

**REPORT ON LEGISLATION BY THE
COMMITTEE ON LEGAL ISSUES PERTAINING TO ANIMALS**

S.5172

Sen. Ritchie

AN ACT to amend the agriculture and markets law, in relation to unlawful tampering with farm animals.

THIS LEGISLATION IS OPPOSED

1. Summary of the Proposed Law

S.5172 adds section 378-A to Article 26 of the Agriculture & Markets Law, making it a misdemeanor to (1) photograph or make a video or audio recording of a farmed animal or farm; (2) inject any unauthorized substance into a farmed animal; (3) feed a farmed animal; and (4) release a farmed animal if oral or written notice barring “tampering” is provided and the farm owner did not provide written consent.

The bill covers all farmed animals used in the production of food or fiber while on a farm. The bill’s expansive definition of the term “farm” includes any real property or vehicle that a farmed animal occupies for any period of time.¹ If a notice is provided, no person may photograph, videotape, or record the farm or animal or inject, feed, or release the animal without the written consent of the owner of the real property or vehicle occupied by the animal at the time.² The notice may be given orally or in writing. If notice is given in writing, it must be posted at a “centralized location on the farm” or “immediately adjacent to the farm” or provided to a person by some other means not specified by the bill. The notice must provide “information and disclosure” that the farm prohibits “unlawful tampering.” The prohibition against unauthorized recording, injection, feeding, and release applies to all legal persons, including employees of the farm.

2. The Committee Opposes the Bill

The Committee on Legal Issues Pertaining to Animals opposes the bill because (a) the bill’s prohibition on photographing, videotaping, or making an audio recording of a

¹ S.5172 provides, “‘Farm’ means any building, structure, vehicle, pasture, paddock, pond, impoundment area, land or property upon which farm animals are housed, cared for, grazed or bred.”

² The bill seems to provide rights to only the “farm owner” because only he or she has authority to consent to an otherwise prohibited act and employees of the farm are covered by the prohibitions under the bill’s definition of person.

farm or farmed animal is overbroad and violates the First Amendment; (b) the bill is contrary to the public's interest in protecting animals by prosecuting animal abuse, enacting animal-protection legislation necessary to address changes in animal agriculture, and making informed choices to consume animal products; and (c) the bill's prohibitions against unlawful injections, feeding, and release are addressed in or are inconsistent with existing law.

- a. The bill's prohibition on photographing, videotaping, or making an audio recording of a farm or farmed animal is overbroad and violates the First Amendment.

The First Amendment to the U.S. Constitution provides that the government shall make no law abridging the freedom of speech or of the press. The act of newsgathering is protected by the First Amendment for "without some protection for seeking out the news, freedom of the press could be eviscerated."³ Specifically, taking a photograph for publication or videotaping for broadcasting is protected First Amendment conduct.⁴ Individuals, not just news organizations, have the right to gather information on matters of public interest for dissemination.⁵ The right to gather information extends to taking photographs on public property.⁶

The proposed law is overbroad because it would prohibit the photographing or videotaping of a farm and farmed animals from a public space, activity protected by the First Amendment.⁷ As explained in section 1 above, the term "farm" is expansive and extends from an old-fashioned roadside barn to vehicles transporting farmed animals. Under the bill, for example, a journalist could be barred from photographing a highway accident involving a truck hauling chickens because the truck is considered a farm. In order to invoke this protection, the truck owner would merely have to announce at the accident scene, or post on his truck, that tampering with his farm is prohibited. A journalist ignoring the warning (or who did not understand the warning applied to

³ *Branzburg v. Hayes*, 408 U.S. 665 (1972).

⁴ *Porat v. Lincoln Towers Community Association*, 2005 WL 646093 at *4 (S.D.N.Y. Mar. 21, 2005); see also *U.S. v. Stevens*, 130 S.Ct. 1577 (2010) (federal statute prohibiting the creation and distribution of depictions of animal cruelty violated First Amendment).

⁵ *Smith v. City of Cumming*, 212 F.3d 1332, 1333 (11 Cir. 2000).

