# BOUND & GAGGED: POTENTIAL FIRST AMENDMENT CHALLENGES TO "AG-GAG" LAWS

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*In an effort to stifle undercover investigations of factory farms, the agricultural industry has pushed forward a slate of bills that limit audio and video recording on farms. This Note describes the different types of "ag-gag" bills legislators have proposed across the nation, and evaluates potential First Amendment challenges to the bills. The Note concludes that the ag-gag laws most likely to pass do not obviously implicate First Amendment rights and advises activists to plan their investigations in anticipation of future legal challenges.*

## INTRODUCTION

In recent years, a series of undercover videos have exposed shocking animal abuses and unsanitary practices at factory farms across the country. One 2011 video showed employees at a Texas cattle farm bashing cows' heads with pickaxes.[1] Another, filmed in 2009 at a Vermont slaughterhouse, showed a worker pouring water on a downed calf's head to increase the electric current as he shocked the calf again and again.[2] In California, a 2008 video showed workers pushing downed cows with a forklift to force them to stand for

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1. Lester Aldrich, *Texas Sheriff Investigates Animal-Cruelty Video Rattling Cattle Market*, WALL ST. J. (Apr. 20, 2011), http://online.wsj.com/article/SB10001424052748704658704576275091620222926.html?mod=googlenews_wsj; Kevin Lewis, *Charges Filed in E6 Cattle Case*, PLAINVIEW HERALD (May 26, 2011, 4:30 PM), http://www.myplainview.com/news/article_5ee448d4-87e0-11e0-be0a-001cc4c03286.html.

2. John Curran, *2 Vt. Slaughterhouse Workers Charged with Cruelty*, BOS. GLOBE (June 4, 2010), http://www.boston.com/business/articles/2010/06/04/2_vt_slaughterhouse_workers_charged_with_cruelty.

inspection.[3] The workers then subjected the cattle to a "veterinary version of waterboarding" by shooting high-intensity water sprays up their noses.[4]

The abuses in Texas and Vermont both led to criminal charges against the farm operators and the employees who perpetrated the violent acts.[5] The California video led not only to criminal charges of animal abuse, but also to the largest meat recall in U.S. history: 143 million pounds of beef—the meatpacker's entire production for two years—were recalled.[6]

These exposés impose high costs on the meat industry in the form of litigation, recalls, and lost sales.[7] To shut off this costly flow of undercover videos, politicians across the nation have recently pushed forward a series of anti-whistleblower bills known as "ag-gag" laws.[8] Although they can take different forms, the ag-gag bills all work to severely limit documentation of agricultural activities.[9] Three states have had similar laws on the books since the 1990s, although they were seemingly uncontroversial when passed and are rarely, if ever, applied.[10] But between 2011 and 2013, legislative interest in ag-gag

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3. Rick Weiss, *Video Reveals Violations of Laws, Abuse of Cows at Slaughterhouses,* WASH. POST, Jan. 30, 2008, at A4, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/01/29/AR2008012903054.html.

4. *Id.*

5. Mark Bittman, Op-Ed., *Who Protects the Animals?*, N.Y. TIMES, Apr. 27, 2011, at A27, *available at* http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals; Curran, *supra* note 2.

6. David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST, Feb. 18, 2008, at A1.

7. GLYNN T. TONSOR & NICOLE J. OLYNK, KAN. STATE UNIV., U.S. MEAT DEMAND: THE INFLUENCE OF ANIMAL WELFARE MEDIA COVERAGE (2010), *available at* http://www.agmanager.info/livestock/marketing/animalwelfare/MF2951.pdf (finding that media reports significantly reduce demand for pork and poultry products).

8. Food writer Mark Bittman coined the term "ag gag" in a *New York Times* editorial. *See* Bittman, *supra* note 5. The term is now widely used to describe laws that limit photographing or video recording of agricultural facilities.

9. Although the undercover investigations targeted by the bills all took place at livestock facilities, many of the bills are specifically drafted so as to cover both animal and crop production facilities. For example, Iowa's new law defines "agricultural production facility" to include "an animal facility . . . and a crop production facility." H.R. 589, 84th Gen. Assemb. (Iowa 2012).

10. Kansas, Montana, and North Dakota passed ag-gag laws in the 1990s. *See* KAN. STAT. ANN. § 47-1827 (2006); MONT. CODE ANN. § 81-30-103 (2011); N.D. CENT. CODE § 12.1-21.1-02 (2011).

bills exploded. Legislators in sixteen states introduced ag-gag bills.[11] So far, only Iowa and Utah successfully enacted the bills,[12] but ag-gag laws remain pending in nine states. Despite this relatively low success rate, more and more state legislators are proposing ag-gag bills. Two bills were introduced in 2011, six in 2012, and nine in 2013.[13]

This Note provides an overview of ag-gag bills in the context of the First Amendment. Are any of these ag-gag bills constitutional? If so, are some more likely to pass constitutional muster than others? Part I provides an overview of applicable First Amendment doctrine. Part II examines the different forms taken by ag-gag laws across the nation and explores potential First Amendment challenges to the ag-gag bills. Part II also touches on "animal terrorism" laws, which are not always included under the ag-gag umbrella, but can also be used to restrict documentation of farm activities. Part III proposes precautions undercover activists can take to protect themselves against the ag-gag laws.

## I. POTENTIAL FIRST AMENDMENT CHALLENGES TO AG-GAG LAWS

Opponents often assert that ag-gag bills are unconstitutional.[14] As Part II will explore, the accuracy of that assessment depends

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11. Nine states introduced ag-gag bills in 2013. *See* H.R. 0110, 2013 Leg., Reg. Sess. (N.H. 2013); H.R. 0126, 2013 Gen. Sess. (Wyo. 2013); S. 373, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013); S. 391, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013); Leg. 204, 103d Leg., 1st Sess. (Neb. 2013); S. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); S. 14, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); H.R. 683, 2013–2014 Gen. Assemb., Reg. Sess. (Penn. 2013); S. 1248, 108th Gen. Assemb. (Tenn. 2013); S. 552, 51st Leg., 1st Sess. (N.M. 2013); Assemb. 343, 2013–14 Reg. Sess. (Ca. 2013). Florida, Illinois, Indiana, Iowa, Minnesota, Missouri, Nebraska, New York, and Utah all considered ag-gag laws in 2011 and 2012. *See* S. 1184, 2012 Gen. Assemb., Reg. Sess. (Fla. 2012); H.R. 5143, 97th Gen. Assemb. (Ill. 2012); S. 184, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012); Iowa H.R. 589 (2012); H.R. 1369, 87th Sess. (Minn. 2011); S. 695, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); Leg. 915, 102d Leg., 2d Sess. (Neb. 2012); S. 5172, 235th Gen. Assemb., Reg. Sess. (N.Y. 2011); H.R. 187, 2012 Gen. Sess. (Utah 2012). This list is updated as of March 20, 2013.

12. IOWA CODE § 717A.3A (2012); UTAH CODE ANN. § 76-6-112 (West 2012).

13. *See supra* note 11.

