Ag Gag Past, Present, and Future

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While the animal rights and food justice movements are relatively young, their political unpopularity has generated a steady onslaught of legislation designed to curtail their effectiveness. At each stage of their nascent development, these movements have confronted a new wave of criminal or civil sanctions carefully tailored to combat the previous successes the movements had achieved.

Among the first wave of animal rights activists were those who would seek to liberate animals from harsh or inhumane treatment through criminal trespass and property crimes. Whatever one might think about the wisdom or propriety of the tactics of this first generation of activists, it is beyond dispute that those opposed to the animal activists were not satisfied with the existing criminal sanctions for crimes like trespass and theft. Instead, this band of daring scofflaws were labeled terrorists by federal legislation and now face some of the harshest sentences available in the criminal code.

In recent years, most food and animal rights activists have abandoned direct action campaigns, perhaps in part because of the increased penalties that such crimes carry, and the well documented efforts (and abuses) on the part of the FBI to infiltrate animal rights groups and arrest persons involved in direct action.[1] In this new era, words, rather than deeds, have become the primary form of advocacy for persons seeking to expose food justice and animal welfare issues. And in the age of mass

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1. *See generally* WILL POTTER, GREEN IS THE NEW RED (2011).

communication and the internet, the power of words and images can hardly be overstated.[2]

But industry has responded. Those willing to speak negatively about agricultural production have been confronted with at least two unique limits on their ability to criticize the way our food is produced. First, the agricultural industry lobbied for, and frequently obtained, legislation that provides for defamation liability without the defining limits of defamation. These distortions of defamation law, known as the food disparagement laws,[3] tend to shift the burden of proof from the plaintiff to the defendant (speaker), assume that statements critical of an industry are untrue unless there is definitive science to support the critique, or eliminate the *mens rea* of maliciousness as to the falsity of a statement. Such changes reflect a marked shift in the contours of defamation and allow for potential liability for speech critical of food producers that would be unthinkable in any other context.

And yet, at least the food disparagement laws, at their core, purport to target speech that is untrue. The most recent wave of anti-animal rights and anti-food justice laws, Ag Gag laws, criminalize efforts to produce true whistleblowing investigations in the agricultural context. Under an Ag Gag regime, the whistleblowing tactics of muckrakers like Upton Sinclair,[4] which have shaped public law and opinion about food production, are subject to criminalization. Under Ag Gag laws, people who record unsafe or cruel workplace conditions at agricultural facilities may be incarcerated. Typically Ag Gag laws take the form of criminalizing the acts of recording or the conduct preparatory to producing truthful speech about the production of our food. But as legal challenges to the traditional Ag Gag laws progress through the courts and their constitutionality increasingly called into question,[5] some states are considering the next generation of Ag Gag laws and practices—that is, Ag Gag 2.0. This new form of legislation or judicial action would further limit whis-

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2. Indeed, a recent Gallup Poll finds that over 30% of Americans now believe that animals should have the "same rights as people." Rebecca Rifkin, *In U.S., More Say Animals Should Have Same Rights as People*, GALLUP (May 18, 2015), http://www.gallup.com/poll/183275/say-animals-rights-people.aspx (noting a dramatic increase in this figure in recent years).

3. Food disparagement laws make it easier for food producers to sue their critics for libel by allowing a food manufacturer or processor to sue a person or group making disparaging comments about their products. Many of these laws establish a lower standard for civil liability and allow for greater damages by allowing for punitive damages and attorneys' fees.

4. Upton Sinclair was an American author who wrote nearly 100 books across several genres. His classic novel, *The Jungle*, exposed conditions in the United States meat packing industry.

5. At the time of writing this paper, Plaintiffs are awaiting the resolution of a motion for summary judgment in the District of Idaho, where the nation's first challenge to an Ag Gag law is pending.

tleblowing activism in a number of ways, but two key examples are the rise of quick report laws and the creative use of trespass laws to suppress information about public harms. These types of limitations on whistleblowing are different in form, but the same in effect—they limit speech critical of the agricultural industry and function as Ag Gag laws.[6]

This brief descriptive essay will proceed in four parts. I will first review the history of animal rights advocacy and prosecution. Second, I will describe the agricultural disparagement, or "meat libel," statutes. Third, I will discuss current Ag Gag legislation. Finally, I will discuss the future of Ag Gag legislation.

I. THE FIRST WAVE OF ANIMAL RIGHTS ADVOCACY AND PROSECUTION

The modern animal rights movement began in the late 1970s and early 1980s[7] with the overriding objective of reducing the amount of animal suffering by eliminating the exploitation of animals by humans.[8] However, it would be a huge mistake to view the animal rights movement as monolithic in its goals or methods.[9] During the 1980s, members of the movement successfully brought cases of horrific animal abuse to the attention of the general public through conventional forms of social protest.[10] At the same time, many activists also took a more direct ap-

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6. Although on the surface it makes no sense to describe something that is not a law as an Ag Gag law, certain State actions have such a chilling effect on speech critical of food production as to fairly evince the spirit of Ag Gag. One such example is the decision to prosecute for animal abuse a person who records and reports on animal abuse, as was briefly considered by Colorado law enforcement authorities. *See, e.g.,* Will Potter, *Breaking: Undercover Investigator Charged with Animal Cruelty for Videotaping Farm Abuse*, GREEN IS THE NEW RED (Nov. 22, 2013), http://www.greenisthenewred.com/blog/colorado-cok-investigation-taylor-radig/7403/.

7. *See* Michael Hill, United States v. Fullmer *and the Animal Enterprise Terrorism Act: "True Threats" to Advocacy*, 61 CASE W. RES. L. REV. 981, 982 (2011); *see generally* PETER SINGER, ANIMAL LIBERATION (1975); *All About PETA*, PETA, http://www.peta.org/about-peta/learn-about-peta/ (last visited Feb. 18, 2015) (PETA was founded in 1980, which catalyzed an interest and energy towards animal well-being); *About Us*, ANIMAL LEGAL DEF. FUND, http://aldf.org/about-us/ (last visited Feb. 18, 2015) (describing the founding of ALDF in 1979).

8. *See* Hill, *supra* note 7, at 984; Laura G. Kniaz, *Animal Liberation and the Law: Animals Board the Underground Railroad*, 43 BUFF. L. REV. 765, 772 (1995).

9. *See, e.g.*, James McWilliams, *Animal Welfare vs. Animal Rights Abolitionism: Is Compromise Possible?*, DAILY PITCHFORK (Feb. 12, 2015), http://dailypitchfork.org/?p=625 (describing the debate between the animal welfare supporters who support the humane treatment of animals and animal rights supporters who believe that the only way animals can be treated humanely is to completely stop using them).

10. Philip M. Boffey, *Animals in the Lab: Protests Accelerate, but Use Is Dropping*, N.Y. TIMES (Oct. 27, 1981), http://www.nytimes.com/1981/10/27/science/animals-in-the-lab-protests-accelerate-but-use-is-dropping.html (describing how an animal rights activist's findings, after he infiltrated a lab, led to a police raid and the freeing of the animals); DEBORAH RUDACILLE, THE SCALPEL AND THE BUTTERFLY: THE WAR BETWEEN ANIMAL RESEARCH AND ANIMAL PROTECTION

proach to alleviating animal suffering by engaging in various direct action campaigns, including the liberation of confined animals.[11] Certainly, animal rights activists are not unique in their use of a variety of both legal and illegal methods to influence public opinion and advance their ends.[12] However, it is fair to say that the early years of the animal rights movement in this country were characterized by a substantial number of effective, illegal actions.[13]

By the late 1980s, direct action campaigns, in which criminal activity played a substantial role, were helping the burgeoning animal rights movement gain momentum by stirring public interest. The first documented animal liberation in this country, committed in 1977 by Kenneth LeVasseur,[14] was illustrative of the direct action that characterized this period in the movement.[15] With the aid of several accomplices, LeVassuer released two dolphins into the wild after seeing that they were subjected to what he characterized as "life threatening conditions" at the

166–67 (2000) (describing how the cosmetic industry began to go "cruelty free" in response to criticism of animal testing); *see generally* Hill, *supra* note 7.

