry. The three specific practices that have been the subject of particular scrutiny are the ones to which he refers: the "battery cage" for laying hens, the "gestation crate" for breeding pigs, and the "veal crate" for calves. Every year, in the United States, approximately 98% of egg-producing chickens live in battery cages, approximately two-thirds of breeding pigs (and over 90% of the 1.8 million breeding pigs kept by the ten top producers) are kept in gestation crates during pregnancy, and at least 40% of male dairy calves

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38 "Missouri House Oks Ban on Barn Photos," Washington Post, May 16, 2002 (http://www.washingtonpost.com/wp-dyn/articles/A25338–2002 May 16.html).

39 A.Kovac, "Legislators Target Chicken Farms' Egg," Chicago Tribune, February 14, 2002 (http://www.chicagotribune.com/news/local/chicago/chi-0202140022feb14.story).

40 Byrd, supra note 5.

raised for veal are reared in veal crates.[41] These practices are only examples of what are perhaps some of the most egregious methods of intensive confinement of farmed animals. Other types of confinement systems are used throughout the industry, for example, for dairy cows, meat-producing broiler chickens, and pigs generally.

The rather odd term "battery cage" is derived from the process of stacking cages one on the other, as in a "battery" of guns. It is standard practice to put eight hens in a cage that is approximately 20" by 19", though some suppliers put more.[42] The birds are unable to spread their wings. According to Dr. Joy Mench, of the Department of Animal Science at the University of California, Davis:

> When there are eight birds in a cage this size, the bird barely has room to stand. And even then she's really compressed. There are a lot of birds pressing against her and turning around is really difficult. And a really important thing about this as well, probably one of the main reasons that crowded hens experience a lot of illness, is there's not enough space for all the birds to feed at the same time. If you're a low ranking bird – low on the peck order – you tend to get pushed to the back during feeding and you can't get enough food. So often the lowest ranking bird in that cage gets sick and dies.[43]

In order to avoid the wounds that would be caused by the hens fighting, which, in these close conditions, is inevitable, their beaks are cut off. Dr. Mench states that the loss of the beak causes

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41 Introduction to United Egg Producers Animal Husbandry Guidelines for U.S. Egg-Laying Flocks, 2002 Edition, United Egg Producers; Swine 2000, Part I: Reference of Swine Health and Management in the United States, 2000, National Animal Health Monitoring System, USDA, August 2001; John J. McGlone, Phd, "The Crate (stall, case, cage, box, etc.) – Its History and Efficacy," PhD, Pork Industry Institute, Texas Tech University (http://www.depts.ttu.edu/porkindustryinstitute/SowHousing_files/The%20Crate_files/frame.htm); L. Wilson, L. Terosky, C. Stull & W. R. Stricklin, "Effects of Individual Housing Design and Size on Behavior and Stress Indicators of Special-Fed Holstein Veal Calves," Journal of Animal Sciences, Savory; June, 1999; L. Wilson, C. Stull & R. Warner, "Welfare Concerns of Special-Fed Veal in the United States," The Professional Animal Scientist 10:53-58.

42 Battery cages may also be 16" by 20" (which typically hold between 5-7 birds) or 24" by 20" (which typically hold between 8-10 birds). Donald Bell, "Egg Economics Update," University of California/Cooperative Extension, 1999 (http://animalscience.ucdavis.edu/Avian/eeu1299.html); "Caged Laying Hen Well-Being: An Economic Perspective," Michigan State University, 2001 (http://www.msu.edu/user/rahn/Publications/NCADCPaper.pdf).

43 D. Zwerdling, "McDonald's New Farm: the Fast Food Industry and Animal Rights: Cracking Down on Egg Suppliers," American Radio Works (http://americanradioworks.org/features/mcdonalds/index.html).

lifelong suffering to a hen, whose beak is her primary means of exploring her environment.[44]

The "gestation crate" is used to confine pregnant pigs. Pigs kept for breeding are impregnated continuously until their "production" drops off and they are sent to slaughter. The average life span of a breeding pig is about three years, which is significantly longer than that of other pigs, who are generally slaughtered prior to maturity at four to six months.[45] The "crates" used to confine pregnant pigs are actually metal stalls, without any straw, lined up next to each other in large buildings with concrete floors. The pig can generally take no more than one step forward or back, and can never turn around. Shortly before giving birth, the pig is transferred to a different crate (the "farrowing crate"), which is similarly confining, where she gives birth and suckles her piglets until they are weaned at the age of approximately three weeks.[46] She is then impregnated again and transferred back to the gestation crate. Thus, in systems where the gestation crate is in use, the breeding pig spends the vast majority of her life intensively confined.[47]

Finally, perhaps the most well known intensive confinement system is the veal crate. In this system, very young calves are confined in wooden stalls, which are, again, so small that the animal is unable to turn around. In order to maintain the whiteness of the flesh of the calves, thereby making it more marketable, the calves are often kept anemic through a diet deficient in iron.[48]

Not only are such practices legal in the United States, but the current legal

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44 Id.

45 Nutrition of Piglets and Sows, American Soybean Association Technical Bulletin, 1999 (htttp://www.asajapan.org/tech/animal_wiseman_e_52.html); Swine 2000: Reference of Swine Health and Management in the United States, 2000, National Animal Health and Monitoring System (USDA), August 2001 (http://www.aphis.usda.gov/vs/ceah/cahm/Swine/Swine2000/finalswoodes1.pdf).

46 Highlights of NAHMS Swine 2000, Part I, August 2001 (http://www.aphis.usda.gov/vs/ceah/cahm/Swine/Swine2000/swine1highlights.htm.pdf).

47 Nutrition of Piglets and Sows, American Soybean Association Technical Bulletin, 1999 (http://www.asajapan.org/tech/animal_wiseman_e_52.html); Swine 2000: Reference of Swine Health and Management in the United States, 2000, National Animal Health and Monitoring System (USDA), August 2001 (http://www.aphis.usda.gov/vs/ceah/cahm/Swine/Swine2000/finalswoodes1.pdf); John J. McGlone, Phd, "The Crate (stall, case, cage, box, etc.) – Its History and Efficacy," PhD, Pork Industry Institute, Texas Tech University (http://www.depts.ttu.edu/porkindustryinstitute/SowHousing_files/The%20Crate_files/frame.htm).

48 L. Wilson, Carolyn Stull & R. Warner, "Welfare Concerns of Special-Fed Veal in the United States," The Professional Animal Scientist 10:53-58.

framework prohibits United States courts from independently determining whether or not such practices are objectively cruel. Instead, in states with customary farming exemptions (i.e., the majority of states), a prosecutor's and judge's only role is to determine whether such practice is customary, which they all most certainly are. In states where there are no customary farming exemptions, on the rare occasion that a customary farming practice comes before a court, the legal focus is generally on whether such practices are "justifiable" or whether the worker acted with the appropriate state of mind or whether the animal was really an animal.

In the United Kingdom, however, due to a remarkable set of circumstances, a court was afforded a unique opportunity to examine customary farming practices and determine, for the first time, this exact point: whether, in the court's reasonable judgment, such customary farming practices are cruel.

McLibel

In the widely publicized "McLibel" case, McDonald's brought an action for defamation against a number of English political activists who helped hand out a pamphlet (of which no more than 1000 or so copies had been distributed), which stated, among other things, that many customary farming practices were cruel and that McDonald's was responsible for such cruelty. The odds for McDonald's no doubt seemed favorable; the relatively impoverished defendants would defend themselves, and, most significantly, in the United Kingdom, in order to avail themselves of the absolute defense to defamation that their statements were true, the defendants bore the burden of proving such truth "on the balance of probabilities." This is in stark contrast to the law in the United States, in which the plaintiff in a libel action bears the burden of establishing that the statements were false. But, surprisingly, two of the activists, Helen Steel and Dave Morris, decided to defend themselves, and the parties embarked on the longest civil trial in English history.[49]

At the outset, McDonald's argued the standard legal approach in the United States. The court, it stated, should decide whether or not a farming practice is cruel by looking at

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[49] David J. Wolfson, McLibel, 5 Animal L. 21 (1999). On March 31, 1999, an appeal courts reversed the lower court and held in favor of Steel and Morris on several issues unrelated to animal cruelty. McDonald's had not appealed the findings of the lower court in relation to the animal cruelty discussed in this chapter. For a discussion of the extraordinary disadvantages faced by Steel and Morris in this case, including the fact that they represented themselves pro se, raised only $48,000 over six years, an amount McDonald's spent on legal fees in just one week, lost the right to a jury trial and were denied access by McDonald's to any of its animal production or slaughter facilities in the United Kingdom, see David J. Wolfson, McLibel.

whether such farming practice is a typical farming practice, that is, the norm, and if it were, the court should conclude that such practice was "acceptable and not to be criticized as cruel." The court, however, clearly rejected this argument, stating that it "cannot accept this approach" because "to do so would be to hand the decision as to what is cruel to the food industry completely, moved as it must be by economic as well as animal welfare considerations."[50] This simple logical statement is an unequivocal rejection of the statutory reality in the majority of states in the United States.

