

RAW MILK: LEGAL HISTORY AND CURRENT CONTROVERSY

With Introduction on Understanding American Law

PREPARED FOR

NORTHEAST ORGANIC FARMING ASSOCIATION (NOFA) SUMMER CONFERENCE

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CAVEAT

Nothing herein is intended or should be construed as formal legal advice for any particular problem or situation. For advice concerning Massachusetts agricultural law and its application to specific factual situations, consult an attorney familiar with this area of the law.

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How does a non-lawyer understand American law? ¹

By Michael Pill

1. The hierarchy of legal authority.

In the United States, law comes from several sources. State and federal constitutions create legislative, executive and judicial branches of government. Each of those branches in turn creates “law” that people must live by. At the top of the legal hierarchy are state and federal constitutions. “Unconstitutional” laws enacted by congress and a state legislature may be invalidated by the courts. Next comes legislation, followed by court cases (subject to the exception that a court may invalidate legislation if it violates some constitutional provision). In order of precedence, then, the sources of legal authority are the following:

- (A) Constitution: creates legislative, judicial and executive branches of government;
- (B) Legislature: enacts laws, called “statutes” or “legislation;”
- (C) Courts: Issue published decisions, applied by analogy to govern later fact situations. Occasionally, courts invalidate legislation on the grounds that it is unconstitutional.
- (D) Administrative Agencies: Implement legislation, promulgating administrative regulations and making “adjudicatory” decisions in individual cases.

1(A) Massachusetts Constitution of 1780

“The 1780 Constitution of the Commonwealth of Massachusetts, drafted by John Adams, is the world's oldest functioning written constitution. It served as a model for the United States Constitution, which was written in 1787 and became effective in 1789. (The Bill of Rights to the United States Constitution were approved in 1789 and became effective in 1791).”

SOURCE: “John Adams and the Massachusetts Constitution, § B.1
<http://www.mass.gov/courts/sjc/john-adams-b.html>

The Massachusetts Constitution of 1780, drafted by John Adams, is the oldest written constitution in the world that is still in use. Predating the U.S. Constitution by nearly a

¹ August 6, 2012. Revised 2006, 2010, 2011 & 2012; originally written in 2003 as a preface to

decade, it includes a Declaration of Rights that helped provide a model for the federal constitution's Bill of Rights. A brief online history of the Massachusetts Constitution of 1780 will be found at <http://www.mass.gov/courts/sjc/john-adams-b.html>.

1(B) Massachusetts Legislature and local legislation (bylaws and ordinances)

The Massachusetts Constitution created the state legislature, called the General Court. Mass. Const., c. 1, § 1, Art. 1. The legislature passes individual "bills" which when passed are called "acts." These acts, published in the order enacted, are codified into the chapters and sections in the Massachusetts General Laws. General Laws, chapter ____, section ____ is abbreviated below as simply "G.L. c. __, § ____". Elsewhere you may see it abbreviated as "M.G.L. c. __, § ____."

Administrative regulations, published in the Massachusetts Register as they are promulgated, are codified in the Code of Massachusetts Regulations (CMR).

Local by-laws (enacted by a town meeting) or ordinances (enacted by a city council) are also considered legislation. Some larger municipalities codify their ordinances and bylaws, but most small towns do not do so. Where local legislation is not codified, one must consult local boards (such as a conservation commission to see if the town has a local wetlands bylaw). A record of all local legislation should be available in the office of the city or town clerk.

There are also local administrative regulations, such as regulations promulgated by a local board of health. Like bylaws and ordinances, these should be available in the office of the city or town clerk.

1(C) Massachusetts judiciary and court cases

The courts interpret and apply legislation to specific factual situations. Some court decisions are published, so lawyers can use them as precedent to help decide future cases. The term "common law" refers to general legal principles developed over time through a series of individual court cases. It comes to us from England, from a time when there was little legislation, no administrative regulations, and most legal rule-making was left to the courts.

1(C)(i) How court cases are cited -- understanding the abbreviations.

In Massachusetts, court cases are published both by the state and by a private company. Cases from the highest court (the Supreme Judicial Court) are published in the official Massachusetts reports (abbreviated "Mass."), while cases from the intermediate Appeals Court are published in the official Massachusetts Appeals Court Reports (abbreviated "Mass. App. Ct."). Decisions from both courts are lumped together in the privately published Northeastern Reporter, Second Series (abbreviated "N.E.2d").

Citations to court cases are based on these abbreviations. For example, the citation “*Angus v. Miller*, 5 Mass. App. Ct. 470, 363 N.E.2d 1349 (1977)” breaks down this way: Angus is the plaintiff; Miller is the defendant; the decision by the Appeals Court is published at Volume 5 of the Massachusetts Appeals Court Reports, starting at page 470; the same decision is published in Volume 363 of the Northeastern Reporter, Second Series, starting at page 1349; the case was decided in the year 1977. The Massachusetts Appeals Court Reports are the official reporter published by the Commonwealth. The Northeastern Reporter is a private publication, originally published by West Publishing Company of St. Paul, Minnesota, now part of a corporate conglomerate called Thomson Reuters.

The Supreme Judicial Court (often referred to by lawyers as the “SJC”) is the highest court in Massachusetts. Its decisions are published together with Appeals Court cases in the Northeastern Reporter, Second Series. There is a separate official commonwealth publication for SJC decisions, called the Massachusetts Reports. One can distinguish an SJC decision from an Appeals Court case by the official citation (“Mass.” instead of “Mass. App. Ct.”). An SJC case is cited this way: *Morse v. Benson*, 151 Mass. 440, 24 N.E. 675 (1890). Note that this older case appears in “N.E.” which is the Northeastern Reporter, First Series. After 200 volumes of the Northeastern Reporter were published, numbering began again with the second series. In other words, volume 1 N.E.2d came immediately after volume 200 N.E.

With the case citation, anyone can look up a court case in a law school library or local county law library (now part of a state wide trial court law library system), or in an online data base. The seventeen Massachusetts Trial Court Law Libraries (<http://www.lawlib.state.ma.us>) are open to the public; they are usually located in county court houses. For the location of the nearest library, go to <http://www.lawlib.state.ma.us/locate.htm>. Through the Trial Court Law Libraries, one can gain free access to WestLaw, a leading private data base of legal authority owned by Thomson Reuters.

1(C)(ii) Supreme Judicial Court (SJC) and Appeals Court

The relationship between Massachusetts Appeals Court decisions and those of the SJC is twofold. On the one hand, published decisions of the Appeals Court are binding precedent:

“It goes without saying that Appeals Court decisions may appropriately be cited as sources of Massachusetts law.” *Ford v. Flaherty*, 364 Mass. 382, 388, 305 N.E.2d 112 (1973). “An intermediate court ... is a maker of law in the same sense as the supreme court.” Kaplan, *Do Intermediate Appellate Courts Have a Lawmaking Function?*, 68 Mass.L.Rev. 10, 12 (1985). A town or any other person affected by an Appeals Court decision is governed by the Appeals Court decision until and unless either that court or this court declares otherwise.

Source: *Adamowicz v. Town of Ipswich*, 395 Mass. 757, 759 n. 4, 481 N.E.2d, 1368, 1370 n. 4 (1985).

Note: The above cited decision begins at page 757 of volume 395 of the Massachusetts reports. The quotation appears at page 759, in footnote 4; “759 n. 4” is called the “jump cite.” The same decision appears in volume 481 of the Northeastern Reporter, Second Series, beginning at page 1368, with the above quotation appearing in footnote 4 on page 1370.

On the other hand, while the SJC can and sometimes does reverse an Appeals Court decision, the Appeals Court cannot overrule the SJC. *Burke v. Toothaker* 1 Mass. App. Ct. 234, 239, 295 N.E.2d 184, 186-187 (1973) (“This is an ‘intermediate appellate court’ (G.L. c. 211A, § 1, inserted by St.1972, c. 740, § 1), and we do not regard it as one of our functions to alter established rules of law governing principles of substantive liability.”)

1(C)(iii) Only published SJC and Appeals Court decisions are binding precedent.

SJC cases are issued by the entire court, consisting of seven justices. (A brief history and description of the SJC appears at the court’s internet web site <http://www.mass.gov/courts/sjc/about-the-court.html>.) SJC decisions are binding precedent on all other courts of the Commonwealth. They can be overruled only by the legislature, the SJC itself, or by the U.S. Supreme Court (the latter only on federal constitutional questions; the SJC is the final arbiter of questions arising under the state constitution).

The Appeals Court, which handles most of the appellate case load, consists of over two dozen justices who sit in panels of three. (See “About the Court” at the Appeals Court internet web site <http://www.mass.gov/courts/appealscourt/about-the-court.html>.)

Because of the Appeals Court’s large caseload, many its decisions are not published (meaning they do not appear in the official Mass. App. Ct. reports, although the complete text of unpublished decisions is available on Westlaw). Published decisions are reviewed by the entire Appeals Court (not just the three judge panel that decided the case), and may be cited as precedent binding on the lower (e.g. trial) courts.

“Summary decisions” issued under Appeals Court Rule 1:28 “are primarily addressed to the parties and, therefore, may not fully address the facts of the case or the panel’s decisional rationale. Moreover, rule 1:28 decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case.” *Chace v. Curran*, 71 Mass. App. Ct. 258, 260 n. 4, 881 N.E.2d 792, 794 n. 4 (2008). The court in *Chace v. Curran*, *supra*, stated that “A summary decision pursuant to rule 1:28, issued after the date of this opinion, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent.” *Id.*

CAVEAT: Some lawyers cite unpublished Appeals Court decisions without plainly identifying them as such. Possibly they are confused, because the Westlaw database includes them along with published decisions. In addition to identifying a decision as

unpublished, the person citing it should provide opponents with the complete text, a requirement set forth by the Appeals Court in *Chace v. Curran, supra*, in these words:

In an effort to ensure that all litigants have equal access to rule 1:28 decisions their adversaries may cite, the court is proposing today a rule requiring, *inter alia*, inclusion of the rule 1:28 decision in an addendum to the brief in which the decision is cited. Until proceedings on that proposed rule are completed, litigants should include the full text of the decision as an addendum to the brief in which it is cited.

71 Mass. App. Ct. at, 260 n. 4, 881 N.E.2d at 794 n. 4.

1(C)(iv) Role of SJC and Appeals Court as appellate courts.