⁶ See *Connell v. Town of Hudson*, 733 F. Supp. 465 (Dist. Ct. N.H. 1990) (right to take photograph of an accident scene in a public place); see also *Musumeci v. U.S. Dept. of Homeland Security*, 10 Civ. 3370 Stipulation and Order of Dismissal (S.D.N.Y. 2010), available at http://www.scribd.com/full/39623305?access_key=key-21nlcq8q54dwdoa8ofbr. (Last visited July 17, 2011.) Courts have recognized that newsgathering methods may be tortious. See, e.g., *Galella v. Onassis*, 487 F.2d 986, 995 (2d Cir. 1973). Thus, farms already have protection against trespassers who enter their private property.

⁷ Even if a law has a legitimate purpose, it may be invalidated on the ground that it is overbroad if a substantial number of its applications are unconstitutional. See, e.g., *Stevens*, 130 S.Ct. at 1587 (finding a federal statute prohibiting depictions of animal cruelty invalid on the ground that it would criminalize depictions of acts such as hunting and animal farming, not simply extreme acts of animal cruelty).

photography of a vehicle) could be charged with a misdemeanor.⁸ An artist photographing the roadside barn could also be charged with a misdemeanor.

In New York State, the prohibition against photographing farms could have profound implications on the press' ability to inform the public about the activities of concentrated animal feeding operations ("CAFO") that affect the public health as well as the public's ability to gather evidence for lawsuits. (A CAFO is a large farm that confines hundreds or thousands of animals in buildings or feedlots; CAFOs are commonly referred to as "factory farms.") CAFOs are a significant source of environmental pollution in New York State.⁹ In 1994, the Second Circuit Court of Appeals considered a case involving allegations that a dairy CAFO contaminated the water supply by improperly disposing of cow manure.¹⁰ Had this bill been law at the time of the suit, a photojournalist covering the story could have been prosecuted if he or she photographed the dairy CAFO from a public highway or a helicopter. Likewise, an individual photographing manure runoff visible from a public street for use as evidence in the lawsuit could have been charged with a misdemeanor under the bill.

- b. The bill is contrary to the public's interest in protecting animals by prosecuting animal abuse, enacting animal-protection legislation necessary to address changes in animal agriculture, and making informed choices to consume animal products.

The prohibition of animal cruelty has a long history in American law, starting in the mid-17th Century.¹¹ New York passed its first anti-cruelty law in 1866 and has been a leader in passing animal-protection legislation.¹² New York vigorously prosecutes egregious cases of animal abuse,¹³ including abuse of animals on farms.¹⁴

⁸ Casual photography is not protected to the same extent as photography intended for distribution under the First Amendment. *Porat*, 2005 WL 646093. Though afforded minimal constitutional protection, this bill could criminalize acts as innocent as a child photographing the exterior of a tractor hauling chickens on the highway or a family picture in front of a pond that happens to contain fish because both the tractor and the pond fit the definition of "farm."

⁹ Citizens' Environmental Coalition and the Sierra Club, *The Wasting of Rural New York State: Factory Farming and Public Health* (2005), available at http://newyork.sierraclub.org/documents/Wasting_NYS_Report.pdf. (Last visited July 17, 2011.); e.g., *Humane Society of the United States v. HVFG, LLC*, Index No. 06 CV 6829 (S.D.N.Y. May 6, 2010) (finding foie gras producer guilty of numerous violations of the Clean Water Act).

¹⁰ *Concerned Area Residents for the Environment v. Southview Farms*, 34 F.3d 114 (2d Cir. 1994).

¹¹ *U.S. v. Stevens*, 130 S. Ct. 1577 (2010), citing *The Body of Liberties* §92 (Mass. Bay Colony 1641) ("No man shall exercise any Tirranny or Crueltie towards any brute Creature which are usuallie kept for man's use").

¹² For example, New York State provides that aggravated animal cruelty is a felony, Ag. & Mkts Law § 353, and requires instruction in humane education, Education Law § 809.

¹³ For example, both the Kings County District Attorney's Office and the Suffolk County District Attorney's Office have units that specialize in the prosecution of animal cruelty cases.