McDonald's also asserted that the court should determine that a farming practice is cruel only when it contravenes governmental guidelines, recommendations or codes; any practice which complies with the existing law or guidelines should be determined not to be cruel. But the court recognized that a farming practice can be cruel, within the ordinary meaning of the word, even if it is legal. Consequently, according to the court, while laws and government regulations are useful measures of animal welfare, neither is determinative of what is, or is not, a cruel practice. Instead, the court stated it would use its own judgment to "decide whether a practice is deliberate and whether it causes sufficiently intensive suffering for a sufficient duration of time to be justly described as cruel."[51]

While the court held a number of customary farming practices to be cruel, for the purposes of this chapter, we will discuss only a few specific findings. Noting that "egg-laying hens . . . work for McDonald's" the court initially focused on the battery cage. While the court believed the evidence presented by Steel and Morris failed to demonstrate that a chicken spending her whole life without sunshine or fresh air was cruel, it held that the severe restriction of movement caused by the battery cage for a chicken's whole life, which in the United Kingdom provides one bird "three quarters of the area of a London telephone directory," was proven to be cruel.[52] As the court poignantly stated:

> [i]t seems to me that even the humble battery hen probably has some sentience, some power of perception by its senses, of virtually total deprivation of all normal activities save eating,

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50 Chief Justice Bell, Verdict Section 8, at 5, "The Rearing and Slaughtering of Animals" (http:/www.mcspotlight.org/case/trial/verdict_jud2c.html).

51 Id. at 6.

52 Id. at 32.

> drinking, some minimal movement, defecating and laying eggs, and that the one in three or four of them which suffer broken bones on harvesting for slaughter must feel some significant pain. I conclude that the battery system as described to me is cruel in respect of the almost total restraint of the birds and the incidence of broken bones when they are taken for slaughter.[53]

In addition, in the context of chickens, the court held that calcium deficits in battery hens which result in osteopaenia (a leg problem leading to fractures), the severe space restrictions meat-producing broiler chickens suffer in their last few days, and the standard practice in the egg industry of gassing male chicks (who are of no use in the egg industry) upon birth by carbon dioxide, were cruel.[54] Discussing the suffocating of chicks, the court stated:

> I bear in mind the danger of substituting one's own imagination of what it must be like to be gassed in this way. I bear in mind that a very young chick's awareness must be limited. But as chickens are living creatures we must assume that they can feel pain, distress and discomfort in some form although we do not know exactly how they feel it. In my view chicks . . . do suffer significantly, albeit for a short period, when gassed by CO^2 and when an alternative method of instantaneous killing is available . . . I find the practice cruel.[55]

Finally, focusing on the gestation crate, the court concluded that while the defendants had not been able to prove that the lack of open air and sunshine was cruel, they had proven that the severe restriction of movement was. Thus, the court stated that "pigs are intelligent and sociable animals and I have no doubt that keeping pigs in dry sow stalls [gestation crates] for extended periods is cruel."[56]

No court in the United States has had the opportunity to determine whether such customary farming practices are cruel within the ordinary meaning of the word, nor is one likely to have a similar opportunity under the current state of the law. It does not seem probable that McDonald's, or any other facet of agribusiness, will make the mistake of initiating a defamation suit in the United States against individuals who claim they are responsible for cruel farming

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53 Id. at 34.

54 Id. at 13.

55 Id. at 15-16.

56 Id. at 38.

practices, particularly since, as stated above, Steel and Morris faced a number of legal disadvantages in the United Kingdom that they would not have faced in the United States. On the other hand, the one advantage Steel and Morris had was that the litigation took place in a cultural environment in which the subject of farmed animal welfare has received serious societal and legislative consideration. An analysis of European legislation only further highlights the deficiencies of the legal approach taken in the United States.

Europe

Recent European concern over the intensive farming of animals began to arise shortly after the publication of a book by Ruth Harrison entitled *Animal Machines* in 1964. The book prompted the British government, in 1965, to appoint a committee "to examine the conditions in which livestock are kept under systems of intensive husbandry and to advise whether standards ought to be set in the interests of welfare, and if so what they should be."[57] This Committee, the Brambell Committee, set forth the "Five Freedoms" of movement:

> In principal we disapprove of a degree of confinement of an animal which necessarily frustrates most of the major activities which make up its natural behavior . . . . An animal should at least have sufficient freedom of movement to be able without difficulty to turn around, groom itself, get up, lie down, stretch its limbs.[58]

While none of these recommendations were given the force of law at that time, their effect was significant. Specifically, in 1987, the Parliament of the United Kingdom banned the veal crate and the anemic diet for veal calves.[59] This was followed by the Pig Husbandry Regulations enacted in 1991, which prohibited the gestation crate in the United Kingdom after 1999.[60]

Certain other individual European countries also made significant strides in the area of farmed animal welfare at the same time as the United Kingdom. For example, in Switzerland, the Animal Protection Act banned all battery cages in 1991. The method of choice

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57 Steven Wise, Of Farm Animals and Justice, 3 Pace Entl. L. Rev. 191, 211 (1986).

58 Id. at 212.

59 Welfare of Calves Regulations No. 2021 (U.K. 1987).

60 Welfare of Pig Regulations 1991; Paragraphs 6 and 7 of Schedule 6 to The Welfare of Farmed Animals (England) Regulations 2000.

in Switzerland is now the aviary, "conceived in accordance with the natural behavior of fowl and based on installations and equipment such as nest boxes and scratching areas, or perches that enable birds to follow patterns of behavior specific to their species."[61] The Swiss Animal Protection Regulations of May 27, 1981 also provide that animals shall not be permanently tethered and that calves must receive sufficient iron in their feed.[62] In Sweden, Parliament enacted laws that require cattle to be permitted to graze if over six months old, banned the gestation crate and required that cows and pigs have access to straw and litter in stalls and boxes. No drugs or hormones can be used on farmed animals, except to treat disease, and all slaughtering must be as humane as possible.[63]

The impact of such reforms led, in turn, to legislation by the European Union, which has significant consequences given that it is comprised of such a large number of countries: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Sweden, and the United Kingdom. In addition, Cyprus, the Czech Republic, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia are all being considered for membership.

In 1999, the European Union prohibited all battery egg production from 2012. The system will be replaced by free-range farming, or the housing of hens in large, barn-like aviaries, or by "enriched" cages with at least 116 square inches of space per chicken (compared with the 70 square inches currently required by law in the European Union and the 48 square inches customarily used in the United States), a nesting area, litter, a scratching pad to sharpen claws, and a perch.[64] Germany has required that such prohibition take effect by 2007 and, simultaneously, banned cages entirely from 2012.[65] The European Union has also prohibited the veal crate from 2007, and the gestation crate (other than in the first four weeks of pregnancy)

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61 1981 Swiss Ban on Battery Cages: A Success Story for Hens and Farmers, 44 Anml. Welfare Inst. Q. No. 1 at 10; Laying Hens; 12 Years of Experience with New Husbandry Systems in Switzerland, Swiss Society for the Protection of Animals.

62 Council of Europe – Information Document; Swiss Animal Protection Regulations, May 27, 1991, at 6.

63 Swedish Animal Protection, cited in Swedish Ministry of Agriculture Press Release (May 27, 1998).

64 Article 5 of Council Directive 1997/74/EC of 19 July 1999.

65 "One Giant Leap For Animal Welfare," Press Release, Bundesministerium für Verbraucherschutz, Emãhrung und Landwirtschaft, 19 October 2001.

from 2013 and has enacted laws on slaughter which apply to all farmed animals including poultry.[66] In light of scientific evidence that boredom in pigs can lead them to harm themselves and each other, the European Union now requires pigs to be provided with "manipulable material," such as hay, to satisfy natural rooting behaviors.[67] There are also relatively strong laws which limit the time periods for the continuous transport of farmed animals as well as a significant movement within the European Union to limit such transportation time periods to a maximum of eight hours.[68]

In another legal development, the Treaty of Rome, the founding document of the European Community, was recently amended to recognize that animals, including farmed animals, are sentient beings (it is unfortunate that the legal status of animals is such that it was considered necessary to pass a law declaring the truth of this thoroughly obvious statement and that its passage was regarded as such a profound event), and that all European Union legislation and member states must pay full regard to the welfare requirements of animals in the formulation and implementation of the community's policies on agriculture, research and transport.[69]

Most fundamentally, from the viewpoint of a European farmed animal, a regulatory system has been initiated in Europe which prohibits a number of the most egregious intensive confinement farming practices.