As “appellate” courts, the Supreme Judicial Court and Appeals Court both review decisions of trial courts to see if an error was made. Such review occurs only when one or more parties files an appeal from the judgment in the trial court, asserting that some error(s) occurred. In Massachusetts, the trial courts include the Superior Court, Land Court, Probate Court, Housing Court, District Court and Boston Municipal Court. There is also an Appellate Division of the District Court.

1(D) Massachusetts administrative agencies and regulations

The state’s administrative agencies are part of the executive branch of government. One example is the Massachusetts Department of Agricultural Resources. Administrative regulations promulgated by this and other state agencies appear initially in the Massachusetts Register, published by the office of the Secretary of the Commonwealth. Regulations are codified by issuing agency and subject matter in the Code of Massachusetts Regulations (CMR). Administrative regulations have the force of law.

Citations to CMR list first the title, then the section number. For example, the abbreviation 330 CMR 27.00 refers to Section 27.00 in Title 330 of the Code of Massachusetts Regulations. That section is entitled “Standards and Sanitation Requirements for Grade A Raw Milk.”

1(E) Secondary legal authority

In addition to state & federal constitutions, legislation & administrative regulations, and court cases, lawyers also rely on what is called “secondary authority.” Secondary authority consists of books (called “treatises”) and articles (published in legal periodicals called “law reviews”), generally written by practicing lawyers and law professors. They are “secondary” sources because they represent the author’s opinion or commentary on constitutions, legislation, court decisions, and administrative regulations.

Treatises are particularly helpful for the nonspecialist lawyer or non-lawyer. They collect court cases and summarize the law. For a general introduction and basic

understanding of an area of the law, they are invaluable. BEWARE, however, of summary statements of legal rules found in treatises. All too often, the omission of crucial details can be misleading. Sometimes a treatise author simply makes a mistake, or omits something important.

There is no substitute for detailed reading of governing legislation, applicable administrative regulations, and individual court cases, if one is seeking an authoritative answer to a specific question. Treatise footnotes usually provide citations to court cases. One way to approach a treatise is to review the text in search of material relevant to the issue at hand. If something relevant is found in the text, it is a good idea to review the court case(s) cited in the accompanying footnote(s).

Case citations in treatises may not be exhaustive. Different treatises on the same subject may cite different court cases. The thorough legal researcher will check all available published treatises that may cover a particular subject.

Treatises and law reviews are frequently cited and quoted by judges writing court decisions. The citation format lists author, title, reference to section and page number within the work, and year of publication, as in the following example: Betty Brody & Alvin Brody, Massachusetts Tort Law, §(Section) 4.01 “Elements of Trespass to Land” at page 4-2 (1994 & Supp. 1997). For a treatise consisting of multiple volumes, the volume number appears at the beginning of the title. Volume 37A of the Massachusetts Practice Series, entitled “Tort Law”, is cited this way: Joseph R. Nolan & Laurie J. Sartorio, 37A Massachusetts Practice: Tort Law, § 26.1 “Nature of Nuisance” at page 221 (3rd ed. 2005 & Supp. 2010). The information in parentheses means that the current third edition was published in 2005, and that a paper supplement (called a “pocket part”, found inside the back cover of the hard bound main volume) was published for the year 2010.

There are two legal treatises on Massachusetts zoning law, both readily available at the Massachusetts Trial Court Law Libraries,² that should be consulted by anyone who needs to learn about the agricultural zoning exemption in G.L. c. 40A, § 3:

- (1) Mark Bobrowski, Handbook of Massachusetts Land Use and Planning Law (3rd edition 2011 & annual paper supplements) ISBN # 9781454801474 but note current paper supplement will have a different ISBN number; Aspen Law & Business division of Aspen Publishers, Inc.; www.aspenpublishers.com; email customer.service@aspenpublishers.com; customer service (800) 234-1660.

CAVEAT: Be sure to subscribe to annual supplements, which will be sent reliably.

This book is written largely from a municipal perspective. Both the table of contents and the index are extremely useful for finding information.

² The seventeen Massachusetts Trial Court Law Libraries (<http://www.lawlib.state.ma.us>) are open to the public; they are usually located in county court houses. For the location of the nearest library, go to <http://www.lawlib.state.ma.us/locate.htm>.

This treatise has been cited in over fifty Massachusetts court decisions.

The current (August, 2012) price of \$294 sounds expensive until one realizes that Massachusetts lawyers generally charge at least \$200 per hour and sometimes much more for an experienced specialist. A good treatise can pay for itself very quickly.

- (2) Martin R. Healy (editor), Massachusetts Zoning Manual, loose leaf in two volumes (5th edition 2010), Massachusetts Continuing Legal Education, Inc. (MCLE), MCLE Product Number 1900236B00; www.mcle.org, (800) 966-6253 or (617) 482-9498. Do not try to order by ISBN number. Current (October, 2012) price is \$245.00.

Be sure to subscribe to supplements, then contact MCLE every year or two, because it they may fail to send you supplements as issued.

This book, like most MCLE treatises, does not have either a table of contents or an index worthy of the name. Finding material relevant to a particular topic is not always easy. I check the Bobrowski treatise cited above first. Once I find the relevant material in Bobrowski, I use the cases he cites to find the corresponding text in the MCLE treatise using the table of cases. In other words, if Bobrowski cites *Smith vs. East Overshoe*, I then look in the MCLE treatise table of cases to see where in the MCLE work that case is cited, then go to those sections.

Consulting these two books and learning to use them may be invaluable if you have a zoning question that you must answer for yourself. Zoning in general (and the agricultural exemption in particular) constitute a specialized area of the law with which many lawyers are unfamiliar. Being able to look up information for yourself will afford you some protection against being led astray by adversary lawyers whose job, after all, is to be zealous advocates for their clients (which may be a public agency such as a municipal board or a state government department); they are not there to provide you with a free education about the governing law.

2. Lawyers reason by analogy and distinction to apply legal authority to particular facts.

In a legal dispute, the lawyer for each side sifts through legislation, administrative regulations, court decisions, and secondary authority, looking for material that support his/her client's case. With cases, the attorney then argues that one or more court decisions apply by analogy to the facts at hand. The opposing lawyer's job is to distinguish those cases and show that some other case, leading to a different conclusion, is really more similar and therefore should govern.

For example, legend has it that early in nineteenth century Iowa (the author's home state), the state legislature felt the need to enact a law stating, "No one shall allow livestock to graze or wander loose on the grounds of the state capitol building." The first person to run afoul of this law was a farmer whose cow wandered onto the capitol lawn and started

munching the grass. The court had no trouble determining that a cow was included in the general term “livestock.”

The next year, however, a local pioneer came back from a remote jungle with a pet orangutan, which he left outdoors while attending to business in the capitol building. The pioneer’s clever lawyer argued that while a domesticated animal like a cow might be considered livestock, an orangutan was a wild animal. The court concluded that a wild animal like an orangutan could not properly be considered “livestock”. The court noted that if the legislature wanted to extend the law, by replacing the term “livestock” with the broader term “any animal”, it could do so.

The third animal to run afoul of the law was a goat. The court felt that the orangutan case was irrelevant because a goat was not a wild animal. The court concluded that a goat, like the cow in the first case, was a domesticated animal that fell within the term “livestock”. With three decided court cases, there was now a body of case law to aid in interpreting the legislation.

3. How to read a court decision

Court cases are filled with legal jargon that can make them difficult to understand. The Trial Court Law Libraries³ have legal dictionaries. The most widely used (but not necessarily the best) legal dictionary is Bryan A. Garner (ed.), *Black’s Law Dictionary* (9th ed. 2009). If you find a term you don’t understand, take the time and trouble to look up the definition. Failure to do so can mean failure to understand the court’s decision.

As in many subject areas, a superficial or inaccurate understanding resulting from failure to understand important words can be worse than complete ignorance. I learned this lesson during my first three days of law school, when I was required to read a seventeenth century English case referring to a claim for damages resulting from the destruction of a “pipe of sack.” By studying Webster’s unabridged dictionary, I learned that one definition of “pipe” was a wooden cask. From the same source, I learned that in past centuries, “sack” was a term for wine. Putting these two together revealed that a “pipe of sack” was a cask of wine.

Law students are taught to read court cases by making a brief (e.g. outline) of each case read in preparation for class. During my first semester of law school, I prepared a typewritten brief of each and every case I read for every one of my classes. The workload was crushing, but it taught me how to read and understand court cases.

As a law student, I generally used the outline format set forth below to break down a court decision into its component parts. Judges have their own writing styles, so not every

³ The seventeen Massachusetts Trial Court Law Libraries (<http://www.lawlib.state.ma.us>) are open to the public; they are usually located in county court houses. For the location of the nearest library, go to <http://www.lawlib.state.ma.us/locate.htm>.

element listed below will appear in every court decision. You must learn to use your own judgment and develop your own outline format when reading court cases.

A. Case name, citation (including year), and the court that decided the case.

B. Parties.

One simple but important task here is to get straight in one's mind who was suing whom in the trial court. That is, who are the plaintiffs and who are the defendants in the trial court? The party bringing the appeal (who can be either a plaintiff or a defendant) is called the appellant. The party who prevailed below, and who is defending the appeal, is called the appellee.

C. Summary by the court or by the private publisher.

Summaries may be useful guides, but beware of them because they are not part of the official court decision.

D. Headnotes (for Massachusetts cases, these are found only in the versions of cases published in the Northeastern Reporter and Northeastern Reporter, 2nd Series).

Headnotes are annotations organized by subject matter, according to topics originally developed by the West Publishing Company at the beginning of the twentieth century. Before computerized and online data bases, the West Digest topic system was the most complete indexing system for American case law. It has carried over into the Westlaw database, where it provides an additional method for searching through court cases to find those that are relevant for a particular problem.

CAVEAT: NEVER RELY ON A SUMMARY OR HEADNOTE;
READ THE ACTUAL COURT DECISION.

Summaries and headnotes are often useful for focusing on the most relevant part of the court's decision, but they are *not* part of that decision and should never be quoted or relied upon.

E. Name of the judge who wrote the decision (if the judge is someone who is highly regarded.)

For example, I always make a note if a Massachusetts decision was written by Oliver Wendell Holmes before his elevation to the U.S. Supreme Court, or by the great nineteenth century Massachusetts SJC Chief Justice Lemuel Shaw.

F. Facts.

What happened? How did this dispute arise? Try to break down the facts using the traditional journalists' outline:

Who,
What
When,
Where
Why and
How.

