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ANIMAL LAW FUNDAMENTALS

Food Transparency & Ag-Gag Laws

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Unwelcome opinion can be argued with, rejected, or compromised upon, but unwelcome facts possess an infuriating stubbornness that nothing can move except plain lies.

- *Hannah Arendt*

Introduction

In 2011, the non-profit Mercy For Animals spent two weeks investigating a Texas farm that raised 10,000 baby cows for human use, primarily as dairy cows. During that winter, Texas experienced an unusual cold snap, and apparently there was no contingency plan for severe cold weather on the ranch. When the snowstorm blew into Texas, a number of the baby cows had no shelter and suffered frostbite, many so severe that they could not walk or even stand.

The ranch in Texas was thrust into the sort of calculus that defines modern industrial farming, balancing profits against animal well-being. The lore of the great American farmer working the earth with compassion is supplanted by different a reality when the pipeline from birth to death for profit does not go exactly as planned. Anyone who has studied animal protection issues knows that ranchers are eager to assure us that no one cares more about animals than the persons whose livelihood and way of life depend on the animals.[2] But investigations and other transparency measures expose a different set of narratives.

Without an undercover investigation one would be left to wonder what happens to injured or ill animals on modern farms. What happened, for example, to the baby cows from the Texas ranch who were in need of medical care from frostbite, and who were too injured to walk? The Mercy for Animals investigation revealed that the decision was made to kill all of the animals. Of course, there is nothing particularly unusual about an industrial farm killing animals, either for food or mere expediency. But the investigation of this farm revealed a particularly bloody approach to what industrial farmers term "depopulating." Faced with bleating calves unable to stand, bloody, "[t]he owner of E6 Cattle required his employees to bash in the calves' heads with a claw hammer, forcing them to condemn calves to a prolonged and horrific death."[3]

The modern farm has very little to do with children's songs and books portraying Old MacDonald's happy farm. But the methods deployed in instances of exigency like this might surprise even calloused readers. During the COVID-19 pandemic, by way of another example, factory farms raising pigs determined that supply chain issues justified killing hundreds of

[2] In one recent column, a rancher criticized a state's decision to hire a person to oversee the state's Bureau of Animal Protection because she had connections to animal protection groups, which were perceived as creating a conflict of interest or undue "impartiality." The same rancher reminded readers that "[n]o one cares about animal conditions and welfare as much as" persons who rely on the animals for profit, such as ranchers. Janie VanWinkle, Opinion: Colorado's Top Animal-Protection Officer is Not a Friend of Livestock Producers, The Colorado Sun (Mar. 18, 2022), https://coloradosun.com/2022/03/18/ranching-animal-welfare-agriculture-opinion/. The person appointed to the Bureau of Animal Protection had collaborated with Mercy For Animals, the group that did the investigation of the dairy farm in Texas described above.

[3] No Mercy Calf Farm Cruelty Exposed, Mercy For Animals (2021), https://calves.mercyforanimals.org/.

thousands of pigs quickly rather than keeping them alive and paying the costs of feeding them when there was no easy way to get the animals slaughtered and sold as pork. The industry and their veterinarians further concluded that the most cost effective (and therefore only) way of doing so was by overheating them to death in closed containers pumped full of humidity and heat, a process the industry calls VSD or "ventilation shutdown." This process was revealed in gruesome detail through a Direct Action Everywhere investigation. Pigs were killed by cooking them to death by the tens of thousands, or as one reporter described it, the animals "die after hours of suffering from a combination of being suffocated and roasted to death."[4] Comparisons have been made between the growing social and legal recognition of the right to rescue dogs left in hot cars, and the process of overheating farmed animals to death. Yet as this paper is being written, U.S. farmers have once again turned to VSD, this time to kill millions of birds potentially infected with an avian flu.[5]

The investigation of the ranch in Texas and the pig facility mentioned above are not notable because they are exceptional. They are notable because they represent standard practices. Indeed, what makes the work of investigators so profound is that the investigations consistently reveal standard practices that completely upend narratives of a peaceable, bucolic farm experience for the animals and put consumers at risk because of food safety concerns. The transparency work of activists and journalists has revealed that modern industrial agriculture is a system that enables animal suffering, often featuring it as an inevitable part of the process. Investigations are often understood as contributing to policy change and public discourse on topics relating to meat production. Upton Sinclair's muckraking experiences, published through the fictional book The Jungle, which described Chicago's slaughterhouses, for example, were so sensational that they are often credited with leading to the enactment of the Meat Inspection Act and Pure Food and Drug Act in 1906.[6] Similarly, the largest beef recall in U.S. history was a product of an undercover investigation by the Humane Society of the United States. Numerous boycotts, corporate policy changes, and policy campaigns have been catalysed by investigations.

Industry responses to these investigations are generally consistent. It is commonplace to call for an investigation and prosecution of the individual workers exposed by an investigation. The narrative of corporate accountability is furthered by a formal statement declaring that "[n]othing like this has ever happened before. Nothing like this will ever happen again."[7]

But the industry assurances have proven to be hollow. The protestations of industry innocence are accompanied by legal manoeuvring that make future investigations of agricultural operations illegal. The industry has literally pursued laws that would make the modern-day Upton Sinclairs criminals. In April of 2011, Mark Bittman wrote a column for the New York Times

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[4] Glenn Greenwald, Hidden Video and Whistleblower Reveal Gruesome Mass-Extermination Method for Iowa Pigs Amid Pandemic, The Intercept (May 29, 2020, 10:08 AM), https://theintercept.com/2020/05/29/pigs-factory-farms-ventilation-shutdown-coronavirus/.

[5] Marina Bolotnikova, US Bird Flu Outbreak: Millions of Birds Culled in 'Most Inhumane Way Available', The Guardian (June 6, 2022, 2:00 PM), https://www.theguardian.com/environment/2022/jun/06/us-bird-flu-outbreak-millions-of-birds-culled-in-most-inhumane-way-available.

[6] See Upton Sinclair, The Jungle (1905); The Pure Food and Drug Act, U.S. House of Representatives: History, Art, & Archives (June 23, 1906), https://history.house.gov/Historical-Highlights/1901-1950/Pure-Food-and-Drug-Act/.

[7] Mark Bittman, Who Protects the Animals?, N.Y. Times: Opinionator (Apr. 26, 2011), https://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/.

lamenting the legislative rise of what he termed "Ag-Gag" laws.[8] Ag-Gag laws, as he put it, "would punish heroic videographers like the one who spent two weeks as an E6 employee" documenting the killing of baby cows with hammers.[9] This paper provides an overview of the scope and nature of Ag-Gag laws in the U.S., and to a lesser extent Canada and Australia, and considers some of the key contextual background and conceptual questions.

Food Disparagement – Pink Slime and Mad Cows[10]

Industrialized agriculture has come to rely on a variety of subsidies that allow the cost of production to be passed on to the public. Figures estimating the amount of federal subsidies vary, but commentators have suggested that between $14–18 billion dollars per year is spent on agricultural subsidies in the U.S.[11] Sizable though they are, these figures omit some of the most substantial subsidies, which are not direct payouts but rather exemptions from laws like the Clean Water Act. "In fact, while other industries must comply with environmental regulation, 'nearly every major federal environmental statute passed since the 1970s has included carve-outs for farms.'"[12] These exemptions and subsidies allow industrialized agriculture to pass costs of production on to the public, and thus place agricultural producers in a position of privilege. In essence, the subsidies and exemptions enjoyed by industrial agriculture allow them to avoid the risks of competing in the free market, and insulate them from failures of innovation.

Strikingly, agricultural businesses are also afforded a distinct advantage when it comes to the marketplace of ideas, and the protections of free speech. Agricultural producers are vigorous participants in the marketplace of ideas, using trade groups and taxpayer funded programs to fund advertising such as the well-known "Beef, it is what's for dinner" campaigns. Indeed, agricultural interests have powerful lobbying groups, prominent advertising and marketing firms, and have achieved success in convincing the public, for example, that the consumption of dairy milk is critical to health and child bone development.

Despite its prominence in the free speech marketplace, industrial agriculture has sought to be shielded from arguments or opinions that are critical of its products. In other words, food producers seek to benefit from free speech protections and propagate their messages, while simultaneously pursuing legislation that would limit the scope of speech protections for those who are critical of the industry. The rise of food disparagement or "meat libel" laws reflects an effort

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[8] Id.

[9] Id.

[10] This section draws upon and directly quotes substantial portions of a prior article, Justin F. Marceau, Ag Gag Past, Present, and Future, 38 Seattle U. L. Rev. 1317 (2015).

[11] Bradley R. Finney, Agricultural Law Stifles Innovation and Competition, 72 Ala. L. Rev. 785, 809 (2021) ("These subsidies initially began during the Great Depression to keep family farms in operation and ensure a steady food supply for the nation.").

[12] Id. at 811 ("numerous statutory provisions that specifically exempt agriculture from compliance with the CWA."). "It is important to recognize that the agriculture exemption is unique. Congress wrote the point source definition to apply to a broad class of dischargers. Over the last 44 years, the courts have considered almost every type of 'discrete conveyance' to be a point source subject to regulation. Except for agriculture. Stormwater and agricultural return flow from farm fields have always been exempt." Mark Ryan, The Clean Water Act's Agriculture Exemptions, 59 Advocate 48, 48–49 (2016). See Alt v. EPA, 979 F. Supp. 2d 701 (N.D. W.Va. 2013) (holding that animal manure that washed into federal waterways following rain was an agricultural stormwater discharge and not a point source discharge, rendering the CAFO's discharges exempt from the Clean Water Act).

to control the debate by privileging speech that is supportive of agricultural production.[13] The industry seeks to enjoy speech subsidies just as it receives financial subsidies, and to date it has largely succeeded.

Meat Libel Defined

Agricultural disparagement liability is a form of defamation—injury to reputation—and agricultural disparagement statutes, commonly referred to as meat or veggie libel laws, make it "easier for farmers to file product disparagement suits" against persons who criticize their products.[14] As one commentator summarized, through these laws "agriculture maintains the unique ability to curtail criticism of the industry through the expansion of defamation liability beyond the limits of traditional defamation law."[15]

These laws first emerged in the early 1990s following a 60 Minutes segment on CBS about chemical usage in growing apples.[16] The segment was based on a report released by the Natural Resources Defense Council (NRDC), which found that a chemical known as Alar, commonly used for growing apples, could pose a danger to children.[17] Following this segment, apple sales in Washington State fell drastically.[18] Apple growers in Washington State faced economic losses, possibly as high as $75 million.[19] In response, 4,700 Washington State apple growers banded together and brought a class action suit for product disparagement against the NRDC and CBS, attempting to recover damages for the financial losses the report and segment had caused.[20] For reasons that sound logical to anyone familiar with defamation law, the apple growers lost because what was said was not demonstrably false. Specifically the trial court granted summary judgment in favor of CBS, finding that the apple growers had failed to provide sufficient facts to show that any statements made in the segment were false.[21] The growers tried to argue that while none of the specific statements in the segment were false, the overall implied message of the segment was false.[22] The court rejected this argument because "[s]uch [a rule] would make it difficult for broadcasters to predict whether their work would subject them to tort liability. . . . [and] raises the . . . chilling effect on speech."[23]

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[13] Industrialized agriculture is afforded unique legal privileges not enjoyed by the general public across a number of legal arenas. See Melissa Mortazavi, Food, Fracking, and Folly, 50 Ariz. St. L.J. 617, 630 (2017) ("Agriculture also receives special treatment under business regulations including bankruptcy, antitrust, and labor laws.").

[14] George B. Delta & Jeffrey H. Matsuura, Law of the Internet § 11.03 (3d ed. 2013).

[15] Finney, supra note 11, at 815.

[16] Megan W. Semple, Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws, 15 Va. Envtl. L.J. 403, 403–04 (1996).

[17] See generally Bradford H. Sewell & Robin M. Whyatt, Natural Res. Def. Council, Intolerable Risk: Pesticides in Our Children's Food (1989).

[18] Colleen K. Lynch, Disregarding the Marketplace of Ideas: A Constitutional Analysis of Agricultural Disparagement Statutes, 18 J.L. & Commerce 167, 167 (1998).

[19] Auvil v. CBS "60 Minutes", 800 F. Supp. 928, 930–31 (E.D. Wash. 1992).

[20] Id. at 931.

[21] Auvil v. CBS "60 Minutes", 67 F.3d 816, 822 (9th Cir. 1995).

[22] Id.

[23] Id.