14. *See, e.g.*, Jason Clayworth, *Animal Rights Spokeswoman: 'Ag Gag' Won't Stop Us!*, DES MOINES REG., (Mar. 1, 2012), http://blogs.desmoinesregister.com/dmr/index.php/2012/03/01/animals-rights-spokeswoman-ag-gag-wont-stop-us ("[Activists] contend the bill is a constitutional violation of free speech"); Dan Flynn, *Iowa Approves Nation's First 'Ag-Gag' Law*, FOOD SAFETY NEWS (Mar. 1, 2012), http://www.foodsafetynews.com/2012/03/iowa-approves-nations-first-ag-gag-law/ ("Many see HF589 as an unconstitutional infringement on First Amendment rights."); Michelle Kretzer, *Cloris Leachman Takes on 'Ag Gag'*, PETA FILES (Feb. 27, 2012), http://www.peta.org/b/thepetafiles/archive/2012/02/27/cloris-leachman-takes-on-ag-gag.aspx (writing that PETA is "fighting back against this unconstitutional measure" in

greatly on the form of the bill. The content of the bills varies significantly from state to state. In general, though, the ag-gag bills can be roughly grouped into five categories. The specific characteristics of these bills will be explored in greater detail in Part II. In brief, each ag-gag bill is drafted to criminalize one of the following behaviors:

- Filming any agricultural activities (often called bans on "agricultural interference");
- Employment fraud in agricultural settings;
- Distribution of agricultural recordings;
- Trespass in agricultural facilities; and
- Delayed reporting of animal abuse.

This Part examines four potential First Amendment challenges to these ag-gag laws: A) overbreadth; B) freedom of the press; C) presumption against content-based restrictions and prior restraints; and D) limitations on incidental restrictions.

The strongest First Amendment challenges could be mounted against the broad "agricultural-interference" bills and those that limit distribution of recordings. However, because the other approaches to ag-gag laws intentionally evade issues of speech and expression, they will be much more difficult to challenge under the First Amendment.

### *A. Overbreadth*

A law violates the First Amendment for overbreadth if "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep."[15] A 2010 Supreme Court case, *United States v. Stevens*,[16] provides the most apt precedent in the ag-gag context. *Stevens* applied the overbreadth doctrine to invalidate a statute banning the creation and sale of depictions of harm to animals.[17] A First Amendment defense against ag-gag bills

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Utah); Nathan Runkle, *Video: CNN Covers Iowa "Ag-Gag" Law Debate*, MFA BLOG (Mar. 7, 2012), http://www.mfablog.org/2012/03/video-cnn-covers-iowa-ag-gag-law-debate.html (describing animal rights commentators as addressing the "unconstitutional nature of the bill").

15. Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442, 449 n.6 (2008) (quoting New York v. Ferber, 458 U.S. 747, 769–71 (1982)) (internal quotation marks omitted).

16. 130 S.Ct. 1577 (2010).

17. *Id.* at 1592; 18 U.S.C. § 48 (2006).

based on *Stevens* may not be as strong as some observers have implied, however.[18]

Congress passed the statute at issue in *Stevens* in reaction to "crush" films, a genre of sexual-fetish films that depict animals being killed, usually by being stepped on.[19] However, the statute more broadly criminalized both the creation and sale of depictions of any harm to animals (with the stipulation that the depicted conduct must also be illegal in the jurisdiction where the depiction was made, sold, or possessed).[20] Emphasizing the possibility that the statute could be construed to ban otherwise protected activities,[21] the Court struck it down for overbreadth.[22]

Like the statute at issue in *Stevens*, some ag-gag bills (particularly the agricultural-interference type) are written so broadly as to criminalize otherwise protected activities. For example, a Wyoming bill would find a person guilty of "interference with an agricultural operation" if they "knowingly or intentionally [record] an image or sound from the agricultural operation by concealing or placing a recording device on the premises of the agricultural operation" without the consent of the owner.[23]

These bills could be construed to ban legally permissible activities like employees taking pictures at work or a tourist taking a picture of a bucolic farm scene. Courts therefore have a strong basis to find that the agricultural interference ag-gag laws are unconstitutionally overbroad.

However, critical differences between undercover activist films and the films addressed in *Stevens* may weaken *Stevens*' precedential

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18. *See, e.g.*, Mickey H. Osterreicher, *Photography & the Law: New Laws Have Significant Impact*, JPG MAG (Mar. 11, 2012), http://jpgmag.com/news/2012/03/new-laws-have-significant-impact-on-photographyrecording.html (noting that *Stevens* spurred some legislatures' changes to ag-gag proposals); Amanda Peterka, *State Legislatures Take Up Bills Barring Undercover Videos of Confined Animal Feeding Operations*, N.Y. TIMES (May 5, 2011), http://www.nytimes.com/gwire/2011/05/05/05greenwire-state-legislatures-take-up-bills-barring-under-88103.html?scp=4&sq=ag%20gag&st=cse (noting that ag-gag laws could "run afoul of *United States v. Stevens*").

19. *Stevens*, 130 S. Ct. at 1583. The defendant in *Stevens* was not a producer of crush films, but sold videos of dogfights. *Id.* at 1583.

20. *Id.* at 1582.

21. *Id.* at 1588–89 (stating that a film could be in violation of the statute if it was made in a state that allowed a certain type of hunting and was then sold in another state that prohibited that type of hunting).

22. *Id.* at 1592.

23. H.R. 0126, 2013 Gen. Sess. (Wyo. 2013).

value in this context. Activists planning to challenge ag-gag laws based on the case should remain aware of three major distinctions.

First, the statute in question in *Stevens* is distinguishable from the proposed ag-gag laws because it foreclosed the *sale* of depictions of harm done to animals.[24] Undercover activist films are not for sale but are distributed free of charge to educate the public and spur political change. Agricultural activists' films would therefore not have been within the purview of that statute. Some courts may find that this fundamental difference renders the *Stevens* precedent inapplicable to the ag-gag context.[25]

Second, the *Stevens* holding is quite limited. *Stevens* does not hold that the First Amendment protects depictions of animal cruelty.[26] Much more narrowly, it holds that the statute in question was too broad. The Court specifically declined to reach the question of whether a more precise statute banning depictions of certain types of animal cruelty could be constitutional.[27] The case therefore does not protect undercover activists' films on the basis of their content.

Lastly, ag-gag videos are filmed in secrecy, without the permission of the private property owner. Crush films, dogfighting films, and hunting videos are more likely to be filmed with the property owner's permission because their goal is to make money, not to expose the property owner's unsavory practices. Property rights are thus heavily implicated in the ag-gag bills, but they were not at all addressed in *Stevens*.

These distinctions indicate that *Stevens* may not be squarely applicable to ag-gag laws. The differences between undercover activist films and the types of films contemplated in *Stevens* may be potent enough for some courts to decline to rely on *Stevens* to strike down ag-gag laws.

Of the proposed ag-gag bills, the agricultural interference type is the most undermined by the overbreadth doctrine. As with the statute addressed in *Stevens*, the agricultural interference bills are so

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24. *See* 18 U.S.C. § 48 (2006).

25. Activists could consider charging a nominal fee for their videos in order to trigger *Stevens* applicability. Exploring this interesting possibility is unfortunately outside of the scope of this Note.

26. *Stevens,* 130 S. Ct. at 1583–84. However, the Court does state in dicta that depictions of animal cruelty should not be categorically denied First Amendment protection like defamation or obscenity. *Id.* at 1584.

