

ENV 5408.A
3 Credit Hours

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Course Description

State-based welfare standards for CAFO animals are on a collision course with the federal government's expanding control of food and agriculture production. California and Massachusetts sales restrictions on non-conforming eggs and meats are poised to transform U.S. food law and animal law, whether or not they survive challenges from industrial agriculture. This course explores recent and pending litigation involving constitutional doctrines of federalism, the "dormant" Commerce Clause, and free speech, and considers the efficacy of market-based programs like third-party "humane" certification. No prior legal study required.

Notes about course topics

This class examines the practices, policies, and regulations that directly impact the well-being of CAFO-farmed animals. You may find this a departure from environmental law and food law courses that address animal suffering as a side-effect, categorized among other externalities that compromise environmental quality, food safety, and public health. I believe viewing farmed animal welfare through that lens undermines meaningful reform. Increasingly, technologies that mitigate other societal costs sidestep welfare concerns, in turn perpetuating the regressive position that institutionalized suffering is necessary—if regrettable—for long-term sustainability.

Confronting farmed animal welfare as a discrete issue, this course examines recent developments and current disputes over the "accepted agricultural practices" in animal confinement, transport, handling, feeding, and slaughter. We will compile a toolkit of legal, market-based, and grassroots strategies for improving welfare standards. And we will debate the doctrines and policies that sanction or curtail animal suffering, including:

- The use of federal preemption and "dormant" Commerce Clause claims against state animal cruelty and foods safety laws;
- Agency policy preferences for voluntary compliance and self-reporting in place of regulatory mandates;
- First Amendment free expression challenges to state laws that inhibit gathering and disseminating information about animal production practices; and
- The credibility and accuracy of governmental and third-party certification programs.

Course Materials

There is no textbook for this course. The reading and reference materials, and links to podcasts and videos, are available on the class TWEN site. Although I am mindful of conserving natural resources, I strongly encourage you to print the case and statute excerpts. You'll need them for quick reference in class.

THE LAW OF ANIMALS IN AGRICULTURE (TERM I, SUMMER 2018)

Each day has its own **Course Materials** folder. **Class preparation items are in red.**

The **Reference Materials** folder includes important statutes, regulations, and other documents that are referenced in your reading. The **For More Information** folder offers additional reading materials for those of you interested in digging deeper into a particular subject. The supplemental materials in this syllabus are not inclusive. If you'd like to contribute anything, please feel free to send it to me.

Grading

This course accommodates all levels of legal expertise. Students currently enrolled in J.D., LL.M., or other Master of Laws programs will be graded as they would be in a typical law school course. Students with no formal legal training will be graded accordingly.

The final grade will be based on a take-home exam, although I reserve the right to add or subtract 5% for exceptional participation in class. To help you make the most of your time in this accelerated course, the exam topic will be distributed midway through the course. Your exam responses will be due no later than 5:00 p.m. (ET) Thursday, June 21 (Summer Solstice!).

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Tuesday, May 29—Foundational Overview of Animal Agriculture Industries

- I. Industrial animal agriculture:
 - Common Characteristics of CAFO facilities
 - Monopoly and Monopsony in industrial animal agriculture
 - “Accepted agricultural practices in egg, meat, and dairy production”
[Excerpt 1 from *The Welfare of Animals in CAFOs*, Mench, et al.](#)
- II. How Do We Define or Assess “Animal Welfare”?
[Excerpt 2 from *The Welfare of Animals in CAFOs* Mench, et al.](#)
- III. Comparing Categories of Animal Law

Wednesday, May 30—The Maximization of Productivity, part 1

The pursuit of increased productivity: regulatory policies and welfare impacts of selective breeding practices and pharmaceutical use.