Following the decision, lobbyists began petitioning state legislatures to create statutes that would provide unprecedented tools for the agriculture industry to challenge speech critical of its products.[24] Departing from well-established constitutional speech and common law tort doctrine, industry sought to hold speakers liable for critical comments that reflected mere opinion or were potentially true. More than twenty-five states considered agricultural disparagement statutes, and more than a dozen enacted such laws.[25]

While the statutes differ in some respects, as one leading treatise has explained, they "share the common purpose of arming agricultural producers with tailor-made statutes that may be invoked against those who enter the market place of public discourse to critique the quality or safety of various agricultural goods."[26] Unlike traditional disparagement or defamation liability, which permits liability only if the plaintiff can prove the falsity of the statements made, food disparagement laws in some states may create a presumption of falsity for any statements critical of the food industry.[27] For example, in some states, one speaking critically about a meat product would be liable for damages unless they could show that their statements are all based on "reasonable and reliable scientific inquiry, facts or data."[28] Such standards seem to eviscerate the traditional protections for false statements that are not intentionally (or maliciously false).[29] The statutes also allow for punitive damages and other relief.[30]

The special status of agricultural disparagement relative to defamation law more generally raises serious First Amendment concerns. Although defamation is one of the historical categories of speech that the Court has treated as unprotected,[31] that does not mean that content-based forms of defamation or disparagement liability are permitted. In R.A.V. v. City of St. Paul, Justice Scalia, writing for a majority of the Supreme Court, recognized that while "fighting words" are not protected speech and may be prohibited, nonetheless "the government may not regulate [even fighting words] based on hostility—or favoritism—towards the underlying message expressed."[32] Thus, unprotected speech—even fighting words or defamation—cannot be regulated in a manner that gives preference to one perspective or point of view. Justice Scalia went so far as to specifically analogize the case before the Court with defamation liability, explaining "the government may proscribe libel; but it may not make the further content discrimination of proscribing only libel

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[24] See Margot S. Fell, Agricultural Disparagement Statutes: Tainted Beef, Tainted Speech, and Tainted Law, 9 Fordham Intellectual Prop. Media & Entm't. L.J. 981, 987–88 (1999).

[25] Semple, supra note 16, at 413.

[26] 3 Smolla & Nimmer on Freedom of Speech § 23:13. For a detailed survey of each food libel law, see generally, David J. Bederman et al., Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes, 34 Harvard J. on Legis. 135, 145 (1997).

[27] Bederman et al., supra note 26, at 147.

[28] Id.

[29] Ala. Code § 6-5-623 (1993) ("It is no defense under this article that the actor did not intend, or was unaware of, the act charged," which potentially can allow for strict liability).

[30] See Sara Lunsford Kohen, What Ever Happened to Veggie Libel?: Why Plaintiffs are Not Using Agricultural Product Disparagement Statutes, 16 Drake J. Agric. L. 261, 273–74 (2011); see generally David J. Bederman, Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone, 10 DePaul L.J. 191, 192 (1998).

[31] R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992).

[32] Id.

critical of the government."[33] Likewise, it seems constitutionally dubious to permit enhanced disparagement liability that specifically targets speech about agricultural, or meat products, yet that is precisely what agricultural disparagement statutes attempt to do.[34]

Important Examples of Meat Libel Litigation

While it may have been apple growers that are often associated with the first calls for agricultural disparagement laws, the meat industry has become a prominent beneficiary of the provisions. Two high-profile cases pertaining specifically to the meat industry illustrate the breadth and speech chilling power of these laws on persons who might speak critically of industrialized agriculture, Texas Beef Group v. Winfrey35 and Beef Products, Inc. v. American Broadcasting Companies.[36]

The first and historically most discussed example of meat libel litigation stemmed from a lawsuit by Texas ranchers against Oprah Winfrey. In 1996, Oprah Winfrey aired a segment on her show about mad cow disease.[37] During the segment, one of the guests was a farmer and former rancher named Howard Lyman, who has been dubbed the "Mad Cowboy," based on the fourth generation rancher's growing anger over the impacts of the livestock industry on human health.[38] On the show, Lyman made statements indicating it was his belief that mad cow disease in the United States could be a serious epidemic.[39] Winfrey asked at one point, "[y]ou said this disease could make AIDS look like the common cold?" "Absolutely," Lyman replied, at which point Winfrey announced that all this "has just stopped me cold from eating another burger!"[40]

Later in the show, Winfrey permitted an "unedited rebuttal to air."[41] Nonetheless, following the segment, the Texas beef industry experienced an economic downturn that lasted several months,[42] leading Texas cattle farmers to band together and file suit against Winfrey using the Texas agricultural disparagement statute.[43] The lawsuit quickly garnered the support of ranchers across the country and even politicians, with Rick Perry, then the Secretary of Agriculture, saying he hoped the lawsuit would "go over and blow the hell out of them."[44] In the

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[33] Id. at 384.

[34] For other constitutional critiques of food disparagement laws, see Bederman et al., supra note 26, at 136; see also Marceau, supra note 10.

[35] Tex. Beef Grp. v. Winfrey, 201 F.3d 680 (5th Cir. 2000).

[36] Beef Products, Inc. v. Am. Broad. Companies, 949 F. Supp. 2d 936 (D. S.D. 2013).

[37] Winfrey, 201 F.3d at 684.

[38] Howard Lyman & Glen Merzer, Mad Cowboy: Plain Truth From the Cattle Rancher Who Won't Eat Meat (2001).

[39] Winfrey, 201 F.3d at 683.

[40] Skip Hollandsworth & Pamela Colloff, How the West Was Won Over, texasmonthly.com (March 1998), https://www.texasmonthly.com/food/how-the-west-was-won-over/ (quoting the broadcast).

[41] Bederman et al., supra note 26, at 167.

[42] Winfrey, 201 F.3d at 684. "One Texas A&M economist said that in the three weeks following the Oprah show the cattle-feeding industry lost $87.6 million, although other observers blamed the loss on a devastating drought and an already volatile market shaken by Britain's mad cow scare." Hollandsworth & Colloff, supra note 40.

[43] Id.; Tex. Civ. Prac. & Rem. Code Ann. § 96.002 (West 1995).

[44] Hollandsworth & Colloff, supra note 40.

face of such pressure, very few individuals could or would have the resources to defend against a $12 million disparagement action brought by wealthy ranchers, but to her credit Winfrey did not settle and challenged the legality of seeking monetary damages for her program's coverage of mad cow disease. Even though the lobby of the courthouse where Winfrey would go to trial somewhat ominously featured a mural of a cattle drive, there was a difference between this case and others that may have been consequential—it was a federal rather than a state courthouse.

After relocating for more than a month to Amarillo, Texas, Winfrey would eventually prevail in the trial court, and survive an appeal by the ranchers. She was victorious in protecting her right to declare that she was done eating hamburgers.[45] But perhaps she only won the battle, and the ranchers still won the war over criticism of the industry. Ralph Nader wrote a column about the litigation before it was resolved and explained, "the realistic objective of these frivolous lawsuits is not money; it is to send a chilling message to millions of people that if Oprah can be sued for saying her mind about not eating hamburgers, then they better keep their own opinions to themselves."[46]

If the Winfrey case illustrated the potential risks posed by food disparagement laws to public discourse about meat production, a subsequent case drove the point home more firmly. Nader and many legal commentators had understandably concluded that food disparagement laws were obviously, almost absurdly, unconstitutional. But when lawsuits are filed in state court, perhaps in front of locally elected judges, Nader's claim that we could all "rest assured" that the laws were "unconstitutional," is of little comfort. Litigation brought under the South Dakota agricultural disparagement statute made this point and illuminated the need to preemptively challenge laws impeding transparency in the agricultural industry, lest one risk a hostile state court with no option for an interlocutory appeal.[47]

While Oprah Winfrey's national popularity in the 1990s buoyed her above concerns about getting "hometowned," the American Broadcasting Company (ABC) did not have similar local support when it was sued in South Dakota state court. In March 2012, ABC News covered a product made by Beef Products, Inc. (BPI), a South Dakota based company.[48] In March and April of 2012 ABC News did a series of reports explaining that about 70% of the meat marketed to Americans as "fresh ground beef" is a highly processed "pulverized, meat product, treated with anhydrous ammonia, which a former USDA microbiologist disparagingly dubbed 'Pink Slime.'"[49] At worst, then, ABC provided a series of reports that were likely true, even if colourfully worded and that lacked any sort of recklessness or malice as to truthfulness. Nonetheless, BPI alleged that

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[45] § 27:112.10. State product disparagement law—Agricultural food disparagement statutes, 5 McCarthy on Trademarks and Unfair Competition § 27:112.10 (5th ed.) (detailing the basis for the trial court's dismissal of the claim, and the appellate court affirmance).

[46] Ralph Nader, Food Defamation Laws, nader.org (2021), https://nader.org/1997/01/13/food-defamation-laws/.

[47] See S.D. Codified Laws § 20-10A (2012). Leading media attorney Steve Zansberg has made a compelling case for permitting interlocutory appeals in cases where journalists are sued for disparagement or defamation type torts, and face business-ending liability if free speech claims are not fully and fairly reviewed. Steven D. Zansberg, Recent High-Profile Cases Highlight the Need for Greater Procedural Protections for Freedom of the Press, 33 Comm. L. 7 (2017).

[48] Nicole C. Sasaki, Beef Products, Inc. v. ABC News: (Pink) Slimy Enough to Determine the Constitutionality of Agricultural Disparagement Laws?, 31 Pace Envtl. L. Rev. 771, 772 (2014).

[49] Zansberg, supra note 47.

ABC violated the state's meat libel law when it referred to the beef product as "Pink Slime" and implied that it was not a particularly appetizing food.

Food quality is undoubtedly a matter of public concern, and ABC moved to dismiss the case, but the state trial judge repeatedly refused to acknowledge the relevance of free speech principles in protecting ABC's journalistic reports. The judge set the case for trial. Facing potentially bankrupting liability if a local jury found them liable, ABC settled the case for $177 million, a sum that "exceeded any previous defamation verdict that [had] not been vacated in U.S. history."[50]

Beyond a massive cash settlement, the producer of this pink meat product also reveled in the "victory" with news pundits, claiming that this was proof that ABC News had lied about the product. In no way did the plaintiffs meet the standard for proving defamation liability, and yet the very existence of the food disparagement law, much less the resulting settlement, provided the meat producers with an opportunity to claim that they had proven that ABC was spreading falsehoods. Conservative news personalities reported that the settlement meant that it had been proved in court that ABC was spreading "fake news." If one of the largest broadcasting companies in the world can be pushed to the brink of financial ruin for running a segment that they honestly and reasonably believed to be true, producers will think twice about coverage that is critical of the agricultural industry.

Food Transparency

As already mentioned, the meat and dairy industries have become infamous for the financial subsidies they receive that help keep the cost of animal products artificially low. In the U.S., for example, per capita dairy supply is drastically outpacing consumer demand, but rather than curtail the dairy subsidies that facilitate over-production, the federal government has facilitated the purchasing and stockpiling of an astounding 1.4 billion pounds of cheese.[51] Less talked about in the academic literature and public sphere is the industries' insistence on free speech subsidies.

The rise of food disparagement or "meat libel" laws is one example of one-sided speech protections for the industries.[52] The remainder of this paper focuses on anti-whistleblower laws commonly known as Ag-Gag laws, which criminalize the investigative actions necessary to facilitate whistleblowing and critical reporting about the production of food.

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[50] Id.

[51] The very expression "government cheese" is derived from a campaign by then President Ronald Reagan to give away federal reserves of U.S. cheese. Emily Moon, What Will the U.S. Government Do With 1.4 Billion Pounds of Cheese?, Pacific Standard (Jan. 10, 2019), https://psmag.com/economics/what-will-the-us-government-do-with-1-4-billion-pounds-of-cheese ("[i]n 2016, farmers poured out tens of millions of gallons of excess milk onto fields and into pools of manure, the Wall Street Journal reported. And the buyouts continue: That same year, the USDA announced a new plan to purchase $20 million of cheddar cheese to deal with the then-record surplus.").

[52] Industrialized agriculture is afforded unique legal privileges not enjoyed by the general public across a number of legal arenas. See Melissa Mortazavi, Food, Fracking, and Folly, 50 Ariz. St. L.J. 617, 630 (2017) ("[a]griculture also receives special treatment under business regulations including bankruptcy, antitrust, and labor laws.").

Is Transparency a Neutral, Affirmatively Valuable Goal?

Before examining the details of Ag-Gag legislation and litigation, it is worth pausing to acknowledge the defining assumption that undergirds opposition to Ag-Gag laws. Perhaps the most famous articulation of this view is a quote attributed to singer and songwriter Paul McCartney, "[i]f slaughterhouses had glass walls, everyone would be a vegetarian." Countless similar formulations of this notion exist in popular discourse and academic writing.[53] According to this transparency-reifying logic, the disinfecting "sunlight" of transparency will inevitably yield changes in public attitude and eventually law and policy.[54]

An emerging body of work theorizes that such assumptions are overly sanguine. Claire Rasmussen and Timothy Pachirat are examples of scholars who have cautioned that there are downsides to fetishizing transparency. Rasmussen has stated "[w]hile [Ag-Gag] laws suggest that disgust may be a natural outcome of seeing violence against animals, the existence of a need for anesthetized and eroticized in ways that are viewed as troubling."[55] Likewise, there is a market for hunting periodicals celebrating the killing of animals with guns, arrows, and more bloody, primitive tools like spears.[56] At least in some forms (against some animals), animal suffering is a marketable commodity. Timothy Pachirat is significantly expanding this field of study through his powerful field research examining the ways in which even factory farming conditions can be commodified and marketed to the public.[57] It is not the case that transparency around animal abuse inevitably signals an end to the cruel practices that are exposed.