Facts are often best organized in chronological order; try to understand events as they happened.

G. Claims/contentions/arguments raised by each side.

What did the plaintiff(s) assert in seeking relief in the trial court?

What defenses and counter-arguments were made by the defendant(s) in the trial court?

These can be broken down as follows:

Plaintiffs' claims

Defendants' defenses

Defendants' counterclaims (if any) and plaintiffs' defenses to the counterclaims.

H. Trial court decision.

(i) What rulings of law were made by the trial judge?

(ii) What were the findings of fact made by the judge or jury?

(iii) Was the case resolved through a trial, with live testimony by witnesses, or by submission of affidavits? Affidavits are used where one side asserts there is no factual dispute; under those circumstances the case may be resolved by a motion for "summary judgment."

I. Error(s) asserted by the appellant(s).

What error does the party bringing the appeal (called the appellant) claim was made in the court below?

An appellate court decides if the trial court was correct or made an error in deciding the case. The appellate court's options include the following:

Affirming the trial court.

Reversing the trial court and ordering entry of a new judgment for the party who lost in the trial court

Reversing the trial court and remanding the case back to the trial court for further proceedings consistent with the appellate court's decision

Affirming in part and reversing in part

J. Key issue(s) or question(s) decided.

How did the court frame the issue or question to be decided?
Sometimes the court simply responds to the contentions of the opposing parties. Alternatively, the court may frame in its own words the issue or question to be decided.

K. What is the court's holding?

The holding of the court is the decision made on the specific factual or legal issues that are presented by the appeal.

As noted above, a trial court decision may be affirmed, reversed, or affirmed in part and reversed in part. The appellate court may remand the case to the trial court for further proceedings in accordance with the appellate court's decision. If the case was remanded, what were the issues to be resolved on remand?

L. Rationale for holding.

What were the reasons for the court's holding on each legal issue?

What facts were decisive?

What legal authority or public policy grounds were relied upon?

Why were the losing side's arguments not persuasive?

M. Are there any dicta?

A dictum (singular) or dicta (plural), represent the court's comments and suggestions for future reference. Dicta go beyond what must be said to decide the immediate question presented by the appeal, so they are given less weight than the holding. When a lawyer is trying to distinguish a case as inapplicable, it helps to be able to say that the court was only speculating about facts not actually before it.

4. Has a particular court case been followed, distinguished or abrogated by later court decisions?

Before online data bases, legal researchers had to go through books called "Shepard's Citations" to learn how a case had been treated by subsequent decisions. One had to pore over columns of citations, then go the library shelves and read the subsequent decisions, each one usually in a separate volume.

This time consuming drudgery has been replaced by clicks of the computer mouse. With Westlaw, for example, the citation feature is called "Key Cite." One can click to see a list of subsequent court cases and secondary authority citing a particular court decision. By clicking on items listed, one can go immediately to see what later cases have to say about the decision. This can be especially useful if a decision is cited by later cases as standing for a proposition not explicitly stated. It is especially important to review later cases identified as distinguishing, abrogating or reversing the earlier decision.

5. Conclusion: Ask lawyers for citations to authority!

If a lawyer urges a legal argument upon you, ask if the lawyer's position is supported by legislation, court cases, regulations, or at least a secondary source such as a treatise. Ask for specific citations to statutes, court cases, regulations and treatises, including "jump cite" references to particular interior pages in court cases or treatises. A lawyer who is dealing straight with you should have no problem providing such supporting information. Beware, if the lawyer starts waffling, or expressing concern that you as a lay person might not understand the legal authority!

A lawyer being paid by a client to obtain a particular result may not quote or cite legal authority in a completely accurate manner. I lost count many years ago of the number of times I have:

- (a) read cases that simply did not stand for the proposition for which they were cited; or
- (b) checked a quotation only to find that a preceding or subsequent statement refuted the quotation or placed it in a different context. It is always good to read the cited legal authority for yourself, or ask a qualified lawyer to do so for you.

Never forget that a lawyer is an advocate, hired to obtain the result desired by a particular client. Never assume that a lawyer who does not work for you will advocate for your best interests. Rather, you must ask yourself who is this lawyer's client(s)? What interests are being served by this lawyer in this situation?

Finally, because an attorney is a hired advocate, never assume that a position taken on behalf of a client represents a lawyer's personal beliefs or opinions.

Raw milk: Legal history and current controversy

A. A page of history: Science and the continuing battle against epidemic diseases

“Upon this point a page of history is worth a volume of logic. “

SOURCE: *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921) (Oliver Wendell Holmes, J.)

“For more than three thousand years of recorded history in the West, human beings have struggled to understand the meaning of the *epidemic* (Greek, *epi* + *demos*, “among the people”). ...

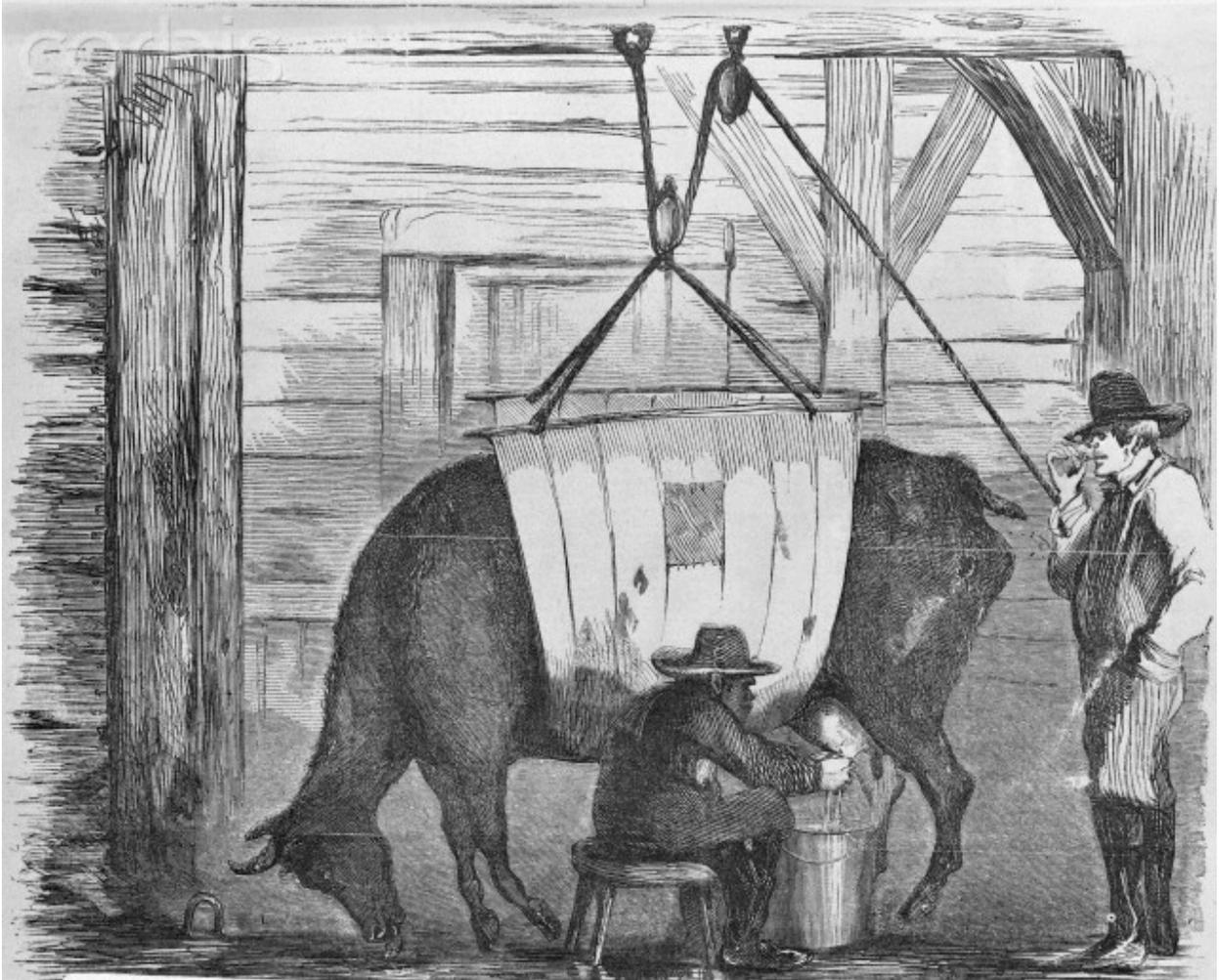
To make sense of the mysterious nature of epidemic disease, the writers of antiquity subsumed the experience under religious, mythological, or philosophical paradigms. One of the earliest ways of comprehending the disorienting effects of an outbreak, then, was to ascribe it to supernatural or cosmic powers, and I call this interpretation *pre-conceptuality*. ...

Gradually, the epidemic experience came to be interpreted as a natural phenomenon rather than as an instrument of divine purpose. ...

The systematic examination of biomedical phenomena that I call the *investigative modality* emerged from eyewitness reports and developed gradually from the seventeenth century to the present.

SOURCE: Introduction, *Epidemic Disease and Human Understanding*, by Charles De Paolo (2006).

By the mid-nineteenth century, cow’s milk had become a focus for the continuing investigation into the causes of infectious diseases and high rates of infant mortality. On the next page is a frequently reproduced illustration from Frank Leslie's Illustrated Newspaper (New York, May 15, 1858). It depicts a diseased cow, unable to stand on its own, pulled up to be milked by an unscrupulous owner. Leslie campaigned against the sale of "swill milk," that came from diseased cows fed distillery refuse.



After the Civil War, robber baron capitalism with its masses of industrial wage laborers living in squalid conditions prompted muckraking journalist Upton Sinclair to write in his book *The Jungle* (Chapter 7, 1906), “How could they know that the pale-blue milk that they bought around the corner was watered, and doctored with formaldehyde besides?”

British scientists Harold Swithinbank and George Newman authored “*Bacteriology of Milk*” (London 1903). Subsequent scientific publications proved that bacteria in milk were leading causes of brucellosis, diphtheria, scarlet fever, tuberculosis and typhoid fever, all serious and frequently fatal infectious diseases.

This writer's grandparents were born in the late nineteenth century. Three of them lived in Czarist Russia before immigrating to the United States. For them, epidemic diseases that killed beloved children and other family members at random were as much to be feared as the Czar's murderous Cossacks. My paternal grandmother was born in a slum in the east end of London in 1891, where her lifelong nickname ("Nellie") was the given name of a neighbor's baby who died in infancy.