Industry to the Rescue?

Through a contrast of laws in the United States and Europe one gains a true appreciation of the extent to which legislatures in the United States have abdicated their responsibilities. The failure of the law in the United States in this area is demonstrated perhaps most clearly by recent efforts on the part of fast food restaurants, supermarkets, and even animal industry groups such as the United Egg Producers and the National Cattlemen's Beef

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66 Article 3(3) of Council Directive 91/629/EEC of 19 November 1991 (as amended by Council Directive 97/2/EC of 20 January 1997); Article 3 of Council Directive 91/630/EEC of 19 November 1991 (as amended by Council Directive 2001/88/EC of 23 October 2001); Council Directive 93/119/EC of 22 December 1993.

67 "Pig toy tale 'anti-Europe Rubbish,'" January 29, 2003 (http://www.cnn.com/2003/WORLD/europe/01/29/uk.pigs.play/index.html).

68 Councel Directive 91/628/EEC (as amended by Council Directive 95/29/EEC) on the Protection of Animals During Transport.

69 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Nov. 10, 1997.

Association, to pressure suppliers to treat animals less inhumanely.[70] These entities, the first of which to act was, interestingly enough, McDonald's, shortly followed by Wendy's, Burger King and Safeway, have begun to develop standards, primarily in the area of slaughter and laying hens, that they will agree to impose on their suppliers.[71] In the case of restaurants and supermarkets, they have indicated a desire to inspect the animal facilities to see that their standards are being followed, although the suppliers have not yet agreed to third party audit procedures.[72] While the standards that have been imposed to date are minimal, and far below what is to be required in the European Union, in light of the practices currently in place they are certainly a step forward, and all of the practices that they seek to impact are customary farming practices.

Such developments have come from these entities in the absence of a widespread public outcry, although certain companies such as McDonald's and Wendy's had been targeted by the late Henry Spira, working with Peter Singer, and People for the Ethical Treatment of Animals ("PETA"). Only very recently, PETA initiated a global boycott against KFC alleging that KFC had failed to respond to two years of negotiations in relation to the inhumane care and slaughter of chickens. While it unclear whether KFC will be responsive to PETA's campaign, the willingness of retailers and industry groups to take on some responsibility for farmed animal welfare is an obvious acknowledgment on their part that the situation is sufficiently negative that they need to get out ahead of the bad news. It is to be hoped that these initiatives will spur the government, at both the state and federal level, to take a more active role. One obvious reason

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70 A number of the standards relating to egg-laying hens are the result of guidelines prepared by the United Egg Producers (UEP) based on recommendations of a scientific advisory committee commissioned in 1999. The UEP guidelines include, among other things, increased cage space per hen and standards relating to "forced molting" (starving hens) and beak cutting of chicks. "UEP Animal Care Certification Logo," Egg Industry, October 2002. See also R. Hegeman, "Cattlemen Work on Animal Care Rules," The Associated Press (December 25, 2002).

71 Burger King Corporation Announces Industry-Leading Food Animal Handling Guidelines and Audits, June 28, 2001 (http://biz.yahoo.com/bio/010628/2244.html); Zwerdling, supra note 43; Janet Adams, "PETA withdraws boycott of Safeway's," Contra Costa Times (http://www.bayarea.com/mld/cctimes/3273959).

72 The National Council of Chain Restaurants and the Food Marketing Institute are preparing voluntary supplier guidelines that would set uniform animal welfare standards (and include the UEP guidelines) and are also planning on, as a next step, an audit program with a third party verifier to enforce those standards. See A. Zuber, "News," Nation's Restaurant News, December 17, 2001 at 6. There are, however, some indications that industry trading groups, such as UEP, will try to maintain control over the audit process. See John Todd, "Record Crowds and Heated Discussions at UEP," Egg Industry, November 2002.

for the government to act is that these entities should not be the only ones with access to the animal facilities to determine whether their requirements are being met. It is inappropriate to rely on another (or in the case of the United Egg Producers or the National Cattlemen's Beef Association, the same) segment of the same industry to be the watchdog. Another reason that government action is needed is that certain suppliers will slip through the cracks because they do not do business with the companies that have agreed to impose the standards. Animals in the hands of those companies are no less deserving of humane treatment.

Most significantly, industry should not draft these standards. As noted, the standards are minimal and far weaker than those imposed in the European Union. They do not begin to compare to what has been required in particularly progressive European countries such as Germany, Sweden, Switzerland, and the United Kingdom. They are, nevertheless, being described as "humane" merely because they are better than what came before. Ultimately, standards set by industry will always run the risk of being the least that can be done in order to avoid public relations problems rather than what is necessary for the animal's well-being.

Nor can individual producers, by themselves, be expected to improve the conditions under which such animals are kept. Although measures which may be extremely deleterious to animals may shave only pennies from the cost of production, because of the economies of scale and the intensely competitive environment of the meat industry in the United States, producers who would prefer to treat their animals in a more ethical manner are severely constrained if they wish to compete. As a booklet recently published by the National Pork Board stated:

> [I]n a technologically complex world in which a producer's choices are sharply limited, it is no longer appropriate to place the entire burden of ethical responsibility on the shoulders of individual farmers. Above all, consumers must not expect individual farmers to undertake practices that will make them uncompetitive in the marketplace. Livestock producers will do what is necessary to compete, or else they will not be livestock producers for very long.[73]

Whatever the reason, there appears to be a substantial gap between the producer's view of an acceptable farming practice and what is considered acceptable by the public (once it

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[73] "Swine Care Handbook," National Pork Board, 2002 (http://www.porkboard.org.docs.swinecarehandbook.pdf).

is informed). This was clearly demonstrated by the success of a recent ballot initiative in Florida. In November 2002, over 2.6 million Florida voters (55% of all votes cast) voted to amend the Florida constitution to ban the use of the gestation crate in the state.[74] The measure

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[74] Animal Cruelty Amendment: Limiting Cruel and Inhumane Confinement of Pigs During Pregnancy:

Inhumane treatment of animals is a concern of Florida citizens. To prevent cruelty to certain animals and as recommended by The Humane Society of the United States, the people of the State of Florida hereby limit the cruel and inhumane confinement of pigs during pregnancy as provided herein.

a. It shall be unlawful for any person to confine a pig during pregnancy in an enclosure, or to tether a pig during pregnancy, on a farm in such a way that she is prevented from turning around freely.

b. This section shall not apply:

1. When a pig is undergoing an examination, test, treatment or operation carried out for veterinary purposes, provided the period during which the animal is confined or tethered is not longer than reasonably necessary.

2. During the prebirthing period.

c. For purposes of this section:

1. "enclosure" means any cage, crate or other enclosure in which a pig is kept for all or the majority of any day, including what is commonly described as the "gestation crate."

2. "farm" means the land, buildings, support facilities, and other appurtenances used in the production of animals for food or fiber.

3. "person" means any natural person, corporation and/or business entity.

4. "pig" means any animal of the porcine species.

5. "turning around freely" means turning around without having to touch any side of the pig's enclosure.

6. "prebirthing period" means the seven day period prior to a pig's expected date of giving birth.

c. A person who violates this section shall be guilty of a misdemeanor of the first degree, punishable as provided in s. 775.082(4)(a), Florida Statutes (1999), as amended, or by a fine of not more than $5000, or by both imprisonment and a fine, unless and until the legislature enacts more stringent penalties for violations hereof. On and after the effective date of this section, law enforcement officers in the state are authorized to enforce the provisions of this section in the same manner and authority as if a violation of this section constituted a violation of Section 828.13, Florida Statutes (1999). The confinement or tethering of each pig shall constitute a separate offense. The knowledge or acts of agents and employees of a person in regard to a pig owned, farmed or in the custody of a person, shall be held to be the knowledge or act of such person.

d. It is the intent of this section that implementing legislation is not required for enforcing any violations hereof.

was placed on the ballot after over 600,000 signatures were gathered, the vast majority of which were collected by unpaid volunteers. It seems clear that, at the citizen level, there is significant interest in the reform of laws that relate to the intensive confinement of farmed animals.

