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Re: SB 300

Members of the Senate Agriculture & Natural Resources Committee.

My Name is Ron Smith. I'm an attorney in Larned, Kansas. Prior to my practice in Larned, I spent 25 years in state government, as legislative staff, and lobbying.¹ My former senior partner, Glee Smith Jr., was President of the Senate from 1965 to 1973.

A lawyer can't have a small-town practice without becoming involved with agriculture on a small basis. All of agriculture is having a tough time these days.

- Ag accounts for 40% of our state's economy.
- While the national economy is booming, Kansas land and commodity prices since 2015 are down significantly.
- The American Farm Bureau reported 2019 farm bankruptcies for the 12-month period ending September 2019, were up 24% from the prior year and the highest level since 2011. That's even with all the federal aid because of the tariffs.
- Kansas had 37 of the 586 national farm bankruptcies. Only Wisconsin had more.
- Part of my handouts include an article on increasing farm bankruptcies.

This leads to the natural question of *who is asking the Senate Agricultural Committee of Kansas to promote legislation to put more farms out of business?* This is not a pro-growth agriculture bill. **And SB 300 is not a food safety bill either.**

I want to make three quick points:

I. WHY would an agricultural state legislature be asked by Big Agriculture to bully and run out of business the small farm and small dairy operations offering raw milk?

Early last year, the Kansas Justice Institute sued the Kansas Department of Agriculture to overturn KSA § 65-771(cc) which banned the advertising of raw milk products. The government was forced to admit this statute was unconstitutional based on current First Amendment decisions of the U. S. Supreme Court. Government entered into a consent decree.

The newspapers say that the bill is authored by the Kansas Dairy Association. Ask yourself why?

¹ I was Deputy Secretary of Administration under Governor John Carlin in 1979-80, and Whitney Damron and I helped start Pete McGill's contract lobbying organization in the early 1980s. I spent 14 years as general counsel and lobbyist for the Kansas Bar Association, and then three years in the Department of Commerce.

I can't stand here and say that small dairies without a raw milk product will file bankruptcy. But the proponents of this bill cannot say that these small farms without that product will have the same way of life and survive in a meaningful way, either. That's the danger of SB 300.

The document I have attached to my testimony is part of a longer law review article on this topic regulating raw milk, what is called "moooshine." The article outlines health benefits of raw milk, taste benefits and concerns with pasteurized milk.

The internet can show in the past ten years, there were major food poisoning problems. The studies are haphazard because most studies are one- or two-year projects, not long-term studies.

- A 2007 Swedish study of nearly 15,000 children across five European countries found those who drank unpasteurized milk were significantly less likely to suffer from asthma and hay fever.
- There were 23,152 reported cases of foodborne illnesses in 2008 and only one half of one percent, 132, were attributed to raw milk. One third were attributed to beef, chicken and fish preparation.
- 2008-2009 714 people in 46 states became ill from consuming peanut and peanut butter products.
- 2011 an outbreak occurred with processed turkey products, prompting a recall of 36 million pounds of ground turkey
- Even *bottled water* can compromise human immune systems against the parasite *Cryptosporidium* which, in immune compromised individuals, can cause severe illness and possibly death.

In the past 20 years there have been deaths caused by cantaloupe, spinach, a lot of food poisoning from eggs, lunch meat, and oysters.

That leads me to believe the word that describes what the proponents are doing with SB 300 and raw milk products is "fear-mongering." Lawmakers need to review who funds these reports because the outcomes of studies often are pre-determined by who pays for the study.

Second Point:

II. In 21st Century America, there is no guarantee to anyone that the next meal at a restaurant or the next packet of hot dogs or quart of pasteurized milk from the grocery store will not make you sick.

As to the safety of pasteurized milk, a renown infectious disease expert, the late John M. Leedom, wrote a few years ago: "Milk and milk products—particularly those that are unpasteurized—are potentially hazardous; [but] even pasteurized products have been implicated in outbreaks. Contamination may occur after pasteurization, and no process works perfectly 100% of the time." (Leedom was professor emeritus of the Department of Medicine at the Keck School of Medicine of USC.)

Government cannot protect us from everything. Food preparation and processing is the most important single issue ensuring the safety of consumable foods.