Life in North America was similar. Years ago in Vermont I visited a nineteenth century cemetery containing in a single row the graves of six children from the same family. My wife's aunt in Canada gave birth to seven children, three of whom died in infancy. The late former president Richard Nixon's family history, typical of the early twentieth century, has been described this way (underlining added):⁴

Dick was the second oldest of five Nixon brothers, only three of whom lived into their mid-twenties. Arthur was seven when he died in 1925; Dick was twelve. "We never really knew for sure what killed Arthur," Nixon told the biographer Jonathan Aitken, but he believed that it was a tubercular fever caused by the milk of an infected cow – and Frank Nixon had pushed his family to drink unpasteurized milk. "My father was very firm in that idea," Nixon told Aitken, who recalled that he had tears in his eyes. "He just kept going and stuck to his guns on raw milk." Harold, who was four years older than Dick, suffered from tuberculosis. Hannah Nixon took him to the dry climate of Prescott, Arizona, a fourteen-hour drive from East Whittier; mother and son stayed there for almost three years. Edward Nixon (born in 1930) believes that Harold's death, in 1933 at the age of twenty-four, affected his older brother's life "forever."

Americans continued to live in fear of infectious diseases at least through the middle of the twentieth century. When my siblings and I were born from the late 1940's to the mid-1950's, our mother made sure we received every possible vaccination. She was haunted by the near death of her older sister (my aunt) from scarlet fever in the 1920's.

⁴ Jeffrey Frank, *Ike and Dick: Portrait of a Strange Political Marriage*, at page 14 (2013).

I remember only too well living in fear of the crippling disease polio, with its terrifying specter of children who would never walk again trapped in “iron lungs” without which they could not breathe. Children were sometimes forbidden to go to the local municipal swimming pool because it was believed such places might spread the disease.

I was eight years old in 1955 when the newly developed Salk vaccine (developed by Dr. Jonas Salk), was administered by injection to schoolchildren nationwide. By the early 1960’s it was largely replaced by the oral Sabin vaccine. The conquest of polio provided fresh proof that the answer to the historic scourge of infectious diseases lay in the capable hands of scientists and public health officials.

The first complete conquest of an infectious disease was proclaimed by the World Health Organization only in 1980, two years following the last reported cases of smallpox. Smallpox was the first infectious disease for which a vaccine was developed, by Edward Jenner in England in 1796.⁵

Other infectious diseases are still with us. For example, tuberculosis remains a major threat, with the World Health Organization proclaiming “Anti-tuberculosis (TB) drug resistance is a major public health problem that threatens progress made in TB care and control worldwide. ... A patient who develops active disease with a drug-resistant TB strain can transmit this form of TB to other individuals.”⁶

The New York state Department of Health states that “Respiratory diphtheria is extremely rare in the United States because of widespread immunization.”⁷ But increasing numbers of parents are refusing to have their children vaccinated against infectious

⁵ <http://www.pbs.org/wgbh/aso/databank/entries/dm79sp.html>.

⁶ <http://www.who.int/tb/challenges/mdr/en/>.

⁷ http://www.health.ny.gov/diseases/communicable/diphtheria/fact_sheet.htm.

diseases. By 2010, ABC News reported that “Thirty-nine percent of parents refused or delayed vaccinations for their kids in 2008, up from 22 percent in 2003, according to the study by the Centers for Disease Control and Prevention, the University of Rochester and the National Opinion Research Center.”⁸

Try to imagine yourself in the position of a public health official today, in a nation where most infectious diseases have been so successfully eradicated that a substantial percentage of children are no longer vaccinated. Your first questions to raw milk advocates might be these:

How can you prove conclusively that the raw milk you want to produce and sell will not sicken and possibly kill large numbers of people?

What regulations and inspection procedures will guarantee that raw milk will be uncontaminated and safe for consumption by people of all ages?

Who will draft those regulations? Who will pay to enforce them?

Raw milk advocates may be right that pasteurization destroys many potential benefits of drinking milk. But from a public safety perspective, the point is that the process insures milk will not kill large numbers of children as it did in the past. We must find a balance between forgetting history and being enslaved by it, two extremes expressed in these words:

"Those who cannot remember the past are condemned to repeat it."

SOURCE: Reason in Common Sense (at page 284, 1905) by George Santayana

“Men make their own history, but they do not make it as they please; they do not make it under self-selected circumstances, but under circumstances existing already, given and transmitted from the past. The tradition of all dead generations weighs like a nightmare on the brains of the living.”

SOURCE: The Eighteenth Brumaire of Louis Bonaparte (1852), by Karl Marx

⁸ <http://abcnews.go.com/GMA/OnCall/study-parents-refuse-delay-vaccinations-kids/story?id=10545911#.UeE5eVNWRRep>.

People who work in the field of public health understandably may see themselves as carrying on a centuries-old struggle to protect all of us from the ravages of epidemic diseases.

Those who advocate for the cause of raw milk must recognize that today's public health and other government officials may view them as cranks or faddists whose fondness for raw milk endangers both their own lives and the lives of their children. See, for example, the Boston Globe editorial "Why is raw milk still legal to buy in Massachusetts?" by Deborah Klotz (February 22, 2012),⁹ "Why raw milk should be avoided" by Stephen Barrett, M.D. (December 22, 2003),¹⁰ and "Cow share agreements: fooling nobody" by Drew Falkenstein, (Food Safety News, November 12, 2009).¹¹

The United States government, through the Department of Health and Human Services Centers for Disease Control and Prevention, issues dire warnings about the safety of raw milk. E.g., "Real Stories about the dangers of raw milk,"¹² "Raw milk questions and answers,"¹³ "Nonpasteurized disease outbreaks 1993-2006."¹⁴ The last cited internet web page summarizes the findings of an article entitled "Nonpasteurized Dairy Products, Disease Outbreaks, and State Laws – United States, 1993-2006, by Adam J. Langer, Tracy Ayers, Julian Grass, Michael Lynch, Frederick J. Angulo and Barbara E. Mahon, published in

⁹ www.bostonglobe.com/lifestyle/health-wellness/2012/02/22/why-raw-milk-still-legal-buy-massachusetts/vBWuJJt2eojadlzZmOEHWO/story.html or www.boston.com/2012/02/22/milk/DpXfPWia4osBjlnZkDRwCP/story.html.

¹⁰ www.quackwatch.org/01QuackeryRelatedTopics/rawmilk.html.

¹¹ <http://www.foodsafetynews.com/2009/11/skirting-the-law-with-cow-share-agreements/>.

¹² www.cdc.gov/foodsafety/rawmilk/raw-milk-videos.html.

¹³ <http://www.cdc.gov/foodsafety/rawmilk/raw-milk-questions-and-answers.html>.

¹⁴ <http://www.cdc.gov/foodsafety/rawmilk/nonpasteurized-outbreaks.html>.

Emerging Infectious Diseases, Volume 18, Number 3 (March, 2012).¹⁵ The findings of the that study are summarized this way by a U.S. Food and Drug Administration web page called “Food Facts”¹⁶

The Dangers of Raw Milk: Unpasteurized Milk Can Pose a Serious Health Risk

Milk and milk products provide a wealth of nutrition benefits. But raw milk can harbor dangerous microorganisms that can pose serious health risks to you and your family. According to an analysis by the Centers for Disease Control and Prevention (CDC), between 1993 and 2006 more than 1500 people in the United States became sick from drinking raw milk or eating cheese made from raw milk. In addition, CDC reported that unpasteurized milk is 150 times more likely to cause foodborne illness and results in 13 times more hospitalizations than illnesses involving pasteurized dairy products.

Raw milk is milk from cows, sheep, or goats that has not been pasteurized to kill harmful bacteria. This raw, unpasteurized milk can carry dangerous bacteria such as Salmonella, E. coli, and Listeria, which are responsible for causing numerous foodborne illnesses.

These harmful bacteria can seriously affect the health of anyone who drinks raw milk or eats foods made from raw milk. However, the bacteria in raw milk can be especially dangerous to people with weakened immune systems, older adults, pregnant women, and children. In fact, the CDC analysis found that foodborne illness from raw milk especially affected children and teenagers.

¹⁵ <http://wwwnc.cdc.gov/eid/article/18/3/pdfs/11-1370.pdf>.

¹⁶ <http://www.fda.gov/Food/ResourcesForYou/consumers/ucm079516.htm>.

B. Rise of government “police power” for protection of public health, safety and welfare

The term “police power” apparently was first used in 1827 by U.S. Supreme Court Chief Justice John Marshall, referring to “the police laws of the different States, made for their safety or health”¹⁷ In the mid-nineteenth century, Massachusetts Supreme Judicial (SJC) Court Chief Justice Lemuel Shaw defined state police power as “the power vested in the legislature by the constitution, to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, either with penalties or without, not repugnant to the constitution, as they shall judge to be for the good and welfare of the commonwealth, and of the subjects of the same.”¹⁸ He explained the underlying principle in these words:¹⁹

We think it is a settled principle, growing out of the nature of well ordered civil society, that every holder of property, however absolute and unqualified may be his title, holds it under the implied liability that his use of it may be so regulated, that it shall not be injurious to the equal enjoyment of others having an equal right to the enjoyment of their property, nor injurious to the rights of the community. All property in this commonwealth, as well that in the interior as that bordering on tide waters, is derived directly or indirectly from the government, and held subject to those general regulations, which are necessary to the common good and general welfare. Rights of property, like all other social and conventional rights, are subject to such reasonable limitations in their enjoyment, as shall prevent them from being injurious, and to such reasonable restraints and regulations established by law, as the legislature, under the governing and controlling power vested in them by the constitution, may think necessary and expedient.

¹⁷ *Brown v. State of Maryland*, 25 U.S. (12 Wheat.) 419, 431, 6 L.Ed. 78 (1827); see also Santiago Legarre, “The Historical Background of the Police Power, 9 U. Pa. J. Const. L. 745 (2007).

¹⁸ *Commonwealth v. Alger*, 61 Mass. 53, 85 (1851).

¹⁹ 61 Mass. at 84-85.