But while the Florida ballot initiative demonstrates growing support for such reform, state by state citizen ballot initiatives cannot be relied upon to resolve the deficiencies in the legal approach in the United States to farmed animal welfare or to reform an entire industry. Ballot initiatives must necessarily focus narrowly on one specific practice at a time, are expensive and time consuming to pursue, and are not even permitted in 26 states.

Fundamentally, the United States has historically placed the role of protecting farmed animals with the government and, in particular, the courts. The first known statute ever to punish individuals for cruelty to animals was enacted in the Massachusetts Bay Colony in 1641 in order to protect farmed animals.[75] If a decision is to be made to abandon this principled tradition and place farmed animals beyond the law, it needs to be made with a full awareness of all of the facts. Currently, there is still a basic belief on the part of the American public, and legal scholarship, that while all may not be right in the way we treat farmed animals, there are laws, albeit imperfect ones, that govern the industry. But, as has been demonstrated, this is simply not the case. The issue is not enforcement or effectiveness, it is jurisdiction.

Is our society really comfortable with removing judges, prosecutors and juries from any role in the determination of what is or is not acceptable treatment of nearly every domesticated animal? Are we sufficiently aware of and comfortable with customary farming practices to simply allow the farmed animal industry the power to do whatever it wants to animals? Should an industry be permitted to regulate itself? Is it right to proceed as if the law protects animals from cruelty when it does not?

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e. If any portion of this section is held invalid for any reason, the remaining portion of this section, to the fullest extent possible, shall be severed from the void portion and given the fullest possible force and application.

f. This section shall take effect six years after approval by the electors.

[75] Animal Welfare Institute, Animals and Their Legal Rights: A Summary of American Laws from 1641-1990, 1 (1990).

Not Your Father's Social Media and Ethics Presentation OR Ethical Social Media Use in Three Easy Steps

Dan Lear
Director of Industry Relations, Avvo

Many presenters on social media focus on the ethical risks that improper social media use creates for lawyers. From their point of view social media is a dangerous legal ethics trap waiting to be sprung on the unwary lawyer. But it doesn't have to be that way. Lawyers shouldn't fear social media and ethical social media use is neither difficult nor dangerous. In place of the pervasive paradigm of fear this presentation will focus on a simple common sense approach to using social media ethically.

This presentation divided into four sections. First, is a discussion of expectations and the fact that if lawyers use social media the way it's intended to be used, the way that users expect for it to be used, there is little to worry about from a legal ethics point of view. Next, is a simple comprehensible discussion of the constitutional law that backs up lawyer social media use and why, from a constitutional law perspective, lawyers should feel much freer to use social media than they typically do. The third section ties the two first pieces together and clarifies that ethical social media use is no than different than ethical communication and marketing in the pre-social media world. Lawyers simply need to remember their ethical obligations. The final section touches on the few areas in which the brave new internet world of social media does create some risks and gray areas that lawyers might not have previously considered.

1. **Expectations**
   Lawyers who struggle to understand the ethical landscape for social media frequently do not understand the difference between inbound and outbound marketing. Much of traditional lawyer advertising – television, yellow pages and newspaper ads, and the like – can be characterized as "outbound marketing." It's basically shouting from the rooftops about how great you are. That type of marketing works well in some situations but not often for legal services. Legal services are "considered purchases" – purchases in which people invest time and even money simply considering who they should hire. In considered purchases, people want information in order to make an informed decision. That's where the notion of "inbound marketing" comes in. It's not shouting about how great you are, it's informing, educating, enlightening and entertaining. Inbound marketing is about playing the longer game by showcasing your competence and experience (and even some of your humanity) and by building relationships and your network. Social media is about you. And that's what social media users expect. They don't expect to be sold to, pitched to, solicited, bragged to, or lied to.

- Association of Professional Responsibility Lawyers -

2. **Constitutional Law**

In 1977 the Supreme Court found that legal advertising was, indeed, commercial speech and, therefore, subject to First Amendment protection. Around the same time, the Supreme Court refined its definition of definition of "commercial speech" saying that commercial speech is "that which does no more than propose a commercial transaction." The definition of "commercial speech" as it relates to legal advertising varies from state to state but generally emphasizes actively looking for clients or proactively advertising your availability for services:

- ABA Comment 1 to RPC 7.2 "an active quest for clients"
- Michigan: "an active quest for clients" Comment to Rule 7.2 MRPC
- Texas: "communications made for the purpose of obtaining professional employment" Comment 1 to Texas Disciplinary Rule of Professional Conduct 7.02
- Washington: "an active quest for clients" WRPC Comment 1 to RPC 7.2
- New York: "communications . . . the primary purpose of which is retention of the lawyer or law firm for pecuniary gain as a result of the communication." Comment 6 to NYRPC 7.1
- California "any message or offer made by or on behalf of a member concerning the availability for professional employment . . . directed to any former, present, or prospective client, including but not limited to the following." CRPC 1-400

So, the **first thing** for lawyers to remember is that that if speech is educating, enlightening, informing, or entertaining, it's ***not*** commercial speech and, therefore, not subject subject to any restrictions that might otherwise prohibit commercial speech.

The **second thing** for lawyers to remember is that regulation of commercial speech has constitutional limits. If a regulator desires to regulate commercial speech, it must meet the constitutional standard to regulate commercial speech, which is *intermediate scrutiny*.

- **First Element:** regulation must have an important government interest (not necessarily hard to do)
- **Second element** regulator must also show that regulation of speech directly advances government interest and
- **Third Element:** that the regulation narrowly tailored (doesn't prohibit permitted speech – more than it needs to)

Bolger v. Youngs Drug Products Corp., 463 U.S. 60 (1983); Sorrell v. IMS Health, 131 S. Ct. 2653 (2011); Bates v. State Bar of

Arizona, 433 U.S. 350 (1977); Central Hudson v. New York, 447 U.S. 557 (1980); Michigan Rule of Professional Conduct 7.2, comment; Comment 1 to Texas Disciplinary Rule of Professional Conduct 7.02; WRPC Comment 1 to RPC 7.2; Comment 6 to NYRPC 7.1; California RPC 1-400

3. **Same as it ever was**

   The technology/internet is revolutionizing everything from the way that we bank to the way we get our groceries, to the way we get around, to the way we buy homes, and beyond. And while the internet and social media interactions create some types of situations and affiliations that are unique to our age, many of the questions that lawyers face can be resolved by a common sense application of the existing rules. Because state rules vary from state to state I'm going to reference the ABA Model Rules. Most, not all, but most, states adhere relatively closely to or at least take as the baseline, the ABA Model Rules so they're a good start.

   - Example: Law firm claimed on internet to be "Jones and Associates" yet, there was only one attorney.
     - Many decisions and ethics opinions from a wide variety of states have held that the use of "associates" in the name of a law firm with one practicing lawyer is false and misleading – regardless of the medium. See, e.g., In re Mitchell, 614 S.E.2d 634 (S.C. 2005); In re Brandt, 670 N.W.2d 552, 554-55 (Wis. 2003); Portage County B. Ass'n v. Mitchell, 800 N.E.2d 1106 (Ohio 2003); Office of Disciplinary Counsel v. Furth, 754 N.E.2d 219, 224, 231 (Ohio 2001); S.C. B. Ethics Advisory Comm., Op. 05-19 (2005), 2005 WL 3873354; Utah St. B. Ethics Advisory Op. Comm., Op. 138 (1994), 1994 WL 579848
   - Example: Solicitation on social media - Lawyers who search Twitter or FaceBook feeds looking for keywords and then soliciting those folks directly. Particularly think of people looking for keywords related to personal injury, divorce, or other emotionally "charged" situations.
     - ABA MPRC – 7.3(b)(2) – prohibits solicitation involving coercion or duress.
     - Cal RPC 1-400(E), Standard (3) – prohibits solicitation in situations in which a lawyer knows or should have reason to know that a potential client is not physical, emotional, or mental state that he or she would not be expected to exercise reasonable judgment as to the retention of counsel.
   - Example: "Astroturfing" – creating false positive reviews for yourself or creating false negative reviews for the competition.
     - Prohibited by ABA MRPC 7.1 – "A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if it contains a

