

## BIG-AG EXCEPTIONALISM: ENDING THE SPECIAL PROTECTION OF THE AGRICULTURAL INDUSTRY

Sonia Weil\*

### ABSTRACT

*Throughout this country's history, farming has held a special place in the American ethos – indeed, the pastoral ideal of a society of small farmers dates back to Thomas Jefferson. Over the last several decades, agriculture has become increasingly industrialized to meet the growing demand for cheap animal products. Today, a majority of farms are large-scale, industrial operations known as “factory farms” – a far cry from the small farms envisioned by Thomas Jefferson – which produce cheap animal products at a lightning pace. The hidden costs of these cheap products, however, are externalized to the environment, consumers, animals, workers, and small farmers in the form of environmental degradation, food safety issues, animal abuse, violations of workers' rights, and negative economic impact. Yet, the agricultural industry maintains unprecedented legal protection – insulating it from public debate and permitting it to operate outside of regulations.*

*This Article explores the harms the industrialized agricultural industry creates and the legal protections the industry enjoys in environmental law, animal cruelty law, labor law, anti-terrorism law, and through heightened protections in trespass and libel law. While other articles have explored the First Amendment implications of laws known as “ag-gag,” and other specific aspects of the harms created by factory farming, this Article serves as a comprehensive overview of the exceptional protection afforded to the industry across various areas of law. This Article joins the important discussion of the need to reco-*

---

\* The author drafted this article while she was an Instructor of Law and LL.M. candidate in Social Justice, Clinical Education, and Systems Change at the University of the District of Columbia David A. Clarke School of Law. She would like to thank Andrew Ferguson, Matt Fraidin, Hannah Lieberman, and Faith Mullen for their guidance and advice throughout this process. She is also grateful for the feedback she received at NYU's Clinical Law Review Writers' Workshop and from her colleagues, Adrian Gottshall, Stacey Eunnae, Nicole Tuchinda, Natasha Bennett, and Meg Newman.

gnize the deficiencies in and revolutionize the industrialized production of animals in the United States. The first steps towards actualizing this revolution are removing the industry from its sphere of legal protection, using the law to hold the industry accountable for its harm, and encouraging a change in industry practices through a shift in law.

#### TABLE OF CONTENTS

INTRODUCTION.....	185
I. HARMS OF BIG-AG .....	186
A. <i>Animal Cruelty</i> .....	187
B. <i>Environment</i> .....	191
C. <i>Worker Safety</i> .....	193
D. <i>Food Safety and Public Health</i> .....	196
E. <i>Economic Impact</i> .....	197
II. HOW CURRENT LAW CONTRIBUTES TO HARM.....	199
A. <i>Ag-Gag Laws</i> .....	199
1. <i>State ag-gag laws</i> .....	200
2. <i>Mandatory reporting provisions</i> .....	205
3. <i>“Right to farm” bills</i> .....	207
4. <i>Defunding of charitable organizations</i> .....	207
B. <i>Anti-Terrorism Laws</i> .....	208
C. <i>Animal Cruelty Exceptions</i> .....	212
D. <i>Lack of Environmental Regulation</i> .....	217
E. <i>Distortion of Trespass Law – “SLAPP”</i> .....	220
F. <i>Distortion of Defamation Law – “Meat” and         “Veggie” Libel</i> .....	222
G. <i>Exemptions from Labor Law</i> .....	225
H. <i>USDA and FDA Under-Enforcement</i> .....	227
III. ALTERNATIVE APPROACH.....	229
A. <i>Rebuttal to Industry Argument for         Exceptionalism</i> .....	229
B. <i>Use Existing Law</i> .....	231
C. <i>Implement Affirmative Laws and Regulations</i> .....	232
D. <i>Eliminate or Repurpose Government Subsidies</i> .....	235
E. <i>Influence Public Opinion and Educate         Consumers</i> .....	236
CONCLUSION .....	237

## INTRODUCTION

Throughout this country's history, farming has held a special place in the American ethos – indeed, the ideal of self-sufficient and virtuous small farmers living off of the land dates back to Thomas Jefferson.<sup>1</sup> Over the last several decades, however, agriculture has increasingly industrialized to meet the growing demand for cheap animal products. Today, a majority of farms are known as “factory farms”<sup>2</sup> – large-scale operations, which create a stark contrast with the small farms of Jefferson's ideal. These factory farms have achieved the goal of producing cheap animal products and have done so with help from generous government subsidies, big-business friendly laws, and lack of regulation.<sup>3</sup> The low prices of factory farmed products, however, are artificial and hide the true costs, which are externalized to consumers, the environment, animals, workers, residents of farming areas, and small farmers.<sup>4</sup>

The industry enjoys legal protection across many areas of law; laws and regulatory loopholes insulate the industry from major environmental, labor, and animal cruelty laws.<sup>5</sup> Unique, industry-specific “ag-gag”<sup>6</sup> legislation decreases the

---

1. Thomas Jefferson frequently expressed his admiration for farmers. For instance, he opined: “Those who labor in earth are the chosen people of God,” THOMAS JEFFERSON, NOTES ON THE STATE OF VIRGINIA 164–65 (William Peden ed., The Univ. of N.C. Press, 2d ed. 2011) (1785), and “[c]ultivators of the earth are the most valuable citizens.” *Extract from Thomas Jefferson to John Jay*, JEFFERSON QUOTES & FAMILY LETTERS, tjrs.monticello.org/letter/69#X3184736 (last visited Dec. 14, 2017) (letter dated Aug. 23, 1785).

2. Factory farms are industrial farming operations that raise large numbers of animals in extreme confinement for use in food products. See *Farm Animal Welfare: Farm Animals Need Our Help*, ASPCA, <http://www.aspc.org/animal-cruelty/farm-animal-welfare> (last visited Oct. 1, 2017) [hereinafter *Farm Animal Welfare*]. These operations are intended to maximize production and minimize cost. See *Factory Farm*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/factory%20farm> (last visited Dec. 14, 2017).

3. See *infra* Parts II.–III.

4. See *infra* Part II.

5. See *infra* Part III.

6. “Ag-gag” is defined as any law that would “chill good faith undercover investigating or reporting of abuse or safety violations by an employee or citizen at agricultural facilities with the force of criminal law.” Rita-Marie Cain Reid & Amber L. Kingery, *Putting A Gag on Farm Whistleblowers: The Right to Lie and the Right to Remain Silent Confront State Agricultural Protectionism*, 11 J. FOOD L. & POL'Y 31, 37 (2015). The term, “ag-gag,” was coined by Mark Bittman in 2011 in his *New York Times* column. See Mark Bittman, *Who Protects the Animals?*,

public's access to information by criminalizing undercover investigations seeking to expose harmful practices, punishing whistleblowers, and curbing what the media and individuals can divulge about practices and products.<sup>7</sup> Meanwhile, the industry uses practices and lobbies for policies that cause environmental degradation, violate workers' rights, abuse animals, chill First Amendment rights, threaten food safety, and harm small farmers.

This Article will discuss the myriad of different laws and regulatory exemptions that insulate the industry from public scrutiny and protect it from the legal consequences of its harmful actions. The breadth of this protection is extraordinary and unlike that of any other industry. Part I will outline the significant problems factory farming creates. Part II of this Article will discuss the legal framework that fails to protect the public and, instead, allows the industry to operate without concern for human or animal welfare. Part III of this Article will offer alternative approaches that would better protect humans and animals, reflect public will, and hold the agricultural industry accountable for its irresponsible, unethical, and harmful actions. This Article will conclude that the legal landscape must be recognized for its deficiencies and altered to shift its focus from protecting a multi-billion-dollar industry to protecting the public interest.

## I. HARMS OF BIG-AG

As outlined above, the injury to the public caused by an unregulated agricultural industry is varying and widespread, affecting human and animal health, the environment, food safety, the economic opportunities of small farmers, and workers' rights. This Part will discuss those harms in more detail.

---

N.Y. TIMES (Apr. 26, 2011, 9:29 PM), <http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/>.

7. See Reid & Kingery, *supra* note 6, at 37–40.

### A. Animal Cruelty

Factory farms are large-scale, industrialized facilities<sup>8</sup>—a far cry from the traditional, individualized operations of the family farms of the past. This system is “designed to produce animals of marketable weight in the shortest period of time possible”<sup>9</sup>—in other words, to maximize profit. The pace of modern food production is staggering; “[e]very twenty-four hours, ninety thousand cows and calves are slaughtered. Every minute, fourteen thousand chickens are killed.”<sup>10</sup>

Unfortunately, there is an inherent conflict between the humane treatment of animals and factory farming’s efficiency model. Animals are confined with hundreds of thousands of other animals in small crates, battery cages, and other systems designed to stifle movement.<sup>11</sup> Ninety-nine percent of farm animals in the United States are restricted to a life indoors, in overcrowded sheds, and are restricted from engaging in “natural behaviors such as foraging, perching, nesting, rooting, and mating.”<sup>12</sup> Further, many animals are incapable of turning around or stretching their limbs during their short, painful lives.<sup>13</sup> Farm animals are also “physically altered without anesthesia.”<sup>14</sup> For example, pigs have their tails cut off, chickens have their beaks clipped off, and “cows have their tails and horns removed,” all without pain relief.<sup>15</sup> This is just to name a few of the cruel and painful practices systematically imposed on farm animals raised for food production—all in the name of

---

8. See *Farm Animal Welfare*, *supra* note 2.

9. Kevin C. Adam, *Shooting the Messenger: A Common-Sense Analysis of State “Ag-Gag” Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1145 (2012).

10. Larissa Wilson, *Ag-Gag Laws: A Shift in the Wrong Direction for Animal Welfare on Farms*, 44 GOLDEN GATE U. L. REV. 311, 314 (2014) (citing *What’s Wrong with Factory Farming?*, CTR. FOR FOOD SAFETY, <http://www.centerforfoodsafety.org/files/factoryfarmingfactsheet.pdf> (last visited Oct. 1, 2017)).

11. See Adam, *supra* note 9.

12. *Id.* at 1145 n.107 (quoting Gaverick Matheny & Cheryl Leahy, *Farm-Animal Welfare, Legislation, and Trade*, 70 LAW & CONTEMP. PROBS. 325, 329 (2007)).

13. *Id.*

14. *Id.* at 1145.

15. *Id.*

“efficiency.”<sup>16</sup>

In recent years, undercover investigators from animal rights organizations have increased public awareness of these kinds of practices.<sup>17</sup> Typically, these investigators have posed as employees and taken video footage and photographs of the conduct in these facilities.<sup>18</sup> They then release the footage and photographs to the media, causing public outrage and, in some cases, product recalls.<sup>19</sup>

For example, in 2008, undercover investigators working for the Humane Society of the United States (HSUS) filmed the mistreatment of “downed” cows, which are sick or otherwise injured cows who cannot walk or stand on their own,<sup>20</sup> “in California that were slaughtered for school children’s lunchmeat.”<sup>21</sup> This exposé led to the largest meat recall in United States history.<sup>22</sup> Similarly, in 2013, investigators with Mercy for Animals publicized footage of farm workers physically abusing pigs and piglets.<sup>23</sup> Workers were taped “kicking, hitting and throwing pigs and slamming piglets into the ground,” leaving them to die slowly.<sup>24</sup> The investigator who shot the footage told the media that the abuse was “commonplace and constant” at the farm, and that the abuse often included sticking fingers in pigs’ eyes and hitting pigs with wooden boards.<sup>25</sup> The media coverage of

---

16. *See id.*

17. *See, e.g.,* Stephen Wells, *Undercover Investigation Reveals Shocking Animal Cruelty and Safety Violations at Tyson Foods Slaughterhouse*, HUFFPOST (Sept. 22, 2015, 9:15 AM), [http://www.huffingtonpost.com/stephen-wells/undercover-investigation-\\_b\\_8131212.html](http://www.huffingtonpost.com/stephen-wells/undercover-investigation-_b_8131212.html) (discussing a recent undercover investigation at a Tyson Foods slaughterhouse).

18. *See, e.g.,* Kate Pickert, *Undercover Animal-Rights Investigator*, TIME (Mar. 9, 2009), <http://content.time.com/time/nation/article/0,8599,1883742,00.html>.

19. *See, e.g.,* Andrew Martin, *Largest Recall of Ground Beef Is Ordered*, N.Y. TIMES (Feb. 18, 2008), <http://www.nytimes.com/2008/02/18/business/18recall.html?mcubz=0>.

20. Wilson, *supra* note 10, at 316 n.36 (citation omitted).

21. *Id.* at 316; *see also* Martin, *supra* note 19.

22. Wilson, *supra* note 10, at 316.

23. Anna Schecter, Monica Alba & Lindsay Perez, *Tyson Foods Dumps Pig Farm After NBC Shows Company Video of Alleged Abuse*, NBC NEWS (Nov. 20, 2013, 6:12 AM), <https://www.nbcnews.com/news/other/tyson-foods-dumps-pig-farm-after-nbc-shows-company-video-f2D11627571>.

24. *Id.*

25. *Id.*

this abuse caused Tyson Foods, the largest meat producer in the United States, to cancel its contract with that particular pork supplier.<sup>26</sup>

There are several reasons the public should care about animal cruelty on factory farms. Food safety is one concern. Abusive treatment of animals while they are being raised or slaughtered can lead to contamination of the animal product, which in turn can cause public health problems.<sup>27</sup> For example, in 2010, there were investigations into several of Iowa's egg-producing farms for animal cruelty; these farms were at the center of the salmonella outbreak that led to the largest egg recall in the United States.<sup>28</sup>

There is also a moral reason to care about the treatment of farm animals. There is a lack of a logical distinction between farm animals and animals that are traditionally beloved and treated as family members, like cats and dogs.<sup>29</sup> In fact, scientific studies have shown that "chickens and pigs outperform dogs and cats on tests of behavioral and cognitive sophistication and that, like dogs and cats, farm animals are individuals with personalities."<sup>30</sup> Professor Cass Sunstein has expressed "that for anyone who cares about animal suffering, nothing is as important as the suffering of farm animals because of the sheer number of [farm] animals . . . raised for food."<sup>31</sup> Therefore, people who care about their pets' welfare should make the connection between the welfare of their pets and the welfare of the billions of farm animals under the control of factory farms. Most people would be morally outraged if a cat or dog were subjected to most practices that are accepted as commonplace on a factory farm.

---

26. *Id.*; see also Tom Philpott, *Undercover Video Reveals Savage Abuse at a Factory Pig Farm. Again.*, MOTHER JONES (Nov. 21, 2013, 6:09 PM), <http://www.motherjones.com/food/2013/11/yet-again-undercover-video-documents-savage-abuse-factory-pig-farm/>.

27. See Wilson, *supra* note 10; Michael Pollan, *Power Steer*, N.Y. TIMES MAG. (Mar. 31, 2002), <http://www.nytimes.com/2002/03/31/magazine/power-steer.html?mcubz=0>.

28. Wilson, *supra* note 10, at 317.

29. Bruce Friedrich, *When the Regulators Refuse to Regulate: Pervasive USDA Underenforcement of the Humane Slaughter Act*, 104 GEO. L.J. 197, 200 (2015).

