

# THE AGRICULTURAL IRON CURTAIN: AG GAG LEGISLATION AND THE THREAT TO FREE SPEECH, FOOD SAFETY, AND ANIMAL WELFARE

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*“If slaughterhouses had glass walls, everyone would be vegetarian.”*  
– Paul McCartney<sup>1</sup>

*“What if my every meal has been an act of cruelty?”<sup>2</sup>*

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1. GLASS WALLS (PETA 2009), available at <http://www.peta.org/tv/videos/celebrities-vegetarianism/86975251001.aspx>.

2. *Bengal Tiger at the Baghdad Zoo*, in RAJIV JOSEPH, GRUESOME PLAYGROUND INJURIES; ANIMALS OUT OF PAPER; BENGAL TIGER AT THE BAGHDAD ZOO: THREE PLAYS 143, 187 (2010).

## I. INTRODUCTION

Meat is a staple at the drive thru<sup>3</sup> and on the kitchen table.<sup>4</sup> Culturally, Americans celebrate Thanksgiving with a turkey, the Fourth of July with burgers and bratwursts, and their favorite sports team with hot dogs. When sick, many people traditionally turn to chicken noodle soup. Meat production is also essential to America's economy.<sup>5</sup> Economically, meat production is a multi-billion dollar per year industry.<sup>6</sup> According to the USDA, the United States was number one in beef production in 2011, producing 12 million metric tons.<sup>7</sup> The United States was number three in exports of beef in the same year, accounting for sixteen percent of the world's beef exports.<sup>8</sup> In 2011, the United States was number three in pork production and number one in pork exports, accounting for thirty-four percent of the world's pork exports.<sup>9</sup> The population of livestock—sheep, cattle, and hogs—in the United States was 167.8 million at the beginning of 2005.<sup>10</sup> In comparison, the entire U.S. population was approximately 308 million in 2010.<sup>11</sup> The Iowa pork industry generated approximately \$6.7 billion gross income in 2011.<sup>12</sup> Minnesota ranked a distant second with almost \$2.6 billion

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3. See MCDONALD'S CORP., 2010 ANNUAL REPORT 10, 14 (2010), available at <http://www.aboutmcdonalds.com/content/dam/AboutMcDonalds/Investors/investors-2010-annual-report.pdf>.

4. See AM. MEAT INST., U.S. MEAT AND POULTRY PRODUCTION & CONSUMPTION: AN OVERVIEW 1 (2009), available at <http://www.meatami.com/ht/a/GetDocumentAction/i/48781> ("Americans consumed 233.9 pounds of meat and poultry per person in 2006.")

5. See Office of Global Analysis, *Beef at a Glance (Excluding Variety Meats)*, FOREIGN AGRIC. SERV., USDA (2012), <https://www.fas.usda.gov/http/CP2012/Beef-2012-Final.pdf> [hereinafter *Beef at a Glance*] (showing the amount of beef produced and exported in the United States in 2011); Office of Global Analysis, *Pork at a Glance (Excluding Variety Meats)*, FOREIGN AGRIC. SERV., USDA (2012), <http://www.fas.usda.gov/http/CP2012/Pork-2012-Final.pdf> [hereinafter *Pork at a Glance*] (showing the amount of pork produced and exported in the United States in 2011).

6. NAT'L AGRIC. STATISTIC SERV., USDA, MEAT ANIMALS PRODUCTION, DISPOSITION, AND INCOME 2011 SUMMARY 11, 17 (2012), available at <http://usda01.library.cornell.edu/usda/current/MeatAnimPr/MeatAnimPr-04-26-2012.pdf> (showing gross income from cattle and calves in the United States in 2011 to be \$63,445,817,000 and from hogs and pigs to be \$21,730,060,000); see also AM. MEAT INST., *supra* note 4 (meat and poultry industry sales in 2006 were estimated at more than \$143 billion).

7. *Beef at a Glance*, *supra* note 5.

8. *Id.*

9. *Pork at a Glance*, *supra* note 5.

10. AM. MEAT INST., *supra* note 4, at 1.

11. PAUL MACKUN & STEVEN WILSON, U.S. CENSUS BUREAU, U.S. DEPT. OF COMMERCE, C2010BR-01, POPULATION DISTRIBUTION AND CHANGE: 2000 TO 2010, at 1 (2011), available at <http://www.census.gov/prod/cen2010/briefs/c2010br-01.pdf>.

12. NAT'L AGRIC. STATISTIC SERV., *supra* note 6, at 17.

gross income from hogs in 2011.<sup>13</sup> With such large profits on the line, it is imperative farmers get their products to consumers, domestically and internationally, in the most efficient and inexpensive way possible. Sometimes this process is frustrated by politics, consumer demand, climate, or human error. Other times, this process is purposefully frustrated by malfeasance, causing glitches in the machine that is the meat production industry.

Recently, the discord between animal welfare groups and the agriculture industry has increased, partly due to the utilization of undercover investigations by groups such as People for the Ethical Treatment of Animals (PETA), the Humane Society of the United States (HSUS), and Mercy for Animals (MFA).<sup>14</sup> Out of concern for farmers and their production success, some states have proposed laws which would make taking pictures, filming, or recording on farms and livestock production facilities illegal.<sup>15</sup> These laws are known collectively as “Ag Gag” bills.<sup>16</sup> Such legislation has been introduced in Iowa,<sup>17</sup> Minnesota,<sup>18</sup> New York,<sup>19</sup> Utah,<sup>20</sup> and Florida,<sup>21</sup> among others.<sup>22</sup> These bills vary in degree of punishment and definition of the crime, but the consequence is the same: undercover investigations would become illegal if these laws were passed.

Part II of this Note will cover background information essential to understanding the issues associated with Ag Gag bills. The third part will review the Ag Gag bills proposed in Iowa, Minnesota, New York, Utah, and Florida. Part

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13. *Id.*

14. See Andrew Duffelmeyer, *Agriculture Industry Pushes to Make Undercover Filming of Farm Animal Abuse Illegal*, HUFFINGTON POST (Mar. 14, 2011), [http://www.huffingtonpost.com/2011/03/14/big-ag-animal-abuse-filming-video-illegal\\_n\\_835504.html](http://www.huffingtonpost.com/2011/03/14/big-ag-animal-abuse-filming-video-illegal_n_835504.html) (discussing “repeated releases” of undercover films).

15. See, e.g., H.F. 589, 84th Gen. Assemb., Reg. Sess. (Iowa 2011); H.F. 1369, 87th Gen. Assemb., Reg. Sess. (Minn. 2011); S.B. 5172, 235th Gen. Assemb., Reg. Sess. (N.Y. 2011); H.B. 187, 59th Leg., Gen. Sess. (Utah 2012); see also Dan Flynn, *Iowa Approves Nation’s First ‘Ag-Gag’ Law*, FOOD SAFETY NEWS (Mar. 1, 2012), <http://www.foodsafetynews.com/2012/03/iowa-approves-nations-first-ag-gag-law/> (discussing Iowa’s “ag-gag” bill and the introduction of “ag-gag” bills in eight additional states in 2012).

16. See Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES, Apr. 26, 2011, <http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/>.

17. Iowa H.F. 589.

18. Minn. H.F. 1369.

19. N.Y. S.B. 5172.

20. Utah H.B. 187.

21. S.B. 1246, 2011 Gen. Assemb., Reg. Sess. (Fla. 2011).

22. Dan Flynn, *Five States Now Have ‘Ag-Gag’ Laws on the Books*, FOOD SAFETY NEWS (Mar. 26, 2012), <http://www.foodsafetynews.com/2012/03/five-states-now-have-ag-gag-laws-on-the-books/> (citing Illinois, Indiana, Missouri, Nebraska, and Tennessee as other states that have attempted passage of Ag Gag laws, and Kansas, Montana, and North Dakota as three states with similar legislation previously enacted).

IV will explore legal alternatives to imposing Ag Gag bills. Next, this Note will analyze the proposed bills under a First Amendment analysis. Finally, public policy reasons for opposing Ag Gag bills will be discussed.

## II. BACKGROUND

To ensure the meat that arrives in the market is safe and of high quality, regulations at the state and federal level dictate how animals, meant for consumption, are raised, transported, slaughtered, and sold.<sup>23</sup> The federal Humane Slaughter Act was passed in 1958 and dictates the methods of slaughter which must be used.<sup>24</sup> The federal government also regulates the inspection of animals before they are slaughtered, and requires any animal destined for slaughter that shows symptoms of disease to be separated from the other animals, slaughtered separately, and the carcasses subjected to thorough examination and inspection.<sup>25</sup> The federal government has vested the Secretary of Agriculture with the power to temporarily suspend slaughter at any facility not adhering to the appropriate methods.<sup>26</sup>

### A. Downer Cows

Downer cows, also known as nonambulatory disabled livestock,<sup>27</sup> are cows that have become nonambulatory due to illness or injury.<sup>28</sup> Because these animals are nearly incapable of moving, they cannot get to food or water.<sup>29</sup> In

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23. See, e.g., Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901–1907 (2006); 510 ILL. COMP. STAT. ANN. 75/3 (West 2004); FLA. STAT. ANN. §§ 828.22, .24 (West 2006).

24. 7 U.S.C. § 1902.

25. 21 U.S.C. § 603(a).

26. *Id.* § 603(b).

27. Prohibition of the Use of Specified Risk Materials for Human Food and Requirements for the Disposition of Non-Ambulatory Disabled Cattle, 69 Fed. Reg. 1862, 1870 (Jan. 12, 2004) (codified at 9 C.F.R. § 309.2(b)) (replacing use of the word “downer” with “non-ambulatory disabled livestock” in the amended regulations).

28. FARM SANCTUARY, THE WELFARE OF CATTLE IN BEEF PRODUCTION: A SUMMARY OF THE SCIENTIFIC EVIDENCE 11 (2006), available at <http://thehill.com/images/stories/whitepapers/pdf/Beef.pdf>; see also 9 C.F.R. § 309.2(b) (2012).

Non-ambulatory disabled livestock are livestock that cannot rise from a recumbent position or that cannot walk, including, but not limited to, those with broken appendages, severed tendons or ligaments, nerve paralysis, fractured vertebral column, or metabolic conditions.