By the late nineteenth century, the United States Supreme Court described the police power this way:²⁰

‘Unwholesome trades, slaughter-houses, operations offensive to the senses, the deposit of powder, the application of steam power to propel cars, the building with combustible materials, and the burial of the dead, may all,’ says Chancellor Kent,^{FN13} ‘be interdicted by law, in the midst of dense masses of population, on the general and rational principle, that every person ought so to use his property as not to injure his neighbors; and that private interests must be made subservient to the general interests of the community.’ This is called the police power; and it is declared by Chief Justice Shaw^{FN14} that it is much easier to perceive and realize the existence and sources of it than to mark its boundaries, or prescribe limits to its exercise.

FN13 2 Commentaries, 340.

FN14 *Commonwealth v. Alger*, 7 Cushing, 84.

This power is, and must be from its very nature, incapable of any very exact definition or limitation. Upon it depends the security of social order, the life and health of the citizen, the comfort of an existence in a thickly populated community, the enjoyment of private and social life, and the beneficial use of property. ‘It extends,’ says another eminent judge,^{FN15} ‘to the protection of the lives, limbs, health, comfort, and quiet of all persons, and the protection of all property within the State; . . . and persons and property are subject to all kinds of restraints and burdens in order to secure the general comfort, health, and prosperity of the State. Of the perfect right of the legislature to do this no question ever was, or, upon acknowledged general principles, ever can be made, so far as natural persons are concerned.’

FN15 *Thorpe v. Rutland and Burlington Railroad Co.*, 27 Vermont, 149.

In 1906, Congress enacted the Pure Food and Drug Act,²¹ with a preamble proclaiming its purpose to be “preventing the manufacture, sale, or transportation of adulterated or misbranded or poisonous or deleterious foods, drugs, medicines, and liquors . . .” The legislation provided (in section 4) that “examinations of specimens of foods and drugs shall be made in the Bureau of Chemistry of the Department of Agriculture, or under the direction and supervision of such Bureau, for the purpose of determining from such

²⁰ *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36, 62, 21 L.Ed. 394 (1872).

²¹ Online at <http://www.ncbi.nlm.nih.gov/books/NBK22116/> where the legislation is cited to “*United States Statutes at Large* (59th Cong., Sess. I, Chp. 3915, p. 768-772; cited as 34 U.S. Stats. 768).”

examinations whether such articles are adulterated or misbranded within the meaning of this Act.” The present U.S. Food and Drug Administration is the successor to the old Bureau of Chemistry.²² The Pure Food and Drug Act was replaced in 1938 by the Food, Drug and Cosmetic Act.²³

Every state has a public health department.²⁴ Most larger municipalities have health departments, which often are older than the state. In Massachusetts, the SJC declared in 1828 that “The great object of the city is to preserve the health of the inhabitants”, upholding the right of the City of Boston to license persons who “remove, cart or carry through any of the streets, squares, lanes or alleys of the city, any house-dirt, offal, filth or animal or vegetable substance from any of the dwelling houses or other places occupied by the inhabitants”²⁵ In 1918, the SJC wrote in a decision that “Under present conditions of life milk is an essential article of food in almost universal use. Any statute rationally adopted to the end of security its purity, preserving unimpaired its natural qualities, and security it from adulteration, plainly is within the power of the Legislature.”²⁶

Massachusetts legislation originally enacted in 1816²⁷ provides that local “Boards of health may make reasonable health regulations.”²⁸ The SJC has described this as a “plenary

²² <http://www.fda.gov/AboutFDA/WhatWeDo/History/Overviews/ucm056044.htm>.

²³ Codified in Title 29, United States Code, Chapter 9, cited as 29 U.S.C. § 301 et seq.

²⁴ http://en.wikipedia.org/wiki/State_health_agency#cite_note-1.

²⁵ *In re Vandine*, 23 Mass. (6 Pick.) 187, 191 (1828).

²⁶ *Commonwealth v. Titcomb*, 229 Mass. 14, 17 (1918).

²⁷ 1816 Mass. Acts, c. 43, § 3, provided that the Boston “Board of Health shall have power to make such rules, orders and regulations, from time to time, for the preventing, removing or destroying of all nuisances, sources of filth and causes of sickness within the limits of the town of Boston, or on board any vessel, or on any island in the harbor of Boston which they may think necessary”

²⁸ Massachusetts General Laws, Chapter 111, Section 31, cited as G.L. c. 111, § 31.

power to promulgate reasonable health regulations that are general in nature and operate prospectively.”²⁹ “Health regulations have a strong presumption of validity, and, when assessing a regulation’s ‘reasonableness,’ all rational presumptions are made in favor of the validity of the regulation.”³⁰ A Cambridge, Massachusetts, health department regulation successfully forced a local company to stop “[t]he testing, storage, transportation and disposal,’ within the city of Cambridge, of five highly toxic chemical warfare agents”, even though the company had federal Defense Department contracts to conduct such research.³¹ The court, quoting an earlier case, stated that “‘If the question is fairly debatable,’ we cannot substitute our own judgment for that of the commissioner.”³²

C. Police power regulation of milk from the late 19th through the mid-20th century

For the protection of the public health, the states’ police power may be used to require that all milk for human consumption be pasteurized and may prescribe the conditions under which the pasteurization is accomplished.

SOURCE: 35A American Jurisprudence (Am. Jur.) 2d, Food § 40 (2012) & cases cited.

Pasteurization of all milk or cream distributed or sold within a municipality ordinarily may be and commonly is required by municipal ordinance or board of health regulation. The requirement is a proper police regulation.

SOURCE: 7 McQuillin The Law of Municipal Corporations, § 24:411 (3rd ed. & Supp. 2012) & cases cited.

²⁹ *Independence Park, Inc. v. Board of Health of Barnstable*, 403 Mass. 477, 480 (1988).

³⁰ *Tri-Nel Management, Inc. v. Board of Health of Barnstable*, 433 Mass. 217, 220 (2001), quoting *Druzik v. Board of Health of Haverhill*, 324 Mass. 129, 138 (1949).

³¹ *Arthur D. Little, Inc. v. Commissioner of Health and Hospitals of Cambridge*, 395 Mass. 535, 537-557 (1985).

³² 395 Mass. at 553, quoting *Borden, Inc. v. Commissioner of Public Health*, 388 Mass. 707, 722 (1983), cert. denied sub nom. *Formaldehyde Inst., Inc. v. Frechette*, 464 U.S. 936 (1983).

By 1865, Massachusetts legislation protecting milk quality was upheld by a court decision stating “it is notorious that the sale of milk adulterated with water is extensively practised with a fraudulent intent. It is for the legislature to judge what reasonable laws ought to be enacted to protect the people against this fraud, and to adapt the protection to the nature of the case.”³³ By the 1880’s, regulators could test milk to enforce a law specifically making it “unlawful to sell milk containing less than thirteen per centum of milk solids.”³⁴

By the early twentieth century, pasteurization was so generally accepted as the way to prevent the spread of epidemic diseases through contaminated milk that courts would take judicial notice of such facts, meaning they were considered established without proof as undisputable. The following case, cited by later decisions, illustrates this judicial attitude:³⁵

Public health demands that milk and all milk products should be pure and wholesome. It is also common knowledge that milk containing deleterious organisms is an unsuitable article of food. Milk is known to be a product easily infected with germ life, and to require special attention and treatment in its production and distribution for consumption as an article of food. Scientific knowledge concerning these facts and the best method of pasteurizing milk for human use in course of production and distribution as a pure and wholesome food is so generally understood and known that courts take judicial notice of these facts. It is a generally accepted fact that when milk is heated to a temperature of 145 degrees Fahrenheit, and sustained at that point for 30 minutes, the disease-causing germs are destroyed. Such pasteurization may be performed at the home or at the distributing stations. Under these circumstances and conditions of the milk business it was proper for the common council of the city of Milwaukee to determine in its legislative function what means and methods were best adapted to accomplish the object of supplying the people of the city of Milwaukee with wholesome milk.

³³ *Commonwealth v. White*, 93 Mass. (11 Allen) 264, 265 (1865).

³⁴ *Commonwealth v. Evans*, 132 Mass. 11, 11-12 (1882)

³⁵ *Pfeffer v. City of Milwaukee*, 171 Wis. 514, 177 N.W. 850, 851, 10 A.L.R. 128 (1920), cited in *City of Phoenix v. Breuninger*, 50 Ariz. 372, 379-380, 72 P.2d 580 (1937) (Superseded by statute on other grounds, *City of Flagstaff v. Associated Dairy Products Co.*, 75 Ariz. 254, 257-258, 255 P.2d 191, 193-194 (1953)), and also cited in *Schlenker v. Board of Health of Auglaize County General Health District*, 171 Ohio St., 23, 24, 167 N.E.2d 920, 921 (1960).

By the 1950's, the Texas state supreme court upheld a ban on raw milk while acknowledging its safety and wholesomeness, in these words (underlining added)³⁶

To be sure the evidence here discloses that respondent's Grade A raw milk was produced in compliance with all Federal, State and County regulations and specifications, that it was wholesome for human consumption and that the respondent holds the necessary State and County permits. All that, however, does not establish the unreasonableness of an ordinance designed to protect the public health against the possibility of milk borne diseases. Conceding that there is some variety of opinion as to the desirability and importance of pasteurization and some very respectable authority to the contrary, nevertheless the courts take judicial notice of the fact that pasteurization of milk is a widely recognized and approved method of prevention of disease and one commonly followed and practiced throughout the United States. *City of Phoenix v. Breuninger, supra* [50 Ariz. 372, 72 P.2d 580]. As put by the Health Officer of the City of Weslaco, a medical doctor, 'there are valid medical reasons universally accepted by the medical profession for the pasteurization of milk in controlling milk borne diseases.' The United States Public Health Service recommends that every effort be made to limit the sale of milk to pasteurized milk only. The Public Health Service reports, that as of 1955, six states forbid the sale of any but pasteurized milk and approximately 1,000 municipalities, together with many entire counties throughout forty-two states of the Union and including Texas, do likewise. In *Natural Milk Producers Association of California v. San Francisco, supra* (20 Cal.2d 101, 124 P.2d 32), the Court observes: 'It has been held repeatedly that it is within the scope of the police power to require, for the protection of the public health, that all milk for human consumption must be pasteurized. * * * It cannot be doubted therefore that the requirement that all milk for human consumption be pasteurized is a proper police regulation.' We have found no decision holding to the contrary.