30. *Id.*

31. *Id.*

To delve even deeper into the moral argument against abusive treatment of farm animals, one has to ask what the distinction is between humans and non-humans that allows humans to have moral status and excludes non-humans from such moral status. One argument there should be no such moral distinction is that species membership itself does not support the view that members of one species (e.g., humans) deserve moral consideration that is not owed to other non-human species. Some note that intelligence distinguishes humans from other species,<sup>32</sup> which others may use to justify human practices towards animals that cause pain, suffering, and death. Others, such as moral philosopher Peter Singer, debunk this argument quite convincingly.<sup>33</sup> In his book, *Animal Liberation*, Singer argues that all beings capable of suffering are worthy of equal consideration and giving lesser consideration to beings based on species is no more justifiable than discrimination based on skin color.<sup>34</sup> He argues that animals' rights should be based on their capacity to feel pain rather than on their intelligence.<sup>35</sup> He points out that many intellectually challenged humans show lower mental capacity than some animals.<sup>36</sup> Furthermore, animals have displayed signs of intelligence on par with that of human children.<sup>37</sup> Therefore, intelligence should not provide a basis for giving non-human animals less consideration. This is a well-explored debate among animal rights scholars and philosophers, and further reading on the topic is readily available to the interested reader.

---

32. See, e.g., F. Patrick Hubbard, "Do Androids Dream?": *Personhood and Intelligent Artifacts*, 83 TEMP. L. REV. 405, 413 (2011) (noting that humans and animals are treated differently because animals lack the capacity for personhood, "particularly in terms of complex intellectual skills").

33. See generally PETER SINGER, *ANIMAL LIBERATION* (1990) (documenting the animal liberation movement and its expansion).

34. *Id.* at 1-3.

35. *Id.* at 19-21.

36. *Id.* at 15-16, 18.

37. *Id.* at 14-16, 18.

### B. Environment

The severe environmental impact of factory farming has been extensively documented. The Food and Agriculture Organization of the United Nations has concluded that “[t]he livestock sector emerges as one of the top two or three most significant contributors to the most serious environmental problems.”<sup>38</sup>

Animal agriculture is a leading producer of greenhouse gases, and therefore a significant cause of climate change.<sup>39</sup> According to the Environmental Protection Agency (EPA), “animal agriculture is the single largest source of methane emissions in the U.S.,” which “contributes approximately two million tons of manure-based emissions annually.”<sup>40</sup> Methane has “21 times the global warming potential of carbon dioxide.”<sup>41</sup> In fact, reports show that “global emissions from all livestock operations account for 18% of all anthropogenic greenhouse gas emissions on the planet,” an amount greater than cars, trucks, and planes.<sup>42</sup> Worldwide, 51% of greenhouse gas emissions can be attributed to animal agriculture.<sup>43</sup>

Factory farms also have dramatic effects on soil, air, and

---

38. James I. Pearce, *A Brave New Jungle: Factory Farming and Advocacy in the Twenty-First Century*, 21 DUKE ENVTL. L. & POL’Y F. 433, 445 (2011) (quoting THE LIVESTOCK, ENV’T & DEV. INITIATIVE, LIVESTOCK’S LONG SHADOW: ENVIRONMENTAL ISSUES AND OPTIONS, at xx (2006), <http://www.europarl.europa.eu/climatechange/doc/FAO%20report%20executive%20summary.pdf>)).

39. See R. Jason Richards & Erica L. Richards, *Cheap Meat: How Factory Farming Is Harming Our Health, the Environment, and the Economy*, 4 KY. J. EQUINE, AGRIC. & NAT. RESOURCES L. 31, 41 (2012); see also Christopher Hyner, *A Leading Cause of Everything: One Industry That Is Destroying Our Planet and Our Ability to Thrive on It*, GEO. ENVTL. L. REV. (Oct. 23, 2015), <https://geln.org/2015/10/23/a-leading-cause-of-everything-one-industry-that-is-destroying-our-planet-and-our-ability-to-thrive-on-it-georgetown-environmental-law-review/>.

40. Richards & Richards, *supra* note 39.

41. Gabriela Wolfe, *Anything but Ag-Gag: Ending the Industry-Advocate Cycle*, 66 SYRACUSE L. REV. 367, 376 (2016) (quoting Lisa Winebarger, Comment, *Standing Behind Beastly Emissions: The U.S. Subsidization of Animal Agriculture Violates the United Nations Framework Convention on Climate Change*, 27 AM. U. INT’L L. REV. 991, 1008 (2012)).

42. Richards & Richards, *supra* note 39 (quoting DAVID KIRBY, ANIMAL FACTORY: THE LOOMING THREAT OF INDUSTRIAL PIG, DAIRY, AND POULTRY FARMS TO HUMANS AND THE ENVIRONMENT 407 (2010)).

43. Wolfe, *supra* note 41.

water quality.<sup>44</sup> Animal agriculture “has been identified as the [United States’] largest source of nonpoint pollution by . . . studies finding that it contributes more than half of the pollutants that enter the nation’s rivers and lakes.”<sup>45</sup> Studies have shown that feces, urine, and animal hair create high concentrations of ground and surface water pollutions, as well as unsafe levels of greenhouse gas emissions, particularly methane.<sup>46</sup> The waste produced by factory farms is enormous; for example, “hog farms in eastern North Carolina produce as much daily sewage as the entire human population of California.”<sup>47</sup> Animal waste is congregated into “waste lagoons.”<sup>48</sup> “These lagoons can be up to 120,000 square feet” — essentially “lake-sized cesspools”<sup>49</sup> — and seep into groundwater, which contaminates the air and water, causing health problems in wildlife and humans.<sup>50</sup> Human exposure to these lagoons has been tied to “asthma, bronchitis, diarrhea, heart palpitations, headaches, depression, nosebleeds, and brain damage.”<sup>51</sup>

Not only is industrial agriculture harmful to the environment, but it is also insufficient to feed a growing global population with limited access to land and water. Livestock production covers approximately 40%–50% of the land in the United States<sup>52</sup> — land which could be used to grow crops to feed to humans rather than to animals raised for human consumption. Further, “animal agriculture is the leading user of the country’s

---

44. See generally Richards & Richards, *supra* note 39 (linking livestock to water quality, pollutants, and ground damage).

45. *Id.* at 40.

46. See Warren A. Braunig, *Reflexive Law Solutions for Factory Farm Pollution*, 80 N.Y.U. L. REV. 1505, 1509–11 (2005); see also Wolfe, *supra* note 41.

47. Richards & Richards, *supra* note 39, at 40.

48. *Id.* at 41.

49. Sara Lacy, Comment, *Hard to Watch: How Ag-Gag Laws Demonstrate the Need for Federal Meat and Poultry Industry Whistleblower Protections*, 65 ADMIN. L. REV. 127, 137 (2013).

50. See Richards & Richards, *supra* note 39, at 40; see also Lacy, *supra* note 49.

51. Lacy, *supra* note 49, at 137 n.67 (quoting Anastasia S. Stathopoulos, Note, *You Are What Your Food Eats: How Regulation of Factory Farm Conditions Could Improve Human Health and Animal Welfare Alike*, 13 N.Y.U. J. LEGIS. & PUB. POL’Y 407, 414 (2010)).

52. Wolfe, *supra* note 41.

water resources"<sup>53</sup>—a fact made more significant by this country's recent severe water shortages in its western region.<sup>54</sup> To put it in perspective, "cattle require 100,000 liters of water per kilogram of food produced," while plants use about 1,100 liters of water per kilogram of food produced.<sup>55</sup>

By 2050 the world's population is estimated to reach 9.7 billion.<sup>56</sup> In order to feed this population, it is estimated that food production must increase by 70%.<sup>57</sup> Thus, it is clear that animal production, an incredibly water- and land-inefficient method of feeding people, will be unsustainable and impracticable due to limits on resources such as water and land.

### C. Worker Safety

There are roughly 1.2 million hired agricultural workers on farms and ranches throughout this country, with approximately 30% of those workers employed in livestock, dairy, and poultry production.<sup>58</sup> A large proportion of the factory-farming workforce is comprised of workers with very little bargaining power, such as undocumented immigrants and other low socioeconomic and minority populations.<sup>59</sup> In fact, estimates suggest that 38% of factory farm workers are undocumented.<sup>60</sup> In some slaughterhouses, undocumented immigrants make up about

---

53. Lucy L. Holifield, *Animal Legal Defense Fund v. Otter: Industrial Food Production Simply is Not a Private Matter*, 12 J. FOOD L. & POL'Y 16, 26 (2016).

54. See Dennis Dimick, *5 Things You Should Know About California's Water Crisis*, NAT'L GEOGRAPHIC (Apr. 6, 2015), <http://news.nationalgeographic.com/2015/04/150406-california-drought-snowpack-map-water-science/>.

55. Holifield, *supra* note 53, at 26-27.

56. *World Population Projected to Reach 9.7 Billion by 2050*, UNITED NATIONS DEP'T ECON. & SOC. AFF. (Jul. 29, 2015), <http://www.un.org/en/development/desa/news/population/2015-report.html>.

57. *2050: A Third More Mouths to Feed*, FOOD & AGRIC. ORG. UNITED NATIONS (Sept. 23, 2009), <http://www.fao.org/news/story/en/item/35571/icode/>.

58. See Autumn L. Canny, Note, *Lost in a Loophole: The Fair Labor Standards Act's Exemption of Agricultural Workers from Overtime Compensation Protection*, 10 DRAKE J. AGRIC. L. 355, 383 (2005).

59. See Lacy, *supra* note 49, at 140.

60. Lucas Spangher, *The Overlooked Plight of Factory Farm Workers*, HUFFPOST (Oct. 18, 2014, 5:39 PM), [http://www.huffingtonpost.com/lucas-spangher/plight-of-factory-farm-workers\\_b\\_5662261.html](http://www.huffingtonpost.com/lucas-spangher/plight-of-factory-farm-workers_b_5662261.html); see also Mark Hawthorne, *Inside the Life of a Factory Farm Worker*, VEGNEWS (May 1, 2013), <http://vegnews.com/articles/page.do?pageId=5732&catId=1>.

two-thirds of the employee population.<sup>61</sup> Factory farm workers' supervisors can exploit fear of immigration consequences, such as deportation, and negative employment actions to silence any attempts to speak out about animal abuse or worker safety violations.<sup>62</sup>

This population is also comprised of extremely low-wage workers; the "USDA reports the average wage of an agricultural worker employed in livestock and poultry production is \$8.64 per hour."<sup>63</sup> They typically work long hours, averaging a work week of "49.4 hours while their nonagricultural counterparts average 42.8 hours a week."<sup>64</sup>

The animal agricultural facilities, particularly slaughterhouses, are dangerous environments for workers—studies based on reported injuries have shown that they are three times more dangerous than the average American factory.<sup>65</sup> A study in Iowa showed that employees in general experience 9.8 injuries or illnesses per year while slaughterhouse employees experience fifty-one illnesses or injuries per year.<sup>66</sup> In fact, working at a slaughterhouse is the "most dangerous job in the United States," according to Eric Schlosser, author of *Fast Food Nation*.<sup>67</sup> Factory farm workers have been killed by falling equipment or falling animals, had limbs amputated after getting stuck in machinery, and have suffered numerous other injuries.<sup>68</sup>

The system seems to place "nearly as little value on human life as it does on animal life."<sup>69</sup> There have been accounts of workers being forced by supervisors to urinate and defecate in their clothing rather than stopping the processing line for a

---

61. Richards & Richards, *supra* note 39, at 38.

62. See Lacy, *supra* note 49, at 140.

63. Canny, *supra* note 58.

64. *Id.* at 383–84.

65. Pearce, *supra* note 38, at 447.

66. Wolfe, *supra* note 41, at 377.

67. See Pearce, *supra* note 38, at 447.

68. *Id.* at 447–48.

69. *Id.* at 448 (quoting GAIL A. EISNITZ, *SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLIGENCE, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY* 275 (1997)).

bathroom break.<sup>70</sup> In fact, Human Rights Watch issued a report in 2004 concluding that the United States “meat packing industry’s working conditions violate basic human rights.”<sup>71</sup> The report stated that workers are prevented from organizing and may be fired if they support unionization.<sup>72</sup> It further found that almost every worker interviewed “bore physical signs of a serious injury” from his or her job as a meatpacker.<sup>73</sup> Moreover, meatpacking workers are treated as just another part of the industrial production process—the industry creates practices that endanger the workers and then treats injuries as a natural part of the production process rather than repeated violations of international human rights standards.<sup>74</sup>

There have also been widespread accounts of sexual assault and harassment of agricultural workers by supervisors.<sup>75</sup> For example, in 2005, the Equal Employment Opportunity Commission won a verdict for a woman who worked “at one of California’s largest cattle-feeding operations, who was repeatedly raped by a supervisor.”<sup>76</sup> In 2010, a study conducted by the University of California, Santa Cruz found that “more than 60 percent of the 150 female farmworkers interviewed said they had experienced some form of sexual harassment.”<sup>77</sup> In 2012, Human Rights Watch “surveyed 52 female farmworkers; nearly all of them had experienced sexual violence or knew others who had.”<sup>78</sup>

The brutal reality of working on a factory farm also spills

---

70. *Id.*

71. Richards & Richards, *supra* note 39, at 37.

72. *Id.*

73. *Id.* (quoting HUMAN RIGHTS WATCH, BLOOD, SWEAT, AND FEAR: WORKERS’ RIGHTS IN U.S. MEAT AND POULTRY PLANTS, 24 (2004), <https://www.hrw.org/sites/default/files/reports/usa0105.pdf> [hereinafter BLOOD, SWEAT, AND FEAR]).

74. *Id.* (quoting BLOOD, SWEAT, AND FEAR, *supra* note 73).

75. José R. Padilla & David Bacon, *Protect Female Farmworkers*, N.Y. TIMES (Jan. 19, 2016), [https://www.nytimes.com/2016/01/19/opinion/how-to-protect-female-farmworkers.html?mcubz=0&\\_r=0](https://www.nytimes.com/2016/01/19/opinion/how-to-protect-female-farmworkers.html?mcubz=0&_r=0).

76. *Id.*

77. *Id.*

78. *Id.*

over into workers' home lives and affects their families.<sup>79</sup> Particularly, slaughterhouse workers develop mental health problems and are more likely to become sadistic and violent.<sup>80</sup> There is also increased domestic violence and alcoholism among many factory farm workers.<sup>81</sup>

#### D. Food Safety and Public Health

The agricultural industry, as the producer of our food, has control over the safety and purity of our food. In addition to animal cruelty, undercover investigations have revealed extensive mishandling of meat, eggs, and dairy.<sup>82</sup> Mishandling of this kind can lead to health risks, such as mad cow disease, salmonella, and other potentially fatal food-borne illnesses being transmitted to the consumer.<sup>83</sup> The conditions in which animals live can lead to bacterial contamination of meat.<sup>84</sup> Approximately, "eighty-nine percent of beef patties made in the United States contain the E. coli bacterium strain."<sup>85</sup> The United States Department of Agriculture (USDA) has found that around 25% of all cut-up chicken is contaminated with some form of

---

79. Pearce, *supra* note 38, at 448.

80. A former worker at a hog processing plant described his experience there as such:

When you're standing there night after night, digging that knife into these hogs, and they're fighting you, kicking at you, squealing, trying to bite you—doing whatever they can to try to get away from you—after a while you just don't give a shit . . . . You become emotionally dead . . . . And you get just as sadistic as the company itself. When I was sticking down there, I was a sadistic person. By the end of the night everybody would be yelling at everybody else.