11. Kniaz, *supra* note 8, at 776.

12. Denise Grady, *Thelma Glass, Organizer of Alabama Bus Protests, Dies at 96*, N.Y. TIMES (July 27, 2012), http://www.nytimes.com/2012/07/28/us/thelma-glass-organizer-of-alabama-bus-protests-dies-at-96.html (describing how some black citizens were arrested during the famous Montgomery Bus Boycott for conspiring to interfere with a business); Associated Press, *South Carolina Judge Tosses Out Criminal Records for 9 Civil Rights Workers*, TIMES-PICAYUNE (Jan. 28, 2015), http://www.nola.com/crime/index.ssf/2015/01/civil_rights_workers_record_er.html (describing how the civil rights activists, the "Friendship 9," were arrested for trespassing for a "sit-in" at a convenience store); *Freedom Day in Selma*, http://www.crmvet.org/tim/tim63b.htm#1963fdselma (last visited Feb. 18, 2015) (describing how 300 arrests were made in two weeks for "sit-ins" and other protest activity).

13. Kniaz, *supra* note 8, at 778; *Eco-Violence: The Record*, S. POVERTY L. CENTER, http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2002/fall/from-push-to-shove/eco-violence-the-rec (last visited Feb. 16, 2015) (describing animal rights activists as "extremists," by stating that they "have committed literally thousands of violent criminal acts in recent decades—arguably more than those from any other radical sector, left or right"); Ben A. Franklin, *Going to Extremes for "Animal Rights"*, N.Y. TIMES (Aug. 30, 1987), http://www.nytimes.com/1987/08/30/weekinreview/going-to-extremes-for-animal-rights.html (referring to animal liberations as "Rambo-style raid[s]" and "laboratory assaults"); Anthony Munoz, *Campus Life: Michigan State; Animal Rights Raiders Destroy Years of Work*, N.Y. TIMES (Mar. 8, 1992), http://www.nytimes.com/1992/03/08/nyregion/campus-life-michigan-state-animal-rights-raiders-destroy-years-of-work.html (characterizing activists as "vandals" who were destroying years of scientific research); Associated Press, *Fire at UC Davis May Be Work of Animal Activists*, L.A. TIMES (Apr. 17, 1987), http://articles.latimes.com/1987-04-17/news/mn-638_1_uc-davis-scientists (suggesting that Animal Liberation Front members were responsible for arson at an animal testing facility that was under construction because they were also investigated for vandalizing cars half a mile away).

14. LeVasseur was a researcher for the University of Hawaii Institute of Marine Biology as an undergraduate.

15. *See* Kniaz, *supra* note 8, at 807.

facility where they were held captive.[16] As a result of the liberation, LeVasseur was arrested and charged with first-degree theft.[17]

Several similar acts of animal liberation followed. For example, in 1986, Roger Troen participated in an animal liberation at the University of Oregon as a getaway driver.[18] Consequently, Troen was also criminally convicted, sentenced to five years of probation, and ordered to pay $35,000 in restitution to the University of Oregon.[19] Rod Coronado, another animal rights activist, was also involved in several liberations throughout the 1980s and 1990s.[20] Coronado liberated minks and coyotes from university research labs, including Oregon State University, Washington State University, and Michigan State University.[21] He successfully avoided arrest for his efforts until a lab at Michigan State University was burned down in 1992.[22] Coronado was subsequently arrested and convicted for the arson, receiving a sentence of fifty-seven months in prison.[23] While these examples were caught and arrested, other activists continued to liberate animals while avoiding arrest.[24]

However, none of these criminal acts in the service of animal rights went unnoticed, and as the harm to the industry's bottom line grew, the legislative response was swift and harsh. In 1992, Congress passed criminal legislation that seemingly treated arson of a lab and the release of a puppy from a research lab as equivalent, and designated both as acts of

16. State v. LaVasseur, 613 P.2d 1328, 1333 (Haw. Ct. App. 1980).

17. *Id*. at 1329 (During the appeals process, LeVasseur asserted a choice of evils defense, arguing that the conditions the dolphins were kept in violated the Animal Welfare Act, and that his choice of theft was preferable to letting the animals suffer. The court eventually decided that, as a matter of law, his crime of theft was a greater, or at least equivalent evil to the violation of the Animal Welfare Act and thus refused the defense and sentenced him to sixth months in jail with five years of probation.).

18. State v. Troen, 786 P.2d 751, 753 (Or. Ct. App. 1990) (During the appeals process, Troen also asserted a choice of evils defense based on the fact that the animals were suffering, and he made the lesser choice of evil to release them. The court held that the University was not violating any federal law and barred Troen's defense.); Kniaz, *supra* note 8, at 811.

19. Kniaz, *supra* note 8, at 813.

20. Jeffery St. Clair, *Firebrand: Rod Coronado's Flame War*, COUNTERPUNCH (June 19, 2009), http://www.counterpunch.org/espa2009/06/19/firebrand-rod-coronado-s-flame-war/.

21. *Id.*

22. Ron Catlett, *Convicted Eco-Terrorist Leads "Yellowstone Wolf Patrol" in Montana Media Trackers*, MEDIATRACKERS (Sept. 17, 2014), http://mediatrackers.org/montana/2014/09/17/convicted-eco-terrorist-leads-yellowstone-wolf-patrol-montana.

23. *Id*.

24. *The Silver Spring Monkeys: The Case That Launched PETA*, PETA, http://www.peta.org/issues/animals-used-for-experimentation/silver-spring-monkeys/ (last visited Feb. 18, 2015) (describing how in 1981 an activist successfully infiltrated a research lab, documented and videotaped evidence of animal abuse, and got the experimenters at the lab arrested); *see* Franklin, *supra* note 13 (describing how in 1985 animal rights activists successfully liberated 460 animals from the University of California, Riverside).

"terror."[25] Specifically, Congress passed, and President Bush signed into law, the Animal Enterprise Protection Act (AEPA).[26] The AEPA states that anyone who causes "physical disruption to the functioning of an animal enterprise" shall be guilty of an offense designated a terrorism crime.[27] Physically disrupting an animal enterprise—including just releasing an animal—was deemed an act of terrorism punishable by lengthy imprisonment.

Savvy animal rights advocates, now facing the possibility of long prison sentences for releasing animals directly—even animals that were at imminent risk of death or torture—looked to another tried and tested method of activism. This popular method involved engaging in corporate pressure through boycotts and other less seemly methods.

A now infamous group of seven young, highly educated people, known as the SHAC-7, created one of the most effective and ingenious efforts to confront corporate apathy towards animal suffering. The animal rights group Stop Huntingdon Animal Cruelty (SHAC) existed solely to put the pharmaceutical testing lab Huntingdon—the largest animal testing lab in Europe—out of business.[28] SHAC sought to achieve this goal, not by destroying property, but by hosting a website.[29] The website published "names, home addresses and telephone numbers of executives and employees of Huntingdon and any companies [that Huntingdon did business with.]"[30] SHAC urged its supporters to contact those people and pressure them to abandon the use or support of animal testing.[31] In May 2004, following a three-year investigation involving over 100 federal agents from different agencies, seven members of SHAC USA, now known as the SHAC-7, were indicted by a grand jury for violations of the AEPA.[32] The website run by the group was deemed to be a conspiracy to violate the AEPA.[33] Years of investigation, hundreds of agents and federal resources were devoted to ensuring the prosecution of seven young

25. DARA LOVITZ, MUZZLING A MOVEMENT 48–50 (2010).

26. *See* Hill, *supra* note 7, at 991. Commentators have explained that the "motivation for passing the AEPA into law was largely financial." *Id.* at 50–51 (detailing the financial contributions to the legislation's sponsors from the agricultural industry).

27. Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, 106 Stat. 928 (1992) (codified as amended at 18 U.S.C. § 43 (2006)).

28. John Cook, *Thugs for Puppies*, SALON (Feb. 7, 2006), http://www.salon.com/2006/02/07/thugs_puppies/.

29. *Id.*

30. *Id.*

31. *Id.* SHAC also engaged in a variety of other pressure tactics through its website.

32. *Id.*

33. *Id.* For a more complete summary of the prosecution of the SHAC-7, see LOVITZ, *supra* note 25, at 63–72.

people for conspiring to cause harm to a business. The government's disdain for the movement is made patently clear by such overreaching—at a time when less than half of reported rapes result in arrests, it is striking that law enforcement would devote so many resources to the prosecution of persons hosting a website.[34]

Moreover, despite the successful use of the AEPA to prosecute the SHAC-7, Congress used the September 11 attacks to further vilify direct action animal rights activists. In the wake of the attack on the Twin Towers in New York, at least one congressman expressed the view that there was a "strong possibility" that eco-terrorists were responsible.[35] In 2006, Congress raised the stakes for interfering with animal operations by passing the Animal Enterprise Terrorism Act (AETA).[36] The AETA is broader than its precursor in several regards. First, while the AEPA required a person to act with the intent to cause physical disruption to an animal enterprise's functioning, the AETA only requires an intent to "damag[e] or interfer[e] with the operations of an animal enterprise."[37] The "damaging or interfering" language in the AETA provides a more lenient standard than the "physical disruption" language in the AEPA.[38] Additionally, the AETA allows for prosecution if a person causes damage to an animal enterprise, or to any property owned by a company that has a relationship with an animal enterprise.[39] This change seems directly responsive to SHAC-7's method of publicly listing businesses that had a relationship with Huntingdon labs on the SHAC website.[40] Moreover, unlike its predecessor which focused on physical damage, under the AETA, merely causing economic injury subjects one to criminal liability and a prison sentence of up to twenty years.[41]

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34. *See, e.g.*, Cassia Spohn & Katharine Tellis, *Justice Denied?: The Exceptional Clearance of Rape Cases in Los Angeles*, 74 ALB. L. REV. 1379, 1416 (2011) (noting that in some urban areas the "'true' arrest rates (i.e., the percentage of cases that were cleared by the arrest of a suspect)" were 35% or lower); *see also* BUREAU OF JUSTICE STATISTICS, SEX OFFENSES AND OFFENDERS (1997), *available at* http://www.bjs.gov/content/pub/pdf/SOO.PDF (reporting that nationally about half of all forcible rapes result in an arrest).

35. LOVITZ, *supra* note 25, at 56 (quoting Representative Don Young).

36. Animal Enterprise Terrorism Act, Pub. L. No. 109-374, 120 Stat. 2652 (2006) (codified at 18 U.S.C. § 43 (2006)).

37. *Id*.

38. Will Potter, *Analysis of the Animal Enterprise Terrorism Act*, GREEN IS THE NEW RED, http://www.greenisthenewred.com/blog/aeta-analysis-109th/ (last visited Feb. 18, 2015).

39. 18 U.S.C. § 43(a)(2)(A) (2006); Potter, *supra* note 38.

40. Potter, *supra* note 38.

41. 18 U.S.C. § 43 (2006) ("[P]unishment for a violation shall be . . . not more than 1 year . . . if the offense . . . does not instill in another the reasonable fear of serious bodily injury or death and . . . results in economic damage that does not exceed $10,000 . . . not more than 5 years . . . if no bodily injury occurs and . . . results in economic damage exceeding $10,000 but not

II. THE EMERGENCE OF AGRICULTURAL DISPARAGEMENT OR "MEAT LIBEL" STATUTES

A. What Is Meat Libel?

Most activists, facing decades in prison, have turned away from crime and towards more soapbox activism: getting the message out. For better or for worse, the animal rights movement began to move above-ground, engaging in more public debate (and litigation)[42] than private sabotage.[43] The industry has responded to this new, and effective, form of protest. The rise of food disparagement or "meat libel" laws (discussed immediately below) reflect an effort to control the debate, and the enactment of Ag Gag laws (discussed in the subsequent section) serves to cut off some of the most critical information in the debate.

Agricultural disparagement 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.[44] These laws first emerged in the early 1990s following a *60 Minutes* segment on CBS about chemical usage in growing apples.[45] 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.[46] Following this

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exceeding $100,000 . . . not more than 10 years . . . if . . . offense results in economic damage exceeding $100,000 . . . not more than 20 years . . . if . . . offense results in economic damage exceeding $1,000,000 . . . ."). At the time of writing, the Center for Constitutional Rights is currently representing some liberators who have been charged under AETA, and is litigating the constitutionality of the statute. *See United States v. Johnson*, CENTER FOR CONST. RTS., http://ccrjustice.org/ourcases/US-v-Johnson (last visited Feb. 18, 2015) (describing the case of Kevin Johnson and Tyler Lang, two activists arrested under the AETA for allegedly liberating mink and foxes from fur farms and the attempts by the Center for Constitutional Rights to challenge the constitutionality of the AETA).

42. There are now organizations whose very mission focuses on using the law and legal system, as opposed to breaking the law, to improve the lives of animals. *See, e.g.*, *About Us*, ANIMAL LEGAL DEFENSE FUND, http://aldf.org/about-us/ (last visited May 30, 2015).

43. Dara Lovitz has explained that even beyond curbing criminal behavior, the enactment of terrorism legislation has actually chilled animal advocacy more generally. LOVITZ, *supra*, note 25, at 105–20.

44. GEORGE B. DELTA & JEFFREY H. MATSUURA, LAW OF THE INTERNET § 11.03 (3d ed. 2013), *available at* 2013 WL 3924200.

45. Megan W. Semple, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403, 403–04 (1996).

46. *See generally* BRADFORD H. SEWELL & ROBIN M. WHYATT, NATURAL RES. DEF. COUNCIL, INTOLERABLE RISK: PESTICIDES IN OUR CHILDREN'S FOOD (1989).

segment, apple sales in Washington State fell drastically.[47] Apple growers in Washington State faced economic losses, possibly as high as $75 million.[48] 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.[49] The 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.[50] 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.[51] The court rejected this argument because "Such [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."[52]

Following the decision, lobbyists began petitioning state legislatures to create statutes that would provide heightened protection for the agriculture industry against segments like the one by *60 Minutes*.[53] That is to say, industry sought protection against reports about their products that were not demonstrably false. More than twenty-five states considered agricultural disparagement statutes, and thirteen states enacted such laws.[54] While the statutes differ in some respects, they share many of the same core elements:

> (1) [D]issemination to the public in any manner; (2) of false information the disseminator knows [or should have known] to be false; (3) stating or implying that a perishable food product is not safe for consumption by the consuming public; (4) information is presumed false when not based on reasonable and reliable scientific inquiry, facts, or data; (5) disparagement provides a cause of action for damages.[55]

Had this kind of statute existed during *Auvil*, it is likely that the argument made by the apple growers, that harm to their industry was ac-

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

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

49. *Id.* at 931.

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

51. *Id.*

52. *Id.*

53. *See* Margot S. Fell, *Agricultural Disparagement Statutes: Tainted Beef, Tainted Speech, and Tainted Law*, 9 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 981, 987–88 (1999).

54. Semple, *supra* note 45, at 413.

55. *Id.*

tionable even absent a showing of falsity, would have prevailed.[56] Criticizing a food product, even if the producer cannot show that what one said is false, is now a basis for civil liability in many states.