Third Point:

III. If you eliminate from the economy raw milk products sold on the farm, you eliminate a portion of sales tax revenue to the state. Do we know how much?

I buy a lot of raw milk products and pay sales taxes to the Reno county and the state. I wish I could get these products at my local grocery so my sales tax dollars would benefit locally, but I can't. Raw milk foods may not generate a lot of tax revenue, but I'll bet you don't know how much you're giving away. Do you want to kiss it all goodbye at a time when you are trying to expand Medicaid and other new tax-reliant programs?

There are health benefits to raw milk. I can list them here but every article, every claim, by proponents of raw milk and opponents can be rebutted and challenged.

What I've seen is a basic statement that milk products – raw milk and pasteurized milk – have fewer sickness outbreaks than other forms processed and natural foods, such as certain vegetables, oysters, fish, beef, etc. etc. It is hard to know who to believe. *Why make public policy on unclear statistics.*

My wife uses raw milk to relieve debilitating muscle stiffness with her fibromyalgia. She believes in the probiotics and enzymes in raw milk so much that she says if SB 300 passes, that we have to buy a cow and we don't have space for a cow!

I'll answer questions. Thank you.

Farm bankruptcies continue to rise across United States

Great Bank Tribune 2-5-20

BY ADAM BELZ
Star Tribune (Minneapolis)

Farm bankruptcies across the U.S. rose again in 2019, as a prolonged slump in commodity prices, poor weather and the ongoing trade war with China squeezed farmers.

Farm bankruptcies rose 20% nationally in 2019 and 16% in the Upper Midwest, according to data released by the federal court system.

While the absolute numbers are small, they have been rising steadily since 2013, a year after the most recent peak in farm profits. Farm bankruptcies in Minnesota, Wisconsin, Iowa, South Dakota and North Dakota were three times greater last year than in 2013. Small dairy farms have led the way.

Chapter 12 filings are the tip of the iceberg when it comes to farm financial troubles. Some farmers file for Chapter 7 bankruptcy and liquidate their holdings.

Farmers with more than \$4.2 million in debt cannot file for Chapter 12, and corporations or partnerships in which no single farmer owns more than 50% of the farm more often file for Chapter 11 bankruptcy.

The extended downcycle since the 2012 peak has led farmers to take on more debt and lenders to demand more collateral. Alternative lenders fill some gaps.

"The situation is just kind of dragging out and wearing people down," said Kevin Klair, director of the Center for Farm Financial Management at the University of Minnesota Extension. "The big difference

between this and the 1980s is we're not falling off a cliff. It's a slow, painful grind."

Winter is when row crop farmers go to the bank for a new line of credit to pay for seed, fertilizer and other planting expenses for the year. That requires demonstrating to a lender that they can pay back the money.

"Maybe 10% to 15% of farmers are struggling to find a lender right now," said Aaron Brudelle, a farm business management instructor in Welcome, Minn.

"They're either needing to put up more collateral or tapping higher-interest financing from new entrants into ag lending."

The first thing a farmer will sell is underused farm equipment, Brudelle said. Selling land is "the last resort," he noted, in part because bankers often demand land as collateral.

Low interest rates, high land prices and the trade war bailout from the U.S. Department of Agriculture helped farmers withstand a poor year in 2019 brought on by the trade war and wet spring. But the downward trend is unmistakable and without an elusive rebound in corn and soybean prices it will continue.

Farm debt in 2019 was projected to hit \$41.5 billion, a 24% increase since 2012 but not adjusted for inflation, as much debt as in the early 1980s, and the debt-to-equity ratios for farmers are much more reasonable now than heading into the 1980s farm crisis.

What's changing is who farmers are borrowing from. Large banks are pulling

back from farm lending. The nine banks in the country with more than \$250 billion in assets — including Wells Fargo, U.S. Bank and Bank of America — have cut their farm lending portfolios by a combined 14% since 2016, or roughly \$2 billion.

"When farming is good, they want to get in, and as soon as it gets tough they want to get out," said Gary Wertsch, president of the Minnesota Farmers Union.

More farmers are turning to alternative lenders — getting loans from equipment dealers or seed companies, or tapping higher-interest financing from new entrants into ag lending.