[Center for Food Safety, *America’s Secret Animal Drug Problem*, Sept. 2015](#)

[FDA’s Strategy on Antimicrobial Resistance – Questions and Answers](#)

Reference materials

- FDA Food, Drugs and Cosmetics Act, 21 U.S.C. § 360b (approval process)
- Animal Legal Defense Fund & Center for Food Safety, *Citizen Petition Seeking Agency Review of Codex Standards on Ractopamine*, Dec. 2012.
- *NRDC v. FDA*, 760 F. 3d 151 (2d Cir. 2014)
- FDA Guidance for Industry # 213, *New Animal Drugs . . . Recommendations for Drug Sponsors for Voluntarily Aligning Product Use*, (Dec. 2013)
- FDA DRAFT Guidance for Industry #233, *Veterinary Feed Directive*, Feb. 2016

For more information

- [CFS: How the Top Restaurants Rate on Reducing Antibiotics in Their Meat Supply](#) (2017)
- An HSUS Report: *Welfare Issues with the Use of Hormones and Antibiotics in Animal Agriculture*, Jan. 2016.
- U.S. Gov’t. Accountability Office, *Antibiotic Resistance, More Information Needed to Oversee Use of Medically Important Drugs in Food Animals*, GAO-17-192, March 2017.
- Pew Charitable Trust, *New FDA Policies on Antibiotic Use in Food Animal Production*, May 2014.

Thursday, May 31—The Maximization of Productivity, part 2

- I. Beyond Selective Breeding: Genetic Engineering for Productivity, Health, and Welfare
[Greger, M., *Transgenesis in Animal Agriculture: Addressing Animal Health and Welfare Concerns*, 88 J. Anim. Sci. 811 \(2010\).](#)
- II. USDA Promotion of Agricultural Animal Research for Increasing Productivity; Animal Welfare Act
[U.S. Research Lab Lets Livestock Suffer in Quest for Profit, NY Times, Jan. 19, 2015](#)
[Cowan & Greene, Cong'l Res. Serv., *Meat Animal Research Center: The Animal Welfare Act & Farm Animal Research*, July 1, 2015](#)

Reference Materials

- Animal Welfare Act, 7 U.S.C. §§ 2131, *et seq.*
- Animal Welfare in Agricultural Research Endeavors Act (AWARE), H.R. 746, 114th Cong.

For more information

- Agricultural Research Service, *Findings and Recommendations on the Animal Care and Well-Being at the U.S. Meat Animal Research Center*, March 9, 2015
- USDA APHIS inspection report, Meat Animal Research Center, July 2017

Friday, June 1—Animal Disease and Long-Distance Transport

- I. Long-Distance Domestic Transport and the Twenty-Eight Hour Law
[Pp. 1-11, Econ. Res. Serv., *Interstate Livestock Movements*, LDP-M-108-1, June 2003.](#)
[Animal Welfare Inst., *Legal Protections for Farm Animals During Transport*, Aug. 2010.](#)
- II. Transmission Vectors of Animal Disease in Transport; the Animal Health Protection Act
[Greger, Michael, *The Long Haul: Risks Associated with Livestock Transport*, 5 *Biosecurity & Bioterrorism: Biodefense Strategy, Practice, and Science*, 301 \(2007\)](#)
[A Comparison of Regulations for the Transport of Farm Animals in Canada, the United States, and the European Union](#)

Reference materials

- Animal Health Protection Act, 7 U.S.C. §§ 8301–8322
- Twenty-Eight Hour Law, 49 U.S.C. § 80502
- USDA APHIS regulations, 9 C.F.R. §§ 89.1–89.5 (under the Twenty-Eight Hour Law)
- FSIS Notice 06-10, Humane Handling at All Entrances and the Twenty-Eight Hour Law, (Jan. 15, 2010), Part IV(A)-(B)
- S. 946, S 850, HR 1282 (114th Cong.) – transportation of horses

Monday, June 4—Livestock Slaughter & the Federal Meat Inspection Act

- I. Overview of a typical livestock slaughter and processing plant
[Promotional videos from the American Meat Institute \(now the North American Meat Institute\)](#)
 - [Cattle slaughter and beef processing \(10 minutes\)](#) - The captive bolt method is by far the most common method used for purposes of complying with the HMSA's requirement that livestock animals be "rendered insensible to pain . . . before being shackled, hoisted, thrown, cast, or cut . . ." 7 U.S.C. 1902(a).
 - [Hog slaughter and pork processing \(18 minutes\)](#) - Shows two stunning methods: (1) electrical shock stunning (which usually lasts only for ~ 30 seconds); and (2) CO2 "stunning." Both comply with the HMSA standards, 7 U.S.C. 1902(a). According to some sources, CO2 stunning is used in a minority of U.S. slaughterhouses; other sources claim this method is more prevalent. The captive bolt method demonstrated in the cattle video is still practiced, but considered unsuitable by many animal scientists.