*Id.* (quoting GAIL A. EISNITZ, *SLAUGHTERHOUSE: THE SHOCKING STORY OF GREED, NEGLECT, AND INHUMANE TREATMENT INSIDE THE U.S. MEAT INDUSTRY* 74–75 (1997)).

81. *Id.* The same hog processing worker stated that he and his wife separated because he would come home drunk and physically abuse her. *Id.*

82. *What is Ag-Gag Legislation?*, ASPCA, <https://www.asPCA.org/animal-cruelty/farm-animal-welfare/what-ag-gag-legislation> (last visited Sept. 17, 2017).

83. *See Foodborne Illnesses: What Consumers Need to Know*, U.S. DEP'T AGRIC. FOOD SAFETY INSPECTION SERV., [https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/foodborne-illness-and-disease/foodborne-illness-what-consumers-need-to-know/CT\\_Index](https://www.fsis.usda.gov/wps/portal/fsis/topics/food-safety-education/get-answers/food-safety-fact-sheets/foodborne-illness-and-disease/foodborne-illness-what-consumers-need-to-know/CT_Index) (last modified Aug. 7, 2013).

84. *See* Wilson, *supra* note 10.

85. *Id.*

salmonella.<sup>86</sup>

Additionally, due to the unsanitary, squalid conditions, farm animals in confinement are given large amounts of preventative antibiotics.<sup>87</sup> In fact, nearly “eighty percent of all antibiotics sold in the United States are purchased for use in animal agriculture.”<sup>88</sup> Constant exposure to antibiotics results in strains of bacteria that become resistant to antibiotics,<sup>89</sup> a scary prospect for humans potentially infected by these new strains of bacteria. For example, in August 2011, Cargill recalled 36 million pounds of turkey meat from a slaughterhouse in Arkansas due to antibiotic-resistant salmonella that sickened more than seventy-six people and killed one person.<sup>90</sup> Farm animals are also given hormones to speed up and increase their growth.<sup>91</sup> These hormones are linked to increased risk of cancer and other health problems in humans, such as reproductive and developmental disorders.<sup>92</sup>

### E. Economic Impact

Government policies, such as subsidies, encourage the consolidation and industrialization of farming operations by incentivizing higher production and lower costs.<sup>93</sup> Between 1997 and 2005, government subsidies provided to “chicken, pork, beef, and corn producers were roughly \$26.5 billion.”<sup>94</sup> Factory farms

---

86. Dan Charles, *USDA Imposes Stricter Limit on Salmonella Bacteria in Poultry Products*, NPR, (Feb. 4, 2015, 5:11 AM), <http://www.npr.org/sections/thesalt/2016/02/04/465530128/usda-imposes-stricter-limit-on-salmonella-bacteria-in-poultry-products>.

87. Wilson, *supra* note 10; see also Wolfe, *supra* note 41, at 374.

88. Wolfe, *supra* note 41, at 374.

89. Wilson, *supra* note 10.

90. *Multistate Outbreak of Human Salmonella Heidelberg Infections Linked to Ground Turkey (Final Update)*, CTR. FOR DISEASE CONTROL & PREVENTION (Nov. 10, 2011), <https://www.cdc.gov/salmonella/2011/ground-turkey-11-10-2011.html>; see also William Neuman, *Cargill Issues Meat Recall After Turkey Tied to Illness*, N.Y. TIMES (Aug. 3, 2011), <http://www.nytimes.com/2011/08/04/business/cargill-recalls-ground-turkey-linked-to-salmonella-outbreak.html?mcubz=3>.

91. See Wolfe, *supra* note 41, at 375.

92. *Id.*

93. Richards & Richards, *supra* note 39, at 35.

94. *Id.*

saved about \$3.9 billion per year in reduced feed costs during that period.<sup>95</sup> The U.S. Farm Bill of 2002 further subsidized factory farms by granting investors up to \$450,000 of federal money to work on animal waste treatment practices.<sup>96</sup>

Heavy government subsidies of the animal industry have driven prices of animal products low.<sup>97</sup> The animal industry, however, costs taxpayers billions of dollars each year in the form of federal subsidies, which mostly benefit the largest operations, leaving small farms unable to compete.<sup>98</sup> The subsidies encourage efficiency and high yield, which, in addition to pushing out small farms, further sacrifice animal and worker welfare.<sup>99</sup>

Factory farming also has a negative economic impact on residents living near farming facilities.<sup>100</sup> As discussed above, factory farms cause water and air pollution and emit offensive odors to surrounding areas.<sup>101</sup> Studies have shown that property values decrease the closer the property is located to an industrial farming facility.<sup>102</sup> Indeed, the Pew Commission on Industrial Farm Animal Production found that “[i]ndustrialization of animal agriculture leads to the reduced enjoyment of property and the deterioration of the surrounding landscape, which are reflected in declining home values and lowering of property tax assessments.”<sup>103</sup> Another report in Iowa found that having a hog farming facility within a half-mile decreased neighboring property values by 40%.<sup>104</sup>

---

95. *Id.*

96. *Id.*

97. *See id.*

98. *Id.* at 35–36.

99. *See id.* at 37.

100. *Id.* at 38.

101. *Id.*

102. *Id.* at 38–39.

103. *Id.* at 38.

104. *Id.*

## II. HOW CURRENT LAW CONTRIBUTES TO HARM

Though the agricultural industry affects food safety, the environment, worker safety, and human and animal health, the industry is not subject to the same stringent rules and regulations as other large industries.<sup>105</sup> “The agricultural industry has successfully convinced legislatures to enact tailor-made [laws] to protect its unique interests” and shield it from public scrutiny of its unsavory practices.<sup>106</sup> It has also effectively advocated for carve-outs from regulations that would interfere with its practices and potentially harm its profits.<sup>107</sup>

The following section provides an overview of the exceptional legal protection afforded to the agricultural industry.

### A. Ag-Gag Laws

Undercover investigations by animal rights advocates on factory farms have exposed wide-spread practices of animal abuse, filthy and dangerous working conditions, threats to food safety, and environmental hazards.<sup>108</sup> These investigations have educated the public about abusive practices, resulted in public outrage, and caused product recalls and lost profits for agricultural corporations.<sup>109</sup> The release of footage of these practices has educated the public about farm animal abuse and has led to a demand for change of industry practices.<sup>110</sup>

The agricultural industry has responded to these publicized investigations not by attempting to remedy the objectionable practices caught on film, but instead by lobbying state legislatures for laws limiting access to agricultural facilities by activists and prohibiting the distribution of footage and images

---

105. *Id.* at 34–35.

106. Nicole E. Negowetti, *Opening the Barnyard Door: Transparency and the Resurgence of Ag-Gag & Veggie Libel Laws*, 38 SEATTLE U. L. REV. 1345, 1367 (2015).

107. See Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, 77 OHIO ST. L.J. 1195, 1213 n.114 (2016) [hereinafter Pollans, *Drinking Water Protection*] (citing J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 298–304 (2000)).

108. See *supra* notes 17–26 and accompanying text.

109. See *supra* notes 17–26 and accompanying text.

110. See *supra* notes 17–26 and accompanying text.

obtained in such facilities.<sup>111</sup> This body of law is referred to as “ag-gag.”

### 1. *State ag-gag laws*

Kansas passed the first ag-gag law in 1990.<sup>112</sup> The law, entitled the “Farm Animal and Field Crop and Research Facilities Protection Act,” made it illegal to enter an animal facility to take photographs or record videos.<sup>113</sup> Montana and North Dakota also passed ag-gag laws in the 1990s.<sup>114</sup> These laws, like the Kansas law, prohibited the entrance onto property to use video and recording devices without consent.<sup>115</sup> These early ag-gag laws, however, were less focused on undercover investigations and more concerned with property damage and the liberation of animals.<sup>116</sup> In fact, early ag-gag laws were rarely enforced and, for the most part, lay under the radar of public awareness.<sup>117</sup>

In 2011 and 2012, when undercover investigations of facilities began to be more commonplace, there was an influx of more restrictive ag-gag bills proposed across the country. Bills were proposed and considered in eleven states.<sup>118</sup> This second gen-

---

111. *See infra* Part III.

112. *See* KAN. STAT. ANN. §§ 47-1825 to -1830 (2017); *see also* CHIP GIBBONS, CTR. FOR CONS. RTS., AG-GAG ACROSS AMERICA: CORPORATE-BACKED ATTACKS ON ACTIVISTS AND WHISTLEBLOWERS 10 (2017), <https://ccrjustice.org/sites/default/files/attach/2017/09/Ag-GagAcrossAmerica.pdf> [hereinafter AG-GAG ACROSS AMERICA].

113. Section 47-1827(c)(4) states: “No person shall, without the effective consent of the owner and with the intent to damage the enterprise conducted at the animal facility enter an animal facility to take pictures by photograph, video camera or by any other means.”

114. AG-GAG ACROSS AMERICA, *supra* note 112, at 10-11; *see also* MONT. CODE ANN. §§ 81-30-101 to -105 (2017); N.D. CENT. CODE §§ 12.1-21.1-01 to -05 (2017). These bills were similar but varied in requirements of intent. *Compare* MONT. CODE ANN. § 81-30-103(2)(3) (requiring specific intent to commit criminal defamation), *with* N.D. CENT. CODE § 12.1-21.1-02(6) (requiring no specific intent).

115. KAN. STAT. ANN. § 47-1827(c)(4); MONT. CODE ANN. § 81-30-103(2)(e); N.D. CENT. CODE § 12.1-21.1-02(6).

116. Justin F. Marceau, *Ag Gag Past, Present, and Future*, 38 SEATTLE U. L. REV. 1317, 1333 (2015).

117. *See id.*

118. *See, e.g.*, IOWA CODE § 717A.3A (2017); UTAH CODE ANN. § 76-6-112 (West 2017), *invalidated by* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017); *see also* Elizabeth Barclay, *2013 Was The Year Bills To Criminalize Animal Cruelty Videos Failed*, NPR (Dec. 27, 2014, 10:39 AM), <http://www.npr.org/sections/thesalt/2013/12/19/255549796/2013->

eration of ag-gag legislation was aimed at shielding corporate farming production from any scrutiny by specifically targeting undercover investigations.<sup>119</sup> Common provisions throughout the bills included imposing time limits on turning over legally obtained recordings to law enforcement, restricting reproductions and dissemination of footage, and limiting the ability to gain employment at a facility on false pretenses.<sup>120</sup>

One way these new laws targeted undercover investigations was by creating new, agricultural-specific crimes. Iowa, which began the second wave of ag-gag legislation,<sup>121</sup> enacted a law that created a new crime termed “agriculture production facility fraud,” which criminalized the act of obtaining access to facilities under false pretenses (i.e., lying on a job application).<sup>122</sup> The statute uses the crime of “agriculture production facility fraud” to target undercover investigations by limiting activists’ ability to obtain employment at animal production facilities, and thus, their ability to obtain footage of abuse.<sup>123</sup> This addition to the legal landscape by the country’s second biggest agricultural state<sup>124</sup> paved the way for the new trend of ag-gag legislation.

Utah followed Iowa’s lead in 2012 and, in its ag-gag statute, created a new crime called “agricultural operation interference.”<sup>125</sup> This crime prohibited the production of an audio or video recording at an agricultural facility, either in person or with a planted device, without the owner’s consent.<sup>126</sup> Many ag-

---

was-the-year-every-new-ag-gag-bill-failed.

119. See Marceau, *supra* note 116, at 1335–39.

120. See *id.* at 1335–40; see also AG-GAG ACROSS AMERICA, *supra* note 113, at 13–21.

121. See AG-GAG ACROSS AMERICA, *supra* note 112, at 13–15.

122. IOWA CODE § 717A.3A.

123. See *id.*

124. *Cash Receipts by Commodity State Ranking*, U.S. DEP’T AGRIC. ECON. RES. SERV., <https://data.ers.usda.gov/reports.aspx?ID=17844> (last updated Aug. 30, 2017).

125. UTAH CODE ANN. § 76-6-112 (West 2017), *invalidated by* Animal Legal Def. Fund v. Herbert, 263 F. Supp. 3d 1193 (D. Utah 2017); see also Bill Chappell, *Judge Overturns Utah’s ‘Ag-Gag’ Ban On Undercover Filming At Farms*, NPR (Jul. 8, 2017), <http://www.npr.org/sections/thetwo-way/2017/07/08/536186914/judge-overturns-utahs-ag-gag-ban-on-undercover-filming-at-farms>.

126. UTAH CODE ANN. § 76-6-112(2)(a)–(d).

gag statutes and proposed bills include a similar offense, which carries penalties, including misdemeanors and felonies, depending on the number of violations and the amount of financial damage caused by the release of the information.<sup>127</sup>

In 2012, Missouri enacted the first ag-gag provision requiring reporting of abuse.<sup>128</sup> The law made it illegal for a “farm animal professional”<sup>129</sup> to fail to turn over to authorities within twenty-four hours any recordings of animal abuse.<sup>130</sup> This so-called “mandatory reporting” or “rapid reporting” provision on its face seems to protect animals but in reality is another tool used by the industry to protect itself from scrutiny.<sup>131</sup> Following Missouri, several other states have instituted similar provisions, and other states have attempted to pass ag-gag laws.<sup>132</sup>

In 2014, Idaho passed a law creating the crime of “interference with agricultural production” and making it illegal to “obtain[] employment . . . by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility.”<sup>133</sup> The crime, though a misdemeanor, carried up to a year of jail time as a penalty.<sup>134</sup> The law also covered good faith employees who gained employment without misrepresentation, who then

---

127. See Marceau, *supra* note 116, at 1335–39.

128. MO. REV. STAT. § 578.013(1) (2016); see also AG-GAG ACROSS AMERICA, *supra* note 112, at 15; Alicia Prygoski, *Detailed Discussion of Ag-gag Laws*, ANIMAL L. & HIST. CTR., <https://www.animallaw.info/article/detailed-discussion-ag-gag-laws> (last visited Dec. 14, 2017).

129. “Farm animal professional” is defined as “any individual employed at a location where farm animals are harbored.” MO. REV. STAT. § 578.005(6).

130. *Id.* § 578.013(1).

131. Mandatory reporting statutes are discussed further within. See *infra* Section II.A.2.

132. See AG-GAG ACROSS AMERICA, *supra* note 112, at 15–21. In 2013, Arkansas, Indiana, and Nebraska attempted to pass ag-gag laws. H.B. 2079, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); S.B. 14, 89th Gen. Assemb., Reg. Sess. (Ark. 2013); H.B. 1562, 118th Gen. Assemb., Reg. Sess. (Ind. 2013); S.B. 373, 118th Gen. Assemb., Reg. Sess. (Ind. 2013); L.B. 204, 103rd Leg., 1st Reg. Sess. (Neb. 2013).