B. Comparing Agricultural Disparagement Statutes to Product Disparagement

In a traditional product disparagement case, the plaintiff generally must prove that "the defendant: (1) intentionally (2) caused pecuniary loss to the plaintiff by (3) falsely stating a fact (4) to a third person, (5) knowing that the statement was false or recklessly disregarding its truth or falsity."[57]

This legal framework differs from the agricultural disparagement statutes in several ways. First, under traditional disparagement liability, the plaintiff bears the burden of proving that the defendant's statement was false.[58] By contrast, the language used in many agricultural disparagement statutes implies the defendant must prove his or her statements were true by showing that they were based on reasonable or reliable scientific evidence.[59] Moreover, because a person is liable for food disparagement unless his or her statement is based on reliable scientific evidence, serious questions arise regarding what exactly is reasonable or reliable scientific evidence. Hypothetically, if a well-known scientist conducts a study, reports on it to a news station such as CBS, but then later finds out his methodology was flawed, could the scientist and CBS be in violation of an agricultural disparagement statute? Arguably yes. Are the lay public precluded from discussing rumors or studies unless they have the expertise to confirm the reliability and veracity of the study in question? Presumably so. The vague language used in many of the statutes and the lack of cases on the subject matter leaves these questions open to interpretation, but it is certainly plausible that any negative statement—true or not—that lacks a firm scientific grounding could result in liability.[60]

Additionally, in some states agricultural disparagement liability can be predicated on a lower *mens rea* than is typically required. As a general matter, liability for product disparagement requires that the defendant act

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56. *See Auvil*, 67 F.3d at 822.

57. Sara Lunsford Kohen, *What Ever Happened to Veggie Libel?: Why Plaintiffs Are Not Using Agricultural Product Disparagement Statutes*, 16 DRAKE J. AGRIC. L. 261, 266 (2011).

58. *See id.* at 269–70.

59. *See* Semple, *supra* note 45, at 413.

60. *See* Kohen, *supra* note 57, at 273–74; *see generally* David J. Bederman, *Food Libel: Litigating Scientific Uncertainty in a Constitutional Twilight Zone*, 10 DEPAUL L.J. 191, 192 (1998).

either knowingly or recklessly with regard to the falsity of the information. In some agricultural disparagement statutes, the plaintiff can recover even if the defendant was merely negligent with regard to the falsity of the information.[61] In Alabama, a defendant potentially may be held strictly liable.[62]

C. Constitutional Concerns with Agricultural Disparity Laws

The special status of agricultural disparagement relative to defamation law more generally raises serious First Amendment concerns.[63] To be sure, defamation is one of the historical categories of speech that the Court has treated as unprotected.[64] But that does not mean that all laws purporting to restrict or prohibit defamatory conduct are insulated from First Amendment scrutiny.[65]

In *New York Times Co. v. Sullivan*, the Supreme Court established that when a defamation plaintiff is a public official, he or she must prove that the defendant had "actual malice" when he or she made false statements about the plaintiff.[66] The Court has expanded this application to public figures as well.[67] It determines whether an individual is a public figure "by looking to the nature and extent of an individual's participation in the particular controversy giving rise to the defamation."[68] The Court has also stated that public figures generally have greater access to channels of communication to contradict a lie than the general public, and public figures "invite attention and comment" so that they can "influence the resolution of the issues involved."[69] This allows a court to deem a private individual a limited public figure for particular issues depending on the context of the situation.[70]

In short, a defamation action for one who can be deemed a public figure or limited public figure requires a heightened pleading and proof requirement that does not apply to other torts. While the Supreme Court

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61. ARIZ. REV. STAT. ANN. § 3-113(E)(1) (1995); FLA. STAT. § 865.065(2)(a) (1995); LA. REV. STAT. ANN. § 3:4502(1) (1991); OKLA. STAT. tit. 2, § 5-102 (2001) (stating the elements of the statutes, including required *mens rea*).

62. 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).

63. *See* U.S. CONST. amend. I.

64. *R.A.V.*, 505 U.S. at 383.

65. Although a few courts have explicitly applied the First Amendment requirement for defamation to product disparagement cases, the Supreme Court itself has not yet had occasion to do so.

66. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 279–80 (1964).

67. Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).

68. *Id.*

69. *Id.* at 344–45.

70. *Id.* at 352.

has not specifically addressed whether a product manufacturer is a public figure or a limited public figure for issues relating to their product's safety or production, such a conclusion seems correct insofar as manufacturers generally seek out as much public attention for their products as possible and regularly engage with the media. Corporations also have more access to the media and channels of communication than a purely private party. And at least two district courts have held that a product manufacturer was, indeed, a public figure.[71]

On the basis of the First Amendment requirement of actual malice alone, many state food disparagement statutes are facially unconstitutional. If falsehoods about products are entitled to at least as much First Amendment protection as falsehoods about persons, and if corporations are public (or limited public) figures, then tort liability cannot exist absent a showing of actual malice. And yet, many of the agricultural disparagement statutes impose liability on the speaker without also requiring that the speaker act with "actual malice."[72]

Even if a court does not deem the agriculture industry a limited public figure, there may be other constitutional concerns arising out of existing defamation law. In *Gertz*, the Supreme Court held that states are able to pass statutes regarding liability for defamation so long as those statutes "do not impose liability without fault."[73] Thus, the food disparagement statutes that allow for strict liability will almost certainly be found unconstitutional.[74]

Similarly, in *Gertz*, the Court held that a negligence standard is acceptable for defamation claims brought by private individuals, but punitive damages cannot be awarded unless the "actual malice" standard from *New York Times* is satisfied.[75] If negligence is the cause of injury in a defamation claim and the plaintiff is a private individual, then the plaintiff may only recover compensatory damages for an "actual injury" suffered from the defamation.[76] Thus, the food disparagement statutes

71. Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 513 (1984) (describing how the Supreme Court allowed Bose to be treated as a public figure in a product disparagement case following a Consumer Reports review of one of Bose's products); Quantum Elecs. Corp. v. Consumers Union of U.S., Inc., 881 F. Supp. 753, 766 (D.R.I. 1995) (finding that Quantum, a manufacturer of Ozone ozonators, was a limited purpose public figure as a matter of law because of "the preexisting public controversy about ozone and ozonators, Quantum's clear efforts to influence the outcome of the controversy, and Quantum's access to the media").

72. Bederman, *supra* note 60, at 206–07.

73. *Gertz*, 418 U.S. at 347.

74. Kohen, *supra* note 57.

75. *Gertz*, 418 U.S. at 350.

76. *See id.* at 349–50.

that allow for punitive damages without "actual malice" will likely be found unconstitutional under this standard.[77]

Finally, the food disparagement statutes implicitly shift the burden of proof to the defendant to prove the truthfulness of their criticism, thus raising another constitutional concern. The Supreme Court has recognized that for defamation cases, it is a "constitutional requirement that the plaintiff bear the burden of showing falsity, as well as fault, before recovering damages."[78] If a food disparagement statute permits liability whenever a speaker's statements are not solidly grounded in reasonable and reliable scientific data, then the burden of proof is effectively shifted to the defendant to demonstrate that what they said is true. In effect, such statutes would presume the falsity of critical statements that cause harm to the agricultural industry, and as such are irreconcilable with the constitutional limits imposed on defamation liability.[79]

D. Cases Challenging Agricultural Disparagement Statutes

While these food disparagement laws seem eminently infirm from a constitutional perspective, challenges to these statutes in actual cases have been shockingly rare. But the infrequency of the challenges flows directly from the rarity of the use of the laws—the disparagement statutes are virtually unused in every state.[80] Only two cases have resulted in published opinions: *Texas Beef Group v. Winfrey*[81] and *Action for a Clean Environment v. Georgia*.[82] Neither case addressed the constitutionality of the statutes.[83]

When the agricultural industry claims disparaging remarks have been made and brings litigation under the meat or food disparagement laws, the cost of litigation for defendants is enormous. In 1996, Oprah

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77. ALA. CODE. § 6-5-622 (1993) ("[Plaintiff can recover] damages . . . including but not limited to, compensatory and punitive damages."); OHIO REV. CODE ANN. § 2307.81(C) (West 2014) ("If the plaintiff establishes that the disseminator knew or should have known that the information was false, damages may be awarded, including compensatory and punitive damages . . . .").

78. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

79. ALA. CODE § 6-5-621(1) (1993); GA. CODE ANN. § 2-16-2(1) (1993); LA. REV. STAT. ANN. § 3:4502(1) (1991); MISS. CODE ANN. § 69-1-253(a) (1994).

80. Much like the terrorism crime statutes enacted under the AETA, the laws function like a scare tactic, but one that is rarely pursued. "South Dakota is one of 13 states with a food disparagement law, although these laws have not been used very often in litigation." DELTA & MATSUURA, *supra* note 44, § 11.03.

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

82. Action for a Clean Env't v. Georgia, 457 S.E.2d 273 (Ga. Ct. App. 1995).

83. Eileen Gay Jones, *Forbidden Fruit: Talking About Pesticides and Food Safety in the Era of Agricultural Product Disparagement Laws*, 66 BROOK. L. REV. 823, 842 (2001); Kohen, *supra* note 57, at 271.

Winfrey aired a segment on her show about mad cow disease.[84] During the segment, one of the guests, a farmer named Howard Lyman, made statements indicating it was his belief that the threat of mad cow disease in the United States could be a worse epidemic than AIDS.[85] Following the segment, the Texas beef industry experienced an economic depression that lasted for about three months,[86] leading Texas cattle farmers to band together and file suit against Oprah using the Texas agricultural disparagement statute as their cause of action.[87]

A defendant will be found liable under the Texas agricultural disparagement statute if he or she "(1) disseminates in any manner information relating to a perishable food product to the public; (2) . . . knows the information is false; and (3) the information states or implies that the perishable food product is not safe for consumption by the public."[88] In determining whether the information is false, the Texas statute provides that "the trier of fact shall consider whether the information was based on reasonable and reliable scientific inquiry, facts, or data."[89]

After lengthy litigation, the appellate court affirmed the district court's verdict in favor of Oprah and ruled that no statements on the show were made with the actual knowledge that they were false.[90] The district court previously held that there was "no evidence by which a reasonable juror could conclude that the Defendants had actual knowledge of the falsity, if any, of the statements made."[91] Because the court found that there was not enough evidence to support the defendants' knowledge of the potential falsity of the information as a matter of law, there was no ruling on whether the information was actually false. Further, the court avoided answering questions regarding the constitutionality of the statute by finding that the claim did not fulfill all of the elements of the Texas agricultural disparagement statute and dismissing the case.[92]

In the only other published case, an environmental group brought a case against Georgia, seeking a declaratory judgment on the constitutionality of Georgia's agricultural disparagement statute.[93] The court ended the case by determining no actual controversy existed because Georgia

84. Tex. Beef Grp. v. Winfrey, 201 F.3d 680, 684 (5th Cir. 2000).
85. *Id*. at 683.
86. *Id.* at 684.
87. *Id.*; TEX. CIV. PRAC. & REM. CODE ANN. § 96.002 (West 1995).
88. TEX. CIV. PRAC. & REM. CODE ANN. § 96.002 (West 1995).
89. *Id.* § 96.003.
90. *Tex. Beef Grp.*, 201 F.3d at 688.
91. Tex. Beef Grp. v. Winfrey, 11 F. Supp. 2d 858, 863 (N.D. Tex. 1998).
92. *Id.*
93. Action for a Clean Env't v. Georgia, 457 S.E.2d 273, 273 (Ga. Ct. App. 1995).

had no legal interest in the case,[94] thus stripping the court of the jurisdiction to opine on the constitutionality of the statute.[95]

Currently, there is an ongoing case brought under the South Dakota agricultural disparagement statute.[96] In March 2012, American Broadcasting Company News (ABC) covered a product made by Beef Products, Inc. (BPI), a South Dakota based company.[97] During its coverage, ABC discussed BPI's product, lean finely textured beef. BPI alleged that ABC referred to the beef product as "pink slime" that was unsafe for the public to consume and that was an "economic fraud."[98] In response to BPI's allegations, ABC argued that it was merely reporting on the contents of food and how food is labeled, stating it is clearly a matter of public interest.[99] ABC moved to dismiss the case, but the South Dakota Supreme Court denied the motion in May of 2014, ordering the case to move on to the discovery phase.[100] Now, if the court finds ABC liable for agricultural disparagement, BPI would be entitled to $1.2 billion, triple the amount of claimed damages.[101] As this case continues to progress, it seems inevitable that the constitutional challenges to South Dakota's food disparagement law will be litigated.

It is unclear why more cases have not been brought under these statutes. It is possible that these laws are serving their intended purpose: stopping people from speaking negatively about the agriculture industry for fear of liability. In *Texas Beef Group*, Lyman was fortunate to have Oprah's financial backing. But in situations where such financial backing is not available, defendants might not be successful in their defenses or might not be able to afford litigation at all.[102] Book publishers, television shows, and news networks have made statements implying that they are reluctant to publish or air pieces that portray the agriculture industry in a negative light.[103]

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94. *See id.* at 274.

95. *Id.*

96. *See* S.D. CODIFIED LAWS § 20-10A (2012).

97. Nicole C. Sasaki, Comment, *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).

98. *Id.*

99. *Id.* at 772–73.

100. Dave Dreeszen, *S.D. Supreme Court Denies ABC Appeal in BPI Defamation Case*, SIOUX CITY J. (May 22, 2014), http://siouxcityjournal.com/news/local/a1/s-d-supreme-court-denies-abc-appeal-in-bpi-defamation/article_ced96cad-4732-5f19-9954-9738b83297d4.html.

101. *Id.*

102. Fell, *supra* note 53, at 1022.

103. *See* Kohen, *supra* note 57, at 275–76 (stating that book publishers, Discovery Channel, and news networks have cancelled their products after being faced with lawsuits under agricultural disparagement statutes).

Because of the few challenges these laws have faced, legislatures bent on disfavoring speech critical of the agricultural industry have become increasingly emboldened. In the face of little resistance to the agricultural disparagement laws, states have taken the next big leap and criminalized access to and recording on agricultural sites through a variety of statutes, colloquially referred to as "Ag Gag laws."

III. THE AG GAG LAW ERA

If terrorism charges deter direct action and disparagement laws chill certain forms of speech, Ag Gag laws go one step further by cutting off speech critical of food producers at an earlier stage in the process—that is to say, Ag Gag laws criminalize the conduct that is necessary to facilitate whistleblowing and reporting about the production of food in this country.[104] The laws criminalize, among other things, deceptive entry—think Upton Sinclair and his undercover employment at a meatpacking plant—and recording without explicit consent by anyone who is present—think of a longtime employee who pulls out a cellphone to document a major environmental or food safety concern. As Justice Scalia has explained in the campaign finance context, if the government is allowed to "[c]ontrol any cog in the [speech] machine, [it] can halt the whole apparatus."[105] By cutting off the right to access and to document misdeeds in the production of food, these laws cut off a critical supply of speech that is critical of the agricultural industry. Food disparagement laws limit one's ability to speak negatively by imposing tort liability, but Ag Gag laws go one step further by limiting one's ability to create the speech necessary for the critique. Just as a restriction on pure speech is problematic, so too is a limit on the ability to create speech. As the Court has recognized, "Laws enacted to control or suppress speech may operate at different points in the speech process."[106]

In this regard, it is notable that the rise of Ag Gag laws corresponds with the success of recent undercover whistleblowing investigations. Following the largest beef recall in U.S. history, based on an investigation

104. The term "Ag Gag" was coined by Mark Bitman, an American food journalist, author, and columnist for the New York Times. He started using the name Ag Gag in April 2011 when he explained that the Ag Gag law in Minnesota would "seek to punish not only photographers and videographers, but those who distribute their work." Mark Bitman, *Who Protects the Animals*, N.Y. TIMES (Apr. 26, 2011), http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_r=0.

104. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 251–52 (2003) (Scalia, J., concurring in part and dissenting in part), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

105. *Citizens United*, 558 U.S. at 336–37.

by the Humane Society of the United States (HSUS)[107] and shocking exposés at dairies like the Bettencourt Dairy in Idaho,[108] legislators have sought to criminalize recording or accessing agricultural facilities.[109] Just when whistleblowing in the food industry was starting to have an effect, legislatures have started criminalizing the efforts to whistleblow in these industries. To date, Ag Gag laws have now been introduced in more than half of the nation's states,[110] and eight states have enacted Ag Gag laws.[111]

A. The Introduction of Ag Gag Laws

The first wave of Ag Gag laws emerged in the early 1990s. In this initial wave, Ag Gag laws sought to further protect agricultural facilities against bad press and property damage, focusing mainly on intentional damage to property and non-consensual entry. These statutes, in a sense, did not really do anything new, as they criminalized activity that was already criminal. Not surprisingly, there are no reported convictions under these laws. Illustrative of this model is 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.[112] The Kansas law set the foundation for Ag Gag legislation by stating:

> (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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107. *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.

108. Associated Press, *Idaho Workers Charged With Animal Cruelty at Bettencourt Dairies' Dry Creek Dairy*, N.Y. DAILY NEWS (Oct. 11, 2012), http://www.nydailynews.com/news/national/watch-animal-cruelty-filmed-idaho-dairy-article-1.1180094.

109. Michael McFadden, *Exposing Ag Gag*, FARM FORWARD (Nov. 7, 2014), http://farmforward.com/2014/11/07/exposing-ag-gag/.

110. Since the early 1990s, "almost 30 states have introduced bills banning or restricting undercover investigations surrounding the abuse of farmed animals." *Id.*

111. Idaho (passed in 2014) (IDAHO CODE ANN. § 18-7042 (West 2014)), Iowa (passed in 2012) (IOWA CODE ANN. § 717A.3A (West 2012)), Missouri (passed in 2012) (MO. ANN. STAT. § 578.013 (West 2012)), South Carolina (passed in 2012) (S.C. CODE ANN. § 47-21 (2012)), Montana (passed in 1991) (MONT. CODE ANN. § 81-30-101–105 (West 2012)), North Dakota (passed in 1990) (N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 1991)), and Kansas (passed in 1991) (KAN. STAT. ANN. § 47-1827 (West 2012)).

112. KAN. STAT. ANN. § 47-1827 (West 2012).

> (3) enter an animal facility to take pictures by photograph, video camera or by other means.[113]

In 1991, Montana enacted a similar law, but unlike any other Ag Gag law, Montana's law directly addressed defamation by making it a crime "to enter an animal facility to take pictures by photograph, video camera, or other means with the intent to commit criminal defamation."[114] The Montana law does not make any material changes to the scope of criminal liability—one is only guilty if he has the intent to defame, that is, maliciously spread mistruths.

Later in the same year, North Dakota passed a more expansive version of an Ag Gag law, creating criminal liability for people releasing animals. Additionally, the North Dakota law criminalizes people not only for committing one of the acts described in the statute, but also for *attempting* to commit an act described in the statute or *attempting* to use recording equipment:

> No person without the effective consent of the owner may:
>
> 1. Intentionally damage or destroy an animal facility, an animal or property in or on the animal facility, or any enterprise conducted at the animal facility.
>
> 2. Acquire or otherwise exercise control over an animal facility or an animal or other property from an animal facility with the intent to deprive the owner and to damage the enterprise conducted at the facility.
>
> . . . .
>
> 6. Enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment.
>
> 7. Intentionally turn out or release any animal in or on an animal facility.[115]

Each of these first-wave Ag Gag laws shared a threshold requirement for criminal liability—they all require non-consensual entry and some other act such as non-consensual recording. That is, in addition to

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113. *Id.* § 47-1827(c)(1), (3).

114. MONT. CODE ANN. § 81-30-103(2)(d) (West 2012) ("A person who does not have the effective consent of the owner and who intends to damage the enterprise conducted at an animal facility may not . . . enter an animal facility to take pictures by photograph, video camera, or other means with the intent to commit criminal defamation . . . .").

115. N.D. CENT. CODE ANN. § 12.1-21.1-02 (West 1991) ("No person without the effective consent of the owner may . . . enter an animal facility and use or attempt to use a camera, video recorder, or any other video or audio recording equipment.").

traditional trespass, one could now face liability for the non-consensual recording or documenting of unsavory practices as well. As explained below, the current generation of Ag Gag laws criminalize a broader range of conduct, including recording while present based on consent.

B. Current Ag Gag Laws

Twenty-one years after the first Ag Gag laws were enacted, in 2012, a new wave of even more restrictive Ag Gag laws emerged. This new generation of Ag Gag laws seeks to provide corporate agriculture production facilities with an unprecedented layer of secrecy. No other industry enjoys such broad anti-whistleblower statutes. All industries are protected against trespass and the theft of trade secrets. For example, under the federal theft of trade secrets statute, it is a crime to steal or copy valuable information with the intent to injure the owner of the trade secret.[116] However, no other single industry has specific laws protecting it from all whistleblowing, regardless of whether trade secrets or intellectual property is threatened.

Iowa spearheaded the new wave of Ag Gag laws by enacting the first of this new, more restrictive set of prohibitions on whistleblowing. The Iowa law provides:

> 1. A person is guilty of agricultural production facility fraud if the person willfully does any of the following:
>
> . . . .
>
> 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 intent to commit an act not authorized by the owner . . . [and] knowing that the act is not authorized.[117]

Also in 2012, Utah passed a similar law that provides:

> (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;

116. 18 U.S.C. § 1832(a) (2012).

117. IOWA CODE ANN. § 717A.3A(1)(a)–(b) (2012).

> (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 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; . . . .[118]

Not surprisingly, legislators who advocate for these new Ag Gag laws strategically avoid discussing animal cruelty, food safety, sanitation, and environmental problems and instead redirect the debate toward protecting people whose livelihoods depend on the agriculture industry. In fact, a substantial number of legislators who favor Ag Gag laws center their arguments around the falsity of undercover videos and prey on the common fears of families and small businesses of being misrepresented and put out of work by extreme activists. In states like Idaho, where a large portion of the population is involved in the agriculture industry, these arguments proved convincing. In 2014, Idaho's version of an Ag Gag law passed the House and Senate by an overwhelming majority.[119] The text of the Idaho statute provides:

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

118. UTAH CODE ANN. § 76-6-112(2)(a)–(c)(iii) (West 2012).

119. This Bill passed the House with 56 Ayes and 14 Nays and the Senate with 23 Ayes and 10 Nays. *See* S. 1337, 62d Leg., Senate Bill 1337 Legislative History (Idaho 2014), *available at* http://www.legislature.idaho.gov/legislation/2014/S1337.htm.