Generally a court will not substitute its own judgment for that of public health officials. An Alabama decision in 1937, upholding a local ordinance requiring that ice cream be made only from pasteurized milk and milk products, stated "the matter of pasteurization presents two schools of thought, and is a question upon which reasonable men may differ, a question 'fairly debatable.' Such being the situation, the duty of the court is clearly to refuse to

³⁶ *City of Weslaco v. Melton*, 158 Tex. 61, 76, 308 S.W.2D 18, 21-22 (1957), reversing *Melton v. City of Weslaco*, 301 S.W.2d 470 (1957).

substitute its judgment for that of the municipal body enacting the ordinance.”³⁷

But the courts are equally unlikely to interfere where raw milk sales are allowed by law. The Massachusetts SJC in 1938 refused to invalidate a local health regulation requiring that milk must be either “certified according to the provisions of the law, or pasteurized ...”, holding that “The regulation in question cannot be pronounced unreasonable, much less an infringement of the plaintiff’s constitutional rights. A strict insistence upon a high standard of purity and safety in milk is well within the police power.”³⁸

The court decisions cited above stand in sharp contrast to a 1926 Missouri case where the state supreme court ruled in favor of a right to sell raw milk, based on the following reasoning:³⁹

A great volume of evidence was offered regarding the relative qualities of raw milk and pasteurized milk. A large number of practicing physicians, chemists, bacteriologists, and users of milk were sworn. The evidence conclusively shows that pasteurization altered the character of the milk, and the testimony of far the greater number of physicians and bacteriologists who testified was that pasteurization impairs its quality; that it destroys some of the vitamins in the milk and impairs others; that it destroys the lactic acid which causes milk to sour; that souring is a process of self-preservation, and lactic acid is an important element in counteracting pernicious bacteria; that pasteurization disintegrates the salts, such as calcium, iron, and phosphates, causes them to lose their organic quality and makes them more difficult, if not impossible, to assimilate; that pasteurization caused constipation and indigestion, particularly among babies and children; that it breaks down the enzymes, though other physicians said there was sufficient of that element in the digestive organisms of persons who drink milk. It was shown that doctors generally require raw milk for ailing babies and children; that children who could not flourish on pasteurized milk usually improved in health and flourished on raw milk. There was other evidence to show that one reason for the satisfactory healthfulness of raw milk is that it increases the vitality and resistance of a child because it is easier to assimilate; that the destruction of

³⁷ *Gilchrist Drug Co., v. City of Birmingham*, 234 Ala. 204, 1112 So. 609, 616, 111 A.L.R. 103 (1937).

³⁸ *Brielman v. Monroe*, 301 Mass. 407, 409, 410 (1938).

³⁹ *State ex rel. Knese v. Kinsey*, 314 Mo. 80, 92-94, 282 S.W. 437, 440-441 (1926).

pathogenic germs by pasteurization was more than counterbalanced by the superior nourishing quality of raw milk.

On the other hand, a few physicians of eminence testified that the digestibility of milk was improved by boiling. The evidence was also conflicting as to whether pasteurization, by which milk is raised to 60 degrees Centigrade, or 140 degrees Fahrenheit, and kept at that temperature for 30 minutes, impaired the vigor of pathogenic bacteria. A good many bacteriologists testified that, while it impaired, it did not destroy them; that their destruction depended upon their vitality. Some of them are more vigorous individuals than others and would survive more rigorous treatment.

In addition to the professional evidence offered, the relators offered the testimony of a number of mothers and other raisers of children, and they uniformly testified that children who were not healthful when fed on pasteurized milk were healthful when fed raw milk, and were often cured of ailments when they took to raw milk. The respondents made no attempt to counteract that testimony, but contended it was unimportant coming from nonprofessional source. But it was the opinion of several physicians that actual experience, particularly clinical experience, was more valuable than laboratory tests in determining the effects of milk upon the system.

VI. The ordinance provides for "certified milk," and that provision, it was explained, was put into the ordinance because physicians demanded raw milk for their patients. It is raw milk, but the city's expert himself testified that certified milk was produced under so exacting and expensive conditions, and the cost was so high, that it could not be produced for commercial purposes. There was no demand for it except for clinical purposes. Respondent does not claim that it is practical to require it of milk dealers.

From the above considerations we reach these conclusions:

(1) Raw milk is healthful, nutritious food, particularly for children, and this is not disputed.

(2) From the great weight of the evidence it is plain that raw milk as a general thing is more nutritious, easier assimilated, and better food, especially for children, than pasteurized milk, though it is probable that some individuals may thrive better on pasteurized and boiled milk than on raw milk.

(3) There is nothing in the record to show that it is impractical for the city to cause sufficient inspection and standardization of dairies so as to reasonably insure the production and distribution of wholesome raw milk free from dangerous bacteria, without the expense attending the production of certified milk.

Therefore no reasons appear why the relators should not be granted permits to deal in it. They have a right to deal in it under the statutes and Constitution, and a denial of that right is supported by neither law nor reason.

D. Late 20th and early 21st century regulation and prohibition of raw milk

Some states prohibit raw milk outright, while others allow limited production and sale. “An Overview of U.S. State Milk Laws” compiled by Pete Kennedy, Esq. (December, 2004) will be found at <http://www.realmilk.com/state-updates/raw-milk-statutes-and-codes-page-1/>. That source should provide a starting point for any reader seeking details about raw milk regulation in a particular state.

In California, where sale of certified raw milk is allowed by law, a dairy found to have engaged in “false and misleading advertising” was enjoined in 1992 from making such claims and ordered to place the following labels on its Raw Certified Milk (RCM) products for a period of ten years⁴⁰

“WARNING: THIS MILK MAY CONTAIN DANGEROUS BACTERIA. THOSE FACING THE HIGHEST RISK OF DISEASE OR DEATH INCLUDE BABIES, PREGNANT WOMEN, THE ELDERLY, ALCOHOLICS, THOSE WITH CANCER, AIDS OR REDUCED IMMUNITY AND THOSE TAKING CORTISONE, ANTIBIOTICS OR ANTACIDS. QUESTIONS REGARDING THE USE OF RAW CERTIFIED MILK SHOULD BE DIRECTED TO YOUR PHYSICIAN.”

In addition, the dairy was ordered

to place a disclosure on all of its advertisements which contain representations concerning the health or nutritional benefits of RCM. For 10 years, such advertisements must bear the following statement, “WARNING: THE FOOD AND DRUG ADMINISTRATION (FDA) HAS DETERMINED (1) THAT THERE IS NO SATISFACTORY SCIENTIFIC PROOF THAT PASTEURIZATION SIGNIFICANTLY REDUCES THE NUTRITIONAL VALUE OF MILK AND (2) THAT THE RISKS ASSOCIATED WITH CONSUMING RAW CERTIFIED MILK OUTWEIGH ANY OF ITS ALLEGED HEALTH BENEFITS.”

⁴⁰ *Consumers Union of U.S., Inc. v. Alta-Dena Certified Dairy, Inc.*, 4 Cal. App. 4th 963, 970-971, 6 Cal.Rptr.2d 193,197 (1992).

The California court held that the dairy's "RCM has frequently been found to contain disease causing organisms", listing individual cases, and that "Despite Alta-Dena's claims to the contrary, RCM is less safe than pasteurized milk."⁴¹

At the federal level, interstate transportation of raw milk is prohibited. In the Federal Register for August 10, 1987,⁴² the U.S. Food and Drug Administration (FDA) stated that effective September 9, 1987, it was "issuing a final regulation requiring that milk and milk products in final package form for human consumption in interstate commerce be pasteurized." That regulation⁴³ remains in effect to this day.

The 1987 federal regulation resulted from a petition filed in 1984 by "the Health Research Group (HRG) of Public Citizen, a privately funded advocacy organization" ⁴⁴ Action on the petition was precipitated by a federal court decision summarized by the FDA in these words:⁴⁵

In *Public Citizen v. Heckler*, 653 F. Supp. 1229 (D.D.C. 1986), the Court ruled that the agency's denial of the HRG petition was arbitrary and capricious in light of the record compiled in the proceeding before the agency. The Court concluded that the record presents "overwhelming evidence of the risks associated with the consumption of raw milk, both certified and otherwise * * *" and is "replete with credible evidence of the danger of raw milk consumption, and the support of various organizations, both within and without the Government, for a federally imposed interstate ban," (653 F. Supp. at 1238). The Court went on to state that the evidence FDA has accumulated concerning raw milk "conclusively" shows that raw and certified raw milk are unsafe (653 F. Supp. at 1232, 1241). According to the Court, "There is no longer any question of fact as to whether the consumption of raw milk is unsafe." (653 F.2d at 1241). The Court ruled that FDA should propose a rule "banning the interstate sale of all raw milk and raw

⁴¹ 4 Cal. App. 4th at 967-970, 6 Cal.Rptr.2d at 195-196.

⁴² 52 Fed. Reg. 29509, 1987 WL 138767 (F.R.)

⁴³ Codified at 21 CFR [Code of Federal Regulations] Part 1240.

⁴⁴ 52 Fed. Reg. at 29510.

⁴⁵ 52 Fed. Reg. at 29511.

milk products, both certified and noncertified * * *.”(653 F. Supp. at 1242). The Court also found that there was no indication that a rule banning the intrastate shipment of raw milk would be necessary to carry out an interstate ban.

To the above quoted words by the federal court, the FDA added the following finding, rejecting raw milk certification as a satisfactory alternative to pasteurization

Raw milk, no matter how carefully produced, may be unsafe. Accordingly, raw milk products may be unsafe. Examinations of cattle and of milk handlers can be done only at intervals. Consequently, pathogenic organisms may enter the milk during these intervals and be transmitted to humans before the presence of the organisms or the existence of a disease condition in cattle or handlers is discovered.

Moreover, it has not been shown to be feasible to perform routine bacteriological tests on the raw milk itself to determine the presence or absence of all pathogens and thereby ensure that it is free from infectious organisms.

In the past, supporters of certified raw milk pointed to standards such as total bacterial counts as proof of safety, but the high incidence of disease associated with certified raw milk is strong evidence that these standards are unreliable indexes of safety. In addition, the American Association of Medical Milk Commissions, the entity that “certifies” raw milk, recently deleted any mention of Salmonella, a known pathogen, from its standards (Ref. 17).