27. *Id.* at 1592.

broadly drafted as to have the potential to criminalize otherwise protected speech. As will be discussed below, although this type of bill is fairly common, none has yet been enacted into law. If such a bill were enacted, its extremely broad nature would likely render it vulnerable to First Amendment challenges based on *Stevens'* precedent.

### *B. Freedom of the Press*

Undercover activist films have more in common with journalism than they do with crush films or hunting videos. They seek to expose an important, hidden truth to the public by using secret information-gathering techniques. Undercover journalism has an ambiguous constitutional foundation, however. There is no conclusive Supreme Court ruling or circuit court consensus on the newsgathering rights of the press, not to mention the murky territory of citizen journalism. Courts have been careful to avoid categorical determinations about journalists' liability for undercover recording.[28] For example, in *Sanders v. American Broadcasting Co.*,[29] the California Supreme Court held that a psychic who had been secretly filmed at work could recover for the tort of intrusion, even though the defendant reporters did uncover her unethical behavior.[30] The court specifically said, however, that it did not "hold or imply that investigative journalists necessarily commit a tort by secretly recording events."[31] Given the unclear status of undercover reporting, it is difficult to predict how courts would treat animal-rights activists' undercover filming, even *without* ag-gag laws on the books.

This Section will explore these ambiguities and highlight two main lessons that may be drawn from the case law: 1) the First Amendment does not provide immunity to journalists against civil or criminal charges following undercover investigations; and 2) news outlets' distribution of accurate information is strongly protected by the First Amendment, depending to some extent on how the information was obtained.

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28. Erik Ugland, *Demarcating the Right To Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113, 121 (2008).

29. 987 P.2d 67 (Cal.1999).

30. *Id.* at 77.

31. *Id.* at 69.

1. No Journalistic Immunity

The First Amendment does not free undercover investigators from civil or criminal liability, even if they ultimately produce an accurate video that serves the public good. The Supreme Court has made clear that the First Amendment does not provide the press with limitless protection against prosecution for breaking the law in the course of journalistic endeavors.[32] Reporters' First Amendment defenses have been rejected in cases involving both undercover and open investigations, for crimes including trespass,[33] harassment,[34] disorderly conduct,[35] and fraud.[36]

*Food Lion v. Capital Cities/ABC, Inc.*,[37] a Fourth Circuit case following the high-profile exposé of unsanitary practices at Food Lion grocery stores, provides insight into how courts analyze charges against undercover journalists. In *Food Lion*, two ABC reporters obtained employment at two different Food Lion grocery store outlets, where they secretly filmed other employees handling meat.[38] The footage showed employees "repackaging and redating fish that had passed the expiration date, grinding expired beef with fresh beef, and applying barbeque sauce to chicken past its expiration date in order to mask the smell and sell it as fresh in the gourmet food section."[39] The court addressed claims of fraud, trespass, and breach of loyalty against the two undercover reporters responsible for the

32. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 669 (1991).

33. *See, e.g.*, Shiffman v. Empire Blue Cross & Blue Shield, 256 A.2d 131, 131 (N.Y. App. Div. 1998) (holding that an undercover reporter posing as a potential patient in a private medical office had no First Amendment affirmative defense because free speech did not confer a privilege for trespass); Stahl v. State, 665 P.2d 839, 840–42 (Okla. Crim. App. 1983) (holding that newspersons who accompanied trespassing protestors onto the grounds of a proposed nuclear facility were not shielded by the First Amendment from state criminal prosecution in their news gathering function).

34. *See, e.g.*, Galella v. Onassis, 487 F.2d 986, 995 (2d Cir. 1973) (holding that the First Amendment did not shield a paparazzo photographer from criminal liability for his constant surveillance of Jacqueline Kennedy Onassis, despite her status as a public figure).

35. *See, e.g.*, Oak Creek v. King, 436 N.W.2d 285, 286 (Wis. 1989) (holding that the First Amendment does not provide news gatherers with special rights of access as surrogates for the general public).

36. *See, e.g.*, Special Force Ministries v. WCCO Television, 584 N.W.2d 789, 793–94 (Minn. Ct. App. 1998) (holding that an undercover reporter who secretly filmed abuses at a facility for mentally retarded persons was not protected by the First Amendment against tort claims for fraud or trespass).

37. 194 F.3d 505 (4th Cir. 1999).

38. *Id.* at 510.

39. *Id.* at 511.

investigation and found that the First Amendment did not bar the claims.[40]

The truth of the reporters' allegations and the accuracy of the footage were not at issue in the litigation. Food Lion did not sue for defamation, but rather relied on traditional tort claims.[41] Based mostly on state law in North Carolina and South Carolina, the court held that the ABC employees breached their duty of loyalty to their employer, Food Lion, and committed trespass.[42] ABC attempted to argue that the First Amendment barred the plaintiffs' recovery, but the court disagreed.[43]

Notably, however, although the court found ABC guilty, it awarded Food Lion a mere $2 in damages.[44] Other courts may similarly treat journalists' offenses leniently when the information exposed by their undercover investigations is of significant social value.

The plaintiffs' approach in *Food Lion* is representative of a trend over the last fifteen years where, "[b]y targeting the media's newsgathering *behavior*, plaintiffs have—with mixed success—avoided the formidable constitutional shield that protects media *expression*."[45] The most successful ag-gag approach—banning agricultural-employment fraud—fits well within this trend.

In sum, the importance of activists' documentary footage does not provide protection against prosecution for civil or criminal violations, with or without ag-gag laws on the books.

2. Strong Protection for News Outlets' Distribution of Footage

News institutions benefit from strong First Amendment protection for publishing accurate information. The extent of this protection depends somewhat on whether the information was gathered illegally, and the extent to which the publishing institution was complicit in that illegality. News institutions cannot be punished for publishing information they obtain lawfully, even if their source is

40. *Id.* at 511, 520.

41. *Id.* at 510.

42. *Id.* at 516.

43. *Id.* at 520–21.

44. *Id.* at 524. The jury initially awarded $5.5 million in compensatory and punitive damages, which was reduced by the trial court judge to $316,400 in total damages. *Id.* at 511. The Fourth Circuit reversed the district court's ruling and limited the damages to $2. *Id.* at 524.

45. Ugland, *supra* note 28, at 131.

a third party who acquired it illegally. Further, the news institution's awareness that a third party acquired the information illegally does not negate First Amendment protection.[46] For example, in *Bartnicki v. Vopper*, the Supreme Court held that a radio program was protected by the First Amendment in disclosing the contents of an illegally intercepted phone conversation about the local teachers' union, even though the program had reason to know that the tapes were illegally intercepted.[47] The Court held that "a stranger's illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern."[48]

There is little guidance, however, on the extent to which news institutions are protected when they are complicit in illegal newsgathering. The Court's decision to protect the radio broadcast in *Bartnicki* was influenced by the fact that the hosts were not complicit in the unlawful acquisition of the tapes.[49] The Court avoided making a broader determination as to whether publication would have been forbidden had the radio program been complicit.[50] Other courts have not barred publication when the newsgathering institution was engaged in illegal activity. For example, in both *Sanders* and *Food Lion*, ABC News orchestrated and supervised the undercover filmmaking.[51] In both cases, however, ABC was punished not for publication of the illegally acquired footage, but rather for the torts committed in the process of gathering the footage.[52] In *Food Lion*, the Fourth Circuit affirmed the lower court's finding that Food Lion could not recover publication damages because "it was [Food Lion's] food handling practices themselves—not the method by which they were recorded or published—which caused the loss of consumer confidence."[53]

The case law demonstrates that news outlets that publish accurate undercover investigations benefit from very strong First Amendment protections. However, the cases' applicability to

46. Bartnicki v. Vopper, 532 U.S. 514, 517–18, 528 (2001).

47. *Id.*

48. *Id.* at 535.