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[53] Angela Fernandez has noted that there is some historical support for this idea that visibility leads to law reform. Fernandez explains that there is a sense that early animal welfare measures in England were viewed as a product of public reaction against public abuse of animals in the streets. Angela Fernandez, Already Artificial: Legal Personality and Animal Rights, in Human Rights After Corporate Personhood: An Uneasy Merger? 215–216 (Jody Greene & Sharif Youssef eds., 2020) (noting the historic "role visibility has played in mobilizing mainstream initiatives"); id. ("Ordinary upper-and-middle class Londoners grew tired of stepping out of their houses and seeing horses that needed water" or donkeys that were "brutally beaten") (citing Hilda Kean, Animal Rights: Political and Social Change in Britain Since 1800 (1998)).

[54] Louis Brandeis, What Can Publicity Do, Harpers (1913) ("Sunlight is said to be the best of disinfectants; electric light the most efficient policeman."). Brandeis certainly did not invent the notion of transparency as curative. See, e.g., James Bryce, The American Commonwealth (1888) (referring to the "genius of universal publicity" and noting that to expose "injustice" or "cruelty" to "the light . . . is to defeat them.").

[55] Claire Rasmussen, Pleasure, Pain, and Place: Ag-Gag, Crush Videos, and Animal Bodies on Display, in Critical Animal Geographies: Politics, Intersections, and Hierarchies in a Multispecies World 54, 56 (Kathryn Gillespie & Rosemary-Claire Collard eds., 2015).

[56] One website notes, "[m]ost bowhunters dream of killing a grizzly bear with their bow. For Tim Wells from Relentless Pursuit TV, the dream for the last several years was to kill a grizzly bear with a spear!" Tim Wells Kills a Grizzly Bear With a Spear, Morrell Targets: Archery Blog (July 12, 2019), https://www.morrelltargets.com/blogs/archery-blog/tim-wells-kills-a-grizzly-bear-with-a-spear.

[57] Although Pachirat has not yet published his book on this topic, others have hinted at the topic. For example, one commentator considered Indiana's Fair Oaks Farms, where "tourists are welcomed onto a fully operational hog breeding farm to learn about large-scale agriculture and observe the life of factory-farmed pigs through actual glass walls." Jan Dutkiewicz, Transparency and the Factory Farm: Agritourism and Counter-Activism at Fair Oaks Farms, 18 Gastronomica 19, 20 (2018). Fair Oaks utilizes petting-zoo, buy-local images to attempt to normalize conventional, industrial farming–and does so "by embracing transparency, seemingly flipping the script on the standard story by taking the power of revelation out of the hands of activists." Id.

Moreover, there is a literature examining the dignity harms to beings whose suffering is tokenized through images, particularly when the images that are deployed tend not to create positive change for the individuals in the images. For example, Susan Sontag in her book Regarding the Pain of Others explains how the mass production of horrific images creates among the public a "passivity that dulls feeling," rather than spurring action.[58] Instead of driving us towards vegetarianism, the glass walls, by this account, may calcify our inaction. Sontag explains that so long as "we feel sympathy, we feel we are not accomplices to what caused the suffering."[59] Our emotional reaction to painful images can serve to reinforce our view of ourselves as morally accountable, and in the process justify our inaction. A nascent body of research tends to confirm Sontag's conclusions. For example, a study from Australia found that persons exposed to investigative footage from a slaughterhouse were overwhelmingly filled with pity (85%) and sadness (72%), but just over 10% of these same people took any action such as writing a blog post, changing their own behaviors or eating habits, or contacting a lawmaker.[60]

This is not to suggest that transparency does not have value.[61] It must have some impact, or at the very least we must acknowledge that the producers of animal products treat transparency as a threat to their businesses that warrants legislative responses. Rather, the point is that one should exercise caution before too readily endorsing one of the reigning clichés of the transparency movement.[62] Brandeis himself envisioned a world in which more transparency, for example among CEOs and banks, would result in more reasonable, lower compensation, but instead such transparency spurred competition and jealousy that led to higher salaries. Transparency is not a silver bullet. It is almost never sufficient to drive change standing alone, and the degree to which it is a necessary aspect of social change is still under-studied.

Research on the Role of Transparency in Shaping Public Norms

Given that some commentators have questioned the value of transparency, it is worth canvassing the existing literature studying the instrumental impacts of transparency in motivating public behavior, or law reform efforts. It is a small but growing field of research.

In a 2018 study, researchers examined the types of animal welfare concerns that are most prominent among persons who eat meat.[63] Through qualitative interviews, the researchers discovered that a major theme among meat consumers was the "transportation of livestock in trucks and also by sea as part of Australia's live-export trade."[64] The researchers asked a series of

[58] Susan Sontag, Regarding the Pain of Others 102 (2019).

[59] Id.

[60] Catherine M. Tiplady et al., Public Response to Media Coverage of Animal Cruelty, 26 J. of Agric. & Env't. Ethics 869, 876, 879 (2013).

[61] It should also be observed that some scholars have cautioned against taking for granted the dignity and privacy harms that may be imposed on "investigated" animals. Elan Abrell, Saving Animals: Multispecies Ecologies of Rescue and Care (2021); Kathryn Gillespie, The Cow with Ear Tag #1389 (2018); Lori Gruen, The Ethics of Captivity (2014).

[62] Lawrence Lessig, Against Transparency, The New Republic (Oct. 8, 2009), https://newrepublic.com/article/70097/against-transparency.

[63] Emily A. Buddle et al., "I Feel Sorry for Them": Australian Meat Consumers' Perceptions about Sheep and Beef Cattle Transportation, 8 Animals 1, 1 (2018).

[64] Id. at 2.

open-ended questions about farm animal welfare, and were surprised that so many of the responses suggested the salience of transport as an issue of substantial concern. The researchers specifically linked the concerns around transport to themes of visibility and transparency: "[t]ransport may be of greater concern to the general public than other practices affecting farm animal welfare, for example painful practices in animal care and production, because transport is highly visible to the public, due to livestock trucks passing regularly through urban areas." The researchers also specifically noted that some respondents "mentioned seeing trucks in their neighbourhoods and on main roads."[65] Likewise, concerns about live export, it was speculated, were driven by "the media and political attention given to the live-export issue in Australia."[66] Such findings tend to confirm the value of efforts in favor of farmed animal transparency. Transparency does not lead inexorably to legal change, but it provides an access point for increasing the salience of animal suffering.

Similarly, an unpublished study out of Norway sought to evaluate the potential for images and media attention to impact social change by studying the public reaction to images from Norwegian fur farms.[67] The study found that publicity was a key tool for social change. During years in which images from fur farms were frequently covered by the media, public opposition toward the fur industry increased, and the author concluded that the use of images and collaboration with the media can elevate the status of a cause and help generate political change.[68] According to this study, the activists' "most powerful tool is shocking visual images," which can ignite "and then build[] on moral outrage."[69]

In another study from Australia, researchers examined the question of whether consumer choices can be altered through greater transparency based on labelling about animal welfare practices on packaging.[70] The findings showed that persons who were supplied additional information about the animal welfare standards used for production "were more likely to express intention to purchase higher welfare products and less inclined towards lower welfare products."[71] The researchers determined that "knowledge plays an important part in driving more humane purchase decisions."[72] The study concludes that improvements to the lives of farmed animals will

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[65] Id. at 7–8.

[66] Id. at 10. For a more comprehensive treatment of the issue of live animal transport from Australia, see Kristen Stilt, Trading in Sacrifice, in Studies in Global Animal Law 47–55 (Anne Peters ed., 2020).

[67] Jeanett Dahlberg, How Does Imagery Matter for Activists Dissemination of Their Ideas and Political Mobilization? A Case Study of the Exposure of the Fur Industry in Norway 73 (June 2020) (Masters' thesis, The Arctic University of Norway) (on file with University Library, The Arctic University of Norway).

[68] Id.

[69] Id. at 6 (explaining as well that images alone cannot catalyze change, but rather require coordination with activist campaigns); id. at 73 ("[t]he result[s] show that the images from the activists, in collaboration with the media, managed to elevate the fur industry and the fur animals' suffering to the public and political agenda.").

[70] Amelia R. Cornish et al., The Price of Good Welfare: Does Informing Consumers About What On-Package Labels Mean for Animal Welfare Influence Their Purchase Intentions?, 148 Appetite 1 (2020).

[71] Id. at 12.

[72] Id.; see Morven G. McEachern & Gary Warnby, Exploring the Relationship Between Consumer Knowledge and Purchase Behaviour of Value-Based Labels, 32 Int'l J. of Consumer Studies 414 (2008); Carolien T. Hoogland et al., Transparency of the Meat Chain in the Light of Food Culture and History, 45 Appetite 15 (2005).

need to be driven by consumer demand, which in turn requires "providing consumers with more information."[73]

Such findings are consistent with more general consumer research, which tends to find that increased transparency "is an essential requirement for making informed . . . decisions."[74] Corporate behavior researchers have found that consumer preferences and values drive corporate practices.[75] So if consumers are ignorant about factory farming conditions, it is more likely that their purchasing behavior will be indiscriminate, in which case marketers can ignore concerns about the environment or animal welfare with impunity.[76] But the perverse incentives created by uninformed consumer buying behavior does not guarantee that consumer behavior will radically change in the face of transparency. Transparency may be necessary to make informed decisions, but the research does not confirm that it is sufficient to inform long-term behavioral change in food decisions. Even the ability to create moral outrage is no guarantee of social, much less political, change.

Indeed, general studies about the impact of media outreach provide less sanguine or even mixed conclusions about the value of transparency. For example, a study of political TV ads found that politicians' public standing will increase following a deluge of favorable advertising; however, the shift in public opinion may be short-lived.[77] More generally, a body of research looking at the impact of whistleblowers[78] finds that most whistleblowing is "often ineffective in creating constructive change."[79] And a key determinate of "effective whistleblowing," or "that which leads to timely termination of the reported wrongdoing," is whether it can attract support from the media, politicians, or other groups the investigated entity is dependent on.[80] Transparency alone,

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[73] Cornish et al., supra note 70, at 13.

[74] Jan Hendrik Betzing et al., The Impact of Transparency on Mobile Privacy Decision Making, 30 Elec. Mkts. 607, 620 (2020).

[75] See Esther Solomon, The Dynamics of Corporate Change: Management's Evaluation of Stakeholder Characteristics. Human Systems Management, 20 Human Sys. Mgmt. 257 (2001).

[76] See id. For this same reason, the importance of avoiding misleading or confusing labels should not be underestimated. See e.g., Carolien T. Hoogland et al., Food and Sustainability: Do Consumers Recognize, Understand and Value On-Package Information on Production Standards?, 49 Appetite 47, 47 (2007); see also Jill E. Hobbs & William A. Kerr, Consumer Information, Labelling and International Trade in Agri-Food Products, 31 Food Policy 78 (2006); Hilary Meehan et al., Food Choice & Consumer Concerns About Animal Welfare in Ireland (2002); Gemma Harper & S.J. Henson, Consumer Concerns About Animal Welfare and the Impact on Food Choice (1999).

[77] Alan S. Gerber et al., Does the Media Matter? A Field Experiment Measuring the Effect of Newspapers on Voting Behavior and Political Opinions, 1 Am. Econ. J.: Applied Econ. 35 (2009) (noting that exposure through media can have strong public impacts, but they may be short-lived, suggesting that an increase in a politician's public standing might only last a week). See also Susan K. Opt & Timothy A. Delaney, Public Perceptions of Investigative Reporting, in The Big Chill: Investigative Reporting in the Current Media Environment 81, 82 (Marilyn Greenwald & Joseph Bernt eds., 2000) (reporting on a 1990s study finding that 70% of persons could not recall an investigative story from the newspaper and suggesting that persons may quickly forget investigations).

[78] Brian K. Richardson & Johny Garner, Stakeholders' Attributions of Whistleblowers: The Effects of Complicity and Motives on Perceptions of Likeability, Credibility, and Legitimacy, Int'l J. of Bus. Commc'n 1, 1 (2019).

[79] Id. at 2 (citing Janet P. Near & Marcia P. Miceli, Effective Whistle-Blowing, 20 Acad. of Mgmt. Rev. 679 (1995)).