133. IDAHO CODE § 18-7042(1)(c) (2017), *invalidated by* Animal Legal Def. Fund v. Otter, 118 F. Supp. 3d 1195 (D. Idaho 2015). The Idaho bill was a direct response by the Idaho Dairymen’s Association to an undercover investigation video that was publicized by Mercy for Animals showing workers at Bettencourt Dairies dragging sick and injured cows in chains, jumping on and kicking cows, and beating cows viciously. See Wilson, *supra* note 10, at 316–18; see also Peter Moskowitz, *Idaho Gov. Signs “Ag Gag” Bill Into Law*, AL-JAZEERA AM. (Feb. 28, 2014, 5:06 PM), <http://america.aljazeera.com/articles/2014/2/28/idaho-gov-signs-ag-gagbillintolaw.html>.

134. IDAHO CODE § 18-7042(3).

witnessed and recorded wrongdoing, and wished to report that wrongdoing (i.e., traditional whistleblowers.)<sup>135</sup>

In 2015, North Carolina passed the most “significant broadening of ag-gag legislation” to date.<sup>136</sup> The law prohibits the act of gaining employment with the purpose of recording within a facility, and intending to use that information to “breach the [employee’s] duty of loyalty to the employer.”<sup>137</sup> Additionally, the law prohibits employees from removing employer’s records and using that information to breach their duty of loyalty.<sup>138</sup> Though this bill mimics the language of other states’ ag-gag legislation, it is not specific to agricultural facilities, and instead, applies to all employment.<sup>139</sup> However, it has strong agricultural implications because North Carolina is a major chicken- and pig-farming state.<sup>140</sup>

Today, “[s]ix states have ag-gag laws on the books: Alabama, Arkansas, Iowa, Kansas, Missouri, and North Carolina.”<sup>141</sup> In the past five years, more than thirty ag-gag bills were proposed across the country.<sup>142</sup>

There have been several legal challenges to the ag-gag legislation. In 2013, Animal Legal Defense Fund (ALDF) and People for the Ethical Treatment of Animals (PETA) filed a lawsuit against Utah’s ag-gag law, arguing that the law infringed on the free speech rights of activists, journalists, and investigators by criminalizing undercover investigations at factory farms.<sup>143</sup> The co-plaintiff and animal rights activist, Amy Meyer, was the first person in the nation to be prosecuted under an ag-gag law for

---

135. *See id.* § 18-7042.

136. AG-GAG ACROSS AMERICA, *supra* note 112, at 19.

137. N.C. GEN. STAT. § 99A-2(b)(2) (2017).

138. *Id.* § 99A-2(b)(1).

139. *See id.* § 99A-2.

140. *See Reid & Kingery, supra* note 6, at 47.

141. *Ag-Gag Laws Keep Animal Cruelty Behind Closed Doors*, HUMANE SOC’Y U.S., [http://www.humanesociety.org/issues/campaigns/factory\\_farming/fact-sheets/ag\\_gag.html](http://www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html) (last visited Dec. 14, 2017).

142. *See id.*

143. Brief for Plaintiff at 2–6, *Animal Legal Def. Fund v. Hebert*, 263 F. Supp. 3d 1193 (D. Utah 2017) (No. 2:13-cv-00679-RJS); *see also Wolfe, supra* note 41, at 383–84.

her videotaping of the operations at a meatpacking company in Utah.<sup>144</sup> In August 2014, the court permitted the lawsuit to move forward, denying the state's motion to dismiss.<sup>145</sup> The case was recently decided in the United States District Court of Utah, with the conclusion that section 76-6-112 of the Utah Code is unconstitutional.<sup>146</sup>

In August 2015, a federal court in Idaho struck down the state's ag-gag law as unconstitutional under the First and Fourteenth Amendments.<sup>147</sup> The plaintiffs in the case were ALDF, PETA, American Civil Liberties Union (ACLU), and a large coalition of environmental and civil rights organizations.<sup>148</sup> The court held that

[a]lthough the State may not agree with the message [animal activists] seek to convey . . . it cannot deny such groups equal protection of the laws in their exercise of their right to free speech. Far from being tailored to a substantial government interest, [the bill] classifies activities protected by the First Amendment based on content. Therefore, under the Equal Protection Clause, it cannot stand.<sup>149</sup>

The court ordered Idaho to pay nearly \$250,000 to PETA to cover the group's legal fees.<sup>150</sup> In December 2015, the State of Idaho filed an appeal, which is still pending, to the United States Court of Appeals for the Ninth Circuit at the urging of

---

144. *Taking Ag-Gag to Court*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/cases-campaigns/features/taking-ag-gag-to-court/> (last visited Dec. 14, 2017); see also Wolfe, *supra* note 41, at 368.

145. *Taking Ag-Gag to Court*, *supra* note 144.

146. *Herbert*, 263 F. Supp. 3d at 1212.

147. *Animal Legal Def. Fund v. Otter*, 118 F. Supp. 3d 1195, 1209, 1211-12 (D. Idaho 2015); see also Holifield, *supra* note 53, at 30-31.

148. *Otter*, 118 F. Supp. 3d at 1195.

149. *Id.* at 1211-12.

150. 'A Warning to Other States': PETA Wins \$250,000 Over Idaho 'Ag-gag' Case, RT (May 20, 2016, 11:56 PM), <https://www.rt.com/usa/343834-peta-paid-fees-ag-gag/>.

the Idaho Dairywomen's Association.<sup>151</sup>

## 2. *Mandatory reporting provisions*

Many newer ag-gag bills include mandatory reporting provisions.<sup>152</sup> These provisions usually require the maker of a recording to surrender it to authorities within a short period of time, usually twenty-four to seventy-two hours, or "require certain classes of people to report suspected animal abuse to authorities" within similarly short time periods.<sup>153</sup>

While facially these bills appear to protect animals against abuse, in practice they serve to prevent activists from conducting comprehensive undercover investigations.<sup>154</sup> By requiring the first incident of animal abuse to be reported immediately, these laws give factory farmers the ability to characterize the incident as isolated, rather than have it be revealed as a pervasive systemic problem or normal business practice.<sup>155</sup> The laws prevent undercover investigators from continuing their investigations after they witness one incident of abuse, hindering their ability to demonstrate a pattern or practice of abuse, which is necessary to establish liability based on the complicity of management.<sup>156</sup> In effect, these "laws force liability and blame to fall entirely at the feet of low-income workers, barring efforts to show complicity" through explicit or implicit sanctioning of abuse on the part of the employer.<sup>157</sup> Moreover, due to the lack of federal whistleblower protections for farmworkers under USDA jurisdiction, the good-faith employee who complies with

---

151. Betsy Z. Russell, *Idaho Appeals 'Ag-Gag' Ruling to 9th Circuit*, SPOKESMAN-REV. (Dec. 11, 2015, 2:33 PM), <http://www.spokesman.com/blogs/boise/2015/dec/11/idaho-appeals-ag-gag-ruling-9th-circuit/>; see also *Current Cases*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/cases-campaigns/current-cases/> (last visited Nov. 14, 2017).

152. See, e.g., MO. REV. STAT. § 578.013 (2016); S.B. 42, 70th Gen. Assemb., 1st Reg. Sess. (Colo. 2015); AG-GAG ACROSS AMERICA, *supra* note 112, at 13–24.

153. Reid & Kingery, *supra* note 6, at 69.

154. Jessalee Landfried, *Bound & Gagged: Potential First Amendment Challenges to "Ag-Gag" Laws*, 23 DUKE ENVTL. L. & POL'Y F. 377, 399 (2013).

155. See Reid & Kingery, *supra* note 6, at 69.

156. See Marceau, *supra* note 116, at 1341.

157. *Id.*

the law and submits evidence to authorities of his or her employer's animal abuse may be fired for doing so.<sup>158</sup>

Proponents of ag-gag laws present these mandatory reporting provisions as designed to protect animals;<sup>159</sup> indeed, it makes superficial sense that one should immediately report animal abuse to the authorities in order to best protect animals. In reality, these laws impede undercover investigations, much like the traditional ag-gag provisions.<sup>160</sup> Rather than protect animals, these laws threaten long-term employment-based investigations of animal abuse, which have proved to be the most effective way to protect animals from abuse.<sup>161</sup>

Furthermore, no U.S. jurisdiction has criminalized the failure to report another crime, even for crimes as serious as murder.<sup>162</sup> There are only a few narrow exceptions to this rule;<sup>163</sup> for example, most states require designated professionals such as social workers, teachers, and doctors to report child abuse.<sup>164</sup> The drafters of animal abuse mandatory reporting provisions seem to consider animal abuse a more serious crime than murder. Such proposed provisions are broader than even child abuse reporting requirements as they do not limit those required to report to a certain class of people.<sup>165</sup> If animal abuse is indeed as or more serious than murder and child abuse, there is a severe disparity in terms of penalty: animal abuse is most often merely a misdemeanor offense, while murder and many forms of child abuse are felony offenses carrying sentences of lifetime imprisonment.<sup>166</sup>

---

158. See Reid & Kingery, *supra* note 6, at 69.

159. See Marceau, *supra* note 116, at 1340.

160. See *id.* at 1340–41 (referring to these laws as a “wolf in sheep’s clothing”).

161. *Id.* at 1341.

162. *Id.*

163. See Matthew Shea, Note, *Punishing Animal Rights Activists for Animal Abuse: Rapid Reporting and the New Wave of Ag-Gag*, 48 COLUM. J.L. & SOC. PROBS. 337, 366–68 (2015).

164. See, e.g., ALA. CODE § 26-14-3 (2017); VA. CODE ANN. § 63.2-1509 (2017).

165. See e.g., H.B. 1191, 108th Gen. Assemb. (Tenn. 2013).

166. See Marceau, *supra* note 116, at 1341.

### 3. “Right to farm” bills

The newest trend in the ag-gag legislative agenda comes in the form of so-called “right to farm” amendments to state constitutions.<sup>167</sup> These measures appeared on ballots across the country in 2016, “largely in response to unprecedented efforts across the country to restrict and regulate agriculture.”<sup>168</sup> The laws seek to guarantee the right of farmers and ranchers to engage in modern farming practices and ensure no laws are passed to restrict these rights.<sup>169</sup> Dubbed “Right to Harm” amendments by opponents such as the HSUS, these amendments would make it nearly impossible to pass regulations restricting agricultural industry practices that harm animals, workers, and the environment.<sup>170</sup> As Wayne Pacelle, President and CEO of HSUS, states on his blog, “[These measures] would consolidate even more power into the hands of the animal agriculture lobbies by barring elected officials and voters from passing commonsense rules relating agriculture . . . . They want to wall off an entire category of our economy from regulatory or legislative oversight.”<sup>171</sup> HSUS campaigned vigorously against these measures, and successfully defeated measures in Nebraska, Indiana, and Oklahoma.<sup>172</sup>

### 4. Defunding of charitable organizations

In 2016, presumably in response to the aggressive campaigns

---

167. Ariel Overstreet-Adkins, Note, *Extraordinary Protections for the Industry that Feeds Us: Examining a Potential Constitutional Right to Farm and Ranch in Montana*, 77 MONT. L. REV. 85, 86 (2016).

168. *Id.*

169. *See id.* at 89–92.

170. Wayne Pacelle, *Remarkable Gains for Farm Animals in 2016*, HUMANE SOC’Y U.S.: HUMANE NATION (Dec. 1, 2016), [http://blog.humanesociety.org/wayne/2016/12/hsus-farm-animals-victories-2016.html?credit=blog\\_post\\_032316\\_id8030](http://blog.humanesociety.org/wayne/2016/12/hsus-farm-animals-victories-2016.html?credit=blog_post_032316_id8030) [hereinafter Pacelle, *Remarkable Gains*].

171. Wayne Pacelle, *Ag Lobby Pushes Right to Harm While it Works to Stifle Free Speech*, HUMANE SOC’Y U.S.: HUMANE NATION (Feb. 22, 2016), [https://blog.humanesociety.org/wayne/2016/02/ag-lobby-pushes-right-to-harm.html?credit=blog\\_post\\_032316\\_id8030](https://blog.humanesociety.org/wayne/2016/02/ag-lobby-pushes-right-to-harm.html?credit=blog_post_032316_id8030) [hereinafter Pacelle, *Ag Lobby*].

172. Pacelle, *Remarkable Gains* *supra* note 170.

HSUS and other organizations waged against the agricultural lobby, the Oklahoma House of Representatives approved House Bill 2250.<sup>173</sup> In effect, the bill made it a crime for charitable organizations that advocate for animals, such as HSUS, to solicit funds from Oklahoma residents if the organization spends any money out of state or does any lobbying work.<sup>174</sup> This law would defund animal protection groups and prevent opponents of the industry “from even participating in the debate.”<sup>175</sup> Groups like HSUS are not government funded; thus, rather than regulate government spending, this law seeks to directly regulate the charitable donations made by state residents.<sup>176</sup> HSUS believes this restriction is “patently unconstitutional,” and a direct violation of the First Amendment.<sup>177</sup>

### B. *Anti-Terrorism Laws*

In addition to ag-gag laws, the agricultural industry benefits from the ability to use anti-terrorism laws against its opponents. In 1992, Congress passed the Animal Enterprise Protection Act (AEPA), which criminalized any “physical disruption” to an animal enterprise.<sup>178</sup> Although whistleblowers were not the original target of the law (the law instead targeted the freeing of animals from research facilities), the term “physical disruption” allowed for broad interpretation and the possibility that whistleblowers could fall within the statute’s purview.<sup>179</sup>

In fact, the AEPA has been used to prosecute animal rights activists who have sought to expose animal abuse. The most well-known example of such a prosecution was a case involving

---

173. See Wayne Pacelle, *Oklahoma Lawmakers Try to Defund Animal Organizations*, HUMANE SOCIETY U.S.: HUMANE NATION (Mar. 2, 2016), [https://blog.humanesociety.org/wayne/2016/03/oklahoma-lawmakers-try-to-defund-animal-organizations.html?credit=blog\\_post\\_032316\\_id8030](https://blog.humanesociety.org/wayne/2016/03/oklahoma-lawmakers-try-to-defund-animal-organizations.html?credit=blog_post_032316_id8030).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id.*

178. Animal Enterprise Protection Act of 1992, Pub. L. No. 102-346, 106 Stat. 928 (codified as amended at 18 U.S.C. § 43 (2016)); see also Adam, *supra* note 9, at 1165.

179. See Adam, *supra* note 9, at 1165–66 (discussing the AEPA).

an animal rights group known as the SHAC-7.<sup>180</sup> This group attempted to end animal testing in a pharmaceutical testing lab by using a website to expose the “names, home addresses and telephone numbers of executives and employees of [the lab] and any companies” with whom the lab conducted business.<sup>181</sup> The SHAC-7 urged website visitors to “contact those people and pressure them to abandon . . . animal testing.”<sup>182</sup> Following a three-year investigation involving over 100 federal agents from various federal agencies, the SHAC-7 were indicted for violations of the AEPA.<sup>183</sup> The website was deemed to violate the AEPA because it was a conspiracy to harm a business involved in an animal enterprise.<sup>184</sup> As the prosecution of the SHAC-7 shows, the government is willing to use massive resources to investigate and punish those who oppose the animal industry.<sup>185</sup>

In 2006, Congress passed the Animal Enterprise Terrorism Act (AETA), an amendment to the AEPA, which expanded the statute’s purview significantly.<sup>186</sup> The 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.<sup>187</sup> The language of the AETA is so broad and vague that almost

---

180. See Marceau, *supra* note 116, at 1322.

181. *Id.* (quoting John Cook, *Thugs for Puppies*, SALON (Feb. 7, 2006, 8:00 AM), [https://www.salon.com/2006/02/07/thugs\\_puppies/](https://www.salon.com/2006/02/07/thugs_puppies/)).