Compare conventional slaughter methods with alternative methods under the most stringent 3rd-party certification program, **Animal Welfare Approved**: [AWA Guidelines for Red Meat Slaughter Facilities](#)
- II. USDA FSIS regulatory authority under FMIA and the Humane Methods of Slaughter Act (HMSA)
[Bruce Friedrich, When the Regulators Refuse to Regulate](#)
- III. Horse Slaughter
[Empacadora de Carnes de Fresno v. Curry, 476 F.3d 326 \(5th Cir. 2007\) \(edited, 4 pgs\)](#)

Reference materials

- Humane Methods of Slaughter Act (HMSA), 7 U.S.C. §§ 1901–1907
 - 9 C.F.R. §§ 313.1 – 313.50, Humane Slaughter of Livestock regulations
- Federal Meat Inspection Act, 21 U.S.C. § 601, *et seq.* (especially §§ 601-610)
 - 9 C.F.R. §§ 500.1–500.8, Rules of Practice (enforcement) under FMIA
- 2002 Congressional Resolution re: HMSA Enforcement

For more information

USDA FSIS Draft Rule: Modernization of Swine Slaughter Inspection (Feb 01, 2018). [Docket No. FSIS-2016-0017](#) | [PDF](#)

Tuesday, June 5—Non-Ambulatory / Downer Livestock Handling

Contributing factors: [Review: impacts of long-distance transport and growth-promotants on health](#)

- I. Federal and State Humane Methods of Slaughter Act and Non-Ambulatory Animals Ante-mortem inspection of livestock; non-ambulatory livestock (in reference materials)
[9 C.F.R. § 309.x \(FMIA regulations for food safety; see §§ 309.1 – 309.3\)](#)
[9 C.F.R. § 313.2 \(HMSA regulations for humane handling\)](#)

- II. Hallmark Meatpacking Plant investigation California Standards for Non-Ambulatory Livestock
[HSUS, Rampant Animal Cruelty at California Slaughter Plant, Jan. 30, 2008](#)

[National Meat Ass'n v. Brown, 599 F.3d 1093 \(9th Cir. 2010\)](#)

[National Meat Ass'n v. Harris, 132 S. Ct. 965 \(2012\)](#)

As you read these cases, keep the relevant statutory language handy.

- Cal. Penal Code § 599f
- Federal Meat Inspection Act, 21 U.S.C. § 678 (preemption section)
- 9 C.F.R. § 313, Humane Slaughter of Livestock (USDA FSIS regs)

- III. How an Undercover Video Changed Federal Law

[HSUS, Abused Calves at Vermont Slaughter Plant, Oct. 30, 2009 \(video, article\).](#)

[Testimony before the House Subcommittee on Domestic Policy, Continuing Problems in USDA's Enforcement of Humane Methods of Slaughter Act, by Dean Wyatt, FSIS Supervisory Public Health Veterinarian, March 2010.](#)

[USDA Shuttters Calf Slaughter Plant in N.J. in Wake of HSUS Investigation, Jan. 27, 2014.](#)

[this plant [closed for good](#) in March, 2016]

SKIM ONLY: HSUS petition to USDA to FSIS: amend regulations to include calves with other cattle eliminated from the food supply if non-ambulatory at slaughter

- May, 2015: USDA published draft rule
- July 18, 2016: USDA published final rule: 9 C.F.R. § 309, *Requirements for the Disposition of Non-Ambulatory Disabled Veal Calves*

Reference materials

- Cal. Penal Code § 599f
- Humane Methods of Slaughter Act, [7 U.S.C. §§ 1901–1907](#)
 - [9 C.F.R. § 313](#), Humane Slaughter of Livestock (USDA FSIS regulations)
- [Federal Meat Inspection Act](#), 21 U.S.C. § 601, *et seq.*; [preemption terms at § 678](#)
 - [9 C.F.R. §§ 500.1–500.8](#), Rules of Practice, Regulatory Requirements under FMIA
- FSIS Compliance Guide for a Systemic Approach to the Humane Handling of Livestock, Oct. 2013 (recommended for compliance with regulations at 9 C.F.R. § 313)
- Requirements for the Disposition of Non-Ambulatory Disabled Veal Calves, 9 C.F.R. 309