[80] Id.

or without other features of political mobilization, should not be treated as a sufficient catalyst for change.[81]

Again, the point is not to diminish the value of transparency. But serious conversations about social change require an acknowledgement that much of the discussion about transparency is heavy on anecdote and tends toward a folk wisdom that uncritically assumes transparency alone is a "catalyst for change."[82] Skeptical media scholars have cautioned that even major revelations through investigations frequently do not lead to changed public behavior. One study laconically summarizes the research: "[A]wareness does not always seem to equate with action."[83] A problematic conclusion from these authors is that most people do not "perceive investigative reporting as influencing their everyday lives."[84]

The technological equivalent of a slaughterhouse with glass walls might be a slaughterhouse that is required to video monitor all actions in the facility, or a fishing boat required to record its catches. Recently, some European countries[85] have begun requiring closed-circuit television, or CCTV, cameras at slaughterhouses. But these innovations are so recent that careful research studying the impacts on public opinion have not yet been conducted. Meat consumption appears to be declining in countries that have introduced CCTV, but this decline in meat consumption might predict popular support for the CCTV requirements, as opposed to the reverse.[86] To be sure, future research should study the impact of the CCTV requirements on public opinion. It seems likely that such transparency measures would reduce meat consumption among

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[81] It is worth being absolutely clear that I do not intend to suggest transparency is only valuable for promoting or catalyzing change. Reliably measuring the effectiveness of transparency to predict or cause change is extremely difficult, but even asking whether it is "working" or "effective" requires an understanding of what we mean by working, or how we measure success. As legal scholar and historian Angela Fernandez pointed out to me, "even if it isn't working now and there is little reason to believe it will in the future, there is a value in being able to see" and know what is happening and what is being kept "secret and hidden."

[82] David L. Protess et al., Journalism of Outrage: Investigative Reporting and Agenda Building in America 3 (Theodore L. Glasser & Howard E. Sypher eds., 1991) ("[i]n the investigative frenzy that followed Watergate, few questioned the extent to which media stories actually had the impact attributed to them."). Id. at 5 (explaining that the main goal of investigative journalism is to "trigger agenda-building processes" that might lead to social justice).

[83] Opt & Delaney, supra note 77, at 84. Notably, however, these researchers did find that of the persons who say they changed behavior based on an investigation some "mentioned they had changed their food or eating habits."

[84] Id.

[85] England was the first to implement mandatory CCTV in 2018. Department for Environment, Food and Rural Affairs, Guidance on the Mandatory Use of Closed Circuit Television in Slaughterhouses (England) Regulations (2018). Scotland followed suit in July 2021. The Scottish Government, Guidance on the Mandatory use of Closed Circuit Television in Slaughterhouses (Scotland) Regulations 2020 (2021). A decree requiring recording in all Spanish slaughterhouses was approved in August 2022. Spain's Slaughterhouses Required To Install Surveillance Cameras, Animal Equality (Sept. 21, 2022), https://animalequality.org/news/spain-slaughterhouses-required-to-install-surveillance-cameras/#:~:text=On%20August%2023%2C%20the%20Spanish,non%2Dcompliance%20with%20current%20regulations.

[86] A UK governmental report published before the CCTV requirement predicts numerous benefits, "CCTV offers a range of benefits in slaughterhouses for the observation and recording of real-time processes, for the recording of individual incidents, for contributing information to the auditing of animal welfare, for aiding the verification of slaughterhouse compliance with legislative and assurance or certification requirements and for the training of slaughterhouse staff." Animal Welfare Committee, Opinion on CCTV in Slaughterhouses (2015).

some consumers.[87] But given the lack of conclusive research regarding transparency, the long history and cultural connections to meat eating, and the reality that meat-based cuisine is being awarded significant cultural status,[88] it seems unlikely that transparency alone will signal the demise of the industries that kill animals for food.[89]

Studies concluding otherwise tend to have limitations. For example, one study finding that media coverage of animal welfare concerns has a statistically significant impact on consumer demand noted that the effect is small when compared to factors like price.[90] Moreover, the crux of the study was a finding that media coverage about animal welfare correlated with decreased demand for meat, concluding that negative media has significant negative effects on demand for meat – but the authors failed to fully account for other reasons, including general attitude changes over time or external factors that might drive demand for meat down during the relevant periods of time.[91] This is consistent with the findings of a meat consumption study from Kansas State, which animal protection advocates frequently cite as an illustration of the importance of transparency and investigations. The study finds that "increased media attention caused a reallocation of expenditures to nonmeat," but the authors explicitly note that they "assumed that publicly available information influences consumer perceptions of meat . . . [and] in turn influences consumption decisions."[92] In other words, the key variable is simply assumed away, and it is taken for granted that transparency changes public behavior.

All of this is just to note that the glass-walls-thesis may be slightly exaggerated. It is likely that more than simply exposure is needed to produce shifts in public opinion, much less policy changes. Still, it would be a serious mistake to suggest that transparency is irrelevant to legal progress for animals. Commentators frequently observe that a barrage of undercover investigations precede and tend to correlate with law reform efforts, including propositions mandating more humane animal confinement practices.[93] And certain facts are beyond dispute, such as the reality that the largest beef recall in U.S. history was a consequence of an undercover investigation conducted by the Humane Society of the United States. More simply, the animal agriculture industry certainly assumes that more exposure of common animal handling practices is bad for their financial bottom-line. The rise of Ag-Gag laws and their migration across the globe

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[87] Carolien T. Hoogland et al., Food and Sustainability: Do Consumers Recognize, Understand and Value On-Package Information on Production Standards?, 49 Appetite 47, 49 (2007) (noting that persons with "universalistic values" are more likely to be impacted).

[88] Enrico Bonadio & Magali Contardi, Paella Given Official Cultural Recognition – What this New Status Means for the Iconic Dish, The Conversation (Nov. 16, 2021), https://theconversation.com/paella-given-official-cultural-recognition-what-this-new-status-means-for-the-iconic-dish-171693.

[89] Transparency of the Meat Chain, Faunalytics (July 14, 2010), https://faunalytics.org/transparency-of-the-meat-chain-in-the-light-of-food-culture-and-history/ (summarizing research regarding cultural connections to food and noting that the findings indicate "limits [for] the ultimate prospects of transparency as a policy tool.").

[90] Glynn T. Tonsor & Nicole J. Olynk, Impacts of Animal Well-Being and Welfare Media on Meat Demand, 62 J. of Agric. Econ. 59, 69 (2011).

[91] Id. The authors explicitly state their methodology, they "assumed that publicly available information influences consumer perceptions of meat product quality, which in turn influences consumption decisions," which of course is the key. Id. at 61.

[92] Glynn Tonsor, U.S. Meat Demand: The Influence of Animal Welfare Media Coverage, Kansas State University (Sept. 1, 2010), https://agmanager.info/livestock-meat/us-meat-demand-influence-animal-welfare-media-coverage.

[93] Sarah McNabb, California's Proposition 2 Has Egg Producers Scrambling: Is It Constitutional?, 23 San Joaquin Agric. L. Rev. 159 (2013–2014) (describing the "initial motivation" for California Proposition 2).

is a story of industry protectionist efforts. It would be foolish to disregard the industry's own sense of what might impede its growth, and discount entirely the value of transparency in producing law and policy changes.[94]

Ag-Gag Laws

Ag-Gag laws are anti-whistleblowing provisions that shield a single set of industries from transparency and public scrutiny. In an effort to avoid the public backlash that might ensue from greater awareness of animal mistreatment within industrialized agriculture, the agricultural industry has sought to legally enshrine an anti-glass-walls approach to food production. In this section, examples of the various types of Ag-Gag enactments across the U.S., and also Australia and Canada, will be examined.

The Scope and Meaning of Ag-Gag Laws

Although the term Ag-Gag does not dictate precise definitional contours, three countries have enactments that are fairly considered to fall within this category. This section will not provide the details of every law that has been proposed or enacted, but will examine some of the most common features of these laws. It is also important to note that while I will articulate the legal trends that I have observed, it would be a mistake to imagine Ag-Gag laws as part of a coherent, evolving legislative plan. It is tempting to search for a clear story of progression or evolution. But there is no such clear linear progression. Instead, the laws tend to be somewhat ad hoc reactions by supporters of the agricultural industry. They are a hodgepodge of legal enactments pursued in response to investigations in the particular enacting jurisdiction (or the threat of such investigations). The strongest connective tissue between the laws is not a set of legal elements or an evolving set of priorities, but rather an abiding effort by industry to construct a narrative about investigations and direct action as dangerous or terroristic activities that necessitate legislation to combat threats to our meat supply. In this way, the laws represent persistent, if varied reactions to activism much more so than they represent a consistent, evolving legislative strategy. In this section, I will provide the actual text of many of these enactments so that readers can judge for themselves the textual similarities and differences.

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[94] Strikingly, however, the industry may be in a bit of a bind. It is possible that efforts to keep animal slaughter secret is as harmful to consumer opinion as transparency itself. One study finds that when the public learns about Ag-Gag laws, their trust in farmers is so diminished that they may support more regulations to protect farmed animals. The industry's interest in Ag-Gag laws may signal to the public that farmers have something to hide. See e.g., Jesse A. Robbins et al., Awareness of Ag-Gag Laws Erodes Trust in Farmers and Increases Support for Animal Welfare Regulations, 61 Food Pol'y 121, 121 (2016). Although this study did not examine perceptions of animal rights advocates, prior research has found that animal protection groups are deemed to be more credible sources of information than livestock industry groups. See Melissa McKendree et al., Effects of Demographic Factors and Information Sources on United States Consumer Perceptions of Animal Welfare, 92 J. of Animal Sci. 3161, 3166, 3170 (2014) (finding that organizations associated with agricultural industries appear to be less used public sources of information on animal welfare); Tiplady et al., supra note 60.

To date, Ag-Gag laws have been introduced in more than half of the U.S. states,[95] and have been enacted in more than a half-dozen states.[96] The U.S. laws gained popularity in the early 2010s, Australia's provisions emerged shortly thereafter, and starting in 2019 Canadian provinces began passing similar legislation, starting with Alberta (2019), followed by Ontario (2020), and in Manitoba (2021).[97]

Prior to their emergence as topics of legal prominence among animal lawyers, a small handful of states enacted a variety of quasi-Ag-Gag laws in the early 1990s, seemingly without much fanfare. These first Ag-Gag laws were unique in that they singled out agricultural industries for special protections, but they did so primarily through measures focused on intentional damage to property and non-consensual entry. Illustrative is what is generally regarded as the first Ag-Gag law, known as the Farm Animal and Field Crop and Research Facilities Protection Act, which was passed in Kansas in 1990,[98] and provided:

> (c) No person shall, without effective consent of the owner and with intent to damage the enterprise conducted at the animal facility:
>
> (1) Enter an animal facility, not open to the public, with intent to commit an act prohibited by this section; [or]

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[95] Since the early 1990s, "almost 30 states have introduced bills banning or restricting undercover investigations surrounding the abuse of farmed animals." Marceau, supra note 1, at 1333 n.110.

[96] Idaho (passed in 2014), Idaho Code § 18-7042 (2014); Iowa (passed in 2012), Iowa Code § 717A.3A (2012); Missouri (passed in 2012), Mo. Rev. Stat. § 578.013 (2012); South Carolina (passed in 2012), S.C. Code Ann. § 47-21 (2012); Montana (passed in 1991), Mont. Code Ann. § 81-30-101-105 (2012); Kansas (passed in 1991), Kan. Stat. Ann. § 47-1827 (2012); and North Dakota (passed in 1990), N.D. Cent. Code § 12.1-21.1-02 (1991).

[97] Ontario, Security from Trespass and Protecting Food Safety Act, S.O. 2020, c 9 (Ont.); Alberta, Petty Trespass Act, R.S.A. 2000, c P-11 (Alta.); Manitoba, The Petty Trespass Amendment and Occupiers' Liability Amendment Act, R.S.M. 2021, c 54 (Man.). The province of Prince Edward Island passed legistion increasing the penalties for entering slaughterhouses or farms without permission, though the legislation notably does not prohibit access through false pretenses. Other provinces, including British Columbia and Saskatchewan have also considered but not passed Ag-Gag style legislation.