182. *Id.*

183. *Id.*

184. *Id.* at 1322–23.

185. See *id.* at 1323; see also Adam, *supra* note 9, at 1166–67; Shea, *supra* note 163, at 343 n.27.

186. See Shea, *supra* note 163, at 343 n.27; see also 18 U.S.C. § 43 (2016). The language of AETA was proposed by the American Legislative Exchange Council (ALEC) in 2003. Shea, *supra* note 163, at 346 n.51. ALEC defines itself as “America’s largest nonpartisan, voluntary membership organization of state legislators dedicated to the principles of limited government, free markets and federalism.” *About ALEC*, ALEC, <https://www.alec.org/about/> (last visited Oct. 3, 2017). In reality, however, more than 98% of ALEC’s revenues come from sources other than legislative dues, such as corporations, corporate trade groups, and corporate foundations—the overwhelming majority of which align with conservative politics. See *American Legislative Exchange Council*, SOURCEWATCH, [http://www.sourcewatch.org/index.php/American\\_Legislative\\_Exchange\\_Council](http://www.sourcewatch.org/index.php/American_Legislative_Exchange_Council) (last visited Sept. 19, 2017).

187. 18 U.S.C. § 43(a)(1)–(a)(2)(A); see also Shea, *supra* note 163, at 342–43.

any form of animal rights advocacy could be caught in the AETA's wide net.<sup>188</sup> The statute punishes those who cause property loss, including lost profits, to a business that sells animals or animal products.<sup>189</sup> Therefore, an activist can potentially be charged with "damaging" animal enterprises by distributing undercover footage recorded on farms.<sup>190</sup> An activist can also be punished for various expressions, including picketing, if the industrial operation is financially damaged.<sup>191</sup>

Under the AETA, "merely causing economic injury subjects one to criminal liability and a prison sentence of up to twenty years."<sup>192</sup> Violators are labeled as terrorists and are threatened with harsh federal prison sentences "with confinement in restrictive terrorist units."<sup>193</sup>

Like ag-gag legislation, the AEPA and AETA suppress the flow of information about factory farms to the public. Opponents of these anti-terrorism statutes argue that the severe consequences and harsh penalties may make activists reconsider engaging in activism, thereby chilling activist behavior and the lawful exercise of free speech.<sup>194</sup>

No other industry has the power to legally label its political opponents as "terrorists." Defining someone as a terrorist has

---

188. See Shea, *supra* note 163, at 342-43.

189. Rachel Meeropol, *Non-violent 'Terrorism'?*, HUFFPOST (Feb. 19, 2015, 5:57 AM), [https://www.huffingtonpost.com/the-center-for-constitutional-rights/non-violent-terrorism\\_b\\_6709996.html](https://www.huffingtonpost.com/the-center-for-constitutional-rights/non-violent-terrorism_b_6709996.html); see also Kimberly E. McCoy, *Subverting Justice: An Indictment of the Animal Enterprise Terrorism Act*, 14 ANIMAL L. 53, 61 (2007) (discussing the AETA's failure to define property and the ACLU's fear that prosecution may be based on tangible and intangible property, including lost profits and loss of goodwill).

190. See Michael Hill, Comment, *The Animal Enterprise Terrorism Act: The Need for a Whistleblower Exception*, 61 CASE W. RES. L. REV. 651, 679 (2010) (discussing footage leaked by an undercover investigator at the Humane Society that led to a plant shut down and product recall, and whether charges may have been brought under the AETA had the whistleblower been backed by a less popular organization).

191. Meeropol, *supra* note 189. But see Shea, *supra* note 163, at 343 (stating that the AETA has a savings clause which directs the act not to be interpreted as prohibiting any expressive conduct).

192. Marceau, *supra* note 116, at 1323.

193. *Animal Enterprise Terrorism Act (AETA)*, C.L. DEF. CTR., <https://cldc.org/organizing-resources/animal-enterprise-terrorism-act-aeta/> (last updated Dec. 5, 2016).

194. See Shea, *supra* note 163, at 343.

severe and powerful consequences in our society.<sup>195</sup> Such a label is usually reserved for people who commit “codified domestic crimes when the impetus for the criminal act is a certain idea,” usually a religious, political, or anti-government sentiment.<sup>196</sup> The term has long been used as a “well-worn brush of un-American and disloyal radicalism.”<sup>197</sup> Thus, the industry brands activists as “un-American” or outsiders of our society. A PETA representative noted in her testimony before a Senate Committee that the industry was “unashamedly distorting the truth in order to protect their interests” and were “trying to take advantage of fears of real terrorism to improperly insulate themselves against public criticism and protest regarding their practices.”<sup>198</sup>

Though many organizations and individuals believe that the AETA and AEPA are unconstitutional, there has been no successful challenge to the laws.<sup>199</sup> In 2013, a federal district court found that a group of animal rights activists did not have standing to challenge the constitutionality of the AETA.<sup>200</sup> The court found that the plaintiffs “failed to allege an objectively reasonable chill [on their speech], and, therefore, failed to establish an injury-in-fact.”<sup>201</sup>

At least eight states have also enacted “animal-terrorism” laws, containing similar provisions to the federal law.<sup>202</sup>

---

195. See Alexandra T. Stuppel, *Terrorism and the Animal Rights and Environmental Movements*, 11 J. ANIMAL & NAT. RESOURCE L. 51, 56 (2015).

196. See *id.* at 54.

197. *Id.* at 55 (quoting JEFFORY A. CLYMER, *AMERICA’S CULTURE OF TERRORISM: VIOLENCE, CAPITALISM, AND THE WRITTEN WORD* 179 (2003)).

198. *Id.* at 56 (quoting *Animal Rights: Activism vs. Criminality: Hearing Before the S. Comm. On the Judiciary*, 108th Cong. 78 (2004) (statement of Lisa Lange, Vice President of Communications, PETA)) (noting that that using terrorism as a way to support political arguments is not new—similar tactics were used after 9/11).

199. See, e.g., *Blum v. Holder*, 930 F. Supp. 2d 326 (D. Mass. 2013), *aff’d* 744 F.3d 790 (1st Cir. 2014).

200. See *id.*; see also Landfried, *supra* note 154, at 394.

201. *Blum*, 930 F. Supp. 2d at 335.

202. Minnesota, Florida, Illinois, Montana, South Carolina, Tennessee, Oklahoma, and Georgia all have some version of an animal-terrorism law. See Landfried, *supra* note 154, at 393 n.87.

### C. Animal Cruelty Exceptions

Animals raised for food or food production in the United States receive little to no protection under animal cruelty laws.<sup>203</sup> One of the most important pieces of federal legislation relating to the protection of animals is the Animal Welfare Act (AWA).<sup>204</sup> This legislation protects, among other things, animals used in research and exhibitions; it also covers commercial breeding of cats and dogs sold for research or as pets.<sup>205</sup> The AWA does not, however, apply to animals raised for food or food production, and thus, does not offer any protection for farm animals.<sup>206</sup> In other words, if you abuse a farm animal in your backyard or in a research setting, the AWA applies, but if you abuse the same animal on a farm, it does not.<sup>207</sup>

Two other federal laws do apply to farm animals, but in limited ways. The first is the Humane Methods of Slaughter Act (HMSA) (also known as the Humane Methods of Livestock Slaughter Act), which requires that livestock slaughter “be carried out only by humane methods” to prevent “needless suffering.”<sup>208</sup> This law, however, excludes poultry; the USDA has refused to include poultry in the HMSA, arguing that to do so would be outside of the agency’s statutory mandate.<sup>209</sup> Poultry accounts for “more than ninety-eight percent of all slaughtered land animals” — thus the “majority of farm animals have neither state nor federal legal protection even at slaugh-

---

203. See Joyce Tischler, *U.S. Lags Far Behind Europe in Protections for Farmed Animals*, ANIMAL LEGAL DEF. FUND (Aug. 15, 2011), <http://aldf.org/blog/u-s-lags-far-behind-europe-in-protections-for-farmed-animals/>; see also Friedrich, *supra* note 29, at 201; *Farmed Animals and the Law*, ANIMAL LEGAL DEF. FUND, <http://aldf.org/resources/advocating-for-animals/farmed-animals-and-the-law/> (last visited Dec. 4, 2017).

204. 7 U.S.C. §§ 2131–2159 (2016).

205. *Id.*

206. *Id.* § 2132(g) (“[T]he term ‘animal’ . . . excludes . . . farm animals, such as, but not limited to livestock or poultry used or intended for use as food or fiber, or livestock or poultry used or intended for improving animal nutrition, breeding, management, or production, efficiency, or for improving the quality of food or fiber.”).

207. See Friedrich, *supra* note 29, at 201–02.

208. 7 U.S.C. § 1901.

209. Friedrich, *supra* note 29, at 201–02.

ter.”<sup>210</sup> The HMSA exempts ritual slaughters and is applicable only to slaughterhouses under federal meat inspection.<sup>211</sup> The law does not “cover state-inspected and small custom-exempt slaughterhouses.”<sup>212</sup> The HMSA is also “pervasively under-enforced.”<sup>213</sup>

Second is the Twenty-Eight Hour Law, which requires that, after twenty-eight hours of travel, livestock should be unloaded, fed, and provided with an opportunity to rest for at least five hours before resuming transport.<sup>214</sup> The statute, however, does not apply to animals “transported in a vehicle or vessel in which the animals have food, water, space, and an opportunity for rest.”<sup>215</sup> Further, animals may be confined for thirty-six hours upon the request of the owner or person having custody of the animals.<sup>216</sup>

Both the HMSA and the Twenty-Eight Hour Law apply to farm animals only while the animals are outside of the farm—while they are being slaughtered or transported.<sup>217</sup> There is no federal law applicable to the treatment of animals raised for food or food production *while the animals are on the farm*.<sup>218</sup> This leaves states as the sole enforcer of legislation protecting farm animals from cruel treatment.<sup>219</sup>

All fifty states have anti-animal cruelty criminal statutes.<sup>220</sup> Many state statutes, however, exempt farm animals from coverage completely and instead apply only to animals considered

---

210. *Id.*

211. 7 U.S.C. §§ 1902(b), 1906; *see also* David J. Wolfson, *Beyond the Law: Agribusiness and the Systemic Abuse of Animals Raised for Food or Food Production*, 2 ANIMAL L. 123, 126 (1996).

212. Wolfson, *supra* note 211.

213. Friedrich, *supra* note 29, at 199.

214. 49 U.S.C. § 80502(a)–(b) (2016).

215. *Id.* § 80502(c).

216. *Id.* § 80502(a)(2)(B).

217. *See* 7 U.S.C. § 1901 (2016); *see also* 49 U.S.C. § 80502.

218. Bittman, *supra* note 6 (“[T]he only federal laws governing animal cruelty apply to slaughterhouses, where animals may spend only minutes before being dispatched. None apply to farms, where animals are protected only by state laws.”).

219. Wolfson, *supra* note 211, at 128; *see also* Bittman, *supra* note 6.

220. Friedrich, *supra* note 29, at 201; *see also* *States’ Animal Cruelty Statutes*, NAT’L AGRIC. L. CTR., <http://nationalaglawcenter.org/state-compilations/animal-cruelty/> (last visited Sept. 21, 2017).

“pets.”<sup>221</sup> As columnist Nicholas Kristof once stated, “Torture a single chicken and you risk arrest. Abuse hundreds of thousands of chickens for their entire lives? That’s agribusiness.”<sup>222</sup> In short, anti-cruelty laws make an illogical distinction between pets, such as cats and dogs, and farm animals, such as pigs and cows. This distinction permits wide-scale animal abuse of farm animals to be the norm (or standard agricultural practice), while the same actions taken towards a cat or dog would allow for felony cruelty charges under state law.<sup>223</sup>

Moreover, many state anti-cruelty provisions, if they do not exempt farm animals completely, fail to adequately address the living standards of contained farm animals. Many statutes do not require that animals have access to “adequate exercise, space, light, ventilation, and clean living conditions.”<sup>224</sup> For example, access to light for confined animals is a requirement only in Washington, D.C.<sup>225</sup> Only Maine and Pennsylvania have provisions relating to clean living conditions in their anti-cruelty statutes,<sup>226</sup> and Maine exempts farm animals raised for food or food production from this provision.<sup>227</sup> Furthermore, most states require proof that the failure to provide shelter is intentional or cruel.<sup>228</sup>

In addition, though the transportation laws of most states mirror the federal law and require that animal transportation be conducted humanely, some states exclude farm animals

---

221. See Friedrich, *supra* note 29, at 201-02; see also Wolfson, *supra* note 211, at 131. For example, South Carolina explicitly excludes poultry from the protection of its anti-cruelty statutes, S.C. CODE ANN. § 47-1-40(C) (2016), despite the fact that seven billion broiler chickens and turkeys are killed every year in the United States. Wolfson, *supra* note 211, at 131.

222. Friedrich, *supra* note 29, at 202 (quoting Nicholas Kristof, Opinion, *Abusing Chickens We Eat*, N.Y. TIMES (Dec. 3, 2014), <https://www.nytimes.com/2014/12/04/opinion/nicholas-kristof-abusing-chickens-we-eat.html>).

223. See *id.* at 201-02.

224. Wolfson, *supra* note 211, at 131 (quoting ANIMAL WELFARE INST., ANIMALS AND THEIR LEGAL RIGHTS: A SUMMARY OF AMERICAN LAWS FROM 1641-1990, at 10 (1990)).

225. D.C. CODE § 22-1001(a)(1) (2017).

226. ME. STAT. tit. 17, § 1031(1)(E) (2017); 18 PA. CONS. STAT. § 5532(a)(2) (2017).

227. tit. 17, § 1031(5).

228. Wolfson, *supra* note 211, at 128-29 (quoting ANIMAL WELFARE INST., *supra* note 224, at 9).

from this law.<sup>229</sup> For example, Nevada's law imposing penalties for animal cruelty does not "[p]rohibit or interfere with established methods of animal husbandry, including . . . transport[ation] of livestock or farm animals."<sup>230</sup> Similarly, Oregon's anti-cruelty law does not apply to the "treatment of livestock being transported by owner or common carrier,"<sup>231</sup> or "[c]ommercially grown poultry,"<sup>232</sup> absent a showing of gross negligence.<sup>233</sup> Even if states include transportation in their anti-cruelty laws, the average fine for a violation of such laws is approximately \$500<sup>234</sup>—a small amount that does little to discourage would-be law breakers.

Even if state anti-cruelty laws exist and include animals raised for food or food production, enforcement remains problematic and erratic.<sup>235</sup> Public prosecutorial agencies are often overburdened with human cases and unlikely to view farm animal protection as a high priority.<sup>236</sup> The animal cruelty enforcement that does occur is "largely directed at dog, cats, and horses rather than [farm] animals."<sup>237</sup> Information about practices on factory farms is also difficult to obtain. Unless a prosecutorial agency is given information by someone "on the inside," obtaining enough evidence to prosecute is difficult.<sup>238</sup> Moreover, "many state statutes require that the prosecution demonstrate a mental state of the defendant that may be hard to prove," further increasing difficulties in prosecutions.<sup>239</sup> Convictions are infrequent and, when they do occur, are limited to minimal fines.<sup>240</sup>

---

229. *See id.* at 129.