49. *See id.* at 532 n.19.

50. *Id.* at 528–29.

51. *See* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 510 (4th Cir. 1999); Sanders v. Am. Broad. Co., 978 P.2d 67, 70 (Cal. 1999).

52. *See Food Lion*, 194 F.3d at 510; *Sanders*, 978 P.2d at 70.

53. *Food Lion*, 194 F.3d at 522.

undercover citizen activists is unclear. There are no settled legal definitions of "journalism" or "journalists," which are complex terms in a time when bloggers break important news stories and passersby film significant events with cellphone cameras.[54] At the very least, there is no consensus in the courts on whether citizen journalists should receive any of the protections typically afforded to professional journalists.[55] The First Amendment thus leaves open significant questions for undercover activist filmmakers and the organizations that hire and support them, neither of which are traditional news institutions. Courts may be influenced by the fact that reporters are subject to professional standards and that their employers have an institutional interest in producing accurate journalism.[56] If future jurisprudence better defines the role of citizen journalists, suits filed against activists under ag-gag laws will be significantly affected.[57]

In sum, the First Amendment does not clearly protect ag-gag filmmakers, but does strongly protect news institutions that distribute their films, as long as the films are accurate. To the filmmakers themselves, the First Amendment may be most helpful on the back end, once undercover films have been distributed and litigation has been pursued against the activists. At that point, there is a strong likelihood that courts will treat activists leniently if they have created truthful videos that depict information of value to the public. It is, of course, less than ideal to rely on potential leniency as protection. Part III will propose precautionary measures activists can take to protect themselves.

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54. *See* Mary-Rose Papandrea, *Citizen Journalism and the Reporter's Privilege*, 91 MINN. L. REV. 515, 518 (2007).

55. See discussion of the first amendment protections for professional journalists *infra* Part I.C.

56. The Society of Professional Journalists' Code of Ethics states that journalists should avoid undercover investigations unless the information gathered is 1) vital to the public and 2) not available through other means. *SPJ Code of Ethics*, SOC'Y PROF. JOURNALISTS, http://www.spj.org/pdf/ethicscode.pdf (last visited Feb. 4, 2013).

57. Courts are tentatively beginning to address this thorny issue. In a 2006 case, the California Court of Appeal held that website editors were entitled to the protections of California's reporter's privilege shield law. O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 77 (Cal. Ct. App. 2006).

### *C. Presumption Against Content-Based Restrictions and Prior Restraints*

News institutions, journalists, and citizen activists are all protected by a strong presumption against the validity of laws that impose content-based restrictions on speech or any prior restraints on speech.[58]

Content-*based* restrictions on speech regulate subject matter or viewpoint.[59] They are presumptively invalid,[60] and subject to strict-scrutiny review.[61] To overcome this presumption, the burden is on the government to prove that the content-based statute is the least restrictive means to promote a compelling government interest.[62] Content-*neutral* regulations of the time, place, or manner of speech are held to intermediate scrutiny and are therefore more likely to be constitutional, particularly if they leave open acceptable alternative methods of communication.[63]

Of the different types of ag-gag bills, the agricultural-interference laws and distribution limitations are the most likely to be struck down as unconstitutional, content-based restrictions. The agricultural-interference bills would enact broad bans against filming in agricultural settings.[64] Arguably, therefore, these types of bills ban films based on their subject matter—agricultural activities—and should be subject to the strict scrutiny review applicable to content-based restrictions. On the other hand, bill proponents would likely argue that the prohibitions are actually content-neutral because they are based on the place, not the subject, of the films. Even if a court agreed, these types of laws might not hold up to intermediate scrutiny given that they do not leave open any alternative method of communicating the same information.

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58. *See, e.g.*, Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980) ("[W]hen regulation is based on the content of speech, governmental action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speaker's views.'" (quoting Niemotko v. Maryland, 340 U.S. 268, 282 (1951))).

59. *See* Galena v. Leone, 638 F.3d 186, 199 (3d Cir. 2011).

60. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377, 382 (1992).

61. Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009).

62. Ashcroft v. ACLU, 542 U.S. 656, 665 (2004).

63. *See Consol. Edison*, 447 U.S. at 536 (providing the example that regulating traffic noise is content-neutral because "[n]o matter what its message, a roving sound truck that blares at 2 a. m. disturbs neighborhood tranquility").

64. See discussion *infra* Part II.C.1.

As for the bills that impose limits on distribution of recordings made on agricultural premises, these are likewise content-based because they impose restrictions based on the same agricultural content as the agricultural-interference films.[65]

Additionally, neither type of bill serves a compelling government purpose. Indeed, these bills more likely *restrict* a compelling government interest in public access to information relating to food safety and animal cruelty. These ag-gag laws therefore are unlikely to survive a strict-scrutiny test and would be held unconstitutional.

Some content-based ag-gag bills might also be invalid under the doctrine of prior restraints,[66] which imposes a strong presumption against bans on expression of ideas prior to their publication.[67] The Supreme Court has called prior restraints "the most serious and the least tolerable infringement on First Amendment rights," noting that they can be most damaging when they "fall[] upon the communication of news and commentary on current events."[68]

Ag-gag laws that ban distribution of films made in agricultural settings are clear examples of unconstitutional prior-restraint laws. By prohibiting distribution of audio and video recordings, they essentially institute a before-the-fact ban on publication. These types of bills would therefore impose a prior restraint and are thus presumptively invalid.

### *D. Limits on Incidental Restrictions of Speech*

In some cases, regulations that do not directly address speech but in practice function to limit expressive conduct can be found unconstitutional. These "incidental restrictions" are unconstitutional if they are "greater than necessary to further a substantial governmental interest."[69] In contrast to content-based restrictions, incidental restrictions need not be the least intrusive means of achieving a compelling governmental interest to pass constitutional

65. See discussion infra Part II.C.3.

66. DVD Copy Control Ass'n v. Bunner, 75 P.3d 1, 17 (Cal. 2003) ("[A] prior restraint is a *content-based* restriction on speech *prior to its occurrence*." (quoting Planned Parenthood Shasta-Diablo, Inc. v. Williams, 873 P.2d 1224, 1230 (Cal. 1994)).

67. *See* Near v. Minnesota, 283 U.S. 697, 733 (1931) (Butler, J., dissenting) ("[E]very man shall have a right to speak, write, and print his opinions upon any subject whatsoever, without any prior restraint . . . .").