Canada has also seen at least two failed efforts to pass federal Ag-Gag laws. See "Ag Gag" Laws, Animal Justice, https://animaljustice.ca/issues/ag-gag-laws (last visited June 1, 2023). However, Ag-Gag legislation has again been introduced in Parliament. Conservative Member of Parliament John Barlow introduced Bill C-275, An Act to amend the Health of Animals Act (biosecurity on farms) on May 30, 2022, a bill that "threatens to jail animal protection advocates who expose animal suffering on farms, and hit them with fines of up to half a million dollars." Camille Labchuk, Federal Ag Gag Legislation Introduced in Parliament, Animal Justice (June 2, 2022), https://animaljustice.ca/blog/billc275. The bill uses "biosecurity" to target animal protection advocates, "prohibiting unauthorized entry into a farm building, which bill proponents say is necessary to stop pathogens that could harm animals and the food supply." Id. On May 1, 2023, Barlow moved that Bill C-275 be read the second time and referred to a committee, leading with stories from 2019 about protesters on family farms and proclaiming that he brought the bill forward because the protesters "put those animals at risk," and also "had a very serious impact on those families." Bill C-275, openparliament.ca, https://openparliament.ca/bills/44-1/C-275/ (last visited June 2, 2023). He asserts, "Even when I speak to members of the Tschetter today, they are still upset about what occurred on their farm and are still hesitant when they check their barns." Id. He finishes by stating Bill C-275 "would ensure the security on our farms and help with the mental health of Canadian farm families." Id.

[98] Kan. Stat. Ann. § 47-1827 (2012).

. . . .

(3) enter an animal facility to take pictures by photograph, video camera or by other
means.[99]

The law specifically targets photographs or videography, which makes clear that the goal was, at least in part, to limit speech-related activities.[100] But on the other hand, these initial laws might be thought of as comparatively benign. After all, the criminal prohibition applies only when a person enters private property under conditions that look like a traditional trespass. Indeed, as initially enacted, the Kansas statute defined effective consent as consent not obtained through force or by threat. Animal advocates are not pursuing transparency through threats or force, so such a provision was of little relevance to most investigators. Notably, in 2012 (around the time of the other U.S. Ag-Gag enactments discussed below), Kansas amended the statute to provide that consent is also ineffective if "[i]nduced by force, fraud, deception, duress or threat."[101] This update to the Kansas law fundamentally changed its scope and rendered it much more of a threat to undercover investigators.

Some of the Australian efforts to target investigations for criminalization seem to follow a template similar to that of the initial Kansas enactment.[102] Many of the Australian laws seek to "expand the scope of trespass, and increase penalties for trespass." For example, in 2020 Queensland enacted a new trespass offense that provided heightened penalties for those found to be unlawfully "entering or remaining on farmland."[103] Likewise, the national government enacted what commentators have referred to as an Ag-Gag law, a provision titled the Agricultural Protection Act, which criminalized "inciting trespass on agricultural land."[104] These laws do not appear to permit criminal liability based on deception.

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[99] Id. § 47-1827(c)(1), (3).

[100] Even a law that criminalized only speech done through trespass should be thought to implicate principles relevant to free speech. It might be odd to permit an aggravated form of trespass, for example, if the trespasser is speaking critically of the current president. Likewise, heightening trespass penalties for those who seek to criticize a particular industry would seem to raise concerns.

[101] Id. § 47-1826(e) (emphasis added); Livestock and Domestic Animals Act, ch. 125, sec. 41, §1826(e)(1), 2012 Kan. Sess. Laws 962 (2012). Much more could be said about Kansas' Ag-Gag law and the litigation overturning it. See Animal Legal Def. Fund v. Kelly, 9 F.4th 1219, 1234 (10th Cir. 2021) (noting "the damage to the enterprise intended from ALDF's investigations does not flow directly" from the deception told in order to gain entry).

[102] "Taking their lead from the U.S., Australian governments have sought to make it more difficult for animal protection advocates to capture images from inside farms." Katharine Gelber & Siobhan O'Sullivan, Cat Got Your Tongue? Free Speech, Democracy, and Australia's 'Ag-Gag' Laws, 56 Australian J. of Political Sci. 19, 20 (2021).

[103] Agriculture and Other Legislation Amendment Act 2020 (Qld). In 2022, the High Court of New South Wales upheld an Ag-Gag-like law, called the Surveillance Devices Act. A non-profit, Farm Transparency Project, had challenged the law as impeding public access to information about animal cruelty, but the Court held that a prohibition on publishing video footage obtained while trespassing could be sustained against a challenge by the advocates. The Australian law at issue in the New South Wales case was used to silence animal advocates, but the law's original purpose appears to have been about protecting privacy in homes, or preventing people from putting up hidden cameras in restrooms. Surveillance Devices Act 2007 No 64, NSW Government (May 16, 2022), https://legislation.nsw.gov.au/view/whole/html/inforce/current/act-2007-064.

[104] Reserving criminal penalties for those who are reckless as to whether the trespass will "cause detriment to . . . production . . . on the agricultural land." See also the Inclosed Lands Protection Act 1901 (NSW), amended in 2016, to prohibit any "interfering with the

This effort to single out agricultural trespass as uniquely deserving of punishment is itself problematic. But other forms of Ag-Gag laws are more pernicious. For example, U.S. states that enacted Ag-Gag laws after 2012 pivoted toward providing industrial meat and dairy production with considerably greater secrecy. Rather than simply creating a new category of trespass, these new laws fundamentally redefined trespass or the concept of unlawful entry in agricultural contexts. These provisions target undercover whistleblowers in agricultural facilities, while continuing to permit similar investigations in every other industry. Most Americans would be understandably shocked if laws were proposed that would protect big banks or pharmaceutical companies from fraud investigations. Likewise, one can imagine the outcry that would likely accompany efforts to insulate childcare facilities or veteran medical care from undercover investigations. Prior to Ag-Gag laws, no single industry had specific laws protecting it from all whistleblowing, regardless of whether trade secrets or intellectual property was threatened.

Iowa spearheaded the new wave of Ag-Gag laws. Iowa's 2012 law provides:

1. A person is guilty of agricultural production facility fraud if the person willfully does any of the following:

    a. Obtains access to an agricultural production facility by false pretenses[, or]

    b. Makes a false statement or representation as part of an application or agreement to be employed at an agricultural production facility, if the person knows the statement to be false, and makes the statement with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized.[105]

This effort to prevent deception-based access was novel, and tailored to prevent undercover investigations. Some of the most famous, award-winning journalistic projects in modern history involve trickery and deception. Politicians, hospitals, businesses, and non-profits have all been exposed through investigative tactics involving deception. In the eyes of some scholars, these investigations are an important part of American democracy and accountability.[106] And yet, when it came to exposing common meat industry practices, lawmakers criminalized the practice.

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conduct of an agricultural business." Gelber & O'Sullivan, supra note 102, at 28 (concluding that taking photographs or videos without consent would constitute "interfering" with an agricultural facility). Other legislation considered in Australia proposes to target those who encourage or incite trespass, and according to some could sweep broadly enough to justify prosecutions of organizations or even just someone who is "a member of an organization" that facilitates agricultural facility trespasses. Id. at 29 (arguing that "large numbers of animal protection advocates" could be at "risk of prosecution.").

[105] Iowa Code § 717A.3A(1)(a)–(b) (2012). A first conviction under the statute constitutes a serious misdemeanor, and any subsequent conviction constitutes an aggravated misdemeanor. Id. § 717A.3A(2)(a)–(b).

[106] Brooke Kroeger, Undercover Reporting: The Truth About Deception (2012).

In January 2019, a federal district court struck down the original Iowa law quoted above,[107] and in March 2019, Iowa enacted a new "Agricultural Production Facility Trespass" law.[108] A person violates this law, § 717A.3B, if the person:

a. Uses deception . . . on a matter that would reasonably result in a denial of access to an agricultural production facility that is not open to the public, and, through such deception, gains access to the agricultural production facility, with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer[, or]

b. Uses deception . . . on a matter that would reasonably result in a denial of an opportunity to be employed at an agricultural production facility that is not open to the public, and, through such deception, is so employed, with the intent to cause physical or economic harm or other injury to the agricultural production facility's operations, agricultural animals, crop, owner, personnel, equipment, building, premises, business interest, or customer.[109]

So by 2012, Kansas and Iowa (twice) both had laws criminalizing deception-based investigations. That same year, Utah joined the group by passing a similar Ag-Gag law that also targeted misrepresentation and provided:

(2) A person is guilty of agricultural operation interference if the person:

(a) without consent from the owner of the agricultural operation, or the owner's agent, knowingly or intentionally records an image of, or sound from, the agricultural operation by leaving a recording device on the agricultural operation;

(b) obtains access to an agricultural operation under false pretenses; [or]

(c)(i) applies for employment at an agricultural operation with the intent to record an image of, or sound from, the agricultural operation;

(ii) knows, at the time that the person accepts employment at the agricultural

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[107] Animal Legal Def. Fund v. Reynolds, 353 F. Supp. 3d 812 (S.D. Iowa 2019), aff'd in part, rev'd in part and remanded, 8 F.4th 781 (8th Cir. 2021).

[108] Iowa Code § 717A.3B (2019). In March 2022, a federal district court also struck down this second law as a violation of free speech. Veronica Fowler, Victory in Ag Gag 2.0 Lawsuit, ACLU Iowa (Mar. 14, 2022), https://www.aclu-ia.org/en/press-releases/victory-ag-gag-20-lawsuit#:~:text=Today%20the%20U.S.%20District%20Court,mills%20violates%20the%20First%20Amendment.

[109] It is beyond the scope of this project, but the Iowa legislature persisted even after this second version of the law was struck down by enacting a third version of the Ag-Gag offense. Lawsuit Challenges Constitutionality of Iowa's Revamped Ag-Gag Law, Animal Legal Defense Fund (Aug. 10, 2021), https://aldf.org/article/lawsuit-challenges-constitutionality-of-iowas-revamped-ag-gag-law/. This third version was challenged in federal court and a judge struck it down, finding once again that the law violates free speech rights. Federal court finds 3rd Iowa ag-gag law unconstitutional, CBS News Minnesota (Sept. 28, 2022, 8:50 AM), https://www.cbsnews.com/minnesota/news/federal-court-finds-3rd-iowa-ag-gag-law-unconstitutional/.

operation, that the owner of the agricultural operation prohibits the employee
from recording an image of, or sound from, the agricultural operation; and

(iii) while employed at, and while present on, the agricultural operation, records an image of, or sound from, the agricultural operation; . . . .[110]

Just behind this wave of deception-focused 2012 enactments, in 2014, Idaho's version of an Ag-Gag law passed and was signed into law by the governor as an emergency measure.[111] The text of the Idaho statute was a striking expansion of previous Ag-Gag laws. The key portion of the law provided:

(1) A person commits the crime of interference with agricultural production if the person knowingly:

. . . .

(a) Is not employed by an agricultural production facility and enters an agricultural production facility by force, threat, misrepresentation or trespass;

(b) Obtains records of an agricultural production facility by force, threat, misrepresentation or trespass;

(c) Obtains employment with an agricultural product facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's operations, livestock, crops, owners, personnel, equipment, buildings, premises, business interests or customers; [or]

(d) Enters an agricultural production facility that is not open to the public and, without the facility owner's express consent or pursuant to judicial process or statutory authorization, makes audio or video recordings of the conduct of an agricultural production facility's operations; . . . .[112]

The Idaho law is striking in its breadth. It targets three types of deceptions – those used to obtain records, to gain access, and to gain employment. The law also was the first to single out recordings themselves for criminal punishment.

Laws that outright prohibit recording without consent and that target misrepresentation make undercover investigations legally perilous. But one of the most enduring questions is whether these laws can be explained as something more than simple protectionism for agricultural enterprises. Upon examination, it appears that Ag-Gag laws are a solution in search of a legitimate problem. In legal briefs, legislative testimony, and press releases, the defenders of these laws have tended to coalesce around the notion that the laws are essential protections for

[110] Utah Code Ann. § 76-6-112(2)(a)–(c)(iii) (2012).

[111] This Bill passed the House with 56 Ayes and 14 Nays, and the Senate with 23 Ayes and 10 Nays. See Senate Bill 1337, legislature.idaho.gov (2014), https://legislature.idaho.gov/sessioninfo/2014/legislation/s1337/.

[112] Idaho Code § 18-7042(1)(a)–(d) (2014).

food safety and biosecurity.[113] As drafted, however, the Ag-Gag laws are a strikingly poor fit for such problems. By their plain terms, the laws apply when there is no risk to the food-supply, such as when an investigation reveals cows being killed by pickaxes or pigs being killed by ventilation shutdown. Likewise, the laws do not apply to punish biosecurity or food safety threats that might arise outside of the context of an investigation. If lawmakers sought to minimize biosecurity risks on factory farms, they could pass legislation that would target this problem, and such legislation would apply to regular employees (and tours) just as much as it would to investigators.