The Wall Street Journal reported in November that one alternative lender, Ag Resource Management, had grown loan volume at a 40% rate over the past three years.

"I'd describe them as maybe payday lenders," said Glen Smith, chairman of the Farm Credit Administration, at a Congressional subcommittee meeting in November.

Not only do they generally charge rates roughly double what traditional

lenders charge, loans from alternative lenders and company-financed debt can make the situation more complicated for the local banker who's been working with the farmer for years, especially if the loan goes sideways.

"It's a lot tougher to untangle them — who's got first position, who's got second, and who might not get paid," Brudelle said.

All this adds up to an increasingly complicated landscape, said Mary Nell Presler, director of the farmer-lender mediation program at the University of Minnesota.

"It's getting more difficult every year and more complex," she said. "With the economy the way it is, it's very difficult to make a cash flow work and have a positive bottom line."

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**THE PROHIBITION OF MOOSHINE:
A CONSUMER PROTECTION ANALYSIS OF RAW MILK IN
INTERSTATE COMMERCE**

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dying raw milk with finely powdered charcoal or with a food dye that is blue, green, or red.¹⁷⁴

Importantly, enough “winking and nodding” can bring virtually unregulated raw milk permitted for animal consumption—but destined for human consumption—to be sold on-farm, at farmer’s markets, and even in retail stores.¹⁷⁵ For example, state regulations that only allow pet food sales of raw milk often only require that the product be labeled as “pet food” when sold; there are no laws against human consumption.¹⁷⁶ Attempts to exploit the pet food exception have, in fact, been made even in interstate commerce.¹⁷⁷

E. *Why Raw Milk Consumers Want the Product*

Raw milk consumers want the choice to consume the product because of its health benefits and taste benefits—even above those available via small-scale, sustainable, organic dairy farms that pasteurize—and also because of concerns with mainstream pasteurized milk. Rather than use technology to make up for unsafe processing, or potentially unsafe processing, and harm the nutrient value of milk, proponents argue that certified raw milk provides a superior alternative.¹⁷⁸ They argue that certification, as a preventative measure, maximizes safety and health benefits by avoiding pasteurization and focusing on the integrity of the raw product.¹⁷⁹

¹⁷⁴ *Id.* (“(A) finely powdered charcoal; (B) FD & C Blue No. 1, FD, & C Blue No. 2, Ultramarine Blue; or (C) FD & C Green No. 3, FD & C Red. No. 3, or FD & C Red No. 40.”).

¹⁷⁵ Dan Flynn, *Raw Milk Dropped in Florida*, FOOD SAFETY NEWS (Sept. 23, 2009), <http://www.foodsafetynews.com/2009/09/whole-foods-farmers-market-drop-raw-milk/#.Ur3tao1Q1Mo>; April Fulton, *Drinking Raw Milk Is Worth The Risk, Advocates Say*, NAT’L PUB. RADIO (July 19, 2010), <http://www.npr.org/templates/story/story.php?storyId=128547897>; *Underground Raw Milk*, THE GLOG: CHEF GUI’S WEBLOG (Apr. 20, 2009), <http://www.chefgui.blogspot.com/2009/04/underground-raw-milk.html>.

¹⁷⁶ Flynn, *supra* note 175.

¹⁷⁷ *United States v. Organic Pastures Dairy Co.*, 708 F.Supp. 2d 1005, 1007 (E.D. Cal. 2010).

¹⁷⁸ *The Case for Raw Milk*, CERTIFIED RAW MILK, <http://www.certifiedrawmilk.com/> (last visited Oct. 9, 2014).

¹⁷⁹ *Id.* There are numerous aspects of the food system where food advocates voice concern over the inadequacy of reactive as opposed to preventative measures because reactive measures may lower the nutritional quality of food. *See, e.g., Regulatory Comments and Petitions, Re: Irradiation of Meat and Meat Products*, CTR. FOR SCI. IN THE PUB. INTEREST (Feb. 24, 1999), available at http://www.cspinet.org/foodsafety/irradiation_usda.html; Christine M. Williams, *Nutritional Quality of Food: Shades of Grey or Shades of Green?*, 61 PROCEEDINGS OF THE NUTRITION SOC’Y, 19–24 (2002).