material misrepresentation of fact or law, or omits a fact necessary to make the statement considered as a whole not materially misleading."
        - In New York: A.G. Schneiderman Announces Agreement With 19 Companies To Stop Writing Fake Online Reviews And Pay More Than $350,000 In Fines
        - Also, remember that under ABA MRPC 5.3 you are on the hook for anything anyone under your employ (vendors or employers) do on your behalf.
        - Florida Rules of Professional Conduct - Rule 4-5.3 – same rule
    - Example: Professionalism/attorney/client privilege
        - It used to be that you'd have to wait until you got back to the office to vent about a bad day in court, an insolent client, or an argument with opposing counsel. But today smartphones and social networks have eliminated the preexisting geographic and communication barriers so that the angry missive fired off by a frustrated attorney can be seen by all the world before he's even cleared the courthouse steps. Besides the obvious cost to one's professional standing, reputation for judgment, etc., a poorly thought out comment can actually lead to discipline if it reveals client confidences or materially interferes with the adjudicatory proceedings. However, while the barriers between a lawyer's ill-advised communication and the rest of the world are lower than they once were, this type of communication in any public forum was always unwise, if not prohibited. Gentile v. State Bar of Nevada, 501 U.S. 1030 (1991); In the Matter of Margrett A. Skinner, No. S13Y0105, (Supreme Court of Georgia, March 18, 2013); Office of Lawyer Regulation v. Peshek, 798 N.W.2d 879, (Wis. 2011)

4. **But watch out!**
   Even though most risks haven't been altered dramatically by the internet, there are a few challenging situations that are relatively unique to the internet. Keep the changed (or changing) landscape in mind when considering these issues:
    - Friending, following, or connecting with a judicial officer; judge use of social media
        - ABA Formal Opinion 462, Connecticut (Op. 2013-06), Kentucky (Op. JE-119), Maryland (Op. 2012-07), New York (Op. 13-39, 08-176), Ohio (Op. 2010-7), South Carolina (Op. 17-2009), and Tennessee (Op. 12-01). These opinions largely state that a judge may participate in online social networking, but in doing so must comply with the Code of Judicial Conduct and consider his or her ethical obligations on a case-by-case (and connection-by-connection) basis.

    - Other states have a more restrictive view: California (Op. 66), Florida (Florida Ethics Opinion 2012-12), Massachusetts (Op. 2011-6), and Oklahoma (Op. 2011-3)
        - Florida Opinion 2013-14 cautioned Judges against using Twitter
            - I think they're wrong but it is good to be mindful of.
- Friending, following, or connecting with an opposing party, or even opposing counsel
    - Could you connect with co-counsel on a social network to try and learn trial prep or strategy?
    - What about friending an opposing party for discovery purposes?
    - What about encouraging a client to do so?
    - Advising clients to "clean up" social media pages
        - PROFESSIONAL ETHICS OF THE FLORIDA BAR OPINION 14-1 June 25, 2015
- Endorsements
    - A lawyer should also not solicit, nor allow publication of, endorsements unless they are presented in a way that is not misleading nor likely to create unjustified expectations.
        - South Carolina Ethics Opinion 09-10
    - "we conclude that attorneys are responsible for periodically monitoring the content of their LinkedIn pages at reasonable intervals . . . ."
        - New York County Lawyers Association Professional Ethics Committee Formal Opinion 748 March 10, 2015
        - Note: You can "hide" endorsements, either on an individual or total endorsement level
- For a good general overview on ethical social media marketing see "The State Bar of California Standing Committee on Professional Responsibility and Conduct, Formal Opinion No. 2012-186"


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"Usual" Social Media and Ethics Presentations

1.Scare

2.Scare*

3.Now, go get social! 

*And, sometimes laugh or make a joke about a hapless, usually young, lawyer

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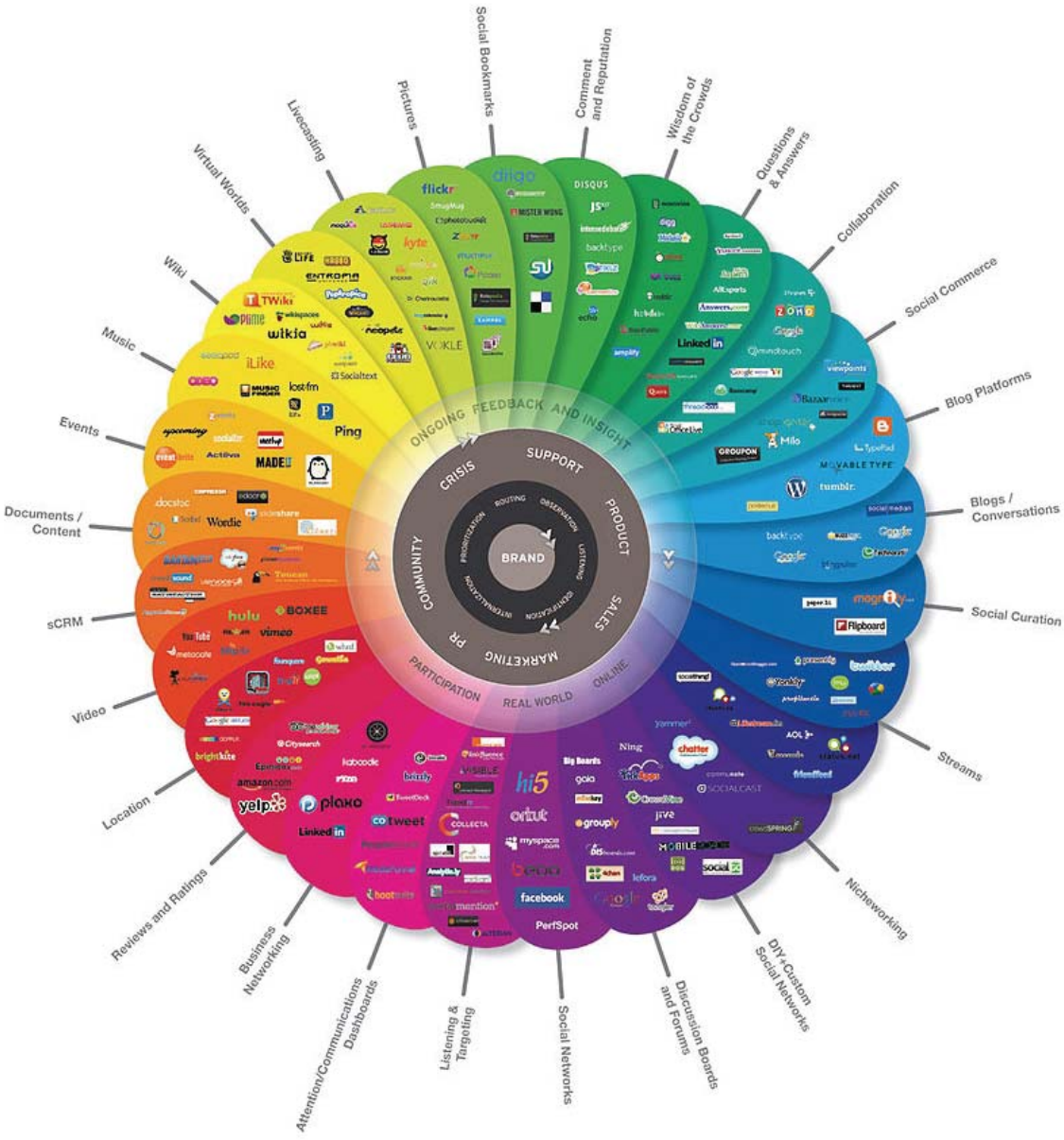
Scare



There are more social media sites, methods, channels, and formats than we could discuss in a week.

"Conversationprism" by Brian Solis and JESS3 - http://www.theconversationprism.com/. Licensed under CC BY 2.5 via Wikimedia Commons - http://commons.wikimedia.org/wiki/File:Conversationprism.jpeg#/media/File:Conversationprism.jpeg

1,280,000,000

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1,370,170,000

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Scare!!