Perhaps recognizing the generally tenuous connection between Ag-Gag laws and food safety, some policymakers have urged the view that Ag-Gag laws are necessary as a means of protecting animals. To this end, Colorado, Missouri, and the Australian parliament introduced legislation that mandated reporting of abuse at an agricultural facility.[114] Missouri's law states:

> Whenever any farm animal professional videotapes or otherwise makes a digital recording of what he or she believes to depict a farm animal subjected to abuse or neglect . . . such farm animal professional shall have a duty to submit such videotape or digital recording to a law enforcement agency within twenty-four hours of the recording . . . . An intentional violation of any provision of this section is a class A misdemeanor.[115]

There is a certain intuitive appeal to the idea that refusing to report abuse is tantamount to abuse itself. But in reality, such laws simply shield systemic (often legal) animal cruelty that occurs at factory farms. Strikingly absent from the legislative history of these bills is any evidence suggesting that persons are generally under-reporting animal abuse to authorities.[116] If anything, there is reason to think that government authorities may take allegations of animal abuse less seriously once reported, but no data suggests that abuse and neglect are under-reported relative to other crimes. As such, these so-called quick reporting laws do not seem to be a response to a real problem in the realm of animal protection. Instead, the laws effectively require an investigor to out themselves at risk, making it impossible to carryout a long-term, ongoing investigation.

A quick reporting law is tailored to perpetuate the structural preconditions that allow for industrialized animal abuse, while avoiding systemic or managerial accountability. For example, if every act of cruelty or neglect requires an immediate outing of the undercover investigator, then showing patterns of abuse or complicity on the part of management is rendered legally impossible. Quick reporting laws reinforce the idea that animal suffering is the result of a few bad apples, rogue workers who are defying the best efforts of corporations to care for animals. These laws occlude the everyday violence of factory farms, and force liability and blame to fall entirely at the feet of the low-income workers, barring efforts to show complicity on the part of management. More generally, this sort of provision seems to intrude on the domain of journalistic autonomy. The journalist or investigator, not the government, should be able to decide what they want to speak about, when, and what form the speech will take. By way of a contrast, it is hard to imagine a law dictating that any investigative journalism targeting a politician must be released within

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[113] To be sure, other more abstract concerns are also frequently articulated, including the idea that entry based on deception is an intrusion on property rights.

[114] Colorado introduced a mandatory report law in 2014, and it failed. SB 042, 70th Gen. Assemb., Reg. Sess. (Colo. 2015).

[115] Mo. Rev. Stat. § 578.013 (2012).

[116] See Justin Marceau & Nancy Leong, Proposed Bill Will Lead to More Animal Abuse, Not Less, Denver Post (Jan. 23, 2015), https://www.denverpost.com/2015/01/23/proposed-bill-will-lead-to-more-animal-abuse-not-less/.

weeks of discovering any malfeasance on the part of the politician. Rather, the discretion to build out the story or expand it belongs to the journalist.[117]

Beyond the U.S. and Australia, more recently Canadian provinces have also manifested a willingness to enact Ag-Gag laws. One might imagine that the Canadian lawmakers would have learned from and avoided some of the U.S. laws' free speech problems, but the laws have had a similar focus and scope.

For example, in 2020, Ontario adopted the "Security from Trespass and Protecting Food Safety" law.[118] Trading on the absurd notion that limiting transparency benefits animals, lawmakers explained that heightened protections for "trespass activities"[119] on factory farms were necessary to "protect farm animals" from "stress."[120] By this logic, it is the investigations – not factory farming itself – that are simply too risky to the well-being of animals. The statute specifies that it is a crime for any person to "enter in or on an animal protection zone on a farm [or "animal processing facility" or other "animal premises"] without the prior consent of the owner or occupier of the farm." And for the purposes of the law, "consent . . . is invalid if it is obtained . . . using duress or under false pretences . . . ."[121]

The similarity between Ontario's law and those laws from states like Utah, Idaho, and Iowa from almost a decade earlier is striking.[122] Leading Canadian animal lawyer and commentator Camille Labchuk poignantly explained the reason legislators were interested in passing such legislation: "Our government doesn't regulate or monitor animal welfare on farms, so hidden-camera footage is often the only way for the public to learn the truth about poor conditions and shocking animal cruelty in the food supply."[123]

Similarly, the province of Alberta, criminalized entry "without the permission of the owner or occupier of the land if entry is prohibited," and specified that one "who obtains by false pretences permission to enter land . . . is deemed to have entered on the land without permission."[124] Here again, the echoes of the U.S. Ag-Gag laws are patent in the provision criminalizing deception-based investigations.[125] But unlike the U.S. laws (and Ontario's

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[117] These quick-report laws also threaten to make criminals out of would-be whistleblowers. Someone who reports abuse should necessarily worry that their observations and actions will be put under scrutiny such that they themselves could be the subject of a criminal prosecution for not reporting quickly enough.

[118] Security from Trespass and Protecting Food Safety Act, supra note 97.

[119] Id.

[120] Id.

[121] Id.

[122] As Canadian scholar Jodi Lazare has observed, "Bill 156 [also] goes further than Alberta's law by creating prohibitions related to the transportation of farmed animals, thus covering the same activities as Alberta's Bill 1." Jodi Lazare, Ag-Gag Laws, Animal Rights Activism, and the Constitution: What is Protected Speech?, 58 Alberta L. Rev. 83, 90 (2020).

[123] Animal Justice Files Legal Challenge to Ontario "Ag Gag" Law, Animal Justice (Mar. 9, 2021), https://animaljustice.ca/media-releases/animal-justice-files-legal-challenge-to-ontario-ag-gag-law.

[124] Petty Trespass Act, supra note 97.

[125] Building on its original Ag-Gag success, in May 2020 Alberta adopted the "Critical Infrastructure Defence Act." The law was enacted to "strengthen penalties against those who would lawlessly trespass or jeopardize public safety by seeking to block critical public infrastructure, including roadways, railways, and other important infrastructure." Legislative Assembly, Alberta Hansard, 30 (Alta.,

provision), the Alberta prohibition on deceptive entry is one of general applicability insofar as the general definition of trespass is expanded.[126] In a rather striking break from the singular focus of Ag-Gag laws in the U.S., Alberta's general petty trespass was amended such that entry upon any land with permission obtained through false pretences is now defined as trespass.[127]

The Legislative History of Ag-Gag Laws

Without attempting to exhaustively summarize the legislative history for each Ag-Gag law, it is worth noting the fundamentally similar motives for these laws across different states and provinces.

At the outset, it is worth pointing out that the introduction of modern Ag-Gag laws corresponded with the growing success of undercover whistleblowing investigations by a growing set of animal protection groups. Following an undercover investigation at a California slaughterhouse, authorities were compelled for food safety reasons to impose the largest beef recall in U.S. history.[128]

As in other areas of legislation, as time passes and court victories accrue based on the constitutionally improper motives of a legislature, future enactments tend to have a more limited legislative history. The legislative history for later Ag-Gag laws, and the Canadian laws in particular, is more circumspect. But this makes the history of the early enactments, such as Idaho's legislative history, particularly relevant to understanding the history and development of

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Feb. 25, 2020) at 4. It is beyond the scope of this project to fully define the scope of this law, but it necessarily includes acts taken on public property, such as blocking roadways. Critical Infrastructure Defence Act, R.S.A. 2020, c C-32.7 (Alta.) ("[n]o person shall, without lawful right, justification or excuse, wilfully obstruct, interrupt or interfere with the construction, maintenance, use or operation of any essential infrastructure in a manner that renders the essential infrastructure dangerous, useless, inoperative or ineffective.").

[126] It is notable that the Alberta law actually adds corporate liability for an entity that helps or directs trespassers.

[127] A final type of anti-transparency measure enacted by states and provinces worth flagging are laws that share many of the attributes of the Ag-Gag laws discussed above, but that impose civil rather than criminal liability. For reasons of length, I will not focus on those laws in this paper, but only note that civil liability might be less of a deterrent than criminal sanctions for large organizations. It is worth recognizing that one such civil liability regime, North Carolina, N.C. Gen. Stat. § 99A-2 (2016), marked the path for Alberta in terms of expanding the scope of the law such that it applies to legitimate whistleblowers from any and all industries under what the state called the "Property Protection Act." Id. § 99A-2(a) ("[a]ny person who intentionally gains access to the nonpublic areas of another's premises and engages in an act that exceeds the person's authority to enter."). Notably, in February 2023, the Fourth Circuit struck down North Carolina's Ag-Gag law on the ground that it violated an employee's First Amendment free speech rights. See People for the Ethical Treatment of Animals, Inc. v. N. Carolina Farm Bureau Fed'n, Inc., 60 F.4th 815 (4th Cir. 2023). North Carolina and the Farm Bureau have filed separate petitions for writ of certiorari, arguing that the First Amendment does not protect animal and environmental groups' activities as defined by the Property Protection Act. Juan Carlos Rodriguez, NC, Farmers Urge High Court To Restore State 'Ag Gag' Law, LAW360 (May 26, 2023, 5:32 PM), https://www.law360.com/articles/1681357/nc-farmers-urge-high-court-to-restore-state-ag-gag-law.

[128] Owners of Hallmark Meat Pay $300,000, Humane Soc'y of the U.S. (Nov. 16, 2012), http://www.humanesociety.org/news/press_releases/2012/11/hallmark-meat-company-settlement-111612.html.

Ag-Gag laws. The historical context for an enactment, as well as the deliberations of the legislative body are relevant in assessing a law's constitutionality.[129]

The introduction of Idaho's Ag-Gag law was a direct response to an undercover investigation video that was publicized by Mercy for Animals.[130] The video showed workers at Bettencourt Dairies dragging sick and injured cows across concrete with chains attached to the cows' necks, jumping on and kicking cows as they moaned in distress, and beating them viciously.[131] The video exposé stirred public attention, and resulted in national media coverage and boycott calls for products from the dairy. In response, and as an effort to rescue Idaho's industrialized animal agriculture industry, the Idaho Dairymen's Association[132] began drafting an Ag-Gag bill.[133] The bill was introduced on a Monday, approved by the Senate Agricultural Affairs Committee on Tuesday, and passed the full Senate on Friday of the same week.[134] The bill was passed as an emergency measure so that it could take effect immediately, and in just over two weeks after being introduced, the bill was signed, codified, and took effect.[135] Dan Steenson, a lobbyist for the Idaho Dairies who drafted the bill, justified the urgency of the bill to the House Agricultural Affairs Committee by explaining that farmers and dairymen were threatened by "extremist groups . . . who masquerade as employees to infiltrate farms in the hope of discovering and recording what they believe to be animal abuse."[136]

With admirable candour that can probably be generalized to all Ag-Gag laws, Steenson also explained that undercover investigations must be prevented by law because the footage and media they produce tends to allow the animal advocates to prosecute industrialized agriculture

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[129] The Court instructs that to smoke-out a bad purpose, courts must look at, among other things: (1) the impact of the law – who is impacted most; (2) the historical background of the decision – the context leading up to the law is relevant (reacting to an investigation); and (3) the Court specified that an improper purpose can be revealed by looking to the "legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266–68 (1977).

[130] Nathan Runkle, Idaho's 'Ag-Gag' Bill: Shameful Attempt to Hide Animal Cruelty on Factory Farms, Huffington Post (Feb. 25, 2014), http://www.huffingtonpost.com/nathan-runkle/idahos-aggag-bill-shamefu_b_4848923.html.

[131] Id.

[132] The Idaho Dairymen's Association is a trade industry organization that represents every dairy farmer and dairy producer in the state of Idaho.

[133] Melissa Cronin, How the Dairy Industry Strong-Armed a State into Silencing Whistleblowers, The Dodo (Oct. 23, 2014), https://www.thedodo.com/ag-gag-idaho-dairy-industry-781488969.html; see also Hearing on S.B. 1337 Before the S. Agric. Affairs Comm., 2014 Leg., 2d Reg. Sess. 2 (Idaho 2014) [hereinafter S. Agric. Affairs] (statement of Dan Steenson, legal counsel for Idaho Dairymen's Association) ("I proudly represent the hard-working dairy farmers who comprise Idaho's–the Idaho Dairymen's Association . . . I prepared this legislation at their request . . . .") (on file with author).

[134] It was introduced on February 10th, 2014. It passed the Senate on February 14th and passed the House on February 26th. On the 28th it was signed into law. See Idaho Code Ann. § 18-7042 (West 2014); see also Senate Bill 1337, State of Idaho Legislature, https://legislature.idaho.gov/sessioninfo/2014/legislation/s1337/ (last visited Sept. 29, 2021).

[135] Titled the Agriculture Security Bill, this legislation had an emergency clause that allowed it to take effect immediately. Dan Flynn, Idaho 'Ag Gag' Bill Clears State Senate, Heads to House, Food Safety News (Feb. 20, 2014), http://www.foodsafetynews.com/2014/02/idahos-senate-passed-ag-gag-bill-close-to-vote-in-house/#.VRRr5vnF92s.

[136] Hearing Before the H. Agric. Affairs Comm., 2014 Leg., 2d Reg. Sess. 6 (Idaho 2014) [hereinafter H. Agric. Affairs] (on file with author).