Furthermore, raw milk is often obtained from sustainable and organic small-scale family farms.¹⁸⁰ It is often a different kind of transaction than one made in a large, impersonal grocery store.¹⁸¹ Rather, the closeness of the transaction between farmer and customer can create heightened accountability on the part of the farmer and connectedness to one's food on the part of the consumer.¹⁸²

1. Health Benefits

Proponents of raw milk argue that vitamins, minerals, immunoglobulins, proteins, and digestive enzymes are all of greater quantity or quality when milk is not subject to pasteurization.¹⁸³ For instance, the application of heat may degrade the vitamin A, D, B12, and B6 present in milk.¹⁸⁴ Heat also may undermine the quality of proteins and enzymes or destroy immunoglobulins.¹⁸⁵ Enzymes present in raw milk may help with digestion and may prevent the presence of unwanted bacteria.¹⁸⁶ Though raw milk contains all of the essential amino acids to ease protein absorption, 20% of the proteins in milk are derived from whey and are heat sensitive.¹⁸⁷ Immunoglobulins, also known as antibodies, provide resistance to viruses and

¹⁸⁰ Byrne, *supra* note 37, at 109; see, e.g., *Sources of Real Milk and Real Milk Products in Oregon* REAL MILK (Jan. 1, 2000), <http://www.realmilk.com/real-milk-finder/oregon/#or> [hereinafter *Sources of Real Milk*]; *Learn More-Cow and Goat-shares*, *supra* note 126.

¹⁸¹ Byrne, *supra* note 37, at 109; *Learn More-Cow and Goat-shares*, *supra* note 126.

¹⁸² Janice Blair, *Economic Impact on Wisconsin from the Sales of Raw Milk*, FARM-TO-CONSUMER LEGAL DEF. FUND, <http://www.farmtoconsumer.org/news/Economic%20Impact%20on%20WI%20summary%20for%20Hearing.pdf> (last visited Oct. 9, 2014).

¹⁸³ Morell et al., *supra* note 2 (arguing that pasteurization kills essential enzymes and in turn leads to higher rates of anemia, less bone strength, hair loss, and behavioral issues in rats; also arguing that there is a fivefold protective system in raw milk: (1) reduces pathogens in milk, (2) stimulated the immune system, (3) build healthy gut wall, (4) prevents absorption and toxins in the gut, (5) ensures assimilation of all nutrients). *But see Food Safety and Raw Milk*, CDC, <http://www.cdc.gov/foodsafety/rawmilk/raw-milk-index.html> (last visited Oct. 9, 2014); Dan Flynn, *Study: Raw and Pasteurized Milk Differ in Taste, Smell and Safety*, FOOD SAFETY NEWS (Oct. 10, 2013), <http://www.foodsafetynews.com/2013/10/milk-smell-and-taste-may-differ-but-benefits-are-the-same/#.UmrKmCR6aAc> (arguing that the only difference between raw and pasteurized milk are its "organoleptic" qualities, i.e. taste, smell, feel, and appearance).

¹⁸⁴ See, e.g., Frank E. Runge & Rober Heger, *Use of Microcalorimetry in Monitoring Stability Studies*, 48 J. AGRIC. FOOD CHEM. 47 (2000); Terry Gompert & Martin Kleinschmit, *Raw Milk Use and Safety Fact Sheet*, THE NEW FARM (May 15, 2007), available at www.newfarm.org/features/2007/0607/rawmilk/bowman.shtml.

¹⁸⁵ See Runge & Heger, *supra* note 184; Gompert & Kleinschmit, *supra* note 184; *The Case for Raw Milk*, *supra* note 178.

¹⁸⁶ Gompert & Kleinschmit, *supra* note 184.