> zation, makes audio or video recordings of the conduct of an agricultural production facility's operations; . . . .[120]

Notably, under Idaho law, it is a crime to engage in an employment-based investigation (or to otherwise gain access by deception) or to engage in recording activities when one is otherwise lawfully present.[121] This goes well beyond the previous generation of Ag Gag laws, which have gone entirely unused. And, as previously noted,[122] the introduction of Idaho's Ag Gag law was a direct response to an undercover investigation video that was publicized by Mercy for Animals.[123] 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.[124] Like many undercover investigations that have been publicized, airing this video on ABC grabbed the public's attention.[125] Thus, in an effort to rescue Idaho's corporate agriculture industry, the Idaho Dairymen's Association[126] began drafting an Ag Gag bill and informing people of their vulnerability to undercover investigations.[127]

The bill was later introduced on a Monday, approved by the Senate Agricultural Affairs Committee on Tuesday, and passed the full Senate on Friday of the same week.[128] In just over two-and-a-half weeks after being introduced, the bill was codified and effective, proving the steamroller power of agricultural lobbying efforts.[129] Dan Steenson, a lobbyist

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120. IDAHO CODE ANN. § 18-7042(1)(a)–(d) (West 2014).

121. *See* IDAHO CODE ANN. § 18-7041(1) (West 2014).

122. Associated Press, *supra* note 108.

123. 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.

124. *Id.*

125. *See, e.g.*, *id.*

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

127. 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-779150704.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).

128. 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, http://www.legislature.idaho.gov/legislation/2014/S1337.htm (last visited Apr. 26, 2015).

129. 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*,

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,"[130] because such groups go on to prosecute farms "in the court of public opinion."[131]

The court of public opinion is the last place that the corporate agriculture industry wants to be, and many who supported the bill were not afraid to address this fear. Indeed, many of the bill's proponents continually referred to activists and journalists as terrorists. Tony VanderHulst, the president of the Idaho Dairymen's Association, introduced himself as the representative of all dairy producers in Idaho, and explained that the bill "protects from systematic attacks by terrorists."[132] He also continually pointed out that "farm terrorists" lie and are deceitful.[133] Along similar lines, 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.[134] He also pointed out that the "edited video was used to attack this innocent Idaho farmer in an attempt to utterly destroy him economically."[135] And Representative Linden Bateman stated that this film "is not at all remotely characteristic to what happens in Idaho or anywhere else in the West as far as I'm concerned."[136] 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. But supporters of Ag Gag laws prefer the fiction to the facts; they do not mention that the videos and exposes released to the public are in fact true, and if one ever is not, it will result in massive compensatory and punitive damages to the aggrieved party. Instead, VanderHulst simply threw up a distracting smoke

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FOOD SAFETY NEWS (Feb. 20, 2014), http://www.foodsafetynews.com/2014/02/idahos-senate-passed-ag-gag-bill-close-to-vote-in-house/#.VRRr5vnF92s.

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

131. *Id.* at 7.

132. *Id.* at 21.

133. Tony VanderHulst's full quote: "Why should those who lie, are deceitful, misrepresent themselves, and openly have an anti-animal/agricultural agenda be allowed to masquerade under the banner." *Id.* at 21.

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

135. *Id.* at 8.

136. H. Deb. on S.B. 1337, 2d Reg. Sess., at 3 (Idaho 2014) (on file with author).

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."[137]

Many others who supported the bill directed the debate away from animal cruelty with the same tactics. Senator Jim Patrick, who sponsored the bill, stated, "[T]errorism ha[s] been used by enemies for centuries [to] destroy the ability to produce food."[138] He justified the need for the bill by asserting, "This is the way you combat your enemies."[139] In effect, the advocates for the bill collectively articulated that terrorists were prosecuting the agriculture industry in the court of public opinion, leaving the agriculture industry with no way of even attempting to prove its innocence. Thus, the powerful representatives of the agriculture industry strategically came up with a law allowing these roles to be flipped: the industry has control of who is prosecuted, the activists are the criminals,[140] and farms like Bettencourt Dairies are the true victims. In effect, the abused animals are erased from the picture.

In essence, the industry wants to do what it could not under disparagement laws; it wants to punish those who damage its reputation through nondefamatory speech. Indeed, in a telling provision of the Idaho Ag Gag law, investigators charged with agricultural interference are required to pay "restitution" of two times the damages to the facility.[141] That is to say, the Idaho law would require a journalist or activist to compensate a farm that has its reputation injured by the production and distribution of a truthful audiovisual recording. Nothing is more anathema to the First Amendment than punishing someone for the impact of their truthful speech in shaping political values.

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137. *H. Agric. Affairs*, *supra* note 130, at 21.

138. *S. Agric. Affairs, supra* note 127, at 46.

139. *Id.*

140. Any expose or recording that does not reveal truth can be actionable defamation. For example, in 2014, the Tenth Circuit upheld an insurance broker's defamation claim against NBC's *Dateline* for an exposé news report titled "Tricks of the Trade." Brokers' Choice of Am., Inc. v. NBC Universal, Inc., 757 F.3d 1125, 1149 (10th Cir. 2014). This short report was a compilation of video segments that had been carefully edited and rearranged. *Id.* at 1132. The finished product took 112 words out of a two-day seminar and depicted the broker "as one who teaches insurance agents how to employ misrepresentations and other questionable tactics in order to dupe senior citizens into purchasing inappropriate annuity products." *Id.* This case set precedent by demonstrating that even a video recording can be defamatory if it shows only a few minutes out of many hours of recorded material that somehow misleads the public or produces false impressions. *Id.* For this reason, the agriculture industry now only has to prove that undercover videos produce false impressions to succeed in a defamation claim. A false "gist" constitutes actionable defamation.

141. IDAHO CODE ANN. § 18-7042(4) (West 2014).

IV. THE FUTURE OF AG GAG

A. Quick Report Laws

As the agenda behind the current Ag Gag laws becomes increasingly transparent, advocates of Ag Gag laws have had to find alternative ways to gain support. Thus, Colorado and Missouri have started to pave a new road for enacting Ag Gag laws by morphing the legislation into mandatory report laws.[142] Similar to child abuse mandatory reporting laws, these new laws require reporting of animal abuse within as little as twenty-four hours. 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.[143]

Similarly, in Colorado, a bill pending at the time of this writing provides: "Any person who fails to provide law enforcement with physical evidence of animal abandonment, mistreatment or neglect within 48 hours after obtaining the physical evidence commits the offense[,] . . . a class 3 misdemeanor."[144]

Representatives and senators portray these bills as aids for animal welfare. These are not Ag Gag laws, so the mantra goes, these are laws designed to protect animals. And there is a certain superficial appeal to the idea that refusing to report abuse is tantamount to abuse itself. But the reality is a bit more complicated. In intent and effect these laws impede journalistic and other undercover investigations of food producing facilities.

First, there is no evidence that there is a problem with people failing to report animal abuse to authorities, and thus these laws provide no concrete benefits to animals.[145] No one has suggested that there is a rash of domestic animal (or farmed animal) abuse that is simply kept secret. On the other hand, these laws do effectively accomplish the agriculture

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142. Colorado introduced a mandatory report law in 2014, and it failed. Mandatory Reports of Animal Abuse, S.B. 15-042, 70th Leg. (Colo. 2015).

143. MO. ANN. STAT. § 578.013 (West 2012).

144. Colorado Senate Committee of Reference Amendment, S.B. 15-042 (Jan. 23, 2015).

145. *See* Justin Marceau & Nancy Leong, *Proposed Bill Will Lead to More Animal Abuse, Not Less*, DENVER POST (Jan. 23, 2015), http://www.denverpost.com/opinion/ci_27381708/proposed-bill-will-lead-more-animal-abuse-not.

industry's purpose of making it impossible to expose what is actually going on inside factory farms. For one thing, if every act of cruelty requires an immediate outing of the undercover investigator, then showing patterns of abuse or complicity on the part of management is impossible. The considerable costs and efforts expended in obtaining undercover employment have to be forfeited at the first sign of criminal abuse. This means that an investigator who observes a single act of abuse on an animal that is walking to its lawful (and imminent) slaughter must end the investigation, turn the evidence relating to the single act over to law enforcement, and abandon any hope of establishing patterns of abuse or systemic failings on the part of the industry. Particularly for discrete and completed acts of abuse—as opposed to some ongoing torture of an animal over the course of weeks or months—it makes no sense to force the untimely end of an investigation. The journalist or investigator, not the government, should be able to decide what she wants to speak about, when, and what form the speech will take. After all, US jurisdictions have resoundingly renounced the notion that it should *be a crime* to fail to report a crime, even when the crime one observes is murder or rape. So it would be incongruous in the extreme to say that for this one crime (perhaps just a misdemeanor), reporting must be immediate and without exceptions. The very uniqueness of such a requirement belies the claim that something sinister and speech suppressing underlies these legislative efforts.