CAFOs are a relatively new kind of entity, slowly arising in the 1920s (chickens) and 1960s (pigs and cows).¹⁵ In New York State, CAFOs became prominent in the 1990s and, by 2003, CAFOs with 200 or more cows made up 41 percent of New York's dairy farms.¹⁶ Unlike activities on traditional family farms of the past that were highly visible to the public, much of what happens in CAFOs occurs behind closed doors hidden from the public view.¹⁷ Therefore, the public generally knows very little about how animals are raised for food and their treatment in CAFOs.¹⁸

The Fourth Amendment and New York Constitution limit the extent to which the government can monitor CAFOs for animal abuse. Law enforcement agencies are subject to constitutional limitations on undercover video surveillance. Since animal cruelty is not an enumerated offense under either federal electronic surveillance law¹⁹ or state electronic surveillance law,²⁰ authorities would not be able to obtain a warrant to place a video recorder inside of a CAFO. Individuals acting without the involvement of government, however, are not subject to those limitations on government and the evidence they collect is often valuable in court proceedings.²¹ Thus, photographs and videotapes made by animal advocates and whistleblower employees are essential tools for detecting and prosecuting animal abuse.²² Without such tools, prosecutors and courts

¹⁴ For example, in November 2010, an employee of Willet Farm Dairy in New York pled guilty to charges of animal cruelty arising from hitting a dairy cow on the head; in March 2010, an owner of a 177-horse farm in Climax, New York was convicted of 33 counts of animal cruelty for starving and neglecting horses.

¹⁵ Danielle Nierenberg, *Happier Meals, Rethinking the Global Meat Industry*, Worldwatch Paper 171 (Sept. 2005), available at http://www.universityofcalifornia.edu/sustainability/documents/worldwatch_happymeals.pdf. (Last visited July 18, 2011).

¹⁶ Citizens' Environmental Coalition and the Sierra Club, *The Wasting of Rural New York State: Factory Farming and Public Health* 13 (2005), available at http://newyork.sierraclub.org/documents/Wasting_NYS_Report.pdf. (Last visited July 17, 2011.)

¹⁷ See generally Matthew Scully, *DOMINION: THE POWER OF MAN, THE SUFFERING OF ANIMALS, AND THE CALL TO MERCY* Ch. 6 (2010) (observing that factory farm buildings typically look like airline hangars from the outside and there are typically no animals or humans in view of the public).

¹⁸ *Id.*

¹⁹ 18 U.S.C. § 2516 (1).

²⁰ N.Y. C.P.L.R. § 700.05.

²¹ See *People v. Jones*, 47 N.Y.2d 528, 533 (1979).

²² For example, in 2010, an undercover investigation by animal advocates led to the conviction of a Conklin Dairy Farm employee arising from his act of beating, stabbing, clubbing, and kicking cows and calves. *Something Biblical Seems in Order for the Guy Convicted of Cow-Punching*, nymag.com (Sept. 27, 2010), at http://nymag.com/daily/intel/2010/09/post_35.html.

would have to contend with problems inherent in witnesses' testimony and may not be able to successfully prosecute charges against farms.²³

The criminal penalties provided in the bill also could discourage farm employees from providing law enforcement with information about animal cruelty and, therefore, are contrary to public policy. New York State's whistle-blowing statute encourages transparency and prohibits retaliatory action against an employee who reports a substantial danger to public health.²⁴

Photographs and videotapes of conditions of farmed animals are also essential to inform the public about conditions in CAFOs so that the public can enact legislation to address changes in food production. Press reports about the conditions of animals have resulted in important animal-protection legislation since the early 20th Century. For example, Upton Sinclair's documentation of Chicago meatpacking plants in his novel *The Jungle* and the resulting public outcry is credited as the impetus of the enactment of the Federal Meat Inspection Act and the Pure Food and Drug Act and the creation of what is now called the Food and Drug Administration.²⁵ The federal Animal Welfare Act ("AWA") was enacted in 1966 as a result of an undercover investigation by the Baltimore Humane Society reported in *Life Magazine* of a local dog dealer who abused animals.²⁶ An investigation of abuse of laboratory animals by PETA is credited with amendments to the AWA in 1985.²⁷

Criminalizing photographs and videos of farms and farmed animals also has implications for consumers. Without photographs and videos of the interiors of factory farms, consumers would not be able to make informed choices about whether to consume animal products from farms that are the subject of the images.²⁸ Consumers would be

²³ Katerina Lorenzatos Makris, *District Attorney Says He Needed Undercover Video to Make Calf Abuse Case*, Examiner.com (May 27, 2011) (prosecutor explaining that undercover video filmed by animal advocates was essential to his animal cruelty case against a calf-raising facility), at <http://www.examiner.com/animal-policy-in-national/district-attorney-says-he-needed-undercover-video-to-prosecute-calf-abuse-case>.