"in the court of public opinion."[137] A consistent theme was the danger of putting factory farms on trial in the media. Indeed, Senator Jim Patrick explained the problem of investigations as a farcical due process concern

> The problem we have here is you can be tried and convicted in the press and on YouTube because everything is so available nowadays. No due process, this is just the way it works. So, we're trying to go through the proper due process. There are plenty of ways to report any kind of abuse, whether it's a chemical spill, whether it's animal abuse. All these things are very easily reported and a video is unnecessary if you go back to the examples of earlier in this century's problems. Well, they didn't use videos.[138]

Another legislator admitted that the law would never have been introduced if it was not for the boycott and public advocacy campaigns that follow an investigation. By seeking boycotts, Representative Donna Pence explained, and "by releasing footage to the internet" that "crossed an ethical line," and she said that if those acts of publication had not occurred "I don't think this bill would have ever surfaced"[139] Still others have explained that Ag-Gag laws are a necessary part of protecting farmers. As one legislator put it, "[t]his bill is not an anti-whistleblower bill. It's an anti-attack-the-innocent bill."[140] Tony VanderHulst, the president of the Idaho Dairymen's Association, testified as the representative of all dairy producers in Idaho, and lamented the poor treatment of the farmer whose farm was investigated and revealed to be engaging in abuse: "The dairy farmer who fell victim to the activist group is well known for his unquestioned compassion for his animals. He is a true steward of his cows, his land and his community. To see him persecuted in the public eye for an issue that everyone agrees has been corrected shows the true and clear motivation of these activist groups."[141]

Equally common are efforts by politicians to equate whistleblowers (or those who engage in non-violent disobedience) with terrorists. VanderHulst opined that the bill's prohibition on deception and recording somehow "protects from systematic attacks by terrorists."[142] Senator Jim Patrick, who sponsored the bill, stated, "terrorism ha[s] been used by enemies for centuries [to] destroy the ability to produce food."[143] He justified the need for the bill by asserting, "[t]his is the way you combat your enemies."[144]

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[137] Id. at 7.

[138] See Betsy Russell, Senate Passes Ag-Gag Bill 23-10, Four Republicans Oppose It, spokesman.com (Feb. 14, 2014), https://www.spokesman.com/blogs/boise/2014/feb/14/senate-passes-ag-gag-bill-23-10-four-republicans-oppose-it/.

[139] Rep. Donna Pence, Pence Legislative 2014 Update Week 7, Donna Pence Legislative Updates & News (Feb. 21, 2014), https://representativepence.wordpress.com/2014/02/21/pence-legislative2014-update-week-7/, archived at http://perma.cc/K4BB-F9GS.

[140] Betsy Russell, Senate Debate: 'Anti-attack the innocent bill,' Written Too Broadly, 'Harsh penalties on whistleblowers', spokesman.com (Feb. 14, 2014), https://www.spokesman.com/blogs/boise/2014/feb/14/senate-debate-anti-attack-innocent-bill-written-too-broadly-harsh-penalties-whistleblowers/.

[141] 3-11 IAT IDA Response, aginfo.net (March 11, 2014), https://www.aginfo.net/report/27424/Idaho-Ag-Today/3-11-IAT-IDA-Response.

[142] H. Agric. Affairs, supra note 136, at 21.

[143] S. Agric. Affairs, supra note 133, at 46.

[144] Id.

Another line of attack is to posit that the investigations are defamatory, and conveying false narratives. Senator Jim Rice explained that "it's important to know that [these video investigations are] a compilation" and that much of the clips have been "cut and moved" to misrepresent the truth.[145] He also pointed out that the "edited video was used to attack this innocent Idaho farmer in an attempt to utterly destroy him economically."[146] Missing from this testimony, however, was any mention of the fact that no investigation in Idaho (or any state) has resulted in a successful defamation lawsuit. If the information conveyed to the public by the activist investigators was not actually true, then the groups and individuals responsible for the investigation would be subject to liability and potentially punitive damages for defamation. Instead, VanderHulst simply threw up a distracting smoke screen of rhetoric: "These farm terrorists use media and sensationalism to attempt to steal the integrity of the producer and their reputation, and their ability to conduct business in Idaho by declaring him guilty in the court of public opinion."[147] Or as another legislator put it, "[m]uch of the opposition to Senate Bill 1337 is coming from extreme activists who wish to contrive issues to get donations for their cause. They contrive these issues to bring in donations to keep their organizations going. I cannot condone vigilante activity."[148]

Although other Ag-Gag laws have not enjoyed such a thorough legislative history, where there are legislative records of the debate, in many instances the contours of the justification for the laws are markedly similar. For example, the North Carolina law's supporters explained that the goal of the law was to allow employers and property owners to engage in activities of public concern without fear of an exposé. In Utah, legislators went so far as to single out a single animal protection group as the intended target for the new criminal law. Representative Michael Noel stated that he was opposed to letting "these groups like PETA and some of these organizations control what we do." Representative Noel then referred to anyone who wanted to film an agricultural operation as a "jack wagon." Similarly, Representative John Mathis explained that the recordings should be criminalized because they are used "for the advancement of animal rights nationally, which, in our industry, we find egregious." And the law was treated as necessary because "[t]his is about a group of people that want to put us [animal agriculture] out of business. Make no mistake about it." In Iowa, legislators responded to calls by lobbyists like the Pork Council who explained, "the undercover people held onto the video until they could get a good news cycle," suggesting that the interest in media coverage was itself condemnable.

The Ag-Gag laws in Canada follow in the footsteps of the American provisions, but the legislation was often enacted so quickly and without any real debate that a meaningful parsing of the legislative history is impossible. As Jodi Lazare has explained, when the laws are enacted so quickly, "it is difficult to uncover the motivations behind [their] adoption with any real certainty."[149] But the laws did not emerge from a vacuum; instead they have to be understood as products of the legislative backdrop of the U.S. laws discussed above. The Canadian Ag-Gag laws often followed successful investigations, or the realistic threat of investigations from

[145] S. Deb. on S.B. 1337, 2d Reg. Sess., at 6 (Idaho 2014) (on file with author).

[146] Id. at 8.

[147] H. Agric. Affairs, supra note 136, at 21.

[148] Id. at 3.

[149] Lazare, supra note 122, at 88–89 (quoting at least one legislator who was explicitly concerned about animal activists). For a detailed legal analysis of the Canadian provisions, see Jodi Lazare, Animal Rights Activism and the Constitution: Are Ag-Gag Laws Justifiable Limits?, 59 Osgoode Hall L.J. 667 (2022).

organizations like Animal Justice, and they followed not just temporally but textually the model of the U.S. laws.[150]

It is beyond the scope of this paper to canvas the longstanding debates about the utility of legislative history. The process of discerning the motive for passing a law is sometimes criticized as an impossible task – how can someone (and should they?) go about trying to "psychoanalyze" an entire legislative body.[151] But the history of the original Ag-Gag laws is clearer and more readily understood from historical context than is the case with many legislative enactments. This history has sometimes proven relevant to the litigation challenging these laws, and it is relevant to understanding the proper historical context for these laws.

The Ag-Gag Litigation

Ag-Gag laws are vulnerable to free speech challenges in court, and risk alienating the public by suggesting that the industry has something to hide. Jodi Lazare posits that the laws present "more of a risk to policy-makers than a solution to any perceived threat to the animal agriculture industry."[152] Litigation victories across the U.S. in rural, largely conservative states have served to chill the legislative interest in these enactments. Additional states are not currently seeking to add Ag-Gag laws to their state codes. Still the litigation presents a more complicated story than it seems, at first blush. This section provides a brief overview of the Ag-Gag litigation to date and flags the key legal questions that remain contested or split across courts.

Idaho

Although Idaho was not the first state to enact an Ag-Gag law, the litigation in that state was the first to yield a federal court decision, and eventually an appellate decision. Idaho presented a unique legal opportunity for advocates looking to challenge Ag-Gag laws because the statute criminalized the widest range of conduct, prohibiting both deceptions used to gain entry and the making of recordings. In March 2014, just weeks after the Ag-Gag law was enacted, a group of animal protection plaintiffs filed suit against the Attorney General of Idaho seeking to enjoin enforcement of the Idaho law. The district court granted the plaintiffs' motion for summary judgment as to all four of the challenged subsections, § 18-7042 (a)–(d). In striking down the challenged portions of the Idaho law in their entirety, the federal trial court noted: "In other words, § 18-7042 seeks to limit and punish those who speak out on topics relating to the agricultural industry, striking at the heart of important First Amendment values. The effect of the statute will be to suppress speech by undercover investigators and whistleblowers concerning topics of great public importance . . . ."[153]

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[150] It is also notable that the Ontario Ag-Gag law was justified by emphasizing, among other things, the need to minimize "stress" to the animals. Id. at 90. The title of the Ontario law references "Food Security" or biosecurity type concerns as well.

[151] Justice Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 29–36 (Amy Gutmann ed., 1997).

[152] Lazare, supra note 122, at 96 (citing Amanda S. Whitford, Animal Welfare Law, Policy and the Threat of 'Ag-gag': One Step Forward, Two Steps Back, 3 Food Ethics 77, 78 (2019)).

[153] Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195, 1201 (D. Idaho 2015).

The appellate decision from the Ninth Circuit affirms crucial parts of the lower court order, but generates a degree of uncertainty as well. As applied to recording, the Court held unequivocally that restrictions on recording implicate free speech protections. Summarily rejecting the idea that recording is conduct rather than speech, the Court explained that it was easy to "dispose of [this] claim," because such an "argument is akin to saying that even though a book is protected by the First Amendment, the process of writing the book is not."[154] The Court noted that protecting the right of activists and journalists to record was not tantamount to leaving businesses without any protection: "[A]gricultural production facility owners can vindicate their rights through tort laws against theft of trade secrets and invasion of privacy. . . To the extent the legislators expressed concern that fabricated recordings of animal abuse would invade privacy rights, the victims can turn to defamation actions for recourse."[155]

The clarity of the right to record as inextricable from free speech protections should be contrasted with the confusing justifications often offered for Ag-Gag laws. Contrary to the claims of Ag-Gag proponents, the holding does not permit persons to enter and record inside one's private home (or barn). On the contrary, the First Amendment right to record does not confer any rights of access. One may be able to record when they are otherwise lawfully present. Nothing more. Just as I can record a police officer while I am lawfully on the street, or a security guard when I am lawfully on my university campus (or lawfully present on a ranch), so too does a right to record not cease to exist simply because one is on or near a factory farm.[156] A property owner can always control access to their property and is free to set the rules for their invitees. But things are different when the government attempts to dictate the terms of what can be recorded. To put the matter plainly, a cat video does not become less speech because it is recorded in a house instead of in the street, and the same is true of a video of a pig or any other animal.

Simply put, the right to record does not confer any right to enter a location, but it does mean that state prohibitions on recording trigger speech related protections whether the recording is made on public or private property. As such, while proponents of Ag-Gag laws have often fretted that these laws are necessary to keep activists from recording inside the bedrooms and bathrooms of small farmers, the farmers have nothing to worry about unless they are inviting third parties into their bedrooms or bathrooms. Moreover, it is perfectly reasonable to recognize that the recording rights might be limited to matters of public concern, or at least warrant more protection when issues of public concern are being recorded.

Whereas the Court's analysis of the protections for recording was clear and straightforward, its discussion regarding protections for misrepresentations is opaque and subject

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[154] Animal Legal Def. Fund v. Wasden, 878 F.3d 1184, 1203 (9th Cir. 2018).

[155] Id. at 1205.

[156] Beyond the scope of this paper but relevant to investigations and transparency are state laws limiting certain types of recording, usually recording that includes audio from conversations. So-called two party consent laws, at a level of generality, might prohibit the recording of conversations without the consent of each party to the conversation. See Reporter's Recording Guide, Reporters Committee for Freedom of the Press, https://www.rcfp.org/reporters-recording-guide/ (last visited Jan. 2, 2023) (providing "a summary of each state's laws governing the recording of phone calls and in-person conversations and how those laws affect newsgathering"). In some instances, these laws have been held unconstitutional as applied to particular circumstances. See e.g., Am. C.L. Union of Ill. v. Alvarez, 679 F.3d 583 (7th Cir. 2012). The point of this paper is not to fully canvas the scope or constitutionality of such laws, but it is worth noting that they raise concerns similar, but distinct from Ag-Gag laws.

to contested interpretations. There are three misrepresentation provisions in Idaho's law – misrepresentation to gain access, misrepresentation to gain records, and misrepresentation to gain employment. The Court did not treat these varying misrepresentations as equivalent. As to the former, the Court clearly ruled that obtaining records by false pretenses is not protected. Deceptively acquiring records was treated as tantamount to theft or fraud. By contrast, in similarly unequivocal language the Court held that misrepresentations that lead to entry onto a farm alone are protected ("[a]cquiring records by misrepresentation results in something definitively more than does entry onto land . . .").[157]

This effort to distinguish lies will likely create some uncertainty. But the greatest confusion will arise over the Court's analysis of deception in the employment context. Recall that Idaho's law prohibits obtaining employment with an agricultural facility by "misrepresentation with the intent to cause economic or other injury." The federal court of appeals considering the challenge to this provision reversed the trial court's holding that employment-investigations in this context are categorically protected, and thus the decision is at least a partial barrier to employment-based investigations. However, the Court focused on the narrow text of the Idaho statute, emphasizing that the law required an intent to harm by the investigator. The existence of such an intent requirement, the Court reasoned, rendered the Idaho employment provision facially constitutional. In the Court's view, the statutory requirement that there be an intent to cause injury to the facility operates as a "clear limitation" on the law's reach such that the Court disagreed "with ALDF that the statute would reach 'a person who overstates her education or experience to get a job for which she otherwise would not have qualified' . . . because the requisite intent to injure would not be satisfied."[158] Of direct relevance to future investigations, the Court emphasized the specific intent to harm requirement in the Idaho statute and explained, "[o]f course, this does not mean that every investigative reporter hired under false pretences intends to harm the employer. That is a critical element that requires proof."[159] This means that at least some undercover, employment-based investigations must be viewed as lawful, and not covered by the Idaho law.