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Ethical Duties Relating to Social Media

Part 7 of the [INSERT STATE NAME] Disciplinary Rules of Professional Conduct

Rule 7.01.	Firm Names & Letterhead
Rule 7.02.	Communications Concerning a Lawyer's Services
Rule 7.03.	Prohibited Solicitations & Payments
Rule 7.04.	Advertisements in the Public Media
Rule 7.05.	Prohibited Written, Electronic, or Digital Solicitations
Rule 7.06.	Prohibited Employment
Rule 7.07.	Filing Requirements for Public Advertisements & Written, Recorded, Electronic, or Other Digital Solicitations

Let's hit the highlights:

General Considerations in Using Social Media

(or, said differently, think before you click.)

Be careful about what you say on social media, and how you use it:

Galveston: Lawyer friended judge on Facebook, posted a string of updates about drinking and partying, and then told judge in court that the Lawyer's father had passed away so she needed a continuance. (Continuance denied.)

North Carolina: Judge friended defense counsel in a child custody case, and they discussed aspects of the case on Facebook (ex parte communication).

San Francisco: Prosecutor was disqualified for blogging about a pending case, including calling his opposing counsel "chicken" for requesting a continuance and mentioning evidence that had not been ruled admissible at trial.

Philadelphia Bar Association Advisory Opinion: Lawyer asked whether he could have a third party "friend" a witness so the Lawyer could secretly gain information to use for impeachment. PBA said that would be unethical.

Florida: The Florida Supreme Court corrected an attorney who claimed his comments were protected free speech when he blogged that a particular judge was an "evil, unfair witch."

x 24!

Followed by . . .

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Now

GO GET SOCIAL!

And thanks for listening.

Not your Father's Social Media and Ethics Presentation

or . . .

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Ethical Social Media Use in Three Easy Steps

Avvo Webinar

Thursday May 26, 2016

Avvo

About me:

Dan Lear
Director of Industry Relations, Avvo
dlear@avvo.com
@rightbrainlaw
http://rightbrainlaw.co/

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If you remember one thing from today . . .

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If you are using social media the way it is *intended* to be used, you shouldn't have to worry too much about the ethical rules.

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Agenda

1. Expectations
2. Remember the Constitution
3. Same as it ever was
4. *Caveats

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1) Expectations

What *is* social media?

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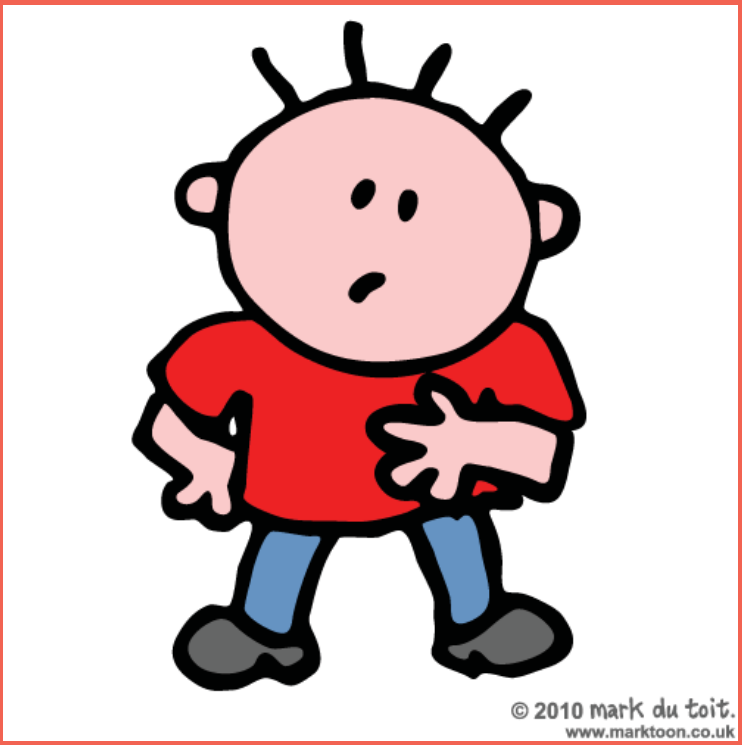

Social media is about you!

("Who? Me?")

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What do social media users expect?

YES!

- Inform
- Engage
- Enlighten
- Entertain

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The ”why” of social media

The Rolls-Royce Silver Cloud—$13,995

"At 60 miles an hour the loudest noise in this new Rolls-Royce comes from the electric clock"

What makes Rolls-Royce the best car in the world? "There is really no magic about it—it is merely patient attention to detail," says an eminent Rolls-Royce engineer.

1. "At 60 miles an hour the loudest noise comes from the electric clock," reports the Technical Editor of THE MOTOR. Three mufflers tune out sound frequencies—acoustically.

2. Every Rolls-Royce engine is run for seven hours at full throttle before installation, and each car is test-driven for hundreds of miles over varying road surfaces.

3. The Rolls-Royce is designed as an *owner-driven* car. It is eighteen inches shorter than the largest domestic cars.

4. The car has power steering, power brakes and automatic gear-shift. It is very easy to drive and to park. No chauffeur required.

5. The finished car spends a week in the final test-shop, being fine-tuned. Here it is subjected to 98 separate ordeals. For example, the engineers use a *stethoscope* to listen for axle-whine.

years. With a new network of dealers and parts-depots from Coast to Coast, service is no problem.

7. The Rolls-Royce radiator has never changed, except that when Sir Henry Royce died in 1933 the monogram RR was changed from red to black.

8. The coachwork is given five coats of primer paint, and hand rubbed between each coat, before *nine* coats of finishing paint go on.

9. By moving a switch on the steering column, you can adjust the shock-absorbers to suit road conditions.

10. A picnic table, veneered in French walnut, slides out from under the dash. Two more swing out behind the front seats.

11. You can get such optional extras as an Espresso coffee-making machine, a dictating machine, a hot and cold water fo[illegible]

12. There are three separate systems of power brakes, two hydraulic and one mechanical. Damage to one system will not affect the others. The Rolls-Royce is a very *safe* car—and also a very *lively* car. It cruises serenely at eighty-five. Top speed is in excess of 100 m.p.h.

13. The Bentley is made by Rolls-Royce. Except for the radiators, they are identical motor cars, manufactured by the same engineers in the same works. People who feel diffident about driving a Rolls-Royce can buy a Bentley.

PRICE. The Rolls-Royce illustrated in this advertisement—f.o.b. principal ports of entry—costs **$13,995.**

If you would like the rewarding experience of driving a Rolls-Royce or Bentley, write or telephone to one of the dealers listed on the opposite page.

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What social media is *not*

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DRUG PROBLEM?

I'LL TURN THAT ADDICTION INTO A PRESCRIPTION!

"Better Call Saul"

SAUL GOODMAN
ATTORNEY AT LAW

CALL NOW!

BETTERCALLSAUL.COM SE HABLA ESPANOL

Social Media is *not* a billboard

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What do social media users expect?

YES!

- Inform
- Engage
- Enlighten
- Entertain

NO!

- Sell
- Pitch
- Solicit
- Brag
- Lie

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2) Remember the Constitution

Bates v. Arizona - 1977

Advertising

Attorneys

Attorneys

Avvo

Commercial Speech

- For everyone else: "that which does no more than propose a commercial transaction"

  Central Hudson 1980

- For attorneys: "an active quest for clients"