230. NEV. REV. STAT. § 574.200(1)(f) (2015).

231. OR. REV. STAT. § 167.335(1) (2015).

232. *Id.* § 167.335(3).

233. *Id.* § 167.335.

234. *See Wolfson, supra* note 211, at 129–30.

235. *See id.* at 131–32.

236. *Id.* at 131.

237. *Id.*

238. *Id.* at 132.

239. *Id.* at 131.

240. Lesley J. Rogers & Gisela Kaplan, *All Animals Are Not Equal: The Interface Between Scientific Knowledge and Legislation for Animal Rights*, in ANIMAL RIGHTS: CURRENT DEBATES AND

Perhaps most disturbingly, state legislators have given wide discretion to the agricultural industry under these statutes to determine the definition of cruelty based on what the industry deems to be standard practice.<sup>241</sup>

Many states have enacted laws or amended laws to allow certain acts as long as the acts are deemed “‘accepted,’ ‘common,’ ‘customary,’ or ‘normal’ farming practices.”<sup>242</sup> For example, Idaho’s anti-cruelty statute states that it shall not be construed to interfere with “[n]ormal or accepted practices of . . . animal husbandry.”<sup>243</sup> The statute further exempts “[a]ny other . . . activities, practices or procedures normally or commonly considered acceptable.”<sup>244</sup> In addition, any “practices, procedures and activities described in this section shall not be construed to be cruel nor shall they be defined as cruelty to animals, nor shall any person engaged in the practices, procedures or activities be charged with cruelty to animals.”<sup>245</sup> Other state laws contain similar exemptions, such as: “Nothing . . . shall affect accepted animal husbandry practices utilized by any person in the care of companion or livestock animals;”<sup>246</sup> “Nothing in this Act affects normal, good husbandry practices utilized by any person in the production of food;”<sup>247</sup> or “The provisions of [the Act] do not . . . [p]rohibit or interfere with established methods of animal husbandry, including the raising, handling, feeding, housing, and transporting of live-

---

NEW DIRECTIONS 195 (Cass R. Sunstein & Martha C. Nussbaum eds., 2004). For example, Montana imposes a fine of no more than \$1000 for a first offense of cruelty to animals, MONT. CODE ANN. § 45-8-211(2)(a) (2017), and New Jersey imposes a fine of no more than \$1000 nor less than \$250 for certain offenses, and a fine of no more than \$2000 nor less than \$500 for other offenses of cruelty to animals. N.J. STAT. ANN. § 4:22-17(b)(1) (West 2017).

241. See *Farmed Animals and the Law*, *supra* note 203; see also *States’ Animal Cruelty Statutes*, *supra* note 220.

242. Wolfson, *supra* note 211, at 123; see also *Farmed Animals and the Law*, *supra* note 203; *States’ Animal Cruelty Statutes*, *supra* note 220.

243. IDAHO CODE § 25-3514(5) (2017).

244. *Id.* § 25-3514(9).

245. *Id.* § 25-3514.

246. COLO. REV. STAT. § 18-9-201.5(1) (2017).

247. 510 ILL. COMP. STAT. 70/13 (2015).

stock or farm animals.”<sup>248</sup>

The determination of what are considered “customary” practices – and, as such, are excluded from anti-cruelty statutes – is left to members of the factory farming industry themselves, who develop the practices and decide how frequently to use those practices.<sup>249</sup> Once a practice is labeled “customary,” it is exempt and is not deemed cruel under anti-cruelty statutes.<sup>250</sup> Thus, the statutes have created an environment where cruel farming practices can be developed and used widely without fear of being categorized as cruel. In fact, the more widely used the cruel practices are, the less likely the practices are to be deemed cruel and illegal under these anti-cruelty provisions.<sup>251</sup>

Therefore, in effect, the definition of cruelty is left to be determined by those the statute is supposed to regulate: the agricultural industry itself. Legislatures have endowed the agribusiness industry with complete authority to define what is, and is not, cruelty to the animals in their care.<sup>252</sup> In fact, legislatures, in effect, condone cruelty to animals – amendments in the law exempting customary practices are a strong indication that, but for that exemption, such practices would be considered cruelty to animals.<sup>253</sup>

#### D. Lack of Environmental Regulation

Despite the severe environmental problems and human

---

248. NEV. REV. STAT. § 574.200(1)(f) (2015).

249. See Wolfson, *supra* note 211, at 132, 137–38; see also *Farmed Animals and the Law*, *supra* note 203.

250. See Wolfson, *supra* note 211, at 132, 137–38; see also *Farmed Animals and the Law*, *supra* note 203.

251. Wolfson, *supra* note 211, at 138. Wolfson cites an example of a case in Pennsylvania where the defendant was accused of starving his horses. *Id.* The defendant argued that the practice of starving horses that were to be sold for meat was a “normal agricultural operation,” and thus, not a criminal act. *Id.* The court convicted the defendant of cruelty to animals, finding that the “defendant failed to establish sufficient testimony as to the pervasiveness of the practice.” *Id.* This finding indicates that if the defendant had in fact established that starving horses was normal practice in the industry, he would not have been found criminally liable because the anti-cruelty statute would not have applied. *Id.*

252. See *id.* at 137–39.

253. *Id.*

health concerns caused by factory farming, little federal or state regulation of these facilities exists.<sup>254</sup> Though other industries are “subject to extensive mandatory environmental regulation, the ill effects of agriculture remain largely unrestricted.”<sup>255</sup> There are a few such mandatory regulations, “including pesticide labeling and concentrated animal feeding operations water pollution permitting,” but they address only a sliver of the extensive environmental impact of the industry.<sup>256</sup>

Indeed, much of federal environmental law expressly exempts many agricultural activities.<sup>257</sup> The industry benefits from exemptions from major environmental statutes, including significant parts of the Clean Air Act and Clean Water Act.<sup>258</sup> For example, although the Clean Water Act regulates water pollution, it does not apply to many concentrated animal feeding operations (CAFO)<sup>259</sup> and most other farms, leaving agricultural facilities virtually unregulated.<sup>260</sup> Under the Clean Air Act, the EPA has authority to regulate greenhouse gas emissions from CAFOs but the emissions thresholds under the “operating permits program [are] such that only the largest emitters are required to have permits and few livestock producers would qualify.”<sup>261</sup>

Other regulations are voluntary.<sup>262</sup> There are no mandatory

---

254. See Margot J. Pollans, *Regulating Farming: Balancing Food Safety and Environmental Protection in a Cooperative Governance Regime*, 50 WAKE FOREST L. REV. 399, 400–01 (2015) [hereinafter Pollans, *Regulating Farming*].

255. *Id.* at 400.

256. *Id.* at 400 n.8.

257. See *id.* at 409.

258. *Id.*

259. The EPA defines an animal feeding operation (AFO) as a lot or facility that confines animals for forty-five days or more in a twelve-month period, and does not produce vegetation. 40 C.F.R. § 122.23(b)(1) (2017); see also Pollans, *Regulating Farming*, *supra* note 254, at 405 n.23. A CAFO is an AFO that is either defined as large or medium, or is determined to be a significant contributor to water pollution by the appropriate authority. 40 C.F.R. § 122.23(b)(2), (c); see also Pollans, *Regulating Farming*, *supra* note 254, at 405 n.23.

260. Pollans, *Regulating Farming*, *supra* note 254, at 409.

261. D. Bruce Myers Jr., *Getting Serious About Greenhouse Gas Emissions from U.S. Livestock Production*, A.B.A. AGRIC. MGMT. COMMITTEE NEWSL. (A.B.A. Mgmt. Committee, Chicago, Ill.), Apr. 2015, at 7.

262. *Id.*

regulations that target livestock-related greenhouse gases.<sup>263</sup> Instead, the federal government has an “interagency methane strategy [that] seeks to address agricultural methane emissions ‘exclusively’ through voluntary” actions.<sup>264</sup> The EPA encourages, but does not require, farmers to attempt to reduce runoff.<sup>265</sup> The USDA pays farmers to use certain conservation practices to try to address environmental harms like soil erosion and habitat loss.<sup>266</sup> Only 5% of farm lands, however, have taken advantage of this program.<sup>267</sup>

Furthermore, Congress – influenced by agricultural industry lobbyists – has hampered what little ability the EPA does have to regulate.<sup>268</sup> Congress has prohibited the EPA from using its funds to implement any rule that would require livestock producers to secure a permit for greenhouse gas emissions – referred to as the “cow tax.”<sup>269</sup> Congress has also barred the EPA from using its funds to implement mandatory greenhouse gas reporting by agricultural facilities.<sup>270</sup>

With its limited power, the EPA has attempted to create a factory farm permit regime under the Clean Water Act.<sup>271</sup> “Rather than having the federal government issuing and monitoring permits to approximately two million farms,” states have been tasked with this role.<sup>272</sup> Unfortunately, states have often decided “not to regulate the environmental hazards of large-scale animal operations” because factory farming generates revenue for the states.<sup>273</sup>

---

263. *Id.*

264. *Id.*

265. Pollans, *Regulating Farming*, *supra* note 254, at 409–10.

266. *Id.* at 410.

267. *Id.*

268. *See* Myers, *supra* note 261.

269. *Id.*

270. *Id.*

271. *See* Richards & Richards, *supra* note 39, at 42–43.

272. *Id.* at 42.

273. *Id.*

*E. Distortion of Trespass Law – “SLAPP”*

Another legal tool the industry uses is the distortion of existing trespass laws in the form of Strategic Lawsuits Against Public Participation (SLAPP).<sup>274</sup> SLAPPs are meritless lawsuits that are filed to harass opponents.<sup>275</sup> The industry uses SLAPPs to “chill free speech and healthy debate” by targeting the often limited financial resources of activists and nonprofits.<sup>276</sup> Lawsuits can last for years and cost thousands of dollars, so SLAPPs are effectively an intimidation and silencing tactic employed by the industry, rather than a genuine attempt to remedy harm caused by trespass.<sup>277</sup>

For example, in Wyoming, ranchers filed a lawsuit for civil trespassing against a non-profit, the Western Watershed Project (WWP), after WWP revealed that there was an *Escherichia coli* (*E. coli*) risk present in the waterways adjacent to the ranchers’ land as a result of cattle grazing.<sup>278</sup> WWP strongly contested that they trespassed on the ranchers’ lands.<sup>279</sup> Even if the organization had trespassed, however, the harm to the ranchers was nominal – akin to a hunter trespassing on property to shoot a deer.<sup>280</sup> Despite the nominal damages, the ranchers brought this suit against WWP, clearly as a result of the reputation-harming information provided to the public by WWP.<sup>281</sup> In this way, the ranchers sought to use the law of trespass to discredit the information provided by WWP and divert attention away from their harmful and unsafe practices.<sup>282</sup>

To go even further, as a result of the WWP incident and at the urging of ranchers, the Wyoming state legislature passed a law

---

274. See Marceau, *supra* note 116, at 1342–43; see also *What is a SLAPP?*, PUB. PARTICIPATION PROJECT, <https://anti-slapp.org/what-is-a-slapp/> (last visited Dec. 7, 2017).

275. Marceau, *supra* note 116, at 1342–43; see also *What is a SLAPP?*, *supra* note 274.

276. *What is a SLAPP?*, *supra* note 274.

277. *Id.*

278. Marceau, *supra* note 116, at 1342–43.

279. *Id.* at 1343.

280. *Id.*

281. See *id.*

282. *Id.*

“prevent[ing] state agencies from relying on information gained during a trespass.”<sup>283</sup> Similar to other ag-gag laws, information is not required to actually be false for it to be barred from consideration.<sup>284</sup> Rather, important information regarding public health “must be ignored if the industry contests the method” by which the information is collected (i.e., by trespassing on private property).<sup>285</sup> The law is thus used to “silence the critics of agriculture” in an explicit effort to prevent state agencies from taking corrective action regarding harms to the environment based on valid water quality data.<sup>286</sup>

In general, damages for trespass are “nominal unless [a] party can show some actual harm.”<sup>287</sup> Therefore, it would be unusual, for example, for someone to sue a neighborhood child who walked through his or her yard on the way to school.<sup>288</sup> Though this child has technically trespassed, a lawsuit would not be worthwhile for the property owner, because he or she would likely be unable to show any actual harm to the property, and thus would not receive any damages.<sup>289</sup> In his article, *Ag Gag Past, Present, and Future*, Justin Marceau uses a particularly vivid example to link this analogy of a child walking to school to the agricultural industry’s SLAPPs.<sup>290</sup> He asks the reader to imagine that this same child finds a “pit of dead bodies” on the property while trespassing on his way to school.<sup>291</sup> His illegal trespass is the “but for” cause of the discovery of the pit of dead bodies.<sup>292</sup> The child could still be sued for his trespass, but again there would be only nominal damages.<sup>293</sup> Further, Marceau points out that it would be a strange decision to sue and try to

---

283. *Id.*; see also WYO. STAT. ANN. § 6-3-414(g) (2017).

284. Marceau, *supra* note 116, at 1334.

285. *Id.*

286. *Id.*

287. *Id.* at 1342.

288. *Id.*

289. *Id.*

290. See *id.*

291. *Id.*

292. *Id.*

293. *Id.*

punish the child for the very activity – trespass as it might be – that led to the discovery of the public harm (the pit of dead bodies).<sup>294</sup>

This seems to be the reasoning that applies to the WPP case.<sup>295</sup> Even had WPP trespassed, the harm to the ranchers was nominal – similar to the child walking across another’s yard to school, over which almost no one would file a lawsuit.<sup>296</sup> The ranchers sued nonetheless because they believed WPP was responsible for harming their reputation by publishing damaging information about their grazing practices<sup>297</sup> – or, in this analogy, for discovering the “pit of dead bodies.” In this way, it is clear that such cases are not about protecting property rights – the typical concern of traditional property law.<sup>298</sup> Instead, SLAPPs and the resulting legislation, like the Wyoming law, are attempts at silencing opponents who seek to publicize harmful, truthful information about agricultural practices.<sup>299</sup>

Silencing investigations based on harmless trespass technicalities could chill such investigations and allow dangerous practices affecting food safety, the environment, and health to continue without public knowledge.

#### F. *Distortion of Defamation Law – “Meat” and “Veggie” Libel*

The agricultural industry has also created a unique limit on the ability to criticize the way food is produced by lobbying for legislation that expands defamation liability well outside of the scope of traditional defamation.<sup>300</sup> This particular kind of defa-

---

294. *Id.* at 1342–43.

295. *Id.* at 1343.

296. *Id.*

297. *Id.*

298. *See id.* at 1343.

299. *Id.* at 1343–44.