For more information

- Dr. Richard Raymond, [Opinion: What is a Downer Calf?](#), Food Safety News, Feb. 21, 2014
- Dan Flynn, Opinion: [Animal Rights Mean No Second Chance for Downer Calves](#), FSN, July 15, 2016
- Becker, *Nonambulatory Livestock & the Humane Methods of Slaughter Act*, CRS, 03/09

Wednesday, June 6—State Animal Cruelty Laws; California Prop 2

- I. State Farmed Animal Welfare Legislation
 - A. Ballot Initiatives and Referendums (Reference: [States with Legislative Referendum for Statutes and Constitutional Amendments](#))
 - B. Survey of state laws & regulations that ban or restrict common practices
Reference: A minority of states have enacted regulations regarding the confinement of animals in agriculture. These tables highlight states that have enacted bans or restrictions on specific animal management practices:
[HSUS Chart – Alabama – Missouri](#)
[HSUS Chart – Montana – Wyoming](#)
- II. Using Animal Cruelty Laws for Farmed Animal Suffering
[Humane Society of Rochester v. Lyng](#) (edited)
[ALDF v. Mendes](#) (edited)

[ABC News 20/20 Sparboe Investigation: Inside a Factory Egg Farm](#) (Nov. 2011)
- III. California *Farmed Animal Protection Act* & sale ban on battery cage-produced eggs
[Excerpt, J. Lovvorn & N. Perry, California Proposition 2 – A Watershed Moment for Animal Law](#) (this was published prior to the *Missouri v. Harris* litigation)
 - A. Federal initiatives to phase out battery cage egg production
[HSUS & United Egg Producers – Summary of agreement \(“Egg Bill”\)](#)
 - B. [State of Missouri v. Harris, 58 F. Supp. 3d 1059 \(E.D. Cal. 2014\)](#) (affirmed on appeal)

Reference Materials

- State animal cruelty laws
 - Arkansas §§ 5-62-103, 104, 105
 - Idaho §§ 25-3502, 3514
 - New York Agric. & Markets Law §§ 350, 353
 - Ohio Rev. Code § 959.13; § 959.131
- California Proposition 2 (2008) – the Prevention of Farm Animal Cruelty Act (see p. 3)

- Cal. Prop 2, as codified: Calif. Health & Safety Code, §§ 25990 – 25994
- Cal. AB 1437 (Calif. Health & Safety Code, §§ 25995 – 25997), the “egg sale ban”
- Egg Products Inspection Act, 15 U.S.C. §§ 1031–1056
- EPIA preemption section, 15 U.S.C. § 1052
- H.R. 1731, 113th Cong. (S. 820), Egg Products Inspection Act Amendments of 2014 (“Egg Bill”)

For more information

- Gary Baise, Farm Futures, [Missouri Scrambles California’s Eggs](#), Dec. 5, 2017

Thursday, June 7—Poultry Slaughter and the PPIA

I. Overview of the typical slaughter and processing plant

[An Inside Look at U.S. Poultry Processing](#) (pay close attention to the narration about how the process is regulated) (7:35) [\(video from the U.S. Poultry & Egg Association\)](#)

compare conventional slaughter methods to those required under the most stringent animal welfare third-party certification program, **Animal Welfare Approved: [AWA Guidelines for Poultry](#)**

II. USDA FSIS regs under the Poultry Products Inspection Act (PPIA); humane slaughter standards
[Levine v. Conner](#), 540 F.Supp.2d 1113 (N.D.Cal. 2008)
[Levine v. Vilsack](#), 587 F.3d 986 (9th Cir. 2009)

[B. Friedrich, Still in the Jungle: Poultry Slaughter and the USDA](#), 23 N.Y.U. Envtl. L.J. 245 (2015)

Reference Materials

Poultry Products Inspection Act, 21 U.S.C. § 451, *et seq.*

Monday, June 11-- Shark Fins and Foie Gras (“Niche” markets)

I. *Shark Fins*: Sale and Distribution Ban

Watch: [Humane Society Intl. & HSUS, Shark Finning Cruelty](#) (~2:00)

Chinatown Neighborhood Assn et al. v. Harris, 794 F.3d 1136 (9th Cir. 2015) (cert. denied)

II. *Foie Gras* production and California’s forced-feeding ban and sale ban

Read/skim: [HSUS: *The Welfare of Animals in the Foie Gras Industry*](#)

[Feeding Ducks for Foie Gras at Hudson Valley Foie Gras](#) (:51), 07/10/12

Note: Various other foie gras force feeding videos are available online, but I chose this video because it was filmed and uploaded by the largest foie gras producer in the United States, Hudson Valley Foie Gras (HVFG). As such, we may assume that this video represents the best possible conditions for geese raised in the production of foie gras.