*Id.*

29. FARM SANCTUARY, *supra* note 28, at 11.

order to move downed cows, farm workers often use chains or ropes to drag the animal around.<sup>30</sup> Farm workers have also been known to utilize heavier equipment, such as forklifts, to push downed cows around.<sup>31</sup> Downer cows are susceptible to a variety of maladies, including mad cow disease, which makes human consumption of downer cows less desirable, if not dangerous.<sup>32</sup> Because downer cows are unable to move, they spend much of their time lying in their own manure, increasing the likelihood for cross contamination of *E. coli*.<sup>33</sup> Several states including Illinois,<sup>34</sup> Florida,<sup>35</sup> and Washington<sup>36</sup> have passed laws limiting or restricting the transportation of downed animals. Until February 2012, California also had a state law regulating the treatment and transportation of downed livestock.<sup>37</sup> The California law outlawed the purchase, sale, and receiving of nonambulatory animals<sup>38</sup> along with the butchering or processing of such animals for human consumption.<sup>39</sup> The California law required slaughterhouses to take “immediate action” to humanely euthanize a downed animal.<sup>40</sup> The provision also made it unlawful to drag or push a nonambulatory animal with equipment, and instead required the animal be moved with a sling or a “sled-like or wheeled conveyance.”<sup>41</sup> Violation of the California law would have resulted in a county jail sentence no more than a year and/or a fine up to \$20,000.<sup>42</sup> The California law, however, was overturned by the Supreme Court of the United States.<sup>43</sup> In its decision, the Supreme Court ruled that the Federal Meat Inspection Act preempted the state law.<sup>44</sup>

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30. *Id.*

31. *Id.*

32. See Recall Press Release, Food Safety & Inspection Serv., USDA, FSIS-RS-005-2008, California Firm Recalls Beef Products Derived from Non-Ambulatory Cattle Without the Benefit of Proper Inspection (Feb. 17, 2008) [hereinafter FSIS, Cal. Recall Press Release], available at [http://www.fsis.usda.gov/pdf/recall\\_005-2008\\_release.pdf](http://www.fsis.usda.gov/pdf/recall_005-2008_release.pdf) (recalling beef produced from non-ambulatory cows due to potential “adverse health effects if consumed”).

33. WAYNE PACELLE, THE BOND: OUR KINSHIP WITH ANIMALS, OUR CALL TO DEFEND THEM 112 (2011) [hereinafter PACELLE, THE BOND].

34. 510 ILL. COMP. STAT. ANN. 70/7.5(d) (West Supp. 2012).

35. FLA. STAT. ANN. § 828.26(2) (West 2006).

36. WASH. REV. CODE ANN. § 16.52.225 (West Supp. 2013).

37. CAL. PENAL CODE § 599f (West 2010), *invalidated* by Nat’l Meat Ass’n v. Harris, 132 S. Ct. 965 (2012).

38. *Id.* § 599f(a).

39. *Id.* § 599f(b).

40. *Id.* § 599f(c).

41. *Id.* § 599f(e).

42. *Id.* § 599f(h).

43. Nat’l Meat Ass’n v. Harris, 132 S. Ct. 965, 975 (2012) (holding that § 599f of California’s penal code was expressly preempted by the Federal Meat Inspection Act (FMIA)).

44. *Id.*

The USDA announced a ban on the slaughter of downer cattle for human consumption in 2003 after a cow from Washington state tested positive for BSE.<sup>45</sup> Despite multiple attempts in the United States Congress, federal legislation regulating downer cattle has not been passed.<sup>46</sup> In 2001, the House of Representatives and the Senate passed amendments to ban slaughter of downer cows; the language, however, was cut from the final version of the 2002 Farm Bill.<sup>47</sup> The United States Senate passed a ban on downer cattle in 2003.<sup>48</sup> When legislation that would have prevented the USDA from using funds to approve meat from downed animals in food destined for human consumption entered the House for debate,<sup>49</sup> opponents argued strenuously against such a law.<sup>50</sup> Representative Charles Stenholm of Texas stated that 19,900 cattle were tested for mad cow disease in 2002, forty times the international standard.<sup>51</sup> Representative Stenholm stated that of the 19,990 cows that were tested, 14,000 were downer cows.<sup>52</sup> He argued that banning slaughter of downer cows was not the best way to accomplish the goal of keeping sick animals out of the food chain.<sup>53</sup> Representative Gary Ackerman, the author of the amendment which would have banned downer cows from being slaughtered, stated he was “not impressed” by the argument that the United States tested more animals than the international standard.<sup>54</sup> In fact, a report by the USDA in 2004 concluded that voluntary testing of adult cattle in the United States was ineffective as a means of detecting mad cow disease.<sup>55</sup> The report stated,

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45. Press Release, USDA, Release No. 0452.03, USDA BSE Update (Dec. 30, 2003), available at [www.usda.gov/documents/NewsReleases/2003/12/0452.doc](http://www.usda.gov/documents/NewsReleases/2003/12/0452.doc). BSE stands for Bovine Spongiform Encephalopathy; mad cow disease is the common name for BSE. See Michael Greger, *Could Mad Cow Disease Already Be Killing Thousands of Americans Every Year?*, ORGANIC CONSUMERS ASS'N (Jan. 7, 2004), [www.organicconsumers.org/madcow/GregerCJDkills.cfm](http://www.organicconsumers.org/madcow/GregerCJDkills.cfm).

46. See PACELLE, THE BOND, *supra* note 33, at 116–18.

47. *Id.* at 116; see 147 CONG. REC. H6367 (daily ed. Oct. 4, 2001) (statement of Rep. Ackerman); see also Farm Security and Rural Investment Act of 2002, Pub. L. 107-171, § 10305(a)(2)(C), 116 Stat. 134, 493 (2002) (indicating the sense of Congress that the USDA should “bring about improvement of products and economies in slaughtering operations,” but providing no other provisions regarding downed animals).

48. PACELLE, THE BOND, *supra* note 33, at 116; see also 149 Cong. Rec. H8956 (daily ed. Sept. 30, 2003) (statement by Rep. Blumenauer).

49. 149 CONG. REC. 17,875 (2003).

50. *Id.* at 17,877–78 (statements of Reps. Charles Stenholm and Nick Smith); PACELLE, THE BOND, *supra* note 33, at 116.

51. 149 CONG. REC. 17,877.

52. *Id.*

53. *Id.*

54. *Id.* at 17,875, 17,878.

55. OFFICE OF INSPECTOR GEN., GREAT PLAINS REGION, USDA, REPORT NO. 50601-9-KC, AUDIT REPORT: ANIMAL AND PLANT HEALTH INSPECTION SERVICE AND FOOD SAFETY AND

[The sampling program's] testing of clinically normal adult cattle (20,000) has little, if any, statistical significance and may inadvertently create a false impression of the actual BSE incidence rate in these animals, due to the deceptively small sample size relative to the extraordinarily low expected prevalence of detectable BSE in this population.<sup>56</sup>

The legislation that would have banned downer cows from being slaughtered was defeated by a margin of three votes.<sup>57</sup> By Christmas of 2003, the state of Washington had reported its finding of a downer cow with mad cow disease.<sup>58</sup> That cow had indeed been processed, and meat from the plant that processed the animal had been sent around the country.<sup>59</sup>

### B. *Animal Confinement*

At the state level, several states have passed laws aimed at improving the environment in which animals are raised. In 2002, Florida banned the confinement of breeding sows in gestation crates.<sup>60</sup> Gestation crates are two feet by seven feet enclosures; their size makes it difficult, if not impossible, for a sow to lie down or turn around.<sup>61</sup> Renowned animal scientist Temple Grandin likened gestation crates to a lifetime spent in a first-class seat on an airplane; ““You could maybe turn over on your side . . . and there’s someone bringing you food and water and everything you need, but you can’t move. [The pigs] can feel fear and pain.””<sup>62</sup> In 2012, multiple food companies expressed intentions to phase out gestation crates.<sup>63</sup> These companies include fast food giants McDonald’s and Burger King, along with grocery chains Safeway and Kroger.<sup>64</sup> Pork producers

INSPECTION SERVICE BOVINE SPONGIFORM ENCEPHALOPATHY (BSE) SURVEILLANCE PROGRAM – PHASE I, at 8 (2004), *available at* <http://www.usda.gov/oig/webdocs/50601-9-final.pdf>.

56. *Id.* at 12.

57. 149 CONG. REC. H6678 (daily ed. July 14, 2003) (listing 199 for and 202 against Rep. Ackerman’s amendment to prevent downer cows from entering food system).

58. Recall Press Release, Food Safety & Inspection Serv., USDA, FSIS-RC-067-2003, Washington Firm Recalls Beef Products Following Presumptive BSE Determination (Dec. 23, 2003), *available at* <http://www.fsis.usda.gov/oa/recalls/prelease/pr067-2003.htm>; *see also* PACELLE, THE BOND, *supra* note 33, at 117; FARM SANCTUARY, *supra* note 28, at 11 (describing “downer cows” and the implications of finding a BSE-positive Washington dairy cow).

59. PACELLE, THE BOND, *supra* note 33, at 117.

60. Allen Harper, *Florida’s Ban on Gestation Crates*, LIVESTOCK UPDATE (Va. Coop. Extension), Dec. 2002, [http://www.sites.ext.vt.edu/newsletter-archive/livestock/aps-02\\_12/aps-175.html](http://www.sites.ext.vt.edu/newsletter-archive/livestock/aps-02_12/aps-175.html).

61. *Clarified – What Are Gestation Crates?*, EATOCRACY (June 6, 2012, 10:15 PM), <http://eatocracy.cnn.com/2012/06/06/gestation-crates/>.