¹⁸⁷ *Id.*; *The Health Benefits of Raw Milk*, RAW-MILK-FACTS.COM, http://www.raw-milk-facts.com/raw_milk_health_benefits.html (last visited Oct. 9, 2014).

disease, but their numbers may be significantly decreased in the process of pasteurization.¹⁸⁸

In nutrition, balance can be as important as substance.¹⁸⁹ In the case of raw milk, it may have an ideal balance of minerals to promote absorption.¹⁹⁰ For example, calcium requires phosphorus and magnesium in order for the body to utilize the mineral.¹⁹¹ Raw milk may contain this balance when unpasteurized,¹⁹² and exposure to heat may alter it.¹⁹³ In fact, pasteurized milk may actually cause the depletion of calcium in the body's attempt to process it, due in part to this mineral imbalance.¹⁹⁴

The resulting health benefits of raw milk may include "protecting against infection, diarrhea, rickets, [and] tooth decay."¹⁹⁵ Raw milk may also lead to "better growth, denser bones, greater integrity of internal organs, less anemia, fewer signs of anxiety and stress, and fewer signs of nutrient deficiency."¹⁹⁶ Raw milk may positively affect asthma and allergies.¹⁹⁷ One study revealed that around 82% of individuals that could not consume pasteurized milk due to lactose intolerance could consume raw milk without digestive problems.¹⁹⁸ Advocates further argue that compromising the nutrients in raw milk through pasteurization cannot be countered with additives such that the same beneficial composition results.¹⁹⁹

¹⁸⁸ *The Health Benefits of Raw Milk*, *supra* note 187.

¹⁸⁹ David R. Jacobs Jr. & Linda C. Tapsell, *Food, Not Nutrients, Is the Fundamental Unit in Nutrition*, 65 NUTRITION REV. 439 (Jun. 28, 2008).

¹⁹⁰ *The Case for Raw Milk*, *supra* note 178; *see also* Morell et al., *supra* note 2.

¹⁹¹ *The Case for Raw Milk*, *supra* note 178.

¹⁹² *Id.*

¹⁹³ Martha M. Kramer, Esther Latzke & Mary Margaret Shaw, *A Comparison of Raw, Pasteurized, Evaporated, and Dried Milks as Sources of Calcium and Phosphorous for the Human Subject*, 79 J. BIOL. CHEM. 283 (1928), available at <http://www.jbc.org/content/79/1/283.full.pdf>.

¹⁹⁴ JOSEPH KEON, WHITEWASH: THE DISTURBING TRUTH ABOUT COW'S MILK AND YOUR HEALTH 210–11 (2010).

¹⁹⁵ Evelyn Sprawson, *Preliminary Investigation of the Influence of Raw Milk on Teeth and Lymphoid Tissue*, J. ROYAL SCI. MED. (Jan. 25, 1932); *see also* *Fresh, Unprocessed (Raw) Whole Milk: Safety, Health and Economic Issues*, REAL MILK, <http://www.realmilk.com/safety/fresh-unprocessed-raw-whole-milk/> (last visited Aug. 28, 2014) [hereinafter *Fresh, Unprocessed (Raw) Whole Milk*].

¹⁹⁶ *Fresh, Unprocessed (Raw) Whole Milk*, *supra* note 195.

¹⁹⁷ George Loss et al., *The Protective Effect of Farm Milk Consumption on Childhood Asthma and Atopy: The GABRIELA Study*, 128 J. ALLERGY & CLINICAL IMMUNOLOGY 766 (2011).

¹⁹⁸ Morell et al., *supra* note 2.

¹⁹⁹ *Fresh, Unprocessed (Raw) Whole Milk*, *supra* note 195.

2. Taste Benefits

Raw milk proponents also assert that unpasteurized milk has enhanced organoleptic qualities.²⁰⁰ These qualities include better taste, feel, smell, and appearance.²⁰¹ Supporters of raw milk claim it tastes sweeter.²⁰² This may be due to the lack of pasteurization itself²⁰³ or due to increased freshness because it spends less time being processed than if it were pasteurized.²⁰⁴ In addition to taste, raw milk enthusiasts claim the feel and consistency of the milk is more appealing without pasteurization.²⁰⁵

3. Concerns with “Mainstream” Pasteurized Milk

Consumers wanting to purchase raw milk are often dissatisfied with the reactive measure that is pasteurization.²⁰⁶ Instead, they think regulation should be a more proactive measure by certifying healthy milk from quality animals and farms.²⁰⁷ The choice to consume raw milk has as much to do with avoiding the negative qualities of mainstream milk as it does with obtaining raw milk’s positive qualities.²⁰⁸ While the latter objective may be more apparent, the decision to consume raw milk is just as much about the former. Raw milk proponents voice concerns over the substance of pasteurized milk as well as the processes involved in obtaining most pasteurized milk.²⁰⁹