Moreover, it is very difficult for a lay worker to be able to detect what is and what is not animal abuse. For example, the excruciating act of shackling and hoisting a cow may be legal, but a single relatively slight punch to the same cow for sadistic pleasure may be a crime. More importantly, quick report laws 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 by exposing explicit or implicit sanction for abuse.

Simply put, quick report laws are the proverbial wolf in sheep's clothing. The industry hopes that the public will be enticed by the logical sounding imperative that all abuse be quickly reported. But the industry knows that such a mandate will make long-term investigations impossible by forcing undercover investigators to out themselves to law enforcement at the first sight of an act of abuse. These laws do nothing to protect animals, but threaten to upend the model of whistleblowing that has emerged as the gold standard among modern animal activists—the employment-based investigation.

B. Expanding the Definition of Trespass: The SLAPP Suit[146]

Another form of Ag Gag related litigation has emerged through the creative use of existing trespass laws to harass nonprofits and activists. An illustrative example is a pending trespass case in Wyoming against the Western Watershed Project (WWP). Among other things, WWP monitors water quality in federal waterways.[147] Recently, WWP found that contaminant levels, including *E. coli*, were hundreds of times higher than the lawful limit.[148] The *E. coli* appears to be the result of cattle grazing adjacent to the waterways in question. In response to the water quality findings, the sixteen individual Wyoming ranchers whose cattle were using the land along the waterways banded together and filed a suit for civil trespassing against the WWP.[149] They sued for trespass because someone revealed an *E. coli* risk present in the waterways adjacent to their lands.

The right to be free from trespass is a sacred American tradition. One has a right to remain free from intrusion on his private land. But the damages for trespass are generally nominal unless the party can show some actual harm. For this reason, it is uncommon for someone to sue, for example, the neighbor kids who frequently cut across one's front yard while running to the school bus. The school kids have trespassed, but so long as they did not cause any actual damage, the expected recovery would not normally justify a lawsuit. Taking this analogy one (admittedly morbid) step further, imagine that in cutting across a fenceless yard, the school kids fall into a pit of dead bodies. On such facts, the kids' trespass was illegal and their trespass was the "but for" cause of the discovery of human bodies. One could still sue the kids for trespass, but as in the initial hypothetical, the damages for such a trespass are nominal. The serial killer whose pile of bodies is discovered may be more unhappy about trespassing kids than the average person would be, but the fact that the kids discovered his crime (or his victims) does not make the kids the cause of the harm to the murder victims. To sue these children (or prosecute them) is to try and punish them for the very activity that discovered the public harm. The relatives of the victims in my hypothetical,

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146. GEORGE W. PRING & PENELOPE CANAN, SLAPPS: GETTING SUED FOR SPEAKING OUT (1996).

147. *Landowners File Trespass Lawsuit Against Western Watershed Project*, COUNTY 10 (June 6, 2014), http://county10.com/2014/06/16/landowners-file-trespass-lawsuit-western-watersheds-project/.

148. *Id.*

149. *Id.*

no less than the persons given notice of *E. coli* in federal waterways they use, might find punishing the messenger a very strange choice.

The same general reasoning applies to the trespass case against WWP.[150] Even assuming WWP trespassed, which they vigorously and credibly contest, the harm to the ranchers is nominal.[151] The harm to the ranchers is no different when a hunter trespasses to shoot a deer or a WWP intern trespasses to test a water sample. But the fact that the ranchers brought this lawsuit against WWP (and never have brought such a case against hunters) strongly suggests that they believe WWP is responsible for harming their reputation by publishing data suggesting that their grazing practices have resulted in serious damage to public waterways. In this way, the traditional law of trespass is being distorted into an Ag gag effort; they seek to silence the reporting of the data and treat the data as having been caused (or tainted) by the trespass.

This trespass suit reflects an effort by the agricultural industry to divert attention away from their practices and to vilify WWP. Following the playbook of Ag Gag laws, the lawsuit seeks to kill the messenger for delivering a nondefamatory, truthful message about modern agricultural practices. Making the motives of such litigation transparent, the Wyoming legislature, at the urging of the ranching community, recently passed a law that would prevent state agencies from relying on information gained during a trespass. The proposed bill, which was introduced explicitly as a way to curb the power of WWP, states:

> No resource data collected [while trespassing] is admissible in evidence in any civil, criminal or administrative proceeding, other than a prosecution for [trespassing] or a civil action against the violator. This subsection applies whether or not the [trespassing] was prosecuted or resulted in a conviction. . . . Resource data collected [while trespassing] in the possession of any governmental entity . . . shall be expunged by the entity from all files and data bases, and it shall not be considered in determining any agency action.[152]

As referenced above, resource data is defined as "data relating to land or land use, including but not limited to data regarding agriculture, minerals, geology, history, cultural artifacts, archeology, air, water, soil,

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150. *See* Def's Mot. Dismiss at 5, Frank Ranches Inc. v. Ratner, No. 40007 (D. Wyo. Dec. 11, 2014).

151. I represent WWP in this case and my views are obviously shaped by this fact. WWP's defense to trespass includes the fact that they claim to have accessed the waterways on federal easements.

152. Trespassing to Collect Data, S. File 0012, 63d Leg. (Wyo. 2015), *available at* http://legisweb.state.wy.us/2015/Engross/SF0012.pdf.

conservation, habitat, vegetation or animal species."[153] This law, then, is the functional equivalent of making it impermissible for the government to prosecute the serial murderer when the bodies are discovered only because the kids trespassed. If an environmental activist crossed private property without the permission of the landowner and discovered that the landowner was putting cyanide into the water supply, the activist would not be able to compel any kind of state agency action because the agency would be forced to ignore any data gathered. The law, then, is just the latest in a series of efforts to silence the critics of agriculture; it is an explicit effort to prevent state agencies from taking action to correct harms to the environment based on valid water quality data. Like other Ag Gag laws, there is no requirement that the information be *actually* false. Instead, politically valuable information, even information relevant to public health, must be ignored if the industry contests the method by which it was gathered. Bills like this give lie to the claim that Ag Gag efforts are only about protecting property rights. These laws (and related actions) are about insulating bad actors from whistleblowing and accountability for their bad acts.

V. CONCLUSION

The trinity of animal activism is direct action, criticism (and litigation), and information gathering through investigation. Each of these tried and tested methods face legal barriers in the form of terrorism statutes, food disparagement laws, and now Ag Gag laws. Ag Gag laws themselves are quickly evolving. The initial statutes required an unlawful entry, but the second generation of such laws criminalizes all access by deception and recording. Still another wave of Ag Gag laws—quick reporting and trespass—seeks to control the manner and timing of the use of information gathered. In short, Ag Gag laws operate at differing points along the speech continuum, some criminalizing the production of an anti-industry message, and others criminalizing the manner of distribution of such messages. All of these laws share a common purpose: incapacitating an increasingly influential movement—the animal rights movement. Anyone interested in food safety, worker rights, environmental protection, or animal rights, should be deeply concerned about the proliferation of these laws.

153. *Id.*