62. *Id.*

63. *Id.*

64. *Id.*



argue that the pigs are kept in the crates for their own safety, as pregnant sows tend to become aggressive when housed in a group setting.<sup>65</sup> A two and a half year study conducted by Iowa State University (ISU), however, suggests that “reproductive performance can be maintained or *enhanced* in well-managed group housing systems for gestating sows . . . without increasing labor.”<sup>66</sup> Additionally, the research conducted by ISU suggested that producing pigs in group settings could actually be done at a lower cost than production with the use of gestation stalls.<sup>67</sup> Producing pigs in a group setting versus producing them in a gestation stall-based system requires a different skill set that many farmers in the United States have not developed,<sup>68</sup> which may be the biggest obstacle in convincing American farmers to change methods.

Gestation crates are not the only method of animal confinement that has come under fire. In November 2006, Arizona became the second state to ban gestation crates and the first to ban veal crates.<sup>69</sup> Veal crates are utilized in the production of veal cows and, similar to gestation crates for sows, are designed for efficient production, rather than animal comfort.<sup>70</sup> Efforts continue among animal welfare groups to ban other methods, such as battery cages for hens.<sup>71</sup>

### C. Undercover Investigations

Over a century ago, Upton Sinclair published *The Jungle*.<sup>72</sup> Sinclair worked for weeks in meatpacking factories as preparation for writing *The Jungle*.<sup>73</sup> His experience led to the passing of the Federal Meat Inspection Act in

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65. RACHEL J. JOHNSON, ECON. RESEARCH SERV., USDA, LDP-M-215, LIVESTOCK, DAIRY, AND POULTRY OUTLOOK 9 (2012), available at <http://www.ers.usda.gov/media/601518/ldpm215.pdf>.

66. Press Release, College of Agric. & Life Sci., Iowa State Univ., Alternatives to Sow Gestation Stalls Researched at Iowa State (Apr. 19, 2007), <http://www.ag.iastate.edu/news/releases/319/> (emphasis added).

67. *Id.* Research into the economics of producing pigs in a group setting versus production using gestation crates concluded that a weaned pig from the group setting cost eleven percent less to produce than a weaned pig from a gestation stall-based system. *Id.*

68. *Id.*

69. Paul Shapiro, *Arizona Makes History for Farm Animals*, SATYA, Apr./May 2007, <http://www.satyamag.com/apr07/shapiro.html>.

70. *Id.*

71. Laura Reddy, *Activists Call for End to ‘Cruel’ Battery Cages for Chickens*, ABC NEWS (Nov. 19, 2011), <http://abcnews.go.com/Blotter/activists-call-end-cruel-battery-cages-chickens/story?id=14989778#.TzSDE4HBKFA>.

72. UPTON SINCLAIR, *THE JUNGLE* (Wilder Publ’ns 2010) (1906).

73. A.G. Sulzberger, *States Look to Ban Efforts to Reveal Farm Abuse*, N.Y. TIMES, Apr. 13, 2011, [http://www.nytimes.com/2011/04/14/us/14video.html?\\_r=0](http://www.nytimes.com/2011/04/14/us/14video.html?_r=0).



1906, the first federal legislation for slaughterhouses.<sup>74</sup> The experiences he wrote about in *The Jungle* included dead rats being tossed in meat grinding machines, animal bits being swept off the floor and packaged, and inspectors being bribed to ignore diseased cows being slaughtered for beef.<sup>75</sup> These “sick cows” were probably what would now be referred to as downer or nonambulatory cows.<sup>76</sup>

Despite regulations, livestock and poultry are still vulnerable to mistreatment. Much of this mistreatment has been exposed by undercover investigations by animal rights groups such as PETA and MFA.<sup>77</sup> Videos released by such groups show hogs squealing and kicking while being lowered into tanks of hot water,<sup>78</sup> male chicks being thrown into grinders,<sup>79</sup> and piglets being thrown across rooms.<sup>80</sup> Videos such as these led to the recall of 143 million pounds of ground beef in 2008,<sup>81</sup> and the closing of production facilities, some for an indefinite amount of time.<sup>82</sup> Between recalls, fines, and closures, undercover investigations could be responsible for the loss of millions, if not billions, of dollars to the meat industry.<sup>83</sup> Additionally, videos from undercover investigations have been used by animal welfare groups to advocate for more humane production practices,

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74. Wayne Pacelle, ‘Ag Gag’ Laws Would Punish Whistleblowers, Protect Animal Abusers, HUMANE SOC’Y OF THE U.S. (Apr. 14, 2011), <http://hsus.typepad.com/wayne/2011/04/nytimes-whistleblowers.html> [hereinafter Pacelle, ‘Ag Gag’ Laws Would Punish Whistleblowers].

75. Jon Blackwell, 1906: Rumble over ‘The Jungle,’ CAP. CENTURY, <http://www.capitalcentury.com/1906.html> (last visited Jan. 17, 2013); see SINCLAIR, *supra* note 72, at 57, 59, 125.

76. See SINCLAIR, *supra* note 72, at 59.

77. See 10 Shocking PETA Videos, PETA, [www.peta.org/features/10-shocking-peta-videos.aspx](http://www.peta.org/features/10-shocking-peta-videos.aspx) (last visited Jan. 17, 2013); Michael J. Crumb, *Iowa Select Farms Undercover Video: Mercy for Animals Footage Shows Inside One of Nation’s Largest Pork Producers*, HUFFINGTON POST (Aug. 29, 2011), [http://www.huffingtonpost.com/2011/06/29/iowa-select-farms-mercy-for-animals-video\\_n\\_886743.html](http://www.huffingtonpost.com/2011/06/29/iowa-select-farms-mercy-for-animals-video_n_886743.html).

78. Joby Warrick, ‘They Die Piece by Piece’: In Overtaxed Plants, Humane Treatment of Cattle is Often a Battle Lost, WASH. POST, Apr. 10, 2001, available at [https://www.uta.edu/philosophy/faculty/burgess-jackson/Warrick,%20They%20Die%20Piece%20by%20Piece%20\(2001\).pdf](https://www.uta.edu/philosophy/faculty/burgess-jackson/Warrick,%20They%20Die%20Piece%20by%20Piece%20(2001).pdf). One video released by the Humane Farming Association, filmed at an Iowa pork plant, showed hogs that were still alive and conscious as they were lowered into tanks of hot water, which are intended to soften their hides for skinning. *Id.* As a result of a botched slaughter, hogs drown in the scalding water. *Id.*

79. Duffelmeyer, *supra* note 14.

80. Crumb, *supra* note 77.

81. PACELLE, THE BOND, *supra* note 33, at 109, 112; Pacelle, ‘Ag Gag’ Laws Would Punish Whistleblowers, *supra* note 74; see FSIS, Cal. Recall Press Release, *supra* note 32.

82. See, e.g., PACELLE, THE BOND, *supra* note 33, at 110 (describing the shutdown of Hallmark/Westland Meat Packing after the USDA pulled its inspectors from the plant).

83. See PACELLE, THE BOND, *supra* note 33, at 119; see also Christopher Doering, Mad-Cow Ban Cost U.S. \$11 Billion in Beef Exports, REUTERS (OCT. 7, 2008), <http://www.reuters.com/article/2008/10/07/us-madcow-beeftrade-exports-idUSTRE4969C120081007>.

such as banning battery cages.<sup>84</sup> Larger animal containers mean fewer animals are raised per unit of area, decreasing profits for farmers.<sup>85</sup> There can be little doubt that these undercover investigations work, at least in raising awareness of conditions at slaughterhouses. Recently, the Center for Food Integrity (CFI) established an Animal Care Review panel.<sup>86</sup> The panel is comprised of a variety of animal welfare experts who will review videos obtained through undercover investigations and will then report their professional analysis to the public.<sup>87</sup> In February 2012, the panel reviewed an undercover video taken by animal welfare group Compassion over Killing (COK) at an Iowa hog farm.<sup>88</sup> The analysis of this video was mixed. Some concerns noted by the panel included flies in a farrowing room and footage of sows being fed organs of piglets that have died.<sup>89</sup> This practice is known as “back feeding” and is reportedly used to boost the immune system of sows late in gestation.<sup>90</sup> The panel also noted that most of what the video depicted were “normally accepted production practices” and were not considered abusive.<sup>91</sup> These practices included castrating and docking a piglet in close proximity to the mother and an employee using tape, instead of stitches, on a castration incision.<sup>92</sup> The establishment of such a review panel indicates that at least some sectors of the industry may be genuinely interested in studying how livestock are treated.

#### D. *International Implications*

According to the USDA, the United States was number three in pork production<sup>93</sup> and number one in beef production in 2011.<sup>94</sup> The top five U.S. markets for pork in 2011 were Japan, Mexico, Canada, China, and South Korea.<sup>95</sup> The top five U.S. markets for beef in 2011 were Canada, Mexico, Japan, South Korea, and Hong Kong.<sup>96</sup> After the USDA’s announcement of mad cow disease

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84. Reddy, *supra* note 71.

85. See Shapiro, *supra* note 69.

86. Marlys Miller, *Panel Established to Review Animal Activists’ Videos*, PORK NETWORK, <http://www.porknetwork.com/pork-news/Panel-established-to-review-animal-activists-videos-139737223.html> (last updated Feb. 20, 2012).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Pork at a Glance*, *supra* note 5.

94. *Beef at a Glance*, *supra* note 5.

95. *Pork at a Glance*, *supra* note 5.

96. *Beef at a Glance*, *supra* note 5.

in 2003, most countries banned or restricted importation of American beef.<sup>97</sup> The nations that banned American meat included Mexico, Canada, Japan, and South Korea.<sup>98</sup> Combined, these four countries accounted for approximately 90% of U.S. beef exports.<sup>99</sup> In 2003, the United States was the number three exporter in the world of beef and veal, accounting for 18% of the world's market.<sup>100</sup> In 2004, the United States' share of the world's beef market had plummeted to 3%.<sup>101</sup> By 2007, that percentage had climbed back to nearly 9%.<sup>102</sup> The last major hold out to importation of U.S. beef was South Korea.<sup>103</sup>

South Korea's response to the discovery of mad cow disease in American beef is well-documented. On April 18, 2008, South Korea and the United States announced a new agreement which would completely reopen South Korean markets to American beef.<sup>104</sup> South Korea pursued a gradual re-opening, while the United States pushed for a quicker and more comprehensive agreement.<sup>105</sup> While the governments of each country were eager for the reintegration of American beef into the South Korean market, the citizens of South Korea were not as optimistic.<sup>106</sup> In late May 2008, South Korean police detained over 200 people involved in protests against the country's decision to re-open its market to U.S. beef.<sup>107</sup> The agreement to begin importing beef from the United States cast a negative light on South Korean President Lee Myung-bak.<sup>108</sup> Protests escalated to violent clashes with police as support for the South Korean president Lee Myung-bak plunged.<sup>109</sup> Ultimately, the renegotiation of the South Korean and United States trade agreement that had started the protests was put on hold.<sup>110</sup> In 2008, it was estimated that the United States had lost between \$3.5 and \$4 billion

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97. CHARLES E. HANRAHAN & GEOFFREY S. BECKER, CONG. RESEARCH SERV., RS21709, MAD COW DISEASE AND U.S. BEEF TRADE 1 (2008), available at <http://www.nationalaglawcenter.org/assets/crs/RS21709.pdf>.