The majority of milk consumed in the United States comes from large commercial dairies and is pasteurized and homogenized.²¹⁰ Even so, pasteurized milk has proven perfectly capable of causing foodborne illness:

[P]asteurized milk sickens an average of over 600 people per year. There are many documented outbreaks that have been traced back to pasteurized milk: 1983, when 49 people became ill and 14 died from listeria from milk that was contaminated

²⁰⁰ Flynn, *supra* note 183.

²⁰¹ *Id.*

²⁰² *Id.*; Jennifer K. Nelson & Katherine Zeratsky, *Raw Milk Debate Heats Up*, MAYO CLINIC (Apr. 23, 2010), <http://www.mayoclinic.org/healthy-living/nutrition-and-healthy-eating/expert-blog/raw-milk/bgp-20056137>.

²⁰³ Nelson & Zeratsky, *supra* note 202.

²⁰⁴ *Id.*

²⁰⁵ *Id.*; Byrne, *supra* note 37, at 110.

²⁰⁶ *Raw Milk Vs. Pasteurized Milk*, REAL MILK (Jan. 1, 2000), <http://www.realmilk.com/health/raw-milk-vs-pasteurized-milk/>.

²⁰⁷ *Id.* (at least to a plausible extent).

²⁰⁸ *Id.*; see also Morell et al., *supra* note 2.

²⁰⁹ Gompert & Kleinschmit, *supra* note 184, at 2.

²¹⁰ Byrne, *supra* note 37, at 109.

before pasteurization; 1985, when 16,000 people became ill with salmonella from pasteurized milk traced to a single dairy; 1994, when 224,000 Americans became ill from salmonella traced to Schwan's ice cream; 2006, when 1300 prisoners in California became ill with campylobacter from pasteurized milk; and 2007, when three people were killed by listeria from contaminated pasteurized milk.²¹¹

Instances such as these are often pointed to as having been deceptively omitted from statistical computations when opponents compare the relative safety of raw milk and pasteurized milk; comparatively, from 2002 to 2011, between 25 and 175 cases of foodborne illness were caused by raw milk.²¹² Proponents of raw milk typically admit that raw milk is relatively less safe as compared to pasteurized milk, but instead they argue that it is not as exceptionally unsafe as it is portrayed to be by government officials and opposing industry.²¹³ For example, in 2008 there were 23,152 reported cases of foodborne illness and half of a percent (0.5%), or 132 in number, of those reported cases are attributable to raw milk, whereas one third of the reported cases are attributable to beef, chicken, and fish.²¹⁴ The term "fearmongering" has been used by at least one raw milk advocate to describe the arguably misleading hype over raw milk risks.²¹⁵ As a distinction, advocates typically are not pushing for all milk to be unpasteurized, but only that raw milk be an option for those who seek to consume it; even advocates concede that raw milk produced and distributed at the level of pasteurized milk may not be appropriate for the very reasons that pasteurization was initially implemented.²¹⁶

Furthermore, among the reasons that raw milk consumers want access to the product is that whether due to the sheer volume of production or sway of industry, pasteurized milk is permitted to contain a number of contaminants.²¹⁷ For instance, mainstream dairy cows may be given hormone treatments to

²¹¹ GUMPERT, *supra* note 100, at 115–16, 119.

²¹² Morell et al., *supra* note 2.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.* (explaining for example, that there are no reported deaths from raw milk since the 1980s, yet since 1999 there have been 32 deaths from cantaloupe, 5 from spinach, 14 from lunch meat, 9 from peanut butter, 30 *per year* from eggs, and 15 *per year* from oyster, which, notably, are often a raw animal product).

²¹⁶ *Id.* Consider, however, that HACCP plans for raw meat are implemented at as grand a scale as may be required for all milk to be preventatively regulated so that it could be consumed raw, potentially.