Thus, in FDA's view, “certification” does not provide a reliable index of whether milk or milk products are contaminated with pathogenic bacteria. For example, certified raw milk cannot be certified free of Salmonella organisms (Ref. 13). Milk is an excellent vehicle of infection because its fat content protects pathogens from gastric acid, and, being fluid, it has a relatively short gastric transit time. Opportunities for the introduction and persistence of Salmonella organisms on dairy premises are numerous and varied, and technology does not exist to eliminate Salmonella infection from dairy herds or to preclude the re-introduction of Salmonella organisms. Moreover, recent studies show that cattle can carry and shed S. dublin organisms for many years and demonstrated that S. dublin organisms cannot be routinely detected in cows that are “mammary gland” shedders (Ref. 13).

In light of the foregoing, FDA concludes that the certification process alone provides no assurance that raw milk is free of Salmonella and other harmful organisms.

A recent law review article by an attorney at the FDA, prompted by Michael Pollan's book *The Omnivore's Dilemma* (2006), suggests that the agency's attitude toward raw milk

remains unchanged.⁴⁶ While stating “the eat-food movement is not anti-science”, the author asserts in a footnote⁴⁷ that

There are fringe elements within the eat-food movement that can properly be labeled anti-science. One issue where the rubber hits the road is raw milk--a whole food, to be sure, but one that has been repeatedly shown through sound science to pose a health hazard. See Adam J. Langer et al., Nonpasteurized Dairy Products, Disease Outbreaks, and State Laws--United States, 1993-2006, 18 *Emerging Infectious Diseases* 385 (Mar. 2012), available at <http://www.cdc.gov/foodsafety/rawmilk/nonpasteurized-outbreaks.html>.

Sometimes a shift in judicial attitudes can be begin with legal literature, which provides at least secondary authority on which a judge can rely. For raw milk, the question is whether food choice is a legal right. One law review frames the issue in these terms:⁴⁸

Is there a right to food choice, and if there is, what level of constitutional protection does the right deserve? The Farm-to-Consumer Defense fund argues that food choice is a fundamental right because it implicates autonomy, the right to control over one's family, the right of health, a right of privacy, and other rights. Conversely, the FDA contends not only that there is no fundamental right to choice of food, but there is no right at all to control diet. Are either right? Or does the answer fall somewhere between these two extremes?

These are difficult questions, and are currently unanswered. Yet, when considering the right to choice of food, the law should look to additional considerations beyond food safety. Whether food is safe or dangerous is a subjective question that can be a matter of opinion, or worse, a matter of politics, and therefore should not be the only issue considered when determining whether to grant or deny access to a particular food. Meanwhile, food choice is important for a number of reasons beyond safety, including its impact on health, its importance to religion, its value in cultural identity, and its importance as self-expression and a form of speech. Furthermore, these reasons compare favorably to established fundamental rights and protected choices. Given these considerations, it may well be that food choice does indeed deserve some

⁴⁶ Rebecca L. Goldberg, “Administering Real Food: How the Eat-Food Movement Should – and Should Not – Approach Government Regulation, 39 *Ecology L.Q.* 773 (2012).

⁴⁷ 39 *Ecology L.Q.* at 784 n. 57.

⁴⁸ Kammi L. Rencher, “Food Choice and Fundamental Rights: A Piece of Cake or Pie in the Sky?,” 12 *Nev. L.J.* 418, 442 (2012).

level of heightened protection.

Regardless of whether food choice is a legal right, another law review article highlights a concern that raw milk advocates ignore at their peril. Illness caused by raw milk can result in lawsuits against producers and sellers, “with liability potential from a myriad of legal theories: negligence, negligence per se, strict products liability, defective design and warning, breach of express and implied warranties, and misrepresentation.”⁴⁹ Those who produce and sell raw milk would be well advised to discuss this issue with their insurance agents, to be sure they have coverage for such claims. They should also keep in mind that in a civil case seeking damages, all that is required is for the plaintiff to establish a case by preponderance of the evidence, not the criminal standard of beyond a reasonable doubt. This requirement may be satisfied by circumstantial evidence.⁵⁰

Cow sharing or leasing schemes all have been universally rejected by the courts. In 2012, a federal court issued an injunction against sale in Maryland of raw milk from a Pennsylvania farm, rejecting the farmer’s claim that he was “leasing’ his cows through a

⁴⁹ Damian C. Adams, Michael T. Olexa, Tracey L. Owens, Joshua A. Cossey, “Deja Moo: Is the Return to Public Sale of Raw Milk Udder Nonsense?” 13 Drake J. Agric. L. 305, 320-340, 346 (2008).

⁵⁰ *Nelson v. West Coast Dairy Co.*, 5 Wash.2d 284, 299, 105 P.2d 76, 82-83 (1940) (“[T]he trial court was fully warranted in finding that the most probable cause of respondent’s illness was his consumption of infected raw milks [R]espondent had undulant fever; . . . among urban dwellers the principal cause of such fever is the ingestion of raw milk that is infected with the germs of Bang’s disease; . . . the cows from which respondent obtained the milk, through appellants, were afflicted with Bang’s disease during the period of such consumption. . . . [R]espondent has, by circumstantial evidence, made as clear a case of liability as could be expected or required in a case such as this.”).

private organization” which “required a \$25.00 membership fee and was called ‘The Right to Choose Healthy Food’s Rawsome Club.’”⁵¹

In 1983 the Virginia Supreme Court outlawed an enterprising farmer’s “lease-a-goat program” in which the raw milk consumer had to phone ahead to reserve a goat, then sign a written lease and pay “a rental fee of \$3.00 per day for each goat. For this fee, the lessee was entitled to receive all the ‘by-products’ produced by the designated goat in a 24 hour period and to use the goat as a family pet. Under the terms of the lease, however, the ‘rental goat is not to leave the premises ...’ of the farm.”⁵² The Virginia court held that “Respondent’s argument, which focuses upon the goat, skews the issue. The regulation does not proscribe sale of the animal. The violation with which respondent was charged was a sale of the raw milk produced by the animal. It is immaterial that title to the goat never passed; title to the milk passed when respondent completed the act of delivery.”⁵³

The Virginia farmer then “modified her business operation by selling, rather than renting, undivided interests in her goats. For \$50, an individual who wished to receive unpasteurized goats’ milk could purchase a 24 percent interest in a goat, which, upon payment of a \$3 daily ‘maintenance’ fee, entitled the purchaser to a gallon of milk each day.”⁵⁴ The court rejected this scheme, based on the following analysis⁵⁵

Solem erroneously focuses upon an alleged sale of an interest in the goat and not on the sale of milk which is the act proscribed by the regulation. Although Solem may have formally transferred an undivided interest in her goats to a user of their milk, the

⁵¹ *U.S. v. Allgyer*, 2012 WL[Westlaw] 355261 at *2 & n. 11, *5 (E.D.Pa. 2012) (unpublished slip opinion).

⁵² *Carbaugh v. Solem*, 225 Va. 310, 312-313, 314, 302 S.E.2d 33, 34 (1983).

⁵³ 225 Va. at 314, 302 S.E.2d at 35.

⁵⁴ *Kenley v. Solem*, 237 Va. 202, 203, 375 S.E.2d 532, 532 (1989).

⁵⁵ 237 Va. at 204, 375 S.E.2d at 533.

essential, and admitted, purpose of the transaction is to distribute unpasteurized goats' milk in avoidance of the regulation.

The owner of the 24 percent interest in a goat does not receive only his goat's milk-it goes into a common container, and he gets milk from all of the goats producing milk on that day. In some instances he may not receive any of his goat's milk. The maintenance fee of \$3 per day, geared to the amount of milk each owner receives, is nothing more than a sham for payment for the gallon of milk received by the owner from Solem on that day. We will look to the substance of this transaction and not to its formal trappings.

A Maryland appellate court reached the same conclusion in 2009, upholding a state agency regulation outlawing a farmer's scheme "to sell fractional ownership interests in a herd of dairy cattle, after which he would board and care for the cows, and then provide the raw milk produced by those cows to the owners of the herd in accordance with their percentages of ownership."⁵⁶

Similarly, the Iowa Supreme Court in 1975 affirmed a trial court holding that a nonprofit corporation's "distribution of unpasteurized milk to its members constituted a sale prohibited by" state law.⁵⁷ In that case, "[t]he corporation ... entered into an agreement with Eldon and C.E. Moss to lease from them their herd of Guernsey cattle. It included a provision that all milk produced by the cows would be the property of the corporation. Eldon Moss entered into an agreement for the care of the leased herd."⁵⁸

At least one state (Colorado), prohibits sale of raw milk, but legislatively authorizes consumption of raw milk acquired through a cow-sharing or goat-sharing scheme.⁵⁹

⁵⁶ *Oyarzo v. Maryland Dept. of Health and Mental Hygiene*, 187 Md. App. 264, 267-268, 294, 978 A.2d 804, 806, 822 (2009).

⁵⁷ *Johnson County v. Guernsey Assoc. of Johnson County, Iowa, Inc.*, 232 N.W.2d 84, 85 (Iowa 1975).

⁵⁸ 232 N.W.2d at 85.

⁵⁹ Colorado Revised Statutes Annotated (C.R.S.A.) § 25-5.5-117(3) states that "Retail sales of raw, unpasteurized milk shall not be allowed. Resale of raw milk obtained from a cow

E. Where do we go from here? Raw milk as a legislative and regulatory issue.

To win the battle for raw milk, its advocates need not only political organization and clout, they must learn to stop making unsupported assertions, and start relying on scientific evidence.

For example, I purchased the book *Real Food: What to Eat and Why*, by Nina Planck (2006) in the hope of obtaining such evidence for use in this work. In Chapter 2, entitled “Real Milk, Butter, and Cheese,” I found an extended discussion of the evils of pasteurization and the benefits of raw milk, without a single citation to any source! The book jacket describes the author’s qualifications as follows: “Nina Planck created farmers’ markets in London and Washington, D.C., and ran New York City’s famous Greenmarket. The daughter of Virginia vegetable farmers, she wrote *The Farmers’ Market Cookbook* and hosted a British

share or goat share is strictly prohibited. Raw milk that is not intended for pasteurization shall not be sold to, or offered for sale at, farmers' markets, educational institutions, health care facilities, nursing homes, governmental organizations, or any food establishment.” But subsection (1) of the same statute provides as follows:

(1) The acquisition of raw milk from cows or goats by a consumer for use or consumption by the consumer shall not constitute the sale of raw milk and shall not be prohibited if all of the following conditions are met:

(a) The owner of a cow, goat, cow shares, or goat shares shall receive raw milk directly from the farm or dairy where the cow, goat, or dairy herd is located and the farm or dairy is registered pursuant to subsection (2) of this section. A person who is the owner of a cow share or goat share in a cow, goat, or dairy herd may receive raw milk on behalf of another owner of the same cow, goat, or dairy herd. A person who is not an owner of a cow share or goat share in the same cow, goat, or dairy herd shall not receive raw milk on behalf of the owner of a cow share or goat share.