98. *Id.* (report primarily refers to "Korea").

99. *Id.*

100. *Id.*

101. *Id.* at 1–2.

102. *Id.* at 2.

103. *Id.*

104. *Id.* at 3.

105. *Id.*

106. *See id.* (stating that the reopening of the Korean market had been delayed while officials managed "furious backlash" from consumers and politicians).

107. *Clashes over U.S. Beef in S. Korea*, CNN (June 1, 2008), [http://articles.cnn.com/2008-06-01/world/skorea.usbeef\\_1\\_beef-imports-mad-cow-disease-beefexporters?\\_s=PM:WORLD](http://articles.cnn.com/2008-06-01/world/skorea.usbeef_1_beef-imports-mad-cow-disease-beefexporters?_s=PM:WORLD).

108. *Id.*

109. *S Korea Seeks Change on Beef Deal*, BBC NEWS (June 3, 2008), <http://news.bbc.co.uk/2/hi/7432681.stm> ("Some of the demonstrators have called on Mr[.] Lee to step down.").

110. *Id.*

in sales to South Korea since the market closure in December 2003.<sup>111</sup> A Kansas State University study estimated that total losses to the American beef industry in 2004 as a result of mad cow disease concerns were between \$3.2 and \$4.7 billion.<sup>112</sup>

Looking back over the past decade, it is clear that the meat industry in America is not only important to the economic well-being of this country, but also to the populations of other countries who import millions of tons of American meat for consumption each year. Because of the meat industry's importance at home and abroad, it is fiercely protected. Unfortunately, this protection is at times self-serving. Efforts by consumers to hold the industry accountable are often met with vehement protests from representatives in the agricultural industry.

### III. THE AG GAG BILLS

The first law criminalizing unauthorized recordings and photography in animal production facilities was passed in Kansas in 1990.<sup>113</sup> The law was entitled the Farm Animal and Field Crop and Research Facilities Protection Act and along with making it illegal to damage or destroy property or animals in a facility, it also criminalized entering an animal facility to take pictures or video.<sup>114</sup> Compared to the most recent Ag Gag laws, the Kansas law was less focused on undercover investigations and more concerned with property damage and liberation or theft of animals.<sup>115</sup>

Not surprisingly, the most vocal and stalwart supporters of legislation that would criminalize undercover investigations come from the beef, poultry, and pork industries.<sup>116</sup> Many of the arguments supporting Ag Gag laws focus on

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111. HANRAHAN & BECKER, *supra* note 97, at 2–4.

112. *Id.* at 6; BRIAN COFFEY ET AL., KANS. STATE UNIV., THE ECONOMIC IMPACT OF BSE ON THE U.S. BEEF INDUSTRY: PRODUCT VALUE LOSSES, REGULATORY COSTS, AND CONSUMER REACTIONS 29 tbl.3.5, 30 tbl.3.6 (2005), <http://www.ksre.ksu.edu/bookstore/pubs/MF2678.pdf>.

113. KAN. STAT. ANN. § 47-1827 (2012); *Ag-Gag Laws*, SOURCEWATCH, [http://www.sourcewatch.org/index.php?title=Ag-gag\\_laws](http://www.sourcewatch.org/index.php?title=Ag-gag_laws) (last visited Jan. 17, 2013).

114. KAN. STAT. ANN. § 47-1827(c); *Ag-Gag Laws*, *supra* note 113.

115. *See* KAN. STAT. ANN. § 47-1827. North Dakota and Montana passed similar laws in the early 1990s. MONT. CODE ANN. §§ 81-30-101 to -105 (2011); N.D. CENT. CODE ANN. § 12.1-21.1 (West 2012). Substantively, the laws were very similar but varied in requirements of intent. *See* MONT. CODE ANN. § 81-30-103(1); N.D. CENT. CODE ANN. § 12.1-21.1-02(1).

116. *See Lobbyist Declaration Results, H.F. 589*, IOWA LEGIS., <http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=Lobbyist&Service=DspReport&ga=84&type=b&hbill=hf589> (last visited Jan. 17, 2013). The Poultry Association, Pork Producers Association, and Cattleman's Association lobbied for the ag-gag law. *Id.*

the deceptive nature of undercover investigations.<sup>117</sup> Supporters also argue that outsiders may unintentionally introduce illness to the animals, causing a loss of animal life.<sup>118</sup> And with a loss of animal life comes the loss of profits. Some supporters suggest it is the investigators themselves who initiate the abuse caught on these videos.<sup>119</sup> This argument raises some disconcerting questions. First, if the investigators are the ones who instigate the abuse, how can they possibly be trusted to provide credible evidence? If abuse is not reported outside these investigations, does that mean it is the investigators who are responsible for the abuse, or is it possible that those who witness animal abuse outside of these investigations are simply too afraid or ashamed to come forward? Or even more disturbing, do those routinely involved in animal care fail to see anything wrong with the abuse witnessed on a routine basis?

What follows is a brief history and introduction to bills introduced in Iowa, Minnesota, New York, Utah, and Florida.<sup>120</sup> Collectively referred to as Ag Gag bills by opponents of the bills, the laws would effectively ban nearly all video-taping, picture taking, and recording at animal production facilities.<sup>121</sup> In late February 2012, nearly thirty groups representing various public interests signed a

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117. See Amanda Radke, *Do You Support Ag Gag Laws?*, BEEF (Mar. 14, 2012), <http://beefmagazine.com/blog/do-you-support-ag-gag-laws>.

118. See Interview with Joe Seng, State Sen., Iowa, by Kai Ryssdal (Mar. 1, 2012), <http://www.marketplace.org/topics/life/iowas-ag-gag-sponsor-defends-bill>; *Protecting Agricultural Producers from Fraud*, IOWA SENATE DEMOCRATS (Mar. 2, 2012), <http://www.senate.iowa.gov/democrats/protecting-agricultural-producers-from-fraud/>. Because many of the undercover investigations being targeted by Ag Gag legislation are conducted by people who have gone through the application and hiring process at these facilities, just like any other employee, one has to wonder whether it is the investigatory outsiders who create the risk of illness or the process and environment itself.

119. Radke, *supra* note 117.

120. Illinois, Nebraska, and Indiana also introduced Ag Gag laws in 2012. The Illinois bill was introduced by Republican Representative Jim Sacia and was tabled on March 9, 2012. H.B. 5143, 97th Gen. Assemb., Reg. Sess. (Ill. 2012); *Bill Status of HB5143*, ILL. GEN. ASSEMBLY, [http://www.ilga.gov/search/iga\\_search.asp?scope=leg97](http://www.ilga.gov/search/iga_search.asp?scope=leg97) (enter "HB5143" in "Search . . . by Number" box). The Nebraska bill was introduced to the nonpartisan and unicameral legislature in January 2012. L.B. 915, 102nd Legis., 2nd Sess. (Neb. 2012). The Indiana bill was introduced on January 4, 2012 by Republican State Senators Travis Holdman and Ron Grooms. S.B. 184, 117th Gen. Assemb., 2nd Reg. Sess. (Ind. 2012). The Indiana bill failed to make it past the Senate committee. Marcia Oddi, *Ind. Law – "Ag Gag" Bill Fails in Indiana; Passes in Iowa*, IND. L. BLOG (Mar. 31, 2012, 9:10 AM), [http://indianalawblog.com/archives/2012/03/ind\\_law\\_ag\\_gag.html](http://indianalawblog.com/archives/2012/03/ind_law_ag_gag.html).

121. See Bittman, *supra* note 16. Bittman is credited as coining the term "Ag Gag" in reference to the proposed laws that would criminalize undercover videotaping and photography on animal facilities. Dan Flynn, *Letter from the Editor: Ag-Gag*, FOOD SAFETY NEWS (Mar. 4, 2012), <http://www.foodsafetynews.com/2012/03/letter-from-the-editor-ag-gag/>.

group statement opposing the Ag Gag bills.<sup>122</sup> These groups included: 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 Government Accountability Project.<sup>123</sup>

#### A. Iowa<sup>124</sup>

The Iowa law was passed in the House and the Agricultural committee before stalling in the Iowa Senate toward the end of the 2011 session.<sup>125</sup> In the 2012 session, the Iowa Senate revisited H.F. 589 and on January 25, 2012, deferred an amended version.<sup>126</sup> A heavily amended version of the bill was passed by the Iowa House on February 28, 2012.<sup>127</sup> The final version of the bill referred only to the crime of “agricultural production facility fraud.”<sup>128</sup> It essentially made it a crime to obtain access or employment at an agricultural production facility by making misrepresentations or false statements.<sup>129</sup> The bill was signed by Governor Terry Branstad on March 2, 2012.<sup>130</sup>

In its original versions the Iowa bill would have created the offenses of “animal facility tampering”<sup>131</sup> and “animal facility interference.”<sup>132</sup> Animal facility tampering included actions taken to damage agricultural facilities or to cause harm to an animal in an animal facility.<sup>133</sup> To commit the crime of animal facility interference, a person would, without the consent of the owner of the animal facility, willfully “[p]roduce a record which reproduces an image or sound occurring at the animal facility . . . .”<sup>134</sup> The proposed law stated that the record must

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122. *Laws Seeking to Ban Farm Investigations Opposed*, THE PIGSITE (Feb. 24, 2012), <http://www.thepigsite.com/swinenews/28991/laws-seeking-to-ban-farm-investigations-opposed>.