²¹⁷ *Opinion of the Scientific Panel on Contaminant in the Food Chain on a Request from the Commission Related to Aflatoxin B₁ as Undesirable Substance in Animal Feed*, 39 EFSA J. 1 (2004), available at <http://www.efsa.europa.eu/en/efsajournal/doc/39.pdf>.

increase milk production.²¹⁸ This increase can be in excess of ten times the amount a cow would naturally produce.²¹⁹ Due to the potentially harmful effect these hormones may have on human health after they leach into the milk, administering them was banned in the European Union and Canada.²²⁰

Increased production from hormone treatments in turn often necessitates antibiotic treatment to avoid mastitis and infection.²²¹ In order to keep up with such volume of milk production, cows are mechanically milked.²²² During this extended process, teats can obtain lesions just from the sheer amount of mechanized milking.²²³ The lesions cause severe pain for the animal.²²⁴ Only a limited amount of pus and related contaminants is allowed in mainstream milk, but nevertheless is permitted.²²⁵ Some have shown concern that increased use of hormones has led to an increased presence of pus.²²⁶

Another process concern is that cows must be inseminated and produce calves regularly in order to remain milk-producing animals.²²⁷ Dairy cows may suffer greatly from this process; they are highly social creatures that live in herds and would naturally remain with their young for years.²²⁸ In mainstream dairy production, calves are often removed from their mothers within minutes of birth.²²⁹ Additionally, traditional dairy cows may be kept in confinement for long periods of time,²³⁰ and may have their tails docked without anesthesia.²³¹

²¹⁸ *Id.*; JEFFREY MOUSSAIEFF MASSON, *THE FACE ON YOUR PLATE: THE TRUTH ABOUT FOOD* (2010). John Webster, Emeritus professor of animal husbandry at Bristol University's Clinical Veterinary Science Department, who is widely considered the world's leading authority on dairy cows, acknowledges that the removal of her calf is the single worst incident in the life of a dairy cow." *Cows for Dairy*, WOODSTOCK FARM ANIMAL SANCTUARY, <http://www.woodstocksanctuary.org/learn-3/factory-farmed-animals/cows-for-dairy/> (last visited Oct. 9, 2014).

²¹⁹ *Cows for Dairy*, *supra* note 218.

²²⁰ *Id.*

²²¹ *An HSUS Report: The Welfare of Cows in the Dairy Industry*, THE HUMANE SOC'Y OF THE U.S., <http://www.humanesociety.org/assets/pdfs/farm/hsus-the-welfare-of-cows-in-the-dairy-industry.pdf>.

²²² *Cows for Dairy*, *supra* note 218.

²²³ *HSUS Report*, *supra* note 221, at 5.

²²⁴ *Id.*

²²⁵ 7 C.F.R. § 58.133 (2014) (regarding somatic cell count in milk prior to pasteurization).

²²⁶ *How Many Pus Cells Are in Your Milk*, FOOD MATTERS (Apr. 23, 2009), <http://foodmatters.tv/articles-1/how-many-pus-cells-are-in-your-milk>.

²²⁷ *HSUS Report*, *supra* note 221, at 1–2.

²²⁸ *Cows for Dairy*, *supra* note 218.

²²⁹ *Id.*

²³⁰ *HSUS Report*, *supra* note 221, at 3.

²³¹ *Id.* at 6.

Consumers may have difficulty finding information regarding the quality of treatment present at a mainstream dairy.²³² One alternative that provides some guarantees for consumers is buying organic.²³³ Organic dairy cows must be provided access to pasture even while lactating.²³⁴ They may not receive certain medical treatment while lactating and must be fed organic feed.²³⁵ Though buying organic may solve some of raw milk advocates' input and processing concerns, organic milk is subject to the same federal and state pasteurization laws.²³⁶ It also has grown in scale to a point where many animal welfare concerns for organically produced milk are nearer to concerns for mainstream milk.²³⁷ Meanwhile, raw milk is often obtained from sustainable and organic small-scale family farms.²³⁸ Consumers want to be able to make the type of purchase that raw milk typically involves.