68. Neb. Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976).

69. S.F. Arts & Athletics, Inc. v. U.S. Olympic Comm., 483 U.S. 522, 537 (1987).

muster. Rather, they need only promote "a substantial governmental interest that would be achieved less effectively absent the regulation."[70]

The most successful ag-gag bills—those criminalizing agricultural-employment fraud—place incidental restrictions on speech.[71] They do not directly limit expression, but instead institute a rule that will have that effect in application. Likewise, bills that impose reporting time limits or redefine trespass would place incidental restrictions on speech.[72] Although they do not directly regulate speech, they impose prohibitions which have the practical effect of chilling speech. However, because incidental restrictions are not held to as strict of a standard as content-based regulations, these laws are much more likely to be considered constitutional. For example, the Supreme Court held that a National Park Service regulation prohibiting camping in certain parks was constitutional, even when it had the effect of prohibiting demonstrators from sleeping in parks to make a political statement about homelessness.[73] The Court found that the incidental restriction on the protestors' freedom of expression did not violate the First Amendment because the regulation was content-neutral and was narrowly focused on a substantial governmental interest in maintaining parks "in an attractive and intact condition."[74]

A successful challenge to the ag-gag bills that pose incidental restrictions on speech will hinge on whether the government can demonstrate its substantial interest. State governments can probably meet this relatively low bar: the government arguably has a substantial interest in transparent hiring practices, protecting private property, and ensuring timely reporting of animal abuses. However, these arguments ring false because the "incidental" restrictions are not at all incidental. They are deliberately crafted to limit expression. Perhaps courts attuned to the context of these bills' passage and to the strong evidence that they were designed to evade First

70. Ward v. Rock Against Racism, 491 U.S. 781, 798–99 (1989) (quoting United States v. Albertini, 472 U.S. 675, 689 (1985)).

71. *See* discussion *infra* Part II.C.2.

72. *See* discussion *infra* Part II.C.4–5.

73. Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 298 (1984).

74. *Id.* at 296.

Amendment issues[75] would be more willing to strike down these laws. Ultimately, given that agricultural-employment fraud laws are the only ag-gag bills that have successfully passed, incidental-restraint challenges might be activists' best hope.

## II. AG-GAG LAWS ACROSS AMERICA

This Part will provide context for the current legislative wave of ag-gag bills by examining the older generation of ag-gag laws passed in the 1990s, and outlining the features of existing animal-terrorism laws. It will then describe five general categorizations for the proposed and enacted ag-gag bills and discuss the hostile public opposition to the new slate of bills.

### *A. Existing Ag-Gag Laws: Kansas, Montana, and North Dakota*

Since 1990, Kansas has prohibited anyone from entering an "animal facility" to make audio or video recordings "with the intent to damage the enterprise."[76] By requiring intent to damage (not included in any of the newly proposed ag-gag bills), the law is ambiguous as to whether it covers undercover activists' filmmaking.

Most likely, intent to damage does not include intent to reduce a farm's profits by exposing unsanitary conditions. While the relevant chapter of Kansas's code does not directly define "damage,"[77] it does include a provision for civil penalties that describes damages in more detail.[78] According to that provision, persons harmed by violations of the code can collect civil penalties for all "actual and consequential damages," defined as "costs directly related to the field crop or animal that has been damaged or destroyed."[79] Losses resulting from negative publicity from an undercover video would arguably not be "directly related" to the farm operations, and no animal would have been "damaged or destroyed."

If courts interpret "damage" more broadly, however, undercover films could fall under the statute's purview. Activists typically make

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75. *See, e.g.*, Clayworth, *supra* note 14 (citing Senate Democratic Leader Michael Gronstal who said that lawmakers consulted Iowa's Attorney General when crafting the bill to avoid legal challenges); Osterreicher, *supra* note 18 (citing the *Stevens* precedent as the impetus for some legislatures to change the drafting of their bills).

76. KAN. STAT. ANN. § 47-1827 (2006).

77. *See id.* § 47-1826.

78. *See id.* § 47-1828.

79. *Id.*

audio and video recordings with a variety of goals, including spurring criminal investigations, reducing consumption of meat products, and sparking public outrage at the facilities depicted. Those actions are intentionally targeted to financially harm the enterprises, which could arguably be considered "damage" under the law. Ultimately, however, given that the Kansas code defines "damage" as requiring costs directly related to code violations, it is more likely that courts will interpret "damage" in a way that requires direct harm, and undercover activists' filmmaking would likely not be punishable under the statute.

North Dakota's ag-gag law, passed in 1991, forbids the act of filming or photographing an animal facility without consent of the owner or operator, regardless of intent and without reference to damage.[80]

Montana's statute, also enacted in 1991, requires that the offender enter the property "with the intent to commit criminal defamation."[81] In Montana, communication of defamatory information is justified if the information is true.[82] The requirement that offenders must intend to distribute *untrue* information sets Montana's law apart from the other existing and proposed ag-gag laws. No farm targeted by recent undercover activist films has seriously protested the accuracy of footage taken on its premises. Montana's statute therefore does not criminalize the undercover production of activist films, as long as the footage is accurate.

None of these existing laws appear to have been challenged in court, nor did an online search reveal any charges filed based on these statutes.[83] Additionally, no activist films appear to have been created in any of these three states.[84] These laws therefore provide little insight into potential paths for challenging ag-gag legislation, and perhaps also indicate that such legislation does have a chilling effect

80. N.D. CENT. CODE § 12.1-21.1-02 (2011).

81. MONT. CODE ANN. § 81-30-103 (2011).

82. *Id.* § 45-8-212(3)(a).

83. Based on a Westlaw search as of March 23, 2013.

84. Based on extensive online searches, including online searches of animal rights groups' archives.

on journalistic investigations. The proposed legislation is already bringing new scrutiny to these rarely used statutes.[85]

*B. Animal-Terrorism Laws: State and Federal*

In addition to the ag-gag laws dating to the 1990s, another set of enacted legislation could also limit activists' ability to document abuses on farms. Generally known as animal-terrorism laws, these statutes are typically geared towards stopping the most aggressive types of animal rights activism, such as unauthorized release of laboratory animals and vandalizing animal facilities.[86] Minnesota passed the first such law in 1988, and now at least seven other states have enacted similar laws.[87]

Many of these state laws were spurred by the 2006 adoption of the federal Animal Enterprise Terrorism Act (AETA).[88] While not principally geared towards limiting documentation of farms, AETA and its state progeny could potentially be used to deliver that result. AETA forbids anyone with "the purpose of damaging or interfering with" an animal enterprise from causing the loss of "any real or personal property" of the enterprise or any person connected with it.[89] It also forbids conspiring to or attempting to cause such losses.[90]

Under these laws, activists could be charged with "damaging" animal enterprises by distributing undercover films recorded on farms. The statute includes loss of profits in its definition of economic damages, which could be used to argue that film distribution caused "damage" to an enterprise.[91] However, it also provides an exception for "any *lawful* economic disruption" caused by "reaction to the disclosure of information about an animal enterprise."[92] In states with ag-gag laws, however, activists would no longer be acting lawfully,

85. *See, e.g.*, Dan Flynn, *Five States Now Have 'Ag-Gag' Laws on the Books*, FOOD SAFETY NEWS (Mar. 6, 2012), http://www.foodsafetynews.com/2012/03/five-states-now-have-ag-gag-laws-on-the-books.