123. *Id.*

124. The Iowa bill also includes language pertaining to tampering with crop operations, but the focus of this Note is on the provisions concerning animal production. See H.F. 589, 84th Gen. Assemb., Reg. Sess. § 3 (Iowa 2011).

125. *Bill History for H.F. 589*, IOWA LEGIS., <http://coolice.legis.state.ia.us/Cool-ICE/default.asp?Category=BillInfo&Service=DspHistory&var=HF&key=0642C&GA=84> (last visited Jan. 17, 2013).

126. S. JOURNAL, 84th Gen. Assemb., Reg. Sess. 117 (Iowa 2012).

127. H. JOURNAL, 84th Gen. Assemb., Reg. Sess. 362–63 (Iowa 2012); *Bill History for H.F. 589*, *supra* note 125.

128. 2012 Iowa Legis. Serv. 5–6 (West).

129. *Id.*

130. *Bill History for H.F. 589*, *supra* note 125.

131. H.F. 589, 84th Gen. Assemb., Reg. Sess. § 8 (Iowa 2011).

132. *Id.* § 9.

133. *Id.* § 8.1.a–b.

134. *Id.* § 9.1.a(1).

be produced while at the animal facility and must be a “reproduction of a visual or audio experience occurring at the animal facility.”<sup>135</sup> Methods of reproduction included, but were not limited to, photos and audio.<sup>136</sup> The law also made it a crime to possess or distribute such recordings.<sup>137</sup> One commentator on the Iowa law stated that this bar against possession and distribution puts these types of undercover videos “on par with child pornography.”<sup>138</sup> For the first offense, a person would be guilty of an aggravated misdemeanor.<sup>139</sup> For subsequent offenses, the person would be convicted of a class D felony.<sup>140</sup> Additionally, the offender would be subject to any applicable restitution.<sup>141</sup>

The portion of the original Iowa bill that was signed into law created the crime of “animal facility fraud.”<sup>142</sup> Animal facility fraud is defined by the statute as obtaining “access to an animal facility by false pretenses for the purpose of committing an act not authorized by the owner of the animal facility.”<sup>143</sup> Animal facility fraud can also be committed under the statute by knowingly making a false statement or representation as part of an application for employment at the animal facility and making the statement with the intent to “commit an act not authorized by the owner of the animal facility.”<sup>144</sup> The penalties for animal facility fraud are the same as those for animal facility interference.<sup>145</sup> Section 11 of House File 589 allows for civil actions against those convicted of interfering with animal facilities.<sup>146</sup> The owner of a facility that is “interfered” with could claim an amount up to three times actual and consequential damages along with court costs and reasonable attorney fees.<sup>147</sup> Additionally, the court may order any other equitable relief as it deems appropriate.<sup>148</sup> The original versions of the Iowa bill made exceptions for governmental agents,<sup>149</sup> veterinarians,<sup>150</sup> and persons who

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135. *Id.* § 9.1.a(1)(a)–(b).

136. *Id.* § 9.1.a(1)(b).

137. *Id.* § 9.1.a(2).

138. Kurt Michael Friese, *Gagging on the Ag Gag Bill – Industrial Lobbying and Corporate Overreach at Its Finest*, HUFFINGTON POST (June 7, 2011), [http://www.huffingtonpost.com/kurt-friese/farm-animal-abuse\\_b\\_872867.html](http://www.huffingtonpost.com/kurt-friese/farm-animal-abuse_b_872867.html).

139. H.F. 589, 84th Gen. Assemb., Reg. Sess. § 9.2.a (Iowa 2011).

140. *Id.* § 9.2.b.

141. *Id.* § 9.3.

142. *Id.* § 10.

143. *Id.* § 10.1.a.

144. *Id.* § 10.1.b.

145. *Id.* § 10.2.a–b, .3.

146. *Id.* § 11.

147. *Id.* § 11.1.a–b.

148. *Id.* § 11.2.

149. *Id.* § 12.2.a.

150. *Id.* § 12.2.b.



hold a legal interest in the facility which is “superior to the legal interest held by a person incurring damages resulting from the conduct.”<sup>151</sup>

Much of the support for the Iowa bill came from agribusinesses such as Iowa Pork Producers Association, Iowa Dairy Foods Association, Iowa Poultry Association, and Monsanto.<sup>152</sup> Cody McKinley, a Public Policy Director for the Iowa Pork Producers Association, argued against people being hired ““under false pretenses to get access to these facilities to portray their side of the story.””<sup>153</sup> Bruce Berven, a lobbyist for the Iowa Cattlemen’s Association, broke activists’ motivations down to a ““vegan-slash-vegetarian agenda”” and accused them of being ““basically anti-livestock.””<sup>154</sup>

Opponents of H.F. 589 included Iowa Voters for Companion Animals, Animal Rescue League of Iowa, Iowa Citizens for Community Improvement Action Fund, American Civil Liberties Union of Iowa, and the Iowa Chapter of the Sierra Club.<sup>155</sup> Opposition against Ag Gag bills in Iowa and other states was largely responsible for the stagnation of the bills at the end of the 2011 legislative session.<sup>156</sup> Opponents of the Ag Gag bills argue “[a] well-managed farm has nothing to hide.”<sup>157</sup> They also said they have been “careful to avoid being critical of agriculture as an industry.”<sup>158</sup> In fact, Emily Vaughn of Slow Food USA<sup>159</sup> has referred to the videos as “positive activism” and has supported farmers who “agree with their vision of sustainably produced food and the humane treatment

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151. *Id.* § 12.1.

152. *Lobbyist Declaration Results, H.F. 589, supra* note 116. Not surprisingly, the three registered lobbyists for Iowa Select Farms (one of the farms subject of an undercover video) lobbied in support of H.F. 589. *Id.*

153. Mike Glover, *Animal Abuse Video Bill: Ban on Undercover Filming of Livestock Operations Stalls After Tough Opposition*, HUFFINGTON POST (June 13, 2011), [http://www.huffingtonpost.com/2011/06/13/animal-abuse-videos-bill-livestock\\_n\\_875931.html](http://www.huffingtonpost.com/2011/06/13/animal-abuse-videos-bill-livestock_n_875931.html). Cody McKinley is on record as a lobbyist for Iowa Pork Producers. *Lobbyist Declaration Results, H.F. 589, supra* note 116. One must wonder, how people can tell “their side of the story” accurately and with credibility without open access to the facilities.

154. Glover, *supra* note 153.

155. *Lobbyist Declaration Results, H.F. 589, supra* note 116.

156. *See* Glover, *supra* note 153.

157. *Id.* (quoting Emily Vaughn, a program manager at Slow Food USA).

158. *Id.* Carol Rigelon, spokeswoman for the Humane Society of the United States said, “What we’re trying to do is expose things that might not otherwise be exposed and as a result make agriculture even better.” *Id.*

159. Slow Food, according to its website, is “an idea, a way of living and a way of eating. It is part of a global, grassroots movement with thousands of members in over 150 countries, which links the pleasure of food with a commitment to community and the environment.” *What Is Slow Food*, SLOW FOOD USA, [http://www.slowfoodusa.org/index.php/slow\\_food/](http://www.slowfoodusa.org/index.php/slow_food/) (last visited Jan. 17, 2013).

of animals.”<sup>160</sup> A representative of Slow Food USA wrote online in June 2011 that their company is “not at all anti-farmer, and firmly believe that a vast majority of America’s farmers are honest, hardworking, industrious and well-meaning keepers of their land and heritage.”<sup>161</sup>

### B. *Minnesota*

The Minnesota bill was introduced in April 2011, partly in response to the proposed Iowa law.<sup>162</sup> According to commentary on the bill, it would be illegal to not just produce undercover video, but also to possess or distribute such footage.<sup>163</sup> The Minnesota bill is substantively identical to the Iowa bill, including provisions for both criminal and civil penalties.<sup>164</sup> The penalties in the Minnesota version include a conviction of a “gross misdemeanor” for the first offense of animal facility interference.<sup>165</sup> For subsequent offenses, the person would be guilty of a felony.<sup>166</sup> Just like the Iowa law, the Minnesota law also provides for an order of restitution.<sup>167</sup>

The Minnesota bill was sponsored in the House of Representatives by Representative Rod Hamilton, who justified the bill by stating it would make people who document animal abuse, but do not immediately report it to the owner of the operation, the management, or the police, guilty of animal abuse.<sup>168</sup> Daryn McBeth, who is president of the Minnesota Agri-Growth Council, said the bill was important to protect farmers against trespassers and “fraudulently hired employees.”<sup>169</sup> Senator Doug Magnus stated that the bills were aimed at people “who are harassing and sabotaging these operations” and people who “go undercover [and] aren’t . . . truthful about what they’re doing.”<sup>170</sup> Mangus also accused people of going into animal production facilities and “doing all kinds of

160. Glover, *supra* note 153.

161. Friese, *supra* note 138.

162. H.F. 1369, 87th Gen. Assemb., Reg. Sess. (Minn. 2011); *Minnesota Bill Would Ban Undercover ‘Animal Abuse’ Videos*, TRI-STATE LIVESTOCK NEWS (Apr. 22, 2011), <http://www.tsln.com/article/20110423/TSLN01/110429977>.

163. Tom Laskawy, *Minnesota Next Up to Pass Law Banning Undercover Farm Videos*, GRIST (Apr. 13, 2011), <http://www.grist.org/factory-farms/2011-04-13-minnesota-next-up-to-pass-law-banning-undercover-farm-videos/?ref=se>; see Minn. H.F. 1369, § 3.1(1)–(2).

164. Compare Minn. H.F. 1369, §§ 2.2, 3.2, 8, with H.F. 589, 84th Gen. Assemb., Reg. Sess. §§ 9.2, 10.2, 11 (Iowa 2011).

165. Minn. H.F. 1369, § 3.2.

166. *Id.*

167. Compare *id.* § 3.3, with Iowa H.F. 589, § 10.3.

168. *Minnesota Bill Would Ban Undercover ‘Animal Abuse’ Videos*, *supra* note 162.