  ABA Comment 1 to RPC 7.2

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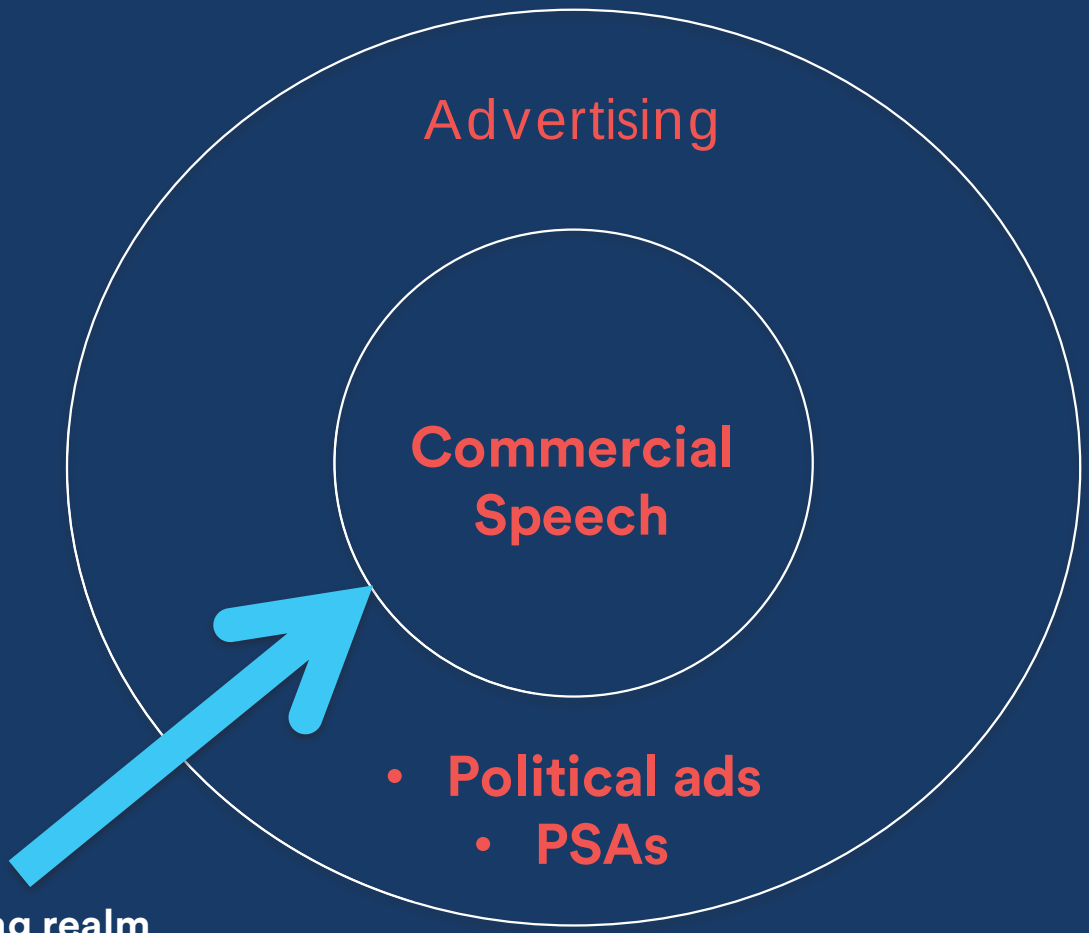
Advertising vs. Commercial Speech



In advertising realm only this is subject to regulatory scrutiny

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What about social media?

In advertising realm only this is subject to regulatory scrutiny

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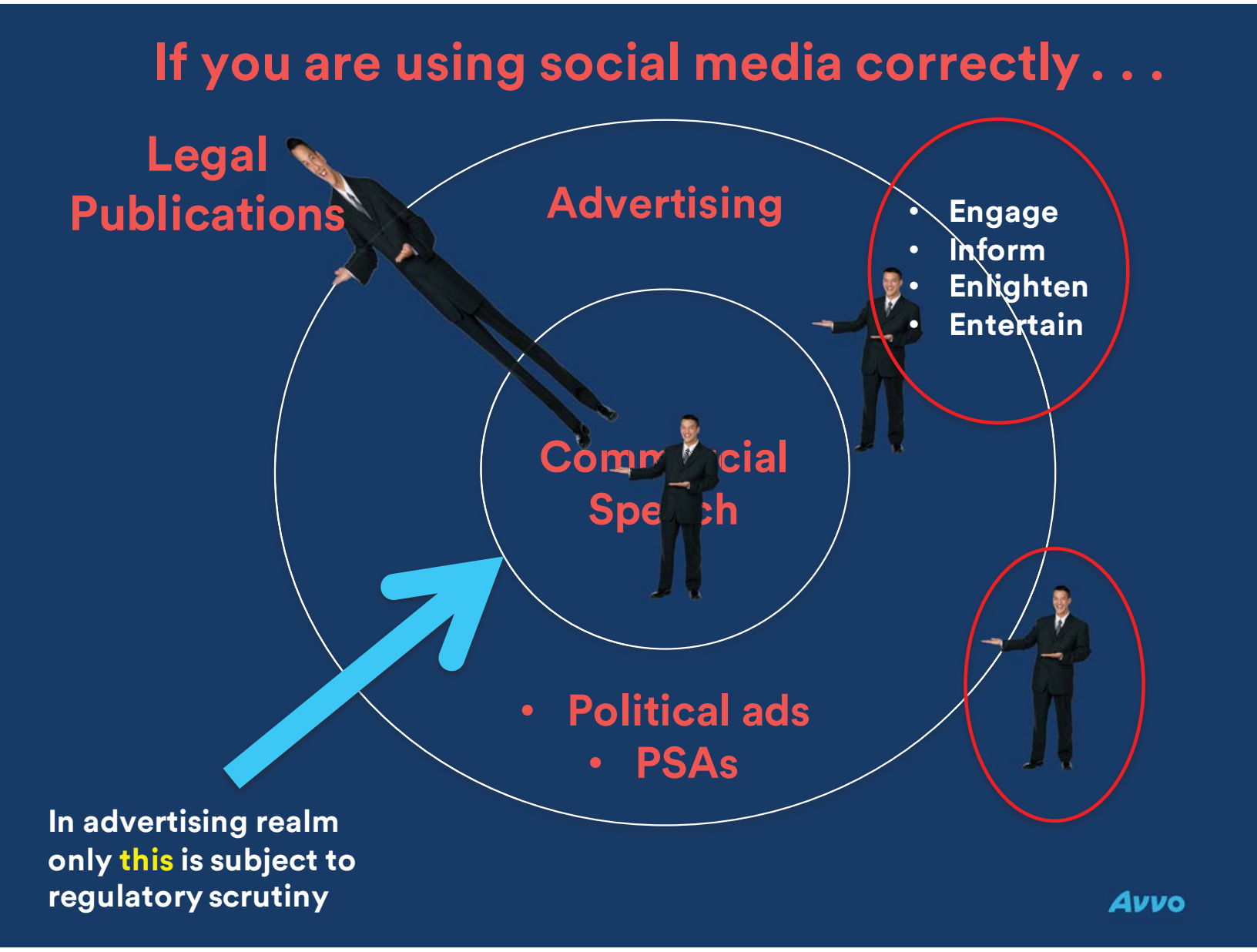
If you are using social media correctly . . .



Remember: Commercial Speech in Attorney Advertising

“an active quest for clients”

ABA Comment 1 to RPC 7.2

Informing, engaging, entertaining, or enlightening? That’s OK!

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Quiz time!

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California Bar: Formal Opinion No. 2012-186


Josh King
Just published an article on wage and hour breaks. Let me know if you would like a copy.
Like · Comment · Share · Promote · 2 seconds ago · Only Me
Josh King
Won another personal injury case. Call me for a free consultation.
Like · Comment · Share · Promote · 2 seconds ago · Only Me
Josh King
Won a million dollar verdict. Tell your friends and check out my website.
Like · Comment · Share · Promote · 2 seconds ago · Only Me
Josh King
Another great victory in court today! My client is delighted. Who wants to be next?
Like · Comment · Share · Promote · 2 seconds ago · Only Me
Josh King
Case finally over. Unanimous verdict! Celebrating tonight.
Like · Comment · Share · Promote · a few seconds ago · Only Me

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Quick aside about regulators

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A bar's authority to regulate advertising is not unfettered . . .

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Regulators' Burden

1. Important government interest
2. Regulation directly advances that government interest
3. Regulation is narrowly tailored

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Changes in the offing?

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3) Same as it ever was

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False and misleading advertising


Attorney at Law
Avvo

See, e.g.:

In re Mitchell, 614 S.E.2d 634 (S.C. 2005)

In re Brandt, 670 N.W.2d 552, 554-55 (Wis. 2003)

Portage County B. Ass'n v. Mitchell, 800 N.E.2d 1106 (Ohio 2003)

Office of Disciplinary Counsel v. Avvo

Solicitation


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ABA Model Professional Rule of Conduct – 7.3(b)(2)

California Rules of Professional Conduct 1-400(E), Standard (3)

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Astroturfing

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ABA Model Rule of Professional Conduct 7.1

“A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."