Assoc. des Eleveurs de Canards et d’Oies du Quebec v. Harris, 729 F.3d 937 (9th Cir. 2013) (cert. denied, 135 S. Ct. 398 (2014)); edited

Assoc. des Eleveurs de Canards et d’Oies du Quebec v. Harris, 79 F. Supp. 3d 1136 (C.D. Cal. 2015) (edited)

Reference Materials

Cal. Health & Safety Code §§ 25980 – 25984
PPIA preemption section, 21 U.S.C. § 467e

Cal. Fish & Game Code §§ 2021-2021.5

Sections from the Magnuson–Stevens Fishery Conservation and Management Act (MSA)
16 U.S.C. §§ 1851–1869, National Fishery Management Program
16 U.S.C. § 1801 – United States Sovereign Rights to Fish and Fishery Management Authority

For more information

Stan Parker, *High Court Urged to Reel in California Shark Fin Ban Case*, Law 360, May 10, 2016.

Tuesday, June 12—Labeling Claims, Organics Program, Consumer Fraud

- I. Unregulated or non-standardized labeling claims
Skim Compassion Over Killing: Petition to USDA to Change Egg Labeling Requirements (2010)
- II. Regulated Labeling claims: Animal Welfare under the National Organics Program
Read: highlighted sections of final rule
- II. State-based labeling requirements
P. Vesilind, Emerging Threats to Food Labeling Reform (2012) (preemption section)
- III. Third-party “humane” certification programs

Reference Materials:

Federal Meat Inspection Act, 21 U.S.C. §§ 601–695
Poultry Products Inspection Act, 21 U.S.C. §§ 451–472
Egg Products Inspection Act, 21 U.S.C. §§ 1035–1051

N.O.P. final rule, *Organic Livestock & Poultry practices*

Wednesday, June 13—“Ag Gag” Laws and Other Barriers to Industry Information

- I. CAFO recordkeeping and reporting requirements to the EPA, USDA, and FDA; industry legal opposition to operational transparency and access
- II. State “ag gag” laws: legislative strategies for protecting industry operations from unauthorized access, information-gathering, and reporting

excerpt: Morgan, S., Ag-Gag Challenged: The Likelihood of Success of Animal Legal Defense Fund v. Herbert’s First Amendment Claims, 39 VT. L. REV. 241 (2014)

Animal Legal Defense Fund, Taking Ag-Gag to Court, Jan. 26, 2016 (recounting recent legal challenges to anti-whistleblower laws in Idaho, Utah, and North Carolina).

Democracy Now, Undercover Activist Details Secret Filming of Animal Abuse & Why “Ag-Gag” Laws May Force Him to Stop, April 19, 2013 (~ 25 minutes)

ALDF v. Otter, No. 1:14-cv-00104-BLW, 2015 WL 4623943 (Aug. 3, 2015) (appealed)

Skim for basic understanding of the challenges: PETA v. Cooper, 1st Amended Complaint filed Feb. 26, 2016, Case No.: 16-v-25 (M.D.N.C. 2016).

Reference Materials

- Utah Criminal Code § 76-6-112, Agricultural Operation Interference (2012)
- Idaho § 18-7042. Interference with agricultural production (2014)
- North Carolina H.B. 405, Civil Remedies for Interference of Property (2015)
- Arkansas interference of property (2016)

Thursday, June 14—Defending Massachusetts’s Act to Prevent Cruelty to Farm Animals

- Massachusetts, An Act to Prevent Farm Animal Cruelty, Bill H. 3930
- Farm Futures, [Indiana, Other States, Pile On Against Massachusetts’ Livestock Law](#), Dec. 13, 2017.
- *State of Indiana, et al., v. Commonwealth of Massachusetts*, Motion for Leave to File Bill of Complaint, Bill of Complaint, and Brief in Support, (filed Dec. 11, 2017)