169. *Id.*

170. *Id.*

mischief.”<sup>171</sup> He suggested that “[i]f you want to see what’s going on in a facility, tell the owner straight up” instead of lying.<sup>172</sup>

### C. New York

The New York bill was proposed as an amendment to the state’s existing agriculture and markets law.<sup>173</sup> The proposed New York bill defined unlawful tampering as “unauthorized video, audio recording or photography done without the farm owner’s written consent.”<sup>174</sup> Interestingly, the New York bill also required oral or written notification when a farm does not allow unlawful tampering.<sup>175</sup> This language is slightly different than the language in the Iowa and Minnesota bills requiring only that notice be given that the facility is not open to the public.<sup>176</sup>

### D. Utah

Utah introduced its version of an Ag Gag bill in February 2012.<sup>177</sup> The sponsor of the bill, Representative John Mathis stated the bill would protect the agricultural industry from those who want to “do away with animal agriculture.”<sup>178</sup> Representative Mathis called this “egregious,” and also claimed that the animal welfare movement has transformed into an animal rights movement, stating “that’s wrong.”<sup>179</sup> Other Utah representatives expressed concern over the disparity between the offense and the punishment.<sup>180</sup> Despite issues with the bill, it received a favorable recommendation from the Law Enforcement and Criminal Justice Committee on February 14, 2012.<sup>181</sup> The bill was subsequently edited

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171. *Id.*

172. *Id.*

173. S.B. 5172, 235th Gen. Assemb., Reg. Sess. (N.Y. 2011).

174. *Id.* § 1.1(F).

175. *Id.* § 1.1(E), 1.2.

176. Compare *id.*, with H.F. 589, 84th Gen. Assemb., Reg. Sess. § 9.1.c (Iowa 2011), and H.F. 1369, 87th Gen. Assemb., Reg. Sess. § 3.1(4) (Minn. 2011).

177. H.B. 187, 59th Leg., Gen. Sess. (Utah 2012).

178. Alicia Graef, *Utah Considering Ag Gag Legislation*, CARE2 (Feb. 17, 2012), <http://www.care2.com/causes/utah-considering-ag-gag-legislation.html>.

179. *Id.*

180. *Id.*

181. Letter from Curtis Oda, Committee Chair, Law Enforcement & Criminal Justice Comm., to Rebecca D. Lockhart, Speaker of the House of Representatives, State of Utah (Feb. 14, 2012), available at <http://le.utah.gov/~2012/comreport/HB187H10.pdf>.

before being passed through the House and Senate and signed into law on March 20, 2012.<sup>182</sup>

### E. Florida

Until January 2012, Florida was considering its own Ag Gag bill. In late January, however, the language proposed by State Senator Jim Norman that would have made videotaping in agricultural operations a first degree felony<sup>183</sup> was removed from the agricultural bills being considered.<sup>184</sup> The Florida bill created the same offenses as the New York, Minnesota, Utah, and Iowa bills, but the language used to describe each offense and punishment was not as extensive.<sup>185</sup>

Florida Senator Jim Norman introduced the bill because he claimed undercover videos and pictures were hurting farmers and the bill, if passed, would “protect farmers from outside assault.”<sup>186</sup> Norman also admitted that he had created the bill at the urging of one of the state’s largest egg producers.<sup>187</sup> The bill was met with protest from several animal welfare groups from the beginning.<sup>188</sup>

Although the likelihood of Ag Gag legislation being passed in Florida is remote at this point, its failure in Florida and other states is important for two reasons. The fact that it did not pass may go a long way in convincing other states that are considering similar bills to abandon them. Because Florida has already considered the measure, however, it’s not outside the realm of possibility that if other states pass their provisions, that Florida will not revisit the idea of Ag Gag legislation. Additionally, even though the laws that passed were amended prior to passage to exclude language regarding undercover photography and videotaping, the possibility of a law including these provisions still exists. Because of the ongoing potential for passage of Ag Gag legislation, this is an im-

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182. *Ag-Gag Laws*, *supra* note 113; Robert Gehrke, *Herbert Signs So-Called ‘Ag-Gag’ Bill*, SALT LAKE TRIB., Mar. 20, 2012, <http://www.sltrib.com/sltrib/politics/53758916-90/animal-bill-brown-farm.html.csp>.

183. S.B. 1246, 2011 Gen. Assemb., Reg. Sess. § 1(2) (Fla. 2011).

184. Jennifer Viegas, *Factory Farming Videos Prompt ‘Ag-Gag’ Bills*, DISCOVERY NEWS (Jan. 31, 2012), <http://news.discovery.com/animals/factory-farming-videos-120131.html>.

185. *See* Fla. S.B. 1246.

186. *Action News at 10: Bill Threatens Animals and Free Speech* (Fox 30 JAX news broadcast Apr. 10, 2011) [hereinafter *Bill Threatens Animals and Free Speech*], available at <http://www.youtube.com/watch?v=quxmpf9eJ64>.

187. Brett Ader, *After Farm-Photo Bill Dies in Florida, Animal Advocacy Groups Wary of Monsanto-Backed Version in Iowa*, FLA. INDEP., May 18, 2011, <http://floridaindependent.com/30363/after-farm-photo-bill-dies-in-florida-animal-advocacy-groups-wary-of-monsanto-backed-version-in-iowa>.

188. *Id.*

portant issue to examine because of the far reaching consequences prohibitions of these types may have to human and animal health and wellbeing.

#### IV. LEGAL ARGUMENTS

Agency law and the constitutional right to freedom of speech provide the foundation for two arguments against Ag Gag laws. First, under agency law, when an employee acts in a manner inconsistent with their employer's best interests, the employee has violated their fiduciary duty to their employer and can be held liable for damages.<sup>189</sup> Application of agency law demonstrates one alternative already available to employers whose employees act in a manner that harms their business.<sup>190</sup> The second legal argument invokes First Amendment rights and examines the categories of speech typically considered to be unprotected. Under First Amendment analysis, these animal welfare videos do not fall into any of the categories of unprotected speech and should therefore not be infringed upon.

##### A. Agency Law

The law of agency governs interactions between principals, agents, and third parties.<sup>191</sup> Essential elements in an agency relationship are control, benefit, and consent.<sup>192</sup> An agency relationship may be created simply by employment.<sup>193</sup> Under the Restatement, an agency is created when: 1) the principal (for example, an employer) "manifests assent" to have the agent (for example, an employee) act on their behalf and under the principal's control, and 2) the agent "manifests assent or otherwise consents" to act in this capacity as an agent.<sup>194</sup>

In *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, the American Broadcasting Company (ABC) conducted an undercover investigation after reports surfaced of Food Lion stores repackaging and selling expired meat.<sup>195</sup> Lynne Dale and Susan Barnett, reporters for ABC, submitted applications, including false

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189. RESTATEMENT (THIRD) OF AGENCY § 8.01 & cmts. b, d (2006).

190. See Duffelmeyer, *supra* note 14 ("People should report the wrongs they see and work through proper channels to prevent them.").

191. See D. GORDON SMITH & CYNTHIA A. WILLIAMS, BUSINESS ORGANIZATIONS: CASES, PROBLEMS, AND CASE STUDIES 21 (Vicki Been et al. eds., 2d ed. 2008) (discussing apparent authority and estoppel in manifestations to third parties to the agency relationship).

192. *Id.* at 15; see RESTATEMENT (THIRD) OF AGENCY § 1.01 cmt. c.

193. WILLIAM PALEY, A TREATISE ON THE LAW OF PRINCIPAL AND AGENT 2 (Thomas W. Waterman ed., 4th ed. 1856).

194. RESTATEMENT (THIRD) OF AGENCY § 1.01.

195. 194 F.3d 505, 510 (4th Cir. 1999).

identities and references, and accepted positions in the Food Lion stores.<sup>196</sup> Dale and Barnett underwent training and subsequently began work; Dale was employed at a North Carolina store as a meat wrapper and Barnett was hired in South Carolina as a deli clerk.<sup>197</sup> Dale and Barnett worked a collective three weeks in their respective positions and recorded a total of forty-five hours of undercover footage through the use of “lipstick” cameras.<sup>198</sup> The footage showed Food Lion employees repackaging meat they knew to be expired, including adding barbeque sauce to expired chicken to mask the odor and allow for sale in the gourmet food section.<sup>199</sup> After the report aired, Food Lion sued ABC and the reporters for fraud, unfair trade practices, breach of the duty of loyalty, and trespass.<sup>200</sup> The trial court awarded Food Lion approximately \$1400 in compensatory damages and \$315,000 in punitive damages, and ruled that ABC had engaged in unfair trade practices and fraud, and that Dale and Barnett had “breached their duty of loyalty and committed a trespass.”<sup>201</sup> The Fourth Circuit ruled that Food Lion could not prove all the elements of fraud under North Carolina law since they could not show injurious reliance.<sup>202</sup> The court rejected Food Lion’s argument that the administrative costs associated with hiring new employees and the wages paid to Dale and Barnett amounted to an injury.<sup>203</sup> The court found that all Food Lion employees are considered “at-will” employees and, therefore, could leave or be fired at any time; the fact that Food Lion spent money training them, as they would have for any other new employee, was not sufficient to establish damages.<sup>204</sup> Food Lion also sought repayment of the wages it had paid to Dale and Barnett, but the Fourth Circuit rejected their argument.<sup>205</sup> The court stated “proof of the breach of duty of loyalty . . . does not equal proof of fraud damages for inadequate services. It is possible to perform the assigned tasks of a job adequately and still breach the duty of loyalty.”<sup>206</sup> The court said that the reporters were paid, not because of the misrepresentations on their job applications and resumes, but because they showed up to work and performed the tasks they were

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196. *Id.*

197. *Id.*

198. *Id.* at 510–11.

199. *Id.* at 511.

200. *Id.*

201. *Id.* at 510.

202. *Id.* at 512–14.

203. *Id.* at 513–14.

204. *Id.* at 513.

205. *Id.* at 513–14.