86. Cynthia Hodges, *Detailed Discussion of State Animal 'Terrorism'/Animal Enterprise Interference Laws,* ANIMAL LEGAL & HIST. CTR. (2011), http://www.animallaw.info/articles/ddusstateecoterrorism.htm.

87. *Id.* (indicating that Florida, Illinois, Montana, South Carolina, Tennessee, Oklahoma, and Georgia all have some version of this type of law).

88. *Id.*

89. Animal Enterprise Terrorism Act, 18 U.S.C. § 43(a) (2006).

90. *Id.* § 43(a)(2)(c).

91. *Id.* § 43(d)(3).

92. *Id.* § 43 (d)(3)(B) (emphasis added).

and therefore might lose the protection of this exception. Even without an ag-gag law on the books, a state might find that activists had violated any number of other laws—fraud, trespass, or breach of loyalty, for example—that might render their economic disruption unlawful. In sum, animal activists in states with and without ag-gag laws could still be found in violation of AETA.

In March 2013, a federal district court found that a group of animal rights activists did not have standing to challenge the constitutionality of AETA.[93] The court found that the plaintiffs, all devoted animal rights activists, "failed to allege an objectively reasonable chill [on their speech], and, therefore, failed to establish an injury-in-fact."[94]

### *C. Proposed Ag-Gag Laws*

The recently proposed state bills take a variety of approaches to limiting audio and video recording inside agricultural facilities. This Section groups these approaches into five categories: 1) broadly banning all audio and video recording on farms as "agricultural interference"; 2) criminalizing employment fraud in agricultural settings; 3) forbidding distribution of recordings; 4) redefining trespass to specifically include agricultural facilities; and 5) requiring rapid reporting of animal abuse. As argued in Part I, broad bans on agricultural interference and bans on distribution of recordings face the strongest First Amendment challenges.

#### 1. Agricultural Interference

Most of the proposed bills define a new offense of "agricultural interference." These bills generally prohibit producing a sound or video recording at an agricultural or livestock facility without the owner's consent.[95] In some cases, these prohibitions are limited to recording devices which are left on the premises rather than being held and operated by a person.[96] The first versions of Iowa's[97] and

93. Blum v. Holder, No. 11–12229–JLT, 2013 WL 1097818, at *9 (D. Mass. Mar. 18, 2013).

94. Id. at *7.

95. S. 552, 51st Leg., 1st Sess. (N.M. 2013); H.R. 683, 2013–2014 Gen. Assemb., Reg. Sess. (Penn. 2013); H.R. 0126, 2013 Gen. Sess. (Wyo. 2013); H.R. 5143, 97th Gen. Assemb. (Ill. 2012); S. 184, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012); H.R. 1369, 87th Sess. (Minn. 2011); S. 5172, 235th Gen. Assemb., Reg. Sess. (N.Y. 2011) (the New York bill used the term "tampering" instead of "interference" but was otherwise the same as the others).

96. *See* UTAH CODE ANN. § 76-6-112(2)(a) (West 2012); Penn. H.R. 683.

Utah's[98] bills included this prohibition, but both were later amended to eliminate the broad prohibition against unauthorized recording (instead, they found success by focusing on agricultural fraud, described below).[99]

The agricultural interference bills impose penalties ranging from misdemeanors to felonies, depending on the number of violations and the amount of financial damage caused by the release of information.[100] In one 2011 proposal in Iowa, victims were also permitted to pursue civil damages up to three times "all actual and consequential" losses.[101] In cases where lowered sales or a meat recall could be traced to publication of a disconcerting video, that provision could potentially impose massive costs on undercover filmmakers.

This type of bill represents the broadest approach to ag-gag laws. As discussed above, because these laws could potentially implicate a wide range of otherwise innocent activities, they would likely face strong First Amendment challenges for overbreadth and content-neutral restrictions.[102]

2. Agricultural Fraud

The two successful recent ag-gag bills approached the activist-filmmaking issue by criminalizing "agricultural fraud." This type of bill, passed in Iowa[103] and Utah,[104] and frequently proposed elsewhere,[105] hampers activists by restricting their ability to gain employment on farms. Typically, the undercover videos are made when an animal rights group, such as the Humane Society, sends an activist to apply for employment at a target facility.[106] The activist

97. H.R. 589, 84th Gen. Assemb. (Iowa 2011).

98. UTAH CODE ANN. § 76-6-112(2)(a).

99. *See infra* Part II.C.2.

100. *See* bills cited *supra* note 11.

101. Iowa H.R. 589 (2011).

102. *See supra* Parts I.A, I.C.

103. IOWA CODE § 717A.3A (2012); H.R. 589, 84th Gen. Assemb. (Iowa 2012).

104. UTAH CODE ANN. § 76-6-112(2)(b) (2012).

105. Leg. 204, 103d Leg., 1st Sess. (Neb. 2013) (banning making a "false statement or representation" to obtain agricultural employment if the false statement "intentionally causes economic damage"); H.R. 0126, 2013 Gen. Sess. (Wyo. 2013); S. 552, 51st Leg., 1st Sess. (N.M. 2013); H.R. 5143, 97th Gen. Assemb. (Ill. 2012); H.R. 1369, 87th Sess. (Minn. 2011).

106. *See, e.g.*, Cody Carlson, *The Ag Gag Laws: Hiding Factory Farm Abuses from Public Scrutiny*, ATLANTIC (Mar. 20, 2012, 9:06 AM), http://www.theatlantic.com/health/archive/2012/03/the-ag-gag-laws-hiding-factory-farm-abuses-from-public-scrutiny/254674 (describing

works at the farm for a few weeks, obtaining footage, talking with other employees, and building a record of a pattern of abuse.[107] If the employer asks the activist whether he or she is affiliated with an animal rights group, the activist needs to lie to continue the investigation.[108] The agricultural-fraud bills therefore attack undercover investigations by outlawing deception in the employment context.

Iowa's successfully enacted ag-gag law criminalizes obtaining access to an agricultural facility by false pretenses, as well as intentionally making a false statement in an employment application with the intent to commit an unauthorized act at the facility.[109] The law attempts to entirely evade First Amendment issues by not even mentioning audio or video recordings in the law.[110] Instead, it focuses on employment procedures, providing a benign cover for its actual purpose—to block undercover investigations of farms.[111]

Utah's legislators also originally drafted their ag-gag bill pursuant to the broad "agricultural-interference" model,[112] but they were only able to pass the bill after amending it to mainly address agricultural fraud (the law also includes a trespass provision, discussed below).[113] Utah's law, like Iowa's, criminalizes obtaining employment in agricultural settings under false pretenses.[114] It additionally criminalizes obtaining employment "with the intent to record an image of, or sound from, the agricultural operation" when on notice that the owner does not authorize recording.[115] Thus, in contrast to Iowa, Utah's agricultural fraud statute explicitly addresses audio and video recording.

Following its successes in Iowa and Utah, the agricultural-fraud approach is likely to proliferate as other states' legislators continue to introduce ag-gag laws. These laws can expand farm owners' rights

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how the activist author applied to work at an egg farm in Iowa to produce video footage using a pinhole camera).