In short, the Ninth Circuit, perhaps intentionally, left some ambiguity as to the scope of free speech protections as a shield to criminal liability for undercover investigations. The holdings as to deceptive entries and recording were ground-breaking and have changed the legal landscape for journalists and investigators in the U.S. But for animal groups whose primary method of investigation is employment-based, the ambiguity as to the First Amendment's reach in the context of misrepresentations used to gain employment is a matter of pressing concern.

Utah

The Utah Ag-Gag law was one of the first to be enacted in the modern era. The filing of a case, however, was slowed by doubts about whether legal challenges could be successfully

[157] Wasden, 878 F.3d at 1200.

[158] Id. at 1201.

[159] Id. at 1202 ("[t]hat the statute excludes 'less tangible damage' such as emotional distress indicates that reputational damages would not be considered an 'economic loss,' and we are not aware of a case suggesting otherwise."). Id. ("[r]ather, Idaho case law defines 'economic loss' as 'tangible out-of-pocket loss' which the victim 'actually suffers.'"). Id. (citing State v. Straub, 292 P.3d 273, 280 (2013)).

mounted against the law. Some commentators were sceptical that courts, particularly in a conservative state like Utah, would recognize speech rights associated with deception. Once a case was finally filed, however, the federal court enjoined the entire statute, and the Utah Attorney General did not appeal. The court opened its opinion as follows

> Utah recently joined the growing number of states to enact so-called 'ag-gag' laws – laws that target undercover investigations at agricultural operations. Utah's version operates, in relevant part, by criminalizing both lying to get into an agricultural operation and filming once inside. Plaintiffs contend the law violates their First Amendment rights. For the reasons below, the court agrees.[160]

In urging that the case not be brought, some had argued that only pure speech, and not speech that provides any benefits, including access, is fairly understood as within the protection of the First Amendment. But this speech-plus (anything) theory, is not well-founded in case law. As the federal district court in Utah concluded, when a "liar does not interfere with ownership or possession of the land, her consent to access the property remains valid, notwithstanding that it was obtained nefariously through misrepresentation."[161] The court explained, "something more than access by misrepresentation seems necessary to cause trespass-related harm."[162] And thus,

> [G]iven its broad language ("obtain[ing] access to an agricultural operation under false pretenses"), the Act on its face criminalizes, for example, an applicant's false statement during a job interview that he is a born-again Christian, that he is married with kids, that he is a fan of the local sports team. It criminalizes putting a local address on a resume when the applicant is actually applying from out of town. In short, the Act criminalizes a broad swath of lies that result in no harm at all, much less interference with ownership or possession of the facility – lies that are therefore entitled to First Amendment protection.[163]

The federal court reviewing the Utah law did not have the occasion to opine on employment-based investigations because the law did not single those out as criminal, but the Utah law did prohibit recording at agricultural facilities and the court struck that provision down as well. The state of Utah took the position that recording "is not speech."[164] On this point, the court provided a salient reminder that "[l]aws enacted to control or suppress speech may operate at different points in the speech process" and then reasoned that because "recordings are speech and that pre-speech restrictions are treated similarly to restrictions on speech itself," the restriction on recordings in the Utah law violated the free speech principles.[165]

Iowa

[160] Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193, 1195–96 (D. Utah 2017).

[161] Id. at 1203.

[162] Id. at 1205.

[163] Id. at 1203–04.

[164] Id.

[165] Id. at 1207 (citing Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336 (2010); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592–93 (1983)).

Following the lead and reasoning of the lower courts in Utah and Idaho, in 2019 a federal judge in Iowa struck down the Iowa Ag-Gag law, concluding that both the deceptive access provision and the employment provision violated the First Amendment.[166] The state appealed, however, and the appellate court decision deepens the confusion surrounding the constitutionality of Ag-Gag laws by finding that the prohibition on deceptive employment was a violation of free speech, but not the general access by deception provision. In some important ways, the appellate result is the opposite of the outcome in the Idaho appeal, which recognized speech protection for deceptive entries but perhaps not for deceptive employment investigations.

Specifically, the Court reviewing the Iowa law held that any access gained through deception is tantamount to "trespass to private property."[167] The Court recognized that lies are protected speech unless they cause cognizable harm, but the reasoning seems to permit broad prohibitions on nearly any undercover investigation on the theory that "[e]ven without physical damage to property arising from a trespass," lies told in order to gain access result in "a diminution of privacy and a violation of the right to exclude."[168] Under such reasoning, lies told in order to gain access are generally outside of the protection of the First Amendment.

This reasoning puts the Eighth Circuit decision in direct conflict with the decisions of the other courts to consider this issue, by effectively treating any entry gained through deception as an actionable trespass. Moreover, the idea that deception always vitiates consent creates more questions than it answers. Seemingly countless lies are told by persons, and many of these so-called "white lies" are efforts to gain favor or perhaps an invitation. One might claim to be a sports fan to get invited to a Super Bowl party, or one might assert an interest in card games to get invited to a poker night. One might claim to enjoy watching someone's children in order to be invited to a party or to be tasked with babysitting. The deception might be harmless, even done without much thought, and yet nonetheless be intentional, and material to the decision of whether someone will be invited to enter or join an event. Perhaps the person just does not want to be excluded from the gathering of friends, or perhaps the individual is trying to impress someone. Or perhaps the person is an undercover journalist reporting on illegal gambling, or fraternities, or sports culture. To treat lies told in order to secure entry as categorically tantamount to trespass is to cast a wide range of lies as non-speech.[169] The U.S. Supreme Court has not gone nearly so far, and instead has recognized that lies that change behavior, even when the changes are based on the deception, are generally entitled to constitutional protection.[170]

The Court's concerns about the harmfulness of lies seemed to dissipate when it came to lies told in order to gain employment, which the court recognized as constitutionally protected. As to the employment provision, the court explained, "[w]hile it is true that § 717A.3A(1)(b) requires proof of other elements, including intent to commit an unauthorized act in the agricultural facility, the fact remains that some persons may be prosecuted only because they

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[166] Reynolds, 353 F. Supp. 3d 812.

[167] Animal Legal Def. Fund v. Reynolds, 8 F.4th 781, 786 (8th Cir. 2021).

[168] Id.

[169] U.S. v. Alvarez, 567 U.S. 709 (2012).

[170] Justice Breyer explained that the First Amendment "applies in family, social, or other private contexts, where lies will often cause little harm," but emphasized that it "also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high." Id. at 736 (Breyer, J., concurring).

make an immaterial false statement [in order to gain employment]," and such a limit on lies, the Court reasoned, was "too broad to satisfy the First Amendment."[171]

To briefly recap the key contested legal questions, courts striking down laws in Utah and Idaho have recognized speech protection for access based on deceptions, but the appellate court in the Idaho case was equivocal about the scope of protection for employment-based deceptions. By contrast, in reviewing the Iowa law, the Eighth Circuit flipped the script, and held that although the deceptive entry prohibition did not offend free speech principles, the provision barring lies told in order to gain employment was unconstitutional.[172] When addressing the problems with laws barring deceptively gained employment, the Court emphasized that "plausible scenarios" of tolerable lies abound, for example one might "falsely profess[] to maintain a wardrobe like the interviewer's, exaggerate[] her exercise routine, or inflate[] his past attendance at the hometown football stadium."[173]

In short, the Court recognized that a wide array of lies could be both material to one's decisions and simultaneously protected by free speech principles. Such reasoning seems persuasive insofar as there is indeed a vast range of lies that one seeking employment might tell in order to facilitate an investigation. But one might reasonably wonder why lies about being non-vegan or not interested in animal rights are permissible when seeking a job, but not when merely seeking to take a tour or otherwise gain a more ephemeral entry. The Court prioritized protecting lies for employment over lies used to gain less formal, or more temporary access. In striking down the employment-deceptions prohibition, the Court explained that undercover "investigators would make misrepresentations that include omitting their affiliation with the Animal Legal Defense Fund, omitting their status as licensed private investigators, downplaying their educational backgrounds," and "telling innocuous white lies to ingratiate themselves to their interviewers."[174] But if these lies cannot be criminalized in the employment context, it is hard to understand why they could be in the context of more fleeting efforts to merely gain entry. In short, the Iowa litigation creates more questions than answers. It certainly does not provide a clear roadmap for legislatures interested in enacting Ag-Gag laws that will pass constitutional muster. But neither does the holding provide much comfort to the organizations and journalists who conduct undercover investigations, often employment investigations.

Other Ag-Gag Litigation & Conclusions

The future of transparency in animal agriculture is hard to predict. On the one hand, successful litigation and ongoing lobbying and public relations efforts have effectively persuaded legislatures in the U.S. to cease introducing new Ag-Gag laws. On other hand, the appeals from the initial Ag-Gag wins are less clear and less decisive than transparency advocates might want, and new Ag-Gag laws are being introduced in Australia and Canada. Litigation remains pending in both Canada and the U.S. at the time of this writing. For example, Animal Justice has filed challenges to Canadian Ag-Gag provisions, including Ontario's law, but no hearings or decisions have yet taken place. Likewise, appeals remain pending in some of the U.S. Ag-Gag litigation, and

[171] Id. at 787.

[172] Reynolds, 8 F.4th at 787–88.

[173] Id.

[174] Id.

questions about the scope of constitutional protection for undercover investigations remain uncertain.

Indeed, as of the time of writing this paper there are two recent appellate victories for transparency advocates to note. The first, a successful challenge to Kansas's Ag-Gag law, which prohibited access based on deception, was challenged by attorneys for Kansas who sought Supreme Court review. After relisting the case multiple times, the Justices ultimately declined to hear Kansas' challenge to the lower court decision striking down Kansas' Ag-Gag law. The second was a successful challenge to North Carolina's Ag-Gag law with a ruling that whistleblowing and undercover investigations are considered newsgathering activities protected by the First Amendment.[175] North Carolina and the Farm Bureau have filed separate petitions for writ of certiorari and these decisions are pending.[176] These cases illustrate the fragility of this legal framework supporting investigations; the Supreme Court could weigh in through a future case, perhaps North Carolina, and curtail the speech rights relevant to investigations. It could be years until we have a definitive answer to many of the questions discussed above about the scope of constitutional protections for undercover investigations, and the answers may come in a case that has nothing to do with animals, but rather could concern an undercover investigation in another setting.

It has been said that glass walls are a key part of animal protection advocacy. This paper has summarized some of the laws that have made transparency in the agricultural sphere challenging. To be sure, there is room for some optimism based on the litigation challenging Ag-Gag laws. But these victories are not categorical, new laws in places like Canada continue to be enacted, and meat libel laws remain on the books in many states. Moreover, the social science strongly suggests that lasting public opinion change requires more than transparency; there is a need for images of animal suffering to be effectively integrated into campaigns and advocacy. Transparency standing alone is not a panacea. At the same time, the lobbying and litigation pursued by industrial agriculture in support of Ag-Gag laws demonstrates that the producers of meat and dairy view transparency as bad for their bottom line. Lawyers and advocates need the sort of ground truth that investigations provide in order to be able to launch effective litigation and outreach campaigns.[177] Even if we cannot measure the value of transparency, we ought not discount its role in revealing and documenting forms of animal exploitation.

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[175] People for the Ethical Treatment of Animals, Inc., 60 F.4th 815.

[176] Rodriguez, supra note 127.

[177] Nancy M. Williams, Affected Ignorance and Animal Suffering: Why Our Failure to Debate Factory Farming Puts Us at Moral Risk, 21 J. of Agric. & Envtl. Ethics 371 (2008).