206. *Id.* at 514.

supposed to.<sup>207</sup> Therefore, the issuance of pay rested not on misrepresentations, but on satisfactory completion of their job duties.<sup>208</sup>

While failing in all its other arguments, Food Lion won on their breach of the duty of loyalty claim.<sup>209</sup> The Fourth Circuit relied heavily on the law of agency in holding that Food Lion could recover damages for this breach.<sup>210</sup> The court stated, “As a matter of agency law, an employee owes a duty of loyalty to her employer.”<sup>211</sup> Because Dale and Barnett acted in a manner “adverse to the interests of Food Lion,” the Fourth Circuit held they had committed a tortious breach of the duty of loyalty.<sup>212</sup> The Fourth Circuit limited its holding to those situations where an employee acts with the “requisite intent” to act against the interests of an employer.<sup>213</sup>

The analysis of agency law in *Food Lion* has application in the context of proposed Ag Gag bills. One of the arguments from proponents of the law is that farmers and their businesses need to be protected from people with “mischievous intentions”<sup>214</sup> who obtain jobs on farms, secretly record farm operations, and subsequently release the footage to promote an “unfair perspective on livestock operations.”<sup>215</sup> The argument that farmers and their businesses are harmed by undercover investigations is not without merit. In the wake of undercover videos demonstrating unsavory or cruel treatment of animals, many consumers stop purchasing products from the farms featured in such videos.<sup>216</sup> Additionally, these investigations have resulted in the recall of millions of tons of meat,<sup>217</sup> leading to lost revenue and poor public perception for many farm operations. The Fourth Circuit’s holding in *Food Lion* demonstrates an important point: farmers harmed because of undercover videos shot by employees have a legal recourse against

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207. *Id.*

208. *Id.*

209. *Id.* at 516.

210. *Id.* at 515–16.

211. *Id.* at 515.

212. *Id.* at 516.

213. *Id.* The court clarified that their ruling did not apply to employees who work multiple jobs and whose performance at one may suffer because of their employment elsewhere. *Id.*

214. Glover, *supra* note 153.

215. Duffelmeyer, *supra* note 14.

216. See Crumb, *supra* note 77 (reporting that California-based Safeway and Kroger ceased purchasing from JBS Swift, which distributes pork from Iowa Select Farms, after watching a video of sows in gestation crates and piglets having tails cut off and being castrated without anesthetics); Steve Karnowski & Derek Kravitz, *Target Follows McDonald’s Lead, Drops Egg Supplier Sparboe Farms After Shocking Undercover Video*, HUFFINGTON POST (Nov. 19, 2011), [http://www.huffingtonpost.com/2011/11/20/target-mcdonalds-egg-supplier\\_n\\_1103770.html?ref=fb&src=sp&comm\\_ref=false](http://www.huffingtonpost.com/2011/11/20/target-mcdonalds-egg-supplier_n_1103770.html?ref=fb&src=sp&comm_ref=false).

217. PACELLE, THE BOND, *supra* note 33, at 112; Duffelmeyer, *supra* note 14; see, e.g., FSIS, Cal. Recall Press Release, *supra* note 32.



such employees under current law. Under agency law, agents must “act loyally for the principal’s benefit in all matters connected with the agency relationship.”<sup>218</sup> A breach of this duty of loyalty may result in the breaching party being held liable for damages.<sup>219</sup> This doctrine of loyalty, and the avenue of recourse for principals who are harmed due to a breach of loyalty, undercuts one argument for Ag Gag laws. It is not necessary or proper for legislatures to criminalize undercover video investigations with broad sweeping laws when there are already effective and adequate ways for employers harmed to seek and recover damages.<sup>220</sup>

### B. *Constitutional Argument*

Each American’s freedom of expression and speech is protected from government intrusion by the First Amendment to the United States Constitution.<sup>221</sup> The area of free speech has spawned many cases, making it an expansive and complicated area of law.<sup>222</sup> The United States Supreme Court still regularly wrestles with free speech issues.<sup>223</sup> Not surprisingly, the First Amendment’s protection of freedom of speech is invoked as an argument by Ag Gag bill opponents.<sup>224</sup> The Supreme Court has distinguished between restricting speech versus restricting conduct.<sup>225</sup> The Court has held that restricting conduct is more permissible than restricting speech, but has suggested that conduct which is also expressive will be, at least partly, protected by the First Amendment.<sup>226</sup> Under

218. RESTATEMENT (THIRD) OF AGENCY § 8.01 (2006).

219. RESTATEMENT (THIRD) OF AGENCY § 8.01 cmt. d(1).

220. Although *Food Lion* was decided under North Carolina law, the law of agency is a broad concept present in jurisdictions throughout America, making it relevant as an argument in a variety of states.

221. See U.S. CONST. amend. I.

222. See, e.g., *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *United States v. O’Brien*, 391 U.S. 367 (1968); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).

223. See, e.g., *U.S. v. Alvarez*, 135 S. Ct. 2537 (2012); *Snyder v. Phelps*, 131 S. Ct. 1207, 1213, 1220 (2011) (holding that a protest held by the Westboro Baptist Church at the funeral of an Iraq War veteran was protected under the First Amendment); see also Robert Barnes, *Supreme Court to Review Free Speech Issue on Lying About Military Honors*, WASH. POST (Oct. 17, 2011), [http://www.washingtonpost.com/politics/supreme-court-to-review-free-speech-issue-on-lying-about-military-honors/2011/10/17/gIQAfh0frL\\_story.html](http://www.washingtonpost.com/politics/supreme-court-to-review-free-speech-issue-on-lying-about-military-honors/2011/10/17/gIQAfh0frL_story.html) (giving a short preview of free speech-related cases the Supreme Court was considering at the time).

224. See Friese, *supra* note 138 (stating that the bills proposed were so broad as to “beg obvious 1st [A]mendment questions to say the least”); *Bill Threatens Animals and Free Speech*, *supra* note 186 (argument presented that it is “not reasonable” under free speech law to incarcerate a person because they have a picture of activities which require heavy regulation).

225. *O’Brien*, 391 U.S. at 376–77.

226. *Id.* at 381–82.

the First Amendment, prior restraint by a government is presumptively illegal,<sup>227</sup> as is content-based discrimination.<sup>228</sup> If the restraint of speech is not content-neutral, the Court will apply strict scrutiny.<sup>229</sup> The Court has also identified a variety of unprotected categories of speech which include incitement,<sup>230</sup> fighting words,<sup>231</sup> and obscenity.<sup>232</sup> In delineating such unprotected categories, the Court has emphasized that such categories must be “well-defined and narrowly limited.”<sup>233</sup> Under these elements of First Amendment analysis, the provisions of Ag Gag bills that would make undercover videotaping and photography illegal do not appear to be constitutional.

The First Amendment relates to free speech, so in order for a First Amendment argument to be relevant, it must first be determined that the gathering of information on private property for publication, for the common good, is considered speech. This is a complicated issue. In *Brown v. Entertainment Merchants Association*, the Court stated that the First Amendment “exists principally to protect discourse on public matters.”<sup>234</sup> In that case, the Court extended First Amendment protection to violent video games.<sup>235</sup> The Court stated, “Whether government regulation applies to *creating*, distributing, or consuming speech makes no difference.”<sup>236</sup> In *United States v. O’Brien*, the Court held that restricting conduct is more permissible than restricting the exercise of speech.<sup>237</sup> The Court also stated that conduct that is at least partially expressive will be eligible for First Amendment protections.<sup>238</sup> On one hand, proponents of the Ag Gag legislation will argue the gathering of information is conduct and is therefore distinct from that of the actual distribution and publication of such information. This argument is limited, however, by the proposed provisions of the Iowa and Minnesota laws written to not just criminalize the gathering of information, but also making it illegal to possess or distribute undercover videos.<sup>239</sup> Clearly from

227. *Near v. Minnesota*, 283 U.S. 697, 713–14 (1931).

228. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 381, 384 (1992).

229. *See Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 418, 429 (1993); *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)).

230. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

231. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

232. *Miller v. California*, 413 U.S. 15, 24 (1973).

233. *Chaplinsky*, 315 U.S. at 571.

234. 131 S. Ct. 2729, 2733 (2011).

235. *Id.*

236. *Id.* at 2734 n.1 (emphasis added).

237. 391 U.S. 367, 376–77 (1968).

238. *Id.* at 376.

239. *See* H.F. 589, 84th Gen. Assemb., Reg. Sess. § 9.1.a(2) (Iowa 2011); H.F. 1369, 87th Gen. Assemb., Reg. Sess. § 3.1(2) (Minn. 2011).

this language there is not just the intent to restrain the gathering of information, but also the dissemination of it. Opponents of the Ag Gag bills will argue that, although there is a difference between the gathering of information and “speech,” laws already exist to punish the tactics used to gather the information that the agriculture industry finds damaging—laws on trespass, fraud, and in some states laws against videotaping someone without their knowledge.<sup>240</sup>

The prevention of gathering information for publication brings up another constitutional issue: prior restraint.<sup>241</sup> Prior restraint has traditionally been applied in cases of government censorship, when governments require licenses for information to be published or otherwise dispersed.<sup>242</sup> Prior restraint is presumptively illegal, due to the likelihood of government abuse.<sup>243</sup> “In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the guaranty to prevent previous restraints upon publication.”<sup>244</sup> Proponents of Ag Gag laws will argue that the laws do not put a prior restraint on speech, but simply stop some methods of gathering information. A couple of issues with this argument arise. First, this argument again puts the method of information gathering at issue, and, as this Note has already argued, there are already legal mechanisms for addressing such actions.<sup>245</sup> Additionally, even though this may not be the traditional idea of “prior restraint,” the Ag Gag laws would prevent the gathering of evidence to use in the exercise of free speech. Such restrictions have important public policy<sup>246</sup> and legal implications.<sup>247</sup> In this case, banning the gathering of evidence is not sufficiently dis-

240. See, e.g., GA. CODE ANN. § 16-11-62 (2009); MASS. GEN. LAWS ANN. ch. 272, § 99(c)(1) (West 2000).

241. Tom Laskawy, ‘Ag-Gag’ Bills Face Tough Row to Hoe, GRIST (May 28, 2011), <http://grist.org/factory-farms/2011-05-27-ag-gag-bills-face-tough-row-to-hoe/> [hereinafter Laskawy, ‘Ag-Gag’ Bills Face Tough Row to Hoe] (“In America . . . it’s very difficult to stop someone from doing something they haven’t done yet, especially when we’re talking about First Amendment issues.”).