107. *See, e.g.*, *id.*
108. *See, e.g.*, *id.*
109. H.R. 589, 84th Gen. Assemb. (Iowa 2012).
110. *See, e.g.*, Carlson, *supra* note 106.
111. *See, e.g.*, *id.*
112. H.R. 187, 2012 Gen. Sess. (Utah 2012).
113. H.R. 187 3d Substitute, 2012 Gen. Sess. (Utah 2012).
114. *See* UTAH CODE ANN. § 76-6-112(2)(b) (2012).
115. *Id.* § 76-6-112(2)(c)(i) .

without explicitly addressing speech issues. This strategy helps evade constitutional issues. Unfortunately, for that reason, the employment fraud laws are less susceptible to challenges based on First Amendment grounds than the agricultural-interference and distribution bills.

3. Crime to Distribute

Some proposed bills criminalize possession and distribution of unauthorized agricultural recordings.[116] For example, Indiana's S.B. 373 charges a person who "distributes, disseminates, or transfers" an unauthorized recording of an agricultural facility, if the recording was made "with intent to defame or directly or indirectly harm the business relationship between an agricultural operation and its customers."[117]

This type of restriction has huge implications for any news outlet, activist group, or individual that relies on the recordings for journalistic, educational, or persuasive purposes. These bills are so broadly drafted that the mere receipt of an email might constitute a violation. A website editor who publishes a video or photo on a website, in a media broadcast, or perhaps even on a personal blog or social media page, could be guilty of "distributing" the recording under the meaning of the bill.

Going even further, Pennsylvania's H.B. 683 bans "uploads, downloads, [and] transfers" of unauthorized recordings.[118] Under such a law, any person who downloaded or shared a video that they themselves did not even make could be in violation of the statute. These bills could criminalize innocuous behavior, such as sending videos in personal emails, posting them to food safety blogs, and sharing videos via social media, even for people who played no role in producing the video.

By criminalizing the publication of undercover farm videos, these bills blatantly seek to limit the public impact of the videos. The goal of the activists' undercover activities is to widely distribute the footage and expose abusive and unsanitary practices at factory farms. By chilling the willingness of third parties to distribute the footage,

116. H.R. 5143, 97th Gen. Assemb. (Ill. 2012); H.R. 1369, 87th Sess. (Minn. 2011); H.R. 589, 84th Gen. Assemb. (Iowa 2011).

117. S.B. 373, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013).

118. H.R. 683, 2013–2014 Gen. Assemb., Reg. Sess. (Penn. 2013).

these bills result in the concealment of any incriminating evidence from the public.

This type of ag-gag bill is likely to face strong First Amendment challenges because it is overly broad, and may limit otherwise protected speech.[119]

4. Redefining Trespass

In some states, legislators have focused on linking undercover recordings with trespass.[120]

For example, Utah's ag-gag law bans unauthorized recording "while . . . committing criminal trespass."[121] This trespass-related third prong of Utah's agricultural-interference law is not a strong bar to undercover recording because Utah's definition of criminal trespass does not clearly encompass activists' video recordings. Utah defines criminal trespass as unlawfully entering or remaining on property and intending "to cause annoyance or injury to any person or damage to any property," or entering the property unlawfully with the intent to commit a crime.[122] Under this definition, undercover recording arguably does not constitute criminal trespass in Utah. The statute bans causing annoyance or injury "to any person," and separately bans causing "damage to any property."[123] Animal activists' films are not intended to cause annoyance or injury to any individual person, and they are not intended to cause damage to the agricultural property itself.[124]

Activists will also be protected by the statutorily defined defense that an entrant's conduct did not "substantially interfere with" the owner's use of the property.[125] By design, animal activists' filming does not interfere with the owner's use of the property. The filming is done in secret; if it substantially interfered with the owner's use, it could not remain hidden.

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119. *See supra* Parts I.B., I.C.

120. S. 552, 51st Leg., 1st Sess. (N.M. 2013); S. 1184, 2012 Gen. Assemb., Reg. Sess. (Fla. 2012); H.R. 187 3d Substitute, 2012 Gen. Sess. (Utah 2012); S. Amend. 3297, 84th Gen. Assemb. (Iowa 2011).

121. UTAH CODE ANN. § 76-6-112(2)(d) (West 2012).

122. *Id.* § 76-6-206(2)(a)(i)–(ii).

123. *Id*. § 76-6-206(2)(a)(i).

124. *See id.*

125. *Id.* § 76-6-206(4)(b).

This type of law does not face strong First Amendment challenges because, like the agricultural-fraud laws, it evades issues of expression.

5. Rapid Reporting of Abuses

An increasingly popular approach is to propose ag-gag bills which are essentially disguised as animal protection statutes. These bills institute very short time limits in which animal abuse must be reported to enforcement authorities.[126] Although these bills appear on their face to institute a protection against animal abuses, in practice they would function to limit the breadth and depth of activists' undercover investigations.

These bills would impose reporting windows from one to three days.[127] By narrowing the window in which activists can record and report violations, the bill would severely limit the activists' surveillance capacity. Undercover activists would have to launch an investigation knowing that they would be required to expose their investigation within one to three days of capturing any abuses. The time limitation would essentially bar activists from in-depth exploration of a facility's practices, thereby crippling activists' ability to develop a record of patterns of abuse and diluting the quality of the investigations.

This approach is especially pernicious because it is easily couched as an effort to protect animals. The bills' ultimate goal is to stifle undercover journalism in agricultural settings, but they can be pitched to the public as intended to ensure rapid prosecution of animal abusers.[128] Animal-rights activists have not been fooled: they have clearly identified these bills as ag-gag efforts and included them

126. *See e.g.*, Assemb. 343, 2013–14 Reg. Sess. (Ca. 2013); S. 1248, 108th Gen. Assemb. (Tenn. 2013); Leg. 204, 103d Leg., 1st Sess. (Neb. 2013) (requiring any person who "reasonably suspects" animal abuse to report it to authorities within twenty-four hours); H. 0110, 2013 Leg., Reg. Sess. (N.H. 2013) (establishing that any person who records "cruelty to livestock" shall have "a duty to report such activities to law enforcement authorities . . . within 24 hours of the recording's creation"); H.R. 0126, 2013 Gen. Sess. (Wyo. 2013); S. Amend. 3297, 84th Gen. Assemb. (Iowa 2011); S. 695. 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); Leg. 915, 102d Leg., 2d Sess. (Neb. 2012); *see also* Iowa S. Amend. 3297 (providing that acting as a whistleblower can be an affirmative defense to a charge of agricultural trespass, but only to defendants who report abuses within 72 hours of witnessing them).

127. *See* bills cited *supra* note 126.

128. *See Anti-Whistleblower Bills Hide Factory-Farming Abuses from the Public*, THE HUMANE SOC'Y OF THE U.S., http://www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html (last updated Apr. 16, 2013).

in their public action campaigns.[129] Still, politicians may face an easier battle in justifying the bills to their constituents. Furthermore, this type of bill does not face strong First Amendment challenges.