²⁴ N.Y. Labor Law section 740(2) prohibits any employer from taking "any retaliatory personnel action against an employee because such employee . . . discloses, or threatens to disclose . . . to a public body an activity, policy or practice of the employer that is in violation of law, rule or regulation which violation creates and presents a substantial and specific danger to the public health or safety. . . ."

²⁵ U.S. Dept. of Agriculture Food Safety and Inspection Agency History Web page at http://www.fsis.usda.gov/about/Agency_History/index.asp. (Last visited July 18, 2011.)

²⁶ Benjamin Adams and Jean Larson, *Legislative History of the Animal Welfare Act*, National Agriculture Library, U.S. Dept. of Agriculture, at <http://www.nal.usda.gov/awic/pubs/AWA2007/intro.shtml>.

²⁷ *Id.*

²⁸ Glynn T. Tonsor and Nicole J. Olynk, *U.S. Meat Demand: The Influence of Animal Welfare Media Coverage*, Kansas State University (Sept. 2010) (media coverage of farm animal welfare issues has a significant, negative effect on U.S. meat demand and triggers consumers to purchase less meat and more

forced to rely on advertising paid for by the factory farms themselves -advertising that often paints an inaccurate picture of conditions on farms.²⁹ Some undercover videos of farms have exposed not only animal cruelty, but practices that implicate the safety of the food supply.³⁰

- c. The bill's prohibitions against unlawful injections, feeding, and release are addressed in or are inconsistent with existing law.

In addition to prohibiting photography and video of farmed animals, the bill prohibits the release of animals without the farm owner's consent, feeding, and the injection of an "unauthorized substance" into an animal if a notice barring tampering is posted.

The bill's prohibition against feeding without the consent of the farm owner is problematic for several reasons. First, the bill's rights are vested in the "farm owner" who has the power to grant or withhold consent to an animal's feeding. The farm owner is not necessarily the same person as the owner of the farmed animal. Consequently, the owner of a farmed animal could be denied the opportunity to feed his or her animals by the owner of the vehicle transporting the animals. Second, because the farmed animal's owner and farm owner may not be the same person, a third party may have difficulty ascertaining the identity of the farm owner for the purpose of obtaining consent to engage in certain activities. Third, a person responsible for depriving an animal of necessary food or sustenance would be guilty of a misdemeanor whether or not the person owns the animal, pursuant to Agriculture and Markets Law section 353. Thus the bill presents a Catch 22 to an employee or agent of the farm who is charged with caring for an animal: If the employee or agent feeds the animal without written consent because the animal is apparently starving, he is guilty of a misdemeanor under the bill. If the employee or agent fails to feed an apparently starving animal because the farm owner withheld written consent to feed, he can be found guilty of violating Agriculture & Markets Law section 353. Finally, the bill contains no exception for animal protection organizations or veterinarians who identify abused farmed animals. Without such exceptions, the safety of animals would be endangered.

In addition to the foregoing problems with the bill, the bill's prohibition against the injection of an "unauthorized substance" into an animal is vague. The bill fails to

non-meat food items), available at <http://www.agmanager.info/livestock/marketing/AnimalWelfare/MF2951.pdf>. (Last visited July 18, 2011).

²⁹ See, e.g., Alexei Barrionuevo, *Egg Producers Relent on Industry Seal*, N.Y. TIMES (Oct. 4, 2005) (egg producers change label after complaints that consumers were misled into thinking egg-laying hens were receiving humane care), available at <http://www.nytimes.com/2005/10/04/business/media/04adco.html>. (Last visited July 18, 2011.)

³⁰ For example, the Humane Society's undercover video of downed cows at a farm in California resulted in the largest recall of beef in U.S. history. Nichole Gaouette, *Panel grills meatpacking chief on beef recall at Chino plant*, LOS ANGELES TIMES (Mar 13, 2008), at <http://articles.latimes.com/2008/mar/13/nation/na-hallmark13>. (Last visited July 18, 2011.)

define what an “unauthorized substance” is. New York Penal Law sections 145.35 and 145.45 prohibit tampering with a consumer product, including food. Arguably, therefore, if a farmed animal was injected with a substance dangerous to the public, the person making the injection could be criminally liable under an existing statute.

3. Summary

For the reasons explained above, the Committee opposes S.5172.

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