For a number of reasons, raw milk advocates want the opportunity to consume the product. They point to health benefits, taste benefits, and concerns over mainstream milk that include controversial inputs and animal welfare issues. Meanwhile, states permit or deny access to raw milk through various degrees of regulation—the level of regulation depends largely on how the state has weighed the balance between health safety and consumer sovereignty. The role of consumer sovereignty in consumer protection and its specific role with raw milk is exceptionally important because food choice is an intimate one connected to fundamental rights. Yet, the history of raw milk regulation and the circumstances under which pasteurization rules were promulgated reveal that discussions during this process wholly omitted consumer sovereignty.

²³² Lindsey Jahn, *Putting Trust on the Table: Boosting Consumer Confidence in the Food Industry*, FOOD MFG. (Feb. 24, 2014), www.foodmanufacturing.com/blogs/2014/02/putting-trust-table-boosting-consumer-confidence-food-industry; Albert Meijer, *Does Transparency Lead to More Compliance*, 5 EUR. FOOD & FEED L. REV. 264 (2007); *Research Shows Consumer Demand for Transparency on Food*, DROVERS CATTLENETWORK (Dec. 10, 2013), <http://www.cattlenetwork.com/cattle-news/Research-shows-consumer-demand-for-transparency-on-food-235228381.html>.

²³³ *National Organic Program*, U.S.D.A., <http://www.ams.usda.gov/AMSV1.0/nop> (last visited Oct. 9, 2014).

²³⁴ 7 C.F.R. § 205.239(a)(1) (2014) (“Year-round access for all animals to the outdoors, shade, shelter, exercise areas, fresh air, clean water for drinking, and direct sunlight, suitable to the species, its stage of life, the climate, and the environment”); 7 C.F.R. § 205.239(b)(2) (2014). (“The producer of an organic livestock operation may provide temporary confinement or shelter for an animal because of: . . . [t]he animal’s stage of life: Except, that lactation is not a stage of life that would exempt ruminants from any of the mandates set forth in this regulation”).

²³⁵ See 7 C.F.R. § 205.237 (2014).

²³⁶ 21 C.F.R. § 1240.61 (2014).

²³⁷ See Andrew Martin, *Industrial Organic Milk vs. Organic Family Farmers*, ORGANIC CONSUMERS ASS’N (Jan. 10, 2005), <http://www.organicconsumers.org/Organic/milk011105.cfm>.

²³⁸ Byrne, *supra* note 37, at 109; see also *Learn More-Cow and Goat-shares*, *supra* note 126; *Sources of Real Milk*, *supra* note 180.

stage of the process so that the end product was something that consumers could safely choose.

In sum, applying this analysis to form a proposed federal regulatory checklist, milk sales could be safely and responsibly regulated by utilizing the following state approaches: limit sales to those involving a direct farmer-to-consumer transaction; restrict the radius of sale; require product labeling to fully disclose the lack of pasteurization and potential hazards and then reinforce product labeling with point-of-sale warning signs; limit advertising; and, most importantly, establish a standardized certification process for the production of certified raw milk.

IV. CONCLUSION

Consumer sovereignty and health safety are both consumer protection concerns of heightened importance for food; the FDA can and should maximize the goals of both by lifting the ban on the sale of raw milk in interstate commerce and instead imposing consistent regulations that draw from state examples and ultimately better realize the sole objective of the original ban—protecting the health of milk consumers.

Raw milk advocates seek the product due to health benefits, taste benefits, and concerns over mainstream milk, including controversial inputs and animal welfare issues. In recognition of this position and of the importance of consumer sovereignty, many states allow access to raw milk in varying degrees. Yet, the history of federal raw milk regulation reveals that discussion wholly omitted consumer sovereignty. This tradeoff is both improper and unnecessary. Consistent federal regulation would eliminate the need for raw milk advocates to go “underground” and consume raw milk that is under-regulated or entirely unregulated. Actual regulation, in lieu of a ban, would render the treatment of raw milk no longer inapposite to other food regulation—in particular, meat regulation.

Though it was determined that the failure to ban raw milk in interstate commerce was arbitrary and capricious, given the FDA’s stance that most sales were intrastate and that most states now allow intrastate sales in some form, it seems very difficult to argue that raw milk is so apparently harmful that it must be banned. Indeed, it appears the only thing arbitrary and capricious about the banning of raw milk in interstate commerce is the ban itself.

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