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Home » Media Center » Press Releases » September 23rd 2013

A.G. Schneiderman Announces Agreement With 19 Companies To Stop Writing Fake Online Reviews And Pay More Than $350,000 In Fines

"Operation Clean Turf" Concludes Year-Long Undercover Investigation Into Reputation Management Industry, Astroturfing And False Endorsements

Schneiderman: Astroturfing Is 21st Century's False Advertising

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ABA Model Rule 5.3

“Responsibilities Regarding Nonlawyer Assistants”

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Professionalism


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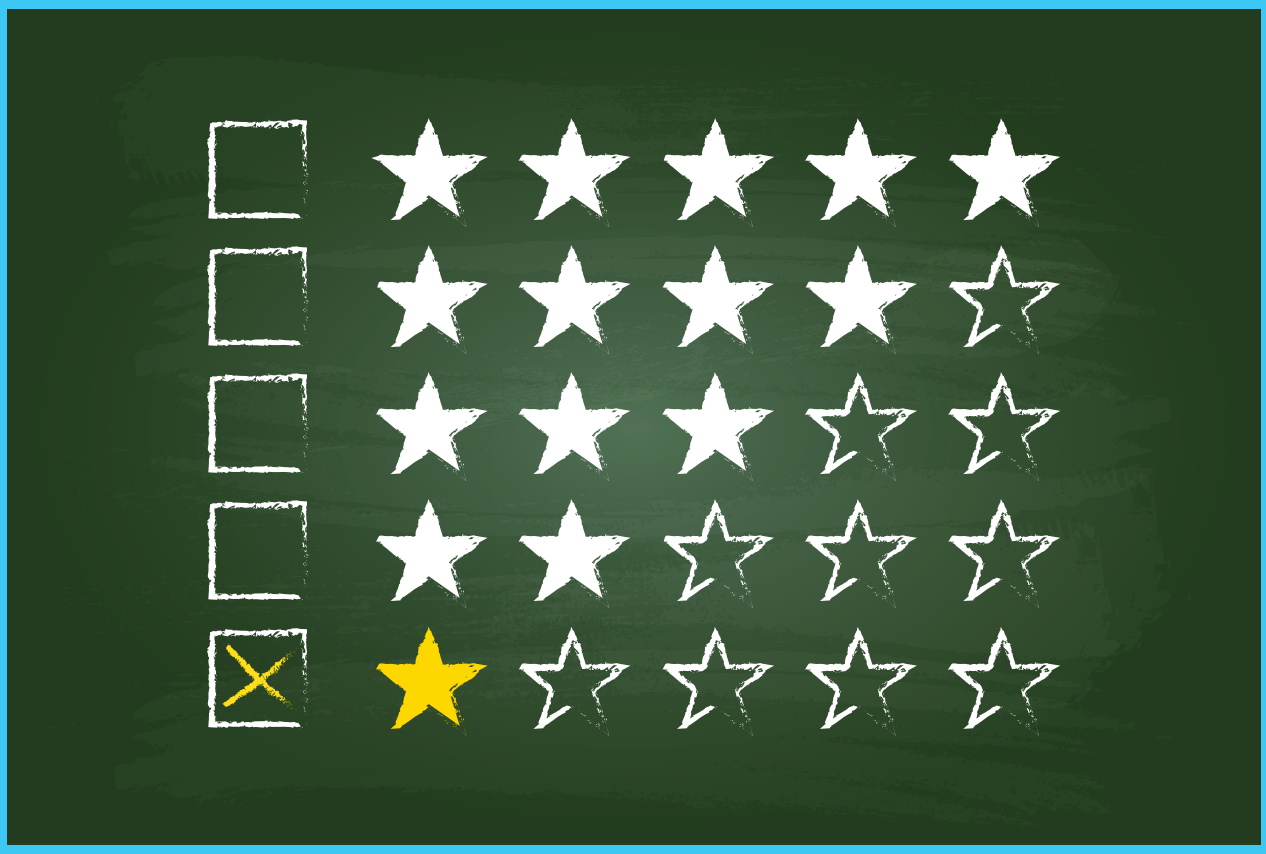
E.G. In re Skinner (Georgia, 2013)



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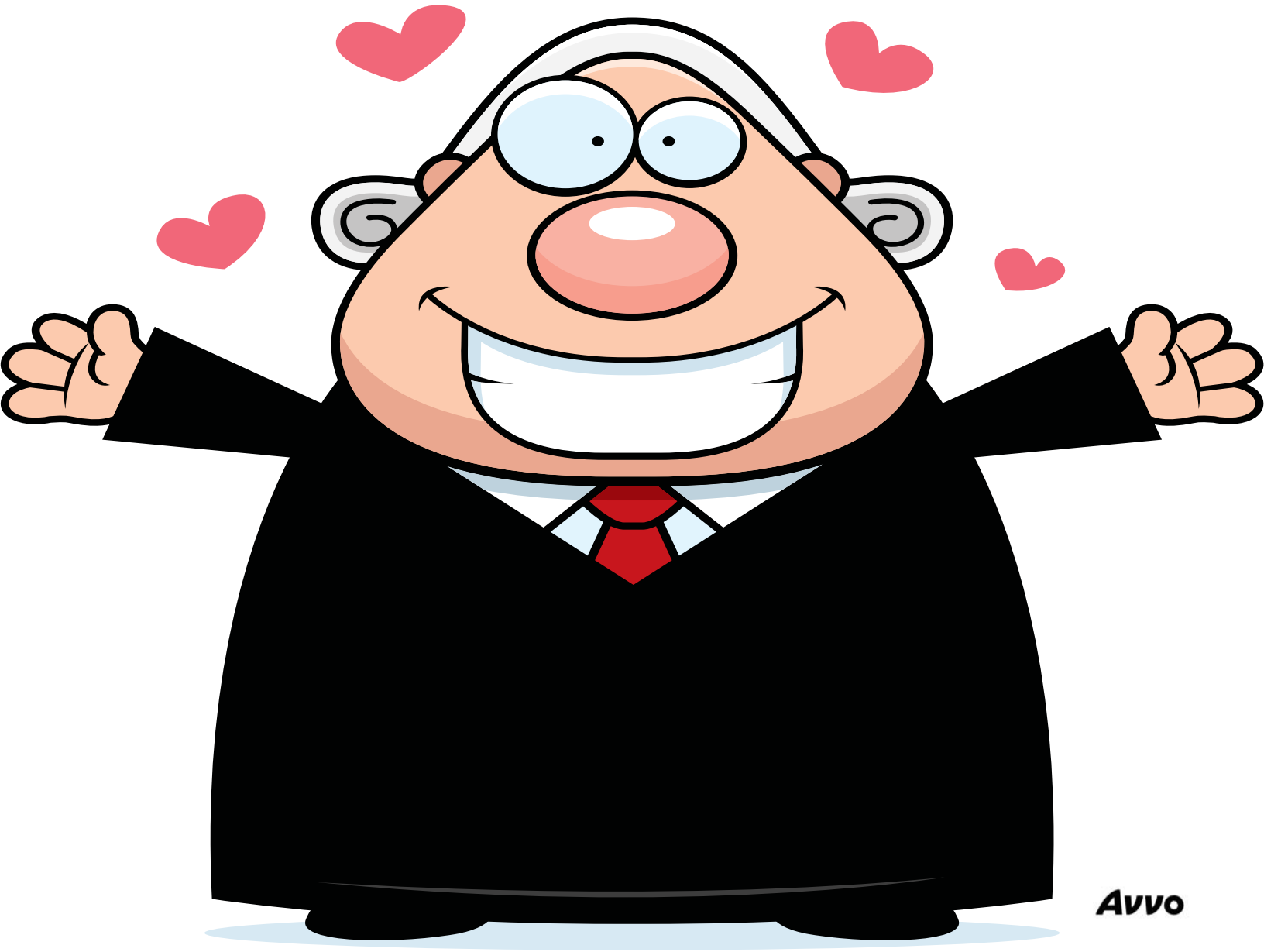
*Caveats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Two camps

More “open”

- ABA Formal Opinion 462
- Connecticut (Op. 2013-06
- Kentucky (Op. JE-119)
- Maryland (Op. 2012-07)
- New York (Op. 13-39, 08-176)
- Ohio (Op. 2010-7)
- South Carolina (Op. 17-2009)
- Tennessee (Op. 12-01).

More “restrictive”

- Florida (Florida Ethics Opinion 2012-12)
- Florida (Florida Ethics Opinion 2013-14)
- Massachusetts (Op. 2011-6)
- Oklahoma (Op. 2011-3)
- California (Op. 66)

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Add as Friend
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Florida Bar Opinion 14-1 June 25, 2015

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ENDORSE
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CDA 230
”The Law that Makes the Internet Go”


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Three Easy Steps

1. Expectations
2. Remember the Constitution
3. Same as it ever was*

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But if all else fails . . .

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If you remember one thing from today . . .

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If you are using social media the way it is intended to be used, you shouldn't have to worry too much about the ethical rules.

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THANK YOU!

Dan Lear
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@rightbrainlaw

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