300. *See id.* at 1318. In a traditional product disparagement case, the plaintiff 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.” *Id.* at 1326 (quoting Sara Lunsford Kohen, *What Ever Happened to Veggie Libel?: Why Plaintiffs Are Not Using Agricultural Product Disparagement Statutes*, 16 DRAKE J. AGRIC. L. 261, 265–66 (2011)).

mation, commonly referred to as “meat libel” or “veggie libel,” allows the industry to file product disparagement lawsuits against those who criticize its products.<sup>301</sup>

Meat libel laws first emerged in the early 1990s after a CBS *60 Minutes* segment aired on television about the chemicals used to grow apples, specifically one called “Alar.”<sup>302</sup> The segment discussed a report by the Natural Resources Defense Council (NRDC), which found that Alar was dangerous for children.<sup>303</sup> Washington State’s apple sales plummeted after the segment aired, leading to an estimated \$75 million loss for the state’s apple growers.<sup>304</sup> The apple growers responded with a class action product disparagement lawsuit against both CBS and the NRDC, seeking to recover for their losses.<sup>305</sup> “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.”<sup>306</sup> This decision followed traditional defamation law, in which showing the statements were not demonstrably false is a defense.<sup>307</sup>

Following this decision, agricultural industry lobbyists began petitioning state legislatures across the country to create defamation statutes with heightened protections, specifically for the agricultural industry against statements that were not demonstrably false.<sup>308</sup> These laws were considered by at least twenty-five states, and enacted by thirteen.<sup>309</sup> The statutes share many of the same 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

---

301. *See id.* at 1324.

302. *Id.*

303. *Id.*

304. *Id.* at 1324–25.

305. *Id.* at 1325.

306. *Id.*

307. *See id.*

308. *Id.*

309. *Id.*

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 actions for damages.<sup>310</sup>

These new defamation statutes make it easier for food producers to sue their critics in several ways. First, the statutes shift the burden of proof in these cases from the plaintiff to the defendant.<sup>311</sup> Traditionally, the plaintiff carries the burden of proving the falsity of the defendant's statement.<sup>312</sup> These new statutes, however, use language that "implies the defendant must prove his or her statements were true by showing that they were based on reasonable or reliable scientific evidence."<sup>313</sup> There are serious questions, however, about what is "reasonable or reliable scientific evidence."<sup>314</sup> Vague language used in the statutes makes it "plausible that any negative statement . . . that lacks a firm scientific grounding could result in liability," regardless of the truth of the statement.<sup>315</sup>

Furthermore, in some states, agricultural disparagement has a lower mens rea standard than is typically required in traditional defamation cases.<sup>316</sup> Generally, product disparagement liability requires that a defendant deliver false information knowingly or recklessly.<sup>317</sup> In contrast, some agricultural disparagement statutes allow plaintiffs to recover "even if the defendant was merely negligent with regards to the

---

310. *Id.* (alteration in original) (quoting Megan W. Semple, Note, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403, 413 (1996)).

311. *See id.* at 1326

312. *Id.*

313. *Id.*

314. *Id.*; see, e.g., LA. STAT. ANN. § 3:4502(1) (2017) (stating that the falseness of information is presumed if not based on "reasonable and reliable scientific inquiry, facts, or data").

315. Marceau, *supra* note 116, at 1326.

316. *Id.*

317. *Id.* at 1326–27.

falsity of the information.”<sup>318</sup> Further, in Alabama, a defendant may potentially be held strictly liable for his or her conduct.<sup>319</sup> Many of the statutes also “allow . . . for punitive damages and attorneys’ fees.”<sup>320</sup>

Meat and veggie libel laws, therefore, serve to uniquely protect the agricultural industry from criticism. Had such a statute existed in the 1990s when the Washington State apple growers sued CBS and the NRDC, the apple growers likely would have prevailed despite their inability to present evidence that the report contained false information about the safety of the chemicals they were using to grow apples. Because of these heightened standards, criticizing a food product—even if the producer of that product cannot show that the criticism is false—is a basis for civil liability.<sup>321</sup>

This misuse of libel law has potentially serious public safety outcomes: people who seek to expose health hazards are deterred from doing so because of the unique onerous burdens of proof favoring the industry.

### G. Exemptions from Labor Law

Though they are some of the most vulnerable people in the workforce, agricultural employees are exempted from provisions of major labor laws, including both the Fair Labor Standards Act (FLSA)<sup>322</sup> and the National Labor Relations Act (NLRA).<sup>323</sup>

---

318. *Id.* at 1327.

319. See ALA. CODE § 6-5-623 (2017) (“It is no defense under this article that the actor did not intend, or was unaware of, the act charged.”); see also Marceau, *supra* note 116, at 1327.

320. Marceau, *supra* note 116, at 1318 n.3.

321. See *id.* at 1326.

322. Fair Labor Standards Act, 29 U.S.C. §§ 201–219 (2016). FLSA provides for a forty-hour workweek, *id.* § 207(a), establishes a national minimum wage, *id.* § 206(a), guarantees time-and-a-half for overtime, *id.* § 207(a), but denies these protections to certain agricultural workers. *Id.* § 213(a)(6).

323. National Labor Relations Act, 29 U.S.C. §§ 151–169 (2016). The NLRA is a foundational statute of labor law in the United States, guaranteeing the basic rights of private sector employees to organize into trade unions, *id.* § 157, engage in collective bargaining for better terms and conditions, *id.*, and take collective action such as a strike. *Id.* § 163. The act does not guarantee these rights to agricultural workers: “When used in this subchapter . . . [t]he term

The FLSA defines “agriculture” as “farming in all its branches . . . performed by a farmer or on a farm as an incident to or in conjunction with such farming operations.”<sup>324</sup> Agricultural employees are exempt from FLSA overtime pay provisions—they do not have to be paid time-and-a-half for work in excess of forty hours per week.<sup>325</sup> Furthermore, any employer in agriculture who did not utilize more than 500 “man days” of agricultural labor in any calendar quarter of the preceding calendar year is exempt from the minimum wage and overtime pay provisions of the FLSA for the current calendar year.<sup>326</sup> A “man day” is defined as any day during which an employee performs agricultural work for at least one hour.<sup>327</sup>

Similarly, the NLRA does not cover agricultural employees.<sup>328</sup> Under the NLRA, Congress has used a definition of employee similar to that of the FLSA, leading to exclusion of agricultural workers from the law’s protection.<sup>329</sup> Farm workers are thus prevented from organizing, further decreasing their bargaining power.

As discussed *supra*, factory farm workers are some of the most marginalized workers employed in one of the most dangerous and brutal industries in the economy.<sup>330</sup> Exclusion of these workers from protective labor laws serves to worsen their marginalization, vulnerability to abuse and health hazards, and lack of collective and individual voice. Farm workers are the most likely to witness and be able to report abuses, yet are silenced by ag-gag laws, fear of retribution, and lack of bargaining power.

---

‘employee’ . . . shall not include any individual employed as an agricultural laborer.” *Id.* § 152(3).

324. 29 U.S.C. § 203(f); see also *Fact Sheet #12: Agricultural Employers Under the Fair Labor Standards Act (FLSA)*, U.S. DEP’T LAB., <https://www.dol.gov/whd/regs/compliance/whdfs12.pdf> (last visited Oct. 6, 2017).

325. 29 U.S.C. §§ 213(a)(6), (a)(12).

326. *Id.* § 213(a)(6).

327. *Id.* § 203(u).

328. *Id.* § 152(3).

329. See *id.*

330. See *supra* Section I.C.

#### H. USDA and FDA Under-Enforcement

The Food and Drug Administration (FDA)<sup>331</sup> and the U.S. Department of Agriculture (USDA)<sup>332</sup> are the federal agencies primarily responsible for oversight of food safety. Both the USDA and FDA, however, are arguably subjects of “agency capture”<sup>333</sup> – and “food safety has been sacrificed as a result.”<sup>334</sup> The industry has generous support from both political parties – its lobbyists have close personal relationships with members of Congress and officials of regulatory agencies such as the USDA and FDA.<sup>335</sup> There is a so-called “revolving door” between industry executive positions and government positions, flowing both ways.<sup>336</sup> Agency personnel are more likely to share the worldview of the industry when they themselves have worked previously in the industry.<sup>337</sup> Similarly, agency personnel might be more reluctant to implement restrictive regulations if they have an eye on a future private sector job in the industry.<sup>338</sup> The industry itself is more likely to hire former government officials with inside knowledge of the agencies.<sup>339</sup> The Center for Disease Control has estimated “that this close relationship between

---

331. The FDA is responsible for protecting and promoting public health through the supervision of food safety, animal feed, veterinary products, tobacco, and pharmaceuticals, among other things. See *What We Do*, U.S. FOOD & DRUG ADMIN., <https://www.fda.gov/AboutFDA/WhatWeDo/default.htm> (last updated Dec. 14, 2017).

332. The USDA is a federal agency tasked with overseeing farming, agriculture, forestry, and food. See *About the U.S. Department of Agriculture*, U.S. DEP’T AGRIC., <https://www.usda.gov/our-agency/about-usda> (last visited Dec. 14, 2017). It aims to promote agriculture, assure food safety, and protect natural resources. *Id.*

333. Friedrich, *supra* note 29, at 207 (“Agency capture is . . . the theory that agencies are likely to do the bidding of the industries they are intended to regulate because they have been ‘captured’ by those industries in a variety of ways.”). The industries being regulated have a vested interest in the nature of the regulatory oversight. See *id.* They are comprised of several corporations with the same interest. See *id.* On the other side are diffuse groups in public who have interest in regulation—often less wealthy, less politically powerful, and less organized than industry. *Id.* at 207–08. Industry groups are able to lobby regulators to put private interests over public interest. See *id.*

334. *Id.* at 210.

335. See *id.*

336. *Id.* at 208.

337. *Id.*

338. *Id.*

339. See *id.*

government and regulatory agency officials, resulting in many years of government and industry indifference, falter, and obstructionism," has led to millions of sicknesses resulting from food safety problems.<sup>340</sup>

Furthermore, both the FDA and USDA under-enforce the regulations they issue. The regulations regarding food safety issued by the FDA are non-binding, which means there are no provisions penalizing non-compliance.<sup>341</sup> In essence, the FDA has requested "private, for-profit corporations to voluntarily change long-standing practices . . . out of a sense of good will."<sup>342</sup> The FDA selected this approach because it believed "pursuing actual binding regulatory action would almost certainly" face opposition from "farmers, pharmaceutical manufacturers, private interest groups, and legislatures."<sup>343</sup> As a result of the size of the industries involved and their separate motivations, it seems likely that the vested interests of the industry may impact the effectiveness of the FDA's approach.<sup>344</sup>

Similarly, the USDA fails to properly enforce regulations under its purview. For example, the USDA is charged with administering the HMSA, the only federal law purportedly protecting farm animals from abuse (and only in the last moments of the animals' lives).<sup>345</sup> This law, however, is pervasively under-enforced by the USDA, resulting in the inadequate protection of animals even when being slaughtered.<sup>346</sup> The USDA has failed to promulgate any regulations to ensure compliance with HMSA.<sup>347</sup>

---

340. *See id.* at 210 (quoting MARION NESTLE, *SAFE FOOD: THE POLITICS OF FOOD SAFETY* 27 (2010)).

341. Jered D. Headrick, *The FDA, Its "Guidances," and the Industries It Is Supposed to Regulate*, 21 *DRAKE J. AGRIC. L.* 263, 282 (2016).

342. *Id.*

343. *Id.* at 268.

344. *See id.*

345. Friedrich, *supra* note 29, at 199.

346. *See id.* at 212-13.

347. *Id.* at 202.

## III. ALTERNATIVE APPROACH

The preceding discussion has touched on the numerous and important negative effects of factory farming. Conversely, factory farming seems to have only one positive effect: the cheap and fast production of meat, dairy, and eggs. Despite this cost-benefit disparity, the industry is not likely to change without significant efforts to implement affirmative laws, close loopholes in existing laws, eradicate government subsidies, and educate consumers. Overall, there must be an elimination of the exceptionalism that the industry enjoys under the current legal landscape.

A. *Rebuttal to Industry Argument for Exceptionalism*

Proponents of the agricultural industry argue that protective laws like ag-gag legislation are warranted because of the importance of the agricultural industry in our society.<sup>348</sup> They suggest that consumers are “not educated enough to understand” certain husbandry practices that are standard in the industry.<sup>349</sup> In other words, the practices revealed by undercover footage only seem cruel to the untrained eye.<sup>350</sup> Advocates for the industry further suggest that undercover investigators are attempting to dishonestly sabotage the industry when they reveal footage to the public.<sup>351</sup> They label these investigators as “extremists” or “terrorists” that “prey on the common fears of families and small businesses.”<sup>352</sup>

Proponents of the industry also claim that protective legislation and regulatory carve-outs are “justified due to the extreme volatility of food markets.”<sup>353</sup> They argue that in order to encourage stability in the market, critical speech and expo-

---

348. Negowetti, *supra* note 106, at 1372.

349. *Id.*

350. *See id.*

351. *See* Marceau, *supra* note 116, at 1336, 1338.

352. *Id.*

353. Negowetti, *supra* note 106.

sure of their practices must be quelled.<sup>354</sup> They also argue that the privacy interests of agricultural facilities located on private property outweigh the public interest in obtaining information about practices that occur in those facilities.<sup>355</sup>

The privacy argument, however, was rebuked by the court in *Animal Legal Defense Fund v. Otter*,<sup>356</sup> the case that found Idaho's ag-gag law unconstitutional.<sup>357</sup> In *Otter*, the court opined that "food production is not a private matter."<sup>358</sup> The court held that protecting the privacy of a powerful industry, which produces the nation's food supply, against public scrutiny is not a compelling government interest.<sup>359</sup> *Otter* limited the right to privacy claimed by companies producing animal products for food by holding that the privacy interest of the agricultural industry is subjugated to the First Amendment rights of interested citizens.<sup>360</sup> The privacy interests of factory farm entities, though existent, are not compelling when weighed against the public's interest and right to know about food safety issues, animal abuse, environmental hazards, and worker rights' abuses.<sup>361</sup>

Furthermore, "[p]ublic discourse about controversial issues is important to a free market economy"<sup>362</sup> and to American ideals of democracy. Ag-gag laws limit the public's access to complete information affecting critical areas of their lives. The laws make it more difficult for consumers to make informed choices about the products they bring into their homes and the food they put into their families' bodies. Ag-gag laws conflict with American ideals of freedom of speech and freedom of choice.

Given that special protection of the agricultural industry is harmful to the public interest and unwarranted, what is the

---

354. *See id.*

355. *See id.* at 1368.

356. 118 F. Supp. 3d 1195 (D. Idaho 2015).

357. *Id.* at 1209, 1211-12.

358. *Id.* at 1208.

359. *Id.* at 1207.

360. *See id.*

361. *See id.*

362. Negowetti, *supra* note 106, at 1372.

alternative?

### B. Use Existing Law

As discussed, protective legislation targets behavior that the agricultural industry considers threatening to its business.<sup>363</sup> All industries exist, however, in an atmosphere where certain behavior can harm its interests. Criminal and civil laws are already in place to protect businesses from harmful, illegal behavior, and these laws successfully operate to protect businesses without industry-specific protective legislation like ag-gag.<sup>364</sup> For example, infiltrating a private facility is likely to be considered trespass under traditional trespass law.<sup>365</sup> Libel or defamation laws would likely prohibit the production and distribution of untruthful videos made with splicing and creative editing.<sup>366</sup> Deceiving employers during the application process would most likely constitute willful misrepresentation or fraud.<sup>367</sup> Finally, an employer can use agency law to seek damages when an employee acts in a manner that is inconsistent with the employer's best interests.<sup>368</sup>

All of these laws, which exist outside of ag-gag legislation, serve to shield business interests, protect private property, and provide protection of the reputation of the agricultural industry. In the past, undercover investigators have been found liable under those legal theories.<sup>369</sup> The industry should utilize these existing laws, rather than being allowed special heightened protections under new laws.