(b) The milk is obtained pursuant to a cow share or a goat share. A cow share or a goat share is an undivided interest in a cow, goat, or herd of cows or goats, created by a written contractual relationship between a consumer and a farmer that includes a legal bill of sale to the consumer for an interest in the cow, goat, or dairy herd and a boarding contract under which the consumer boards the cow, goat, or dairy herd in which the consumer has an interest with the farmer for care and milking, and under which the consumer is entitled to receive a share of milk from the cow, goat, or dairy herd.

television series on local food.” Planck appears to be nothing but a celebrity entrepreneur who has no scientific training or experience.

From the perspective of any scientist or scholar, and probably also of any public official charged with protecting the public health from the scourge of infectious diseases, Planck’s work is nothing but garbage – meaningless rhetoric from the pen of an unqualified author who violates every rule of scholarship. With an M.A. degree in Urban & Regional Planning and a Ph.D. in economics, this writer finds it appalling that anyone would consider what Plank writes about raw milk to be a credible source. The importance of citing sources has been summarized this way:⁶⁰

Why citing is important

It's important to cite sources you used in your research for several reasons:

- To show your reader you've done proper research by listing sources you used to get your information
- To be a responsible scholar by giving credit to other researchers and acknowledging their ideas
- To avoid plagiarism by quoting words and ideas used by other authors
- To allow your reader to track down the sources you used by citing them accurately in your paper by way of footnotes, a bibliography or reference list.

Is there scientific evidence to support Planck’s unsupported assertions? One blogger⁶¹ writes that Planck’s book

opened my mind to the possibility of raw milk for my family. I knew of other families who were regularly consuming it and so already had a source. But I needed further research to feel completely safe with the decision, and then to convince my reasonably skeptical husband. So I went on a quest for more information. Here was my reading list:

http://www.raw-milk-facts.com/raw_milk_health_benefits.html

<http://ninaplanck.com/index.php?page=where-i-buy-real-food>

<http://www.realmilk.com/>

⁶⁰ MIT (Massachusetts Institute of Technology) Libraries: Citing Sources (<http://libguides.mit.edu/citing>)

⁶¹ <http://simplegoodandtasty.com/2009/10/12/got-a-craving-for-raw-milk-blame-it-on-nina-planck>.

<http://www.rawmilktruth.com/>
<http://www.rawmilkbenefits.com/>
<http://baumfarm.com/rawmilk.html>
<http://www.healthbanquet.com/raw-milk.html>

Checking the above internet web page links in July, 2013, produced the following results:

http://www.raw-milk-facts.com/raw_milk_health_benefits.html is an active link to an article with citations in footnotes. A page on the same website (http://www.raw-milk-facts.com/selected_books.html) lists many books on the subject, at least some of which appear to be scientific publications. Another page on the website, entitled "scientific stuff" (http://www.raw-milk-facts.com/scientific_refs.html) contains links to information on a variety of related scientific topics.

<http://ninaplanck.com/index.php?page=where-i-buy-real-food> -- "Page Not Found"

<http://www.realmilk.com/> is the website of the Weston A. Price Foundation's Campaign for Real Milk. It appears to be one of the most credible online advocates for real milk, with articles by named authors who have scientific credentials. See especially the following pages on this website

[realmilk.com-Safety.pdf](#)

[realmilk.com-Pasteurize_or_Certify_Two_Solutions_to_The_Milk_Problem](#)

[realmilk.com-Pasteurization_Does_Harm_Real_Milk](#)

[realmilk.com-More_About_Raw_Milk](#)

[realmilk.com-](#)

[Fresh_Unprocessed_Raw_Whole_Milk_Safety_Health_and_Economic_Issues](#)

[realmilk.com-Raw_Milk_Safety_vs_Rights_Striking_a_Balance](#)

[realmilk.com-Those_Pathogens_What_You_Should_Know](#)

[realmilk.com-](#)

[Abstracts_on_the_Effect_of_Pasteurization_on_the_Nutritional_Value_of_Milk](#)

<http://www.rawmilktruth.com/> appears to be a popular website. It does not appear to be as useful as [realmilk.com](#) or [raw-milk-facts.com](#), unless one is seeking a source for raw milk in central Florida.

<http://www.rawmilkbenefits.com/> is another popular website which does not appear to have much substantive information

<http://baumfarm.com/rawmilk.html> is a single page on the web site of certified organic Baum Farm in Canaan, Vermont. It does cite as "Reference Books" The Milk Book by William Campbell Douglass II, MD and The Untold Story of Milk by Ron Schmid, ND. Schmid is the author of an article entitled "Pasteurize or Certify: Two Solutions to 'The Milk Problem'" which is online at [realmilk.com-Pasteurize_or_Certify_Two_Solutions_to_The_Milk_Problem](#)

<http://www.healthbanquet.com/raw-milk.html> is a page entitled “Raw Milk Benefits and Song” on a site edited by one “Eryn.” It does not appear to have any evidentiary value.

Nationwide, the Weston A. Price Foundation’s Campaign for Real Milk (<http://www.realmilk.com>) appears to be the organization with the most comprehensive scientific and legal approach. Experts with advanced degrees are essential in a legal system where only those with professional training, experience, or both are entitled to express opinions concerning the pros and cons of pasteurization.

In the Northeast, NOFA/Mass (Northeast Organic Farming Association, Massachusetts Chapter) supports a Raw Milk Network (<http://www.nofamass.org/programs/raw-milk-network#.UeKuc1NWReo>) that is “working to make safe, healthy raw milk and raw milk cheeses easily available in Massachusetts.” The Raw Milk Network web page includes a link to the “NOFA Mass Massachusetts Raw Milk Producers.’ Handbook (March 2012). (http://www.nofamass.org/sites/default/files/2012_producers_handbook_0.pdf). As of July, 2013, the contact person for the NOFA/Massachusetts Raw Milk Network is Winton Pitcoff, Coordinator, email winton@nofamass.org, phone (413) 634-5278.

NOFA/Mass currently supports legislation to allow raw milk sales off the farm in Massachusetts (<http://www.nofamass.org/node/184#.UeKz8INWReo>). In Massachusetts, legislation can be enacted when three people agree: the Governor, President of the state Senate, and Speaker of the state House of Representatives. Enlisting their support for expanded raw milk production and sale in Massachusetts is a task that remains to be accomplished.

One fundamental problem seems to be that raw milk producers and consumers seek to return to a pre-industrial (or in our collapsing economic and political system a post-

industrial) local small-scale approach to food production and marketing. But our legal system regulating food is an historic response to industrial mass production and mass marketing.

One law review article summarizes the problem this way:⁶²

Traditionally, local farms produced the food Americans consumed and, for the most part, people ate local, seasonal food. People did not question whether food was “organic” or not because the concept did not exist. All food was organic. Over the course of the 20th century, as the nation transitioned from the predominately agricultural society of the 19th century to an industrial nation with an urbanized population, there was a dramatic shift in the method of food production.

In response to the growing demand of the newly urbanized population, food production shifted away from local production and processing, and toward more industrial processing and national marketing. Food manufacturers met this growing demand by adopting similar techniques to those utilized by the industrial sector. Various technologies and chemicals were developed to sustain this new, streamlined, mega-farm, assembly-line method of food production. The evils inherent in this new food production system first became publicly apparent with respect to the “appalling and grossly unsanitary working conditions in meat packing factories” when Upton Sinclair published his book *The Jungle*. Following this shocking revelation, the legislature responded by enacting the Pure Food and Drug Act (PFDA) and the Meat Inspection Act (MIA) in 1906, thus establishing the initial U.S. food safety statutory framework.

This author goes on to highlight the career of attorney Michael R. Taylor, former vice president for public policy at Monsanto Company, who is now deputy commissioner for foods at the U.S. Food and Drug Administration (FDA),⁶³ arguing that Taylor “represents the agency’s adherence to the current mainstream, one-size-fits-all, industrial approach to food production, and therefore its approach to food safety.”⁶⁴ That attitude, and the large

⁶² Nicholas Obolensky, “The Food Safety Modernization Act of 2011: Too Little, Too Broad, Too Bad,” 17 *Roger Williams U.L. Rev.* 887, 887-888 (2012).

⁶³ 17 *Roger Williams U.L. Rev.* at 925-926 & nn. 190-193.

⁶⁴ 17 *Roger Williams U.L. Rev.* at 926 & n. 194.

corporate business interests it serves, help explain the following incidents in which the FDA has pursued producers of raw milk and raw milk products⁶⁵

An examination of some recent instances in which the FDA has exercised its authority reveals its preferences and policies for controlling food safety. The current trend of enforcement by the FDA against farmstead dairies is an ominous indicator of where the FDA wants to go. For example, on April 20, 2010, two FDA agents, two federal marshals, and one state trooper went to the Rainbow Acres farm in Pennsylvania at 5 a.m. “to execute an administrative search warrant,” ultimately fining the farm-owner for violating a law against selling raw milk. The FDA has targeted twenty different buying clubs in Chicago suspected of obtaining raw milk from out-of-state sources and “has a similar strategy for the states, with the plan being to pressure one state at a time to ban raw milk sales.” Morningland Dairy, a farmstead raw milk cheese operation in Missouri, has been involved in litigation for over a year, and has had approximately 29,000 pounds of its cheese impounded since August 26, 2010, even though there have been no reported illnesses from consumption of its products throughout the thirty years it has been in business. The list of recalls, suspensions, and enforcement actions against raw milk products goes on and on even though there is not yet a federal prohibition of raw milk. The zero tolerance policy on *Listeria monocytogenes*, a foodborne pathogen that can sometimes be virulent, threatens to eliminate raw milk artisanal cheese production, and thus cut out a significant high-value niche for small and mid-sized farming operations.

In conclusion, there must be a campaign for legalization of raw milk that is both political and based on modern science. Political organization and influence must be combined with scientific evidence provided by experts with proper credentials who cite their sources. Neither alone is sufficient.

⁶⁵ 17 Roger Williams U.L.Rev. at 926-927 & nn. 195-199.