### *D. Hostile Opposition and Political Reframing*

The recent ag-gag bills have faced hostile public opposition in every state where they have been proposed.[130] National animal-rights groups are focusing their organizing efforts on defeating these bills, and celebrities from Katherine Heigl[131] to Bob Barker[132] have voiced their opposition. The outrage has not come only from animal-rights activists. For example, in Minnesota, rural daily newspapers published a series of critical editorials pointing out that properly run farms have nothing to hide.[133]

Presumably in response to this opposition, some legislatures are reframing their justifications for the bills. Introductory text to the New York bill explains that the bill's purpose is to combat security problems at New York's "family farms."[134] It cites crimes such as "the unlawful injection of cattle with antibiotics" and "theft of anhydrous ammonia fertilizer, utilized by meth addicts to make illegal substances."[135] The introductory text explains that "farmers need to be more aware of where their security weaknesses are" to "discourage trespass and tampering which may weaken the safety of

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129. *See, e.g.*, *id.*; Ed Sayres, *Ag-Gag Bills Threaten Our Children, Our Freedom and Our Animals,* ASPCA BLOG (Mar. 22, 2012, 10:14 AM), http://www.aspca.org/ Blog/eds-corner-ag-gag (referencing the ag-gag bills in Tennessee, Nebraska, and Missouri).

130. Interestingly, an internet search of local newspapers and animal rights activists' websites indicates that the pre-existing laws in Kansas, Montana, and North Dakota were not controversial at the time of their passage.

131. Sean P. Means, *Heigl Lobbies Utah Senate Against 'Ag-Gag' Bill*, SALT LAKE TRIB. (Mar. 1, 2012, 10:38 AM), http://www.sltrib.com/sltrib/blogsmoviecricket/53625223-66/bill-utah-gag-heigl.html.csp.

132. Jeff Mackey, *Bob Barker Addresses 'Ag Gag' Bill*, PETA FILES (Mar. 19, 2012), http://www.peta.org/b/thepetafiles/archive/2012/03/19/bob-barker-addresses-ag-gag-bill.aspx.

133. *See, e.g.*, *Our View: Bill Just a Cover-Up of Bad Behavior*, WINONA DAILY NEWS (Apr. 21, 2011, 12:00 AM), http://www.winonadailynews.com/news/opinion/editorial/article_f2084c4c-6bce-11e0-844b-001cc4c002e0.html; Gary Anderson & Lee Smith, *Exposing Animal Abuse Amounts to Petty Fraud*, FAIRMONT SENTINEL (Apr. 15, 2011), http://www.fairmontsentinel.com/page/content.detail/id/517182/Exposing-animal-abuse-amounts-to-petty-fraud.html?nav=5005; *Don't Punish Whistleblowers*, NEW ULM J. (Apr. 14, 2011), http://www.nujournal.com/page/content.detail/id/523674/Don-t-punish-whistleblowers.html.

134. Memo for S. 5172, 235th Gen. Assemb., Reg. Sess. (N.Y. 2011).

135. *Id.*

our food supply."[136] Buried in the statutory text, a careful reader will find that "tampering" includes audio and video recording without the owner's consent.[137]

Given the outcry from the animal rights community, this textual trickery did not successfully hide the bill's real goal of stifling activist penetration of farm operations.[138] However, the bill's reframing may indicate a strategy legislatures will pursue in the future.

## III. SUGGESTIONS FOR PROTECTING FURTHER UNDERCOVER ACTIVISM

As explored in Part II, the First Amendment case against ag-gag bills is not bulletproof, especially considering that bills are more likely to pass in forms that avoid blatantly implicating First Amendment rights.

Therefore, in addition to opposing enactment of the legislation, activists should plan their investigations so that they can best avoid liability. This Note offers three suggestions to activists: 1) avoid lying to the greatest extent possible in seeking employment on farms—use real names, addresses, and employment histories; 2) recruit current employees or professional journalists to document abuses; and 3) ensure that the legitimacy of any video is unquestionable. Activists should take these precautions even in states without ag-gag laws.

First, activists should avoid lying as much as possible in seeking employment on farms. Because the First Amendment does not bar claims against undercover reporters,[139] targeted farms will be able to press charges against activists for agricultural-employment fraud (in states with that type of ag-gag law) and traditional fraud (in states without ag-gag laws). Agricultural employers therefore have strong reasons to ask questions designed to create conditions of fraud for undercover activists. By asking, "Are you affiliated with an animal rights group?" or by requiring applicants to sign papers stating that they are not carrying any surveillance equipment, farm operators can lay the groundwork for claims of fraud against any person who lied on

136. *Id.*

137. *See* S. 5172, 235th Gen. Assemb., Reg. Sess. (N.Y. 2011).

138. *See, e.g.*, Laura Allen, *NY Bill to Ban Undercover Investigations*, ANIMAL L. COALITION (Feb. 29, 2012), http://www.animallawcoalition.com/animals-and-politics/article/1805.

139. *See supra* Part I.B.

their application. Farmers were already asking similar questions before the 2011 flood of ag-gag bills across the country. In 2010, an Iowa egg farm asked a Humane Society investigator, "Are you affiliated with a news organization, labor union, or animal protection group?"[140] Under Iowa's newly passed law, the investigator's deceptive answer to that question could have garnered him a misdemeanor conviction.[141] Activists obviously cannot answer such questions honestly if they wish to obtain employment on farms. However, they should use their real names, addresses, and employment histories to rebuff fraud charges to the greatest extent possible.

Second, recruiting current employees or professional journalists to conduct undercover investigations might provide important protection. Current employees may be better protected as undercover investigators because they will have already obtained employment truthfully, and so may not be punishable under employment-fraud ag-gag laws. Recruiting such employees poses serious risks for animal rights groups, however. By initiating contact with existing employees in an attempt to convince them to surreptitiously record their employers, activists would make themselves vulnerable to detection by the employer. For that reason, this strategy is likely not a viable long-term solution. Better yet, professional journalists could be sent into the factory farms to conduct the investigations. By virtue of their positions as journalists, they are more clearly protected by the First Amendment. However, as *Food Lion* demonstrates, even this protection may be somewhat limited.[142]

Lastly, activists' strongest protection, regardless of the type of challenge they may face, is the accuracy of their footage. Undercover investigators should take pains to make sure that the legitimacy of their documentation is unassailable. Each day's filming should include corporate logos and uniforms, individuals known to work in a certain location, and whatever other markers of truth can be found. In distributing the footage, activists and their sponsoring organizations should refrain from excessive editing or embellishment to avoid future allegations that the images were doctored or selectively edited.

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140. Carlson, *supra* note 106.

141. *See* H.R. 589, 84th Gen. Assemb. (Iowa 2012).

142. *See supra* Part I.B.

## IV. CONCLUSION

Contemporary activists' undercover films of farm conditions are part of a long tradition of undercover journalism exposing health issues and animal abuses in livestock facilities.[143] And today, just as in the past, powerful entities whose profits are threatened by these exposés are mounting a major effort to stop activists from making any more undercover videos.[144]

There is some hope that these laws can be challenged under the First Amendment, but in truth, the constitutional defenses against the bills are not as strong as some opponents suggest—particularly for the agricultural-fraud bills that are emerging as the most successful approach.

In response, activists need to structure their investigations in anticipation of future legal challenges. Ultimately, their best hope may be that the power of their films sparks congressional action to protect whistleblowers on factory farms.

143. *See, e.g.*, UPTON SINCLAIR, THE JUNGLE (1905).

144. *See, e.g.*, Carlson, *supra* note 106.