Not only are protective laws for the agriculture industry unnecessary, they are also expensive to the public. By changing existing torts into agricultural-specific crimes under ag-gag laws, legislators shift the cost of enforcement from the alleged

---

363. See *supra* Section III.A.

364. See Reid & Kingery, *supra* note 6, at 47–48.

365. Adam, *supra* note 9, at 1175.

366. *Id.*

367. *Id.*

368. See Reid & Kingery, *supra* note 6, at 64–65.

369. *Id.* at 48.

victims (under tort law) to the taxpayers (under criminal law).<sup>370</sup> Taxpayers should not be responsible for bearing the financial burden of protecting a powerful and wealthy industry from its political opponents.

Punishing wrongful behavior under existing law also avoids some of the other pitfalls of ag-gag legislation, such as the silencing of legitimate whistleblowers and suppressing free-speech rights. Under existing federal law, workers who observe bad behavior going on in factory farm facilities are not punished for reporting the behavior.<sup>371</sup> Workers remain able to act in good faith to expose concerns about health, food safety, worker safety, animal cruelty, and environmental hazards—issues in which the public has a vital interest.<sup>372</sup>

### C. Implement Affirmative Laws and Regulations

To quote Mark Bittman, former food columnist for *The New York Times*, “The problem is the system that enables cruelty and a lack not just of law enforcement but actual laws.”<sup>373</sup>

Another way to address the pitfalls of the ag-gag regime should be to implement and enforce meaningful, affirmative regulation of the industry. At the same time, loopholes and exemptions should be eliminated from existing regulations, such as those governing animal cruelty and environmental impact.

Currently, as discussed *supra*, little mandatory animal cruelty and environmental regulation applies to the industry. The industry has wide discretion to define what is considered animal cruelty under state law.<sup>374</sup> The industry uses its discretion to exempt objectively cruel farming practices from regulation by deeming the practices “normal.”<sup>375</sup> To remedy this, state

---

370. *Id.*

371. See Reid & Kingery, *supra* note 6, at 53–54.

372. See *id.*

373. Bittman, *supra* note 6.

374. Wolfson, *supra* note 211, at 123, 132.

375. See *id.*

legislatures should affirmatively outlaw specific practices deemed to be cruel, and the determination of what constitutes cruelty should not be left to the industry itself. Instead, the determination should be left to an independent committee comprised of experts in animal welfare and husbandry.

California is an example of a state that has successfully passed affirmative regulation.<sup>376</sup> In 2008, HSUS led an effort in California to pass Proposition 2, the Prevention of Animal Cruelty Act.<sup>377</sup> More than 63% of California voters voted in favor of the proposition, and it went into effect on January 1, 2015.<sup>378</sup> The proposition required that veal calves, egg-laying hens, and pregnant pigs be confined only in ways that allow them to lie down, stand up, fully extend their limbs, and turn around.<sup>379</sup> The Ninth Circuit upheld the law as constitutional.<sup>380</sup> Other states could use this both as an example of legislation that regulates specific practices of the industry and as evidence the public supports such measures.

Countries in Europe can also serve as role models for the United States. In terms of mandating the proper treatment of farm animals, Europe is far more advanced than the United States. Many countries in Europe have already passed affirmative anti-cruelty legislation, which specifically prohibit certain farming practices.<sup>381</sup> European legislatures have banned practices such as the use of veal crates, anemic diet for calves, confinement of sows, battery cages, force-feeding, beak-trimming,

---

376. See generally *California Court Affirms Proposition 2's Constitutionality*, HUMANE SOC'Y U.S. (Aug. 30, 2013), [http://m.humanesociety.org/news/press\\_releases/2013/08/california-court-affirms-prop2-083013.html](http://m.humanesociety.org/news/press_releases/2013/08/california-court-affirms-prop2-083013.html) [hereinafter *California Courts*] (discussing the passage of Proposition 2, a California law banning inhumane confinement of certain farm animals).

377. *Id.*; see also *Prevention of Animal Cruelty Act*, CAL. HEALTH & SAFETY CODE §§ 25990-94 (West 2017).

378. *California Courts*, *supra* note 376.

379. HEALTH & SAFETY § 25990.

380. *Cramer v. Harris*, 591 F. App'x 634 (9th Cir. 2015); see also Dan Flynn, *Appeals Court: CA's Proposition 2 Passes Constitutional Muster*, FOOD SAFETY NEWS (Feb. 5, 2015), <http://www.foodsafetynews.com/2015/02/language-used-in-sizing-laying-hen-cages-passes-constitutional-test/#.WclAjNFrw2w>.

381. Wolfson, *supra* note 211, at 140-44.

and the killing of male chicks by suffocation and/or grinding.<sup>382</sup> Germany passed the German Animal Protection Act, which prohibits the force-feeding of animals except for health reasons and battery cages for laying hens.<sup>383</sup> Similarly, Switzerland banned battery cages for laying hens in 1991 and now uses aviaries for hens, which are “in accordance with the natural behavior of fowl.”<sup>384</sup> Sweden has banned the use of antibiotics or hormones on farm animals unless they have a disease not induced by stressful conditions.<sup>385</sup> This European model serves as a stark contrast to most of the American states’ pro-industry responses to the problem of animal cruelty and could be used as an example of successful animal cruelty regulation.

Ideally, the task of regulating the agricultural industry should fall on the shoulders of state legislatures. States should reclaim from the industry the power to define what qualifies as cruelty to animals and pass laws outlining these parameters clearly. State regulation may be difficult, however, given the intense economic pressure from agribusiness in many states and states’ interest in protecting revenue.<sup>386</sup> State legislators tend to believe their interest in protecting state revenues and creating jobs conflicts with placing limits on the agricultural industry.<sup>387</sup>

Federal regulation also faces significant barriers: industry giants, armed with incredible wealth and political power, are cozy with the federal regulatory government agencies, such as the FDA and USDA.<sup>388</sup> These federal agencies must be freed from the influence of the industry – not an easy task. One way to mitigate the influence is to limit the back and forth flow of industry lobbyists and government officials between positions in government and in the industry.

---

382. *Id.* at 149.

383. *See id.* at 141.

384. *Id.* at 141–42 (citation omitted).

385. *Id.* at 143–44.

386. *See* Matt Chester, *Anticorporate Farming Legislation: Constitutionality and Economic Policy*, 9 DRAKE J. AGRIC. L. 79, 101 (2004).

387. *See* Richards & Richards, *supra* note 39, at 51.

388. *See* Brian Daluise, “Is the Meat Here Safe?” *How Strict Liability for Retailers Can Lead to Safer Meat*, 92 B.U. L. REV. 1081, 1097–99 (2012).

Similar to anti-cruelty measures, mandatory federal environmental regulations should be implemented. Loopholes and exemptions that exist in the Clean Water Act, Clean Air Act, and other environmental regulations must be eliminated. The public and the government must see factory farms for what they are: one of the biggest sources of environmental hazards and the leading cause of global warming. The EPA must be allowed by Congress to do its job and protect the public from environmental harm by use of mandatory, not voluntary, provisions.<sup>389</sup>

Additionally, workers' rights' laws must be expanded to include agricultural workers in their protection. Gone are the days of small farming, when the FLSA and NLRA were passed and it was decided that agricultural workers should be excluded. Today, agricultural workers are some of the most vulnerable to abuse and need the protection of federal law more than ever before.

Lastly, anti-terrorism laws should not be used to punish advocates exercising their freedom of speech. The AEPA and AETA should be reserved for acts that truly constitute terrorism, not simply economic damage to a corporation by an opponent seeking to expose negative information about that corporation. Public debate is essential to American ideals, and it should not be labeled as "terrorism."

#### D. Eliminate or Repurpose Government Subsidies

As discussed *supra*, massive government subsidies artificially lower the price of factory-farmed products, externalize the costs to the public, harm small farms, and cost the public billions of taxpayer dollars.<sup>390</sup> States and the federal government should

---

389. Unfortunately, given the current political climate and the President's appointment of Scott Pruitt, former adversary of the EPA, as the Administrator of the EPA, there is little hope that the EPA will increase its environmental regulation of the agricultural industry. See Brady Dennis, *Scott Pruitt, Longtime Adversary of EPA, Confirmed to Lead the Agency*, WASH. POST (Feb. 17, 2017), [https://www.washingtonpost.com/news/energy-environment/wp/2017/02/17/scott-pruitt-long-time-adversary-of-epa-confirmed-to-lead-the-agency/?utm\\_term=.9fbd191146bc](https://www.washingtonpost.com/news/energy-environment/wp/2017/02/17/scott-pruitt-long-time-adversary-of-epa-confirmed-to-lead-the-agency/?utm_term=.9fbd191146bc). The new administration has already sought to slash regulations across the board, including regulations governing clean air and water. See *id.*

390. See *supra* Section I.E.

reconsider these subsidy programs and possibly eliminate them completely. Fewer subsidies “would cause artificially low meat and dairy prices to rise—more accurately reflecting the true costs of production.”<sup>391</sup> This would lead to a decrease in demand and in the scale of factory farm operations.<sup>392</sup>

Instead, the government could use subsidies and spend taxpayer dollars to promote small farmers, organic farmers, worker welfare and health programs, access to healthy foods for low-income communities, and other more socially beneficial endeavors.

#### *E. Influence Public Opinion and Educate Consumers*

Furthermore, legislators should consider that ag-gag and other protective laws do not accurately reflect the public’s will. In 2012, polls conducted by the ASPCA found that 94% of Americans believe in the importance of having measures that ensure animal products are safe for consumption, and the same percentage believe that farm animals should not be subjected to abuse.<sup>393</sup> The same poll showed that 71% of American adults support undercover investigative efforts to expose animal abuse on industrial farms and 64% oppose making such investigations illegal.<sup>394</sup> “In late February 2012, nearly thirty groups representing various public interests signed a group statement opposing” ag-gag bills, including, United Food and Commercial Workers, Center for Science in the Public Interest, Food and Water Watch, Center for Constitutional Rights, Food Empowerment Project, Slow Food USA, Whistleblower Support Fund, and the Government Accountability Project.<sup>395</sup>

The ag-gag regime represents the interests of a singular

---

391. Wolfe, *supra* note 41, at 391.

392. *See id.*

393. ASPCA Research Shows Americans Overwhelmingly Support Investigations to Expose Animal Abuse on Industrial Farms, ASPCA (Feb. 17, 2012), <http://www.aspc.org/about-us/press-releases/aspc-research-shows-americans-overwhelmingly-support-investigations-expose>.

394. *Id.*

395. Sonci Kingery, *The Agricultural Iron Curtain: Ag Gag Legislation and the Threat to Free Speech, Food Safety, and Animal Welfare*, 17 DRAKE J. AGRIC. L. 645, 657–58 (2012).

private interest group—the agricultural industry—rather than the public interest. Therefore, “lawmakers in states with protectionist legislation should reconsider who and what they are protecting, and at what cost.”<sup>396</sup> They should expand their views about economic value to their states, rather than just accommodating the interests of the agricultural industry.

Consumer education and action also matters. Consumers can strongly impact factory farming practices by decreasing their consumption of factory-farmed products, thereby decreasing demand.<sup>397</sup> Consumers should be made aware that they are “voting with their pocketbooks” every time they buy food.<sup>398</sup> By consuming less or no factory-farmed meat, consumers send a message to the industry that their practices are not acceptable.<sup>399</sup> Moreover, by reducing demand for these products, consumers can show state legislators and the federal government that laws must change to protect the consumer rather than support and enable an industry involved in irresponsible, unethical, and harmful practices.<sup>400</sup>

#### CONCLUSION

Today, factory farming plays a significant role in our society; indeed, it is the dominant source of food production in America.<sup>401</sup> Industrialization of farming, however, has created a disconnect between consumers and the farms that produce their food, allowing consumers to distance themselves from the practices used to make their food and the implications of those practices. The industry has worked hard to maintain a lack of transparency, actively fighting for ag-gag legislation to limit access to information about its practices.<sup>402</sup> The industry

---

396. Reid & Kingery, *supra* note 6, at 79.

397. Richards & Richards, *supra* note 39, at 52.

398. *Id.* at 53.

399. *See id.*

400. *See id.* at 51–53.

401. Over 95% of the country’s chickens, eggs, turkey, and pork and over 75% of beef cattle are produced by factory farms. Adam, *supra* note 9, at 1144.

402. *See* Negowetti, *supra* note 106, at 1367–70.

also has taken advantage of federal anti-terrorism laws and industry-specific heightened standards in libel and trespass laws—both of which make it harder for activists to collect and disseminate information about the industry to the public.<sup>403</sup>

Simultaneously, the industry lacks widespread regulation and enjoys significant carve-outs from important animal cruelty, environmental, and labor laws.<sup>404</sup> These exemptions allow the industry to systematically abuse animals, wreak environmental havoc, and exploit already vulnerable workers.<sup>405</sup>

These negative impacts demonstrate that the current system of factory farming agriculture is simply unsustainable. Global population is set to reach 9.7 billion people by 2050 and, at that time, the consumption of animal products is estimated to double current consumption.<sup>406</sup> It is thus necessary to revolutionize the methods by which we produce food in this country in order to preserve the environment, protect animals and workers, and safeguard food safety. The first step to such a revolution is altering the legal landscape that protects the industry in such an exceptional way.

After all, as the *Washington Post* editorial board has aptly questioned, “why [does] an industry that claims it has nothing to hide demand[] protections afforded to no other?”<sup>407</sup>

---

403. See Adam, *supra* note 9, at 1165–67; see also Marceau, *supra* note 116, at 1343–44; Negowetti, *supra* note 106, at 1370–72.

404. See Canny, *supra* note 58, at 383–85; see also Pollans, *Drinking Water Protection*, *supra* note 107, at 1213–14; Richards & Richards, *supra* note 39, at 33–35.

405. See Canny, *supra* note 56, at 383–85; see also Pollans, *Drinking Water Protection*, *supra* note 107, at 1213–14; Richards & Richards, *supra* note 39, at 33–35.

406. See Debra L. Donahue, *Livestock Production, Climate Change, and Human Health: Closing the Awareness Gap*, 45 ENVTL. L. REP. NEWS & ANALYSIS 11,112, 11,115 (2015); see also *World Population Projected to Reach 9.7 Billion by 2050*, UNITED NATIONS (Jul. 29, 2015), <http://www.un.org/en/development/desa/news/population/2015-report.html>.

407. Editorial Board, *Cruelty to Farm Animals Demands Exposure*, WASH. POST (Apr. 26, 2013) [https://www.washingtonpost.com/opinions/cruelty-to-farm-animals-demands-exposure/2013/04/26/9a972c8e-a6bf-11e2-a8e2-5b98cb59187f\\_story.html?utm\\_term=.b2386f79714e](https://www.washingtonpost.com/opinions/cruelty-to-farm-animals-demands-exposure/2013/04/26/9a972c8e-a6bf-11e2-a8e2-5b98cb59187f_story.html?utm_term=.b2386f79714e).