242. See *Near v. Minnesota*, 283 U.S. 697, 713–14 (1931).

243. See *id.*

244. *Id.* at 713.

245. See discussion *supra* Part IV.A.

246. See Wayne Pacelle, *Lights, Camera, Cover-Up?*, HUMANE SOC’Y OF THE U.S. (Mar. 16, 2011), <http://hsus.typepad.com/wayne/2011/03/anti-investigation-bills.html> (“HSUS investigations have led to the largest meat recall in U.S. history”); *Bill Threatens Animals and Free Speech*, *supra* note 186 (“Undercover investigations have exposed egregious animal abuse at factory farms and they have led to both civil and criminal animal cruelty convictions . . . and the passage of stronger animal protection laws.”) (quoting Nathan Runkle from Mercy for Animals).

247. See ‘Ag-Gag’ Bills Face Tough Row to Hoe, *supra* note 241 (discussing how the district attorney in Castro County, Texas charged plant workers and the owner for cruelty after undercover video surfaced of “unspeakable cruelty perpetrated against calves”); Katerina Lorenzatos Makris, *District Attorney Says He Needed Undercover Video to Make Calf Abuse Case*,

tinctive from the actual exercise of free speech to comfortably say that it would be constitutionally permissible.

Assuming the undercover investigations are “speech,” a constitutional analysis would next require an examination of whether the Ag Gag laws are content-neutral.<sup>248</sup> The Supreme Court held that content-based regulations are presumptively invalid.<sup>249</sup> In *R.A.V. v. City of St. Paul*, the Supreme Court declared unconstitutional a Minnesota statute that made bias-motivated activities criminal.<sup>250</sup> In holding the statute was unconstitutional, the Court stated that governments are prevented under the First Amendment from banning speech solely because they encompass disfavored subjects.<sup>251</sup> The Court admitted the state had a “compelling interest” in not allowing racially-motivated speech, but said such interests cannot be served through the “selective limitations upon speech.”<sup>252</sup> The Court wrote, “The existence of adequate content-neutral alternatives . . . ‘undercut[s] significantly’ any defense of such a statute” that is not content-neutral.<sup>253</sup> The Ag Gag laws are not content-neutral because they specifically ban agricultural-based content in undercover videos.<sup>254</sup>

If the Court finds that a ban is content-based, strict scrutiny is applied.<sup>255</sup> Under strict scrutiny analysis, a government regulation must be narrowly tailored to further a compelling government interest.<sup>256</sup> A slightly different standard of

EXAMINER, May 27, 2011, <http://www.examiner.com/article/district-attorney-says-he-needed-undercover-video-to-make-calf-abuse-case> (quoting District Attorney James R. Horton as saying he “wouldn’t have a case” if not for the undercover videos of animal abuse).

248. See *Boos v. Barry*, 485 U.S. 312, 336–37 (1988) (Brennan, J., concurring). See generally *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395–96 (1992) (analysis involves review of content-neutral alternatives and determination of whether content is reasonably necessary to achieve a compelling interest).

249. *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (citing *Leathers v. Medlock*, 499 U.S. 439, 447 (1991); *Ark. Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 230 (1987)).

250. 505 U.S. at 381, 396.

251. *Id.* at 381.

252. *Id.* at 392.

253. *Id.* at 395 (citing *Boos*, 485 U.S. at 329).

254. See e.g., H.F. 589, 84th Gen. Assemb., Reg. Sess. § 9 (Iowa 2011).

255. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)); see also *Renton v. Playtime Theatres*, 475 U.S. 41, 48 (1986) (quoting *Va. Pharmacy Bd. v. Va. Citizens Consumer Council, Inc.* 425 U.S. 748, 771 (1976)) (stating content-neutral speech regulations are those that “are *justified* without reference to the content of the regulated speech”) (emphasis added).

256. *United States v. Playboy Entm’t Group*, 529 U.S. 803, 813 (2000) (citing *Sable Commc’ns of Cal., Inc. v. FCC*, 492 U.S. 115, 126 (1989)) (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”); see also *United States v. Stevens*, 130 S. Ct. 1577, 1584 (2010) (discussing compelling government interest in the animal cruelty context).

“least restrictive means” is also used by the Court when it applies strict scrutiny.<sup>257</sup> The Court has stated that in the area of public health, the consumer’s concern for free flow of speech is highly relevant because it can save lives.<sup>258</sup> Under strict scrutiny analysis, it would seem that the Ag Gag bills which have been proposed do not meet the “narrowly tailored” or “least restrictive means” standard. The bills criminalize not only the act of videotaping in animal production facilities, but also the distribution and possession of such material<sup>259</sup> putting such videos on the same level as child pornography.<sup>260</sup> In *United States v. Stevens*, the Court rejected adding depictions of animal cruelty as a category of unprotected speech, while simultaneously admitting to the illegality of the *act* of animal cruelty.<sup>261</sup> Because a “substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep,”<sup>262</sup> however, the Court found the statute overbroad and unconstitutional.<sup>263</sup> As opponents of Ag Gag legislation have pointed out, the bills could potentially ban innocent videotaping or photography.<sup>264</sup> The Iowa and Minnesota bills state that the recording must be done by the person while “at the animal facility.”<sup>265</sup> This language seems ambiguous. Is someone “at” the facility when they are on the public road next to it? Or, do they have to be in the facility to be considered “at” it? The New York bill is even broader, defining unlawful tampering as “unauthorized video, audio recording or photography done without the farm owner’s written consent.”<sup>266</sup> Such broad proscriptions are clearly not the “least restrictive means necessary,” and therefore, are not narrowly tailored making them a violation of the First Amendment.

The typical video depicting the mistreatment of animals and released by groups like PETA and MFA does not fall under any of the traditional unprotected

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257. *Reno v. ACLU*, 521 U.S. 844, 874 (1997).

258. *Sorrell*, 131 S. Ct. at 2664 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)).

259. H.F. 589, 84th Gen. Assemb., Reg. Sess. § 9.1.a(2) (Iowa 2011); H.F. 1369, 87th Gen. Assemb., Reg. Sess. § 3.1(2) (Minn. 2011).

260. Friese, *supra* note 138. *See generally* *New York v. Ferber*, 458 U.S. 747 (1982) (child pornography case).

261. *United States v. Stevens*, 130 S. Ct. 1577, 1583–86 (2010).

262. *Id.* at 1587 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n.6 (2008)).

263. *Id.* at 1592.

264. *See Ag-Gag Bills and Whistleblower Suppression: Bills Aim to Keep Americans in the Dark*, HUMANE SOCIETY OF THE U.S. (June 18, 2012), [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); *see also* Iowa H.F. 589, § 9; Minn. H.F. 1369, § 3.

265. *See* Iowa H.F. 589, § 9.1.a(1)(a); Minn. H.F. 1369, § 3.1(1)(i).

266. S.B. 5172, 235th Gen. Assemb., Reg. Sess. § 1(F) (N.Y. 2011).

categories of incitement, fighting words, or obscenity.<sup>267</sup> The current incitement test requires three elements: 1) that there be imminent harm; 2) that the speech have the likelihood of producing illegal conduct; and 3) the speech has the intent to cause imminent illegality.<sup>268</sup> Some may argue these undercover videos and photographs have the potential to incite illegal behavior, and therefore should not be protected under the First Amendment. The Court in *Brandenburg v. Ohio*, however, focused its analysis on violent unlawful behavior.<sup>269</sup> The Court has recently stated “the fear that speech might persuade provides no lawful basis for quieting it.”<sup>270</sup> Considering the test from *Brandenburg* and the Court’s statement in *Sorrell v. IMS Health Inc.*, it is reasonable to conclude that the Supreme Court would not view undercover investigations as “incitement.” Simply because one person is persuaded by someone else’s effective practice of freedom of speech is not reason enough to make such speech illegal.<sup>271</sup>

The second category of unprotected speech is fighting words.<sup>272</sup> In *Chaplinsky v. New Hampshire* the Supreme Court said that words spoken directly to a person that are likely to cause them to react violently are not protected by the First Amendment.<sup>273</sup> It is difficult to imagine how the exclusion of fighting words from the protection of the First Amendment will permit Ag Gag laws to be upheld as constitutional. For one thing, the Court emphasizes that fighting words are exactly that: words.<sup>274</sup> Undercover videos depicting actions taken by employees in the course of their work does not fit within even the broadest reading of the Court’s definition of “fighting words” under *Chaplinsky*.<sup>275</sup>

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267. See generally *Miller v. California*, 413 U.S. 15, 23 (1973) (citations omitted) (obscenity); *Brandenburg v. Ohio*, 395 U.S. 444, 447–48 (1969) (incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) (fighting words).

268. See *Brandenburg*, 395 U.S. at 447.

269. See *id.* at 448–49 (citing *Noto v. United States*, 367 U.S. 290, 297–98 (1961)) (drawing a distinction between advocacy directed at inciting lawless action, and the abstract teaching of the moral need for force and violence).

270. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670 (2011) (citing *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam)).

271. See *id.*

272. *Chaplinsky*, 315 U.S. at 571–72.

273. *Id.* The Court wrote that words which “by their very utterance inflict injury or tend to incite an immediate breach of the peace” are considered fighting words and are not protected by the First Amendment. *Id.*

274. See *id.* at 572.

275. See *id.* at 571–73.



The third category of speech traditionally not protected by the First Amendment is obscenity.<sup>276</sup> Under the *Miller v. California* test, courts will analyze:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>277</sup>

Obscenity, as defined by the Supreme Court, applies to sexual content.<sup>278</sup> As the typical undercover video released by animal welfare groups does not contain any sexual material, it is probably safe to say they would not fall under this unprotected category of speech.

While it is not immediately apparent the videos produced and released by animal welfare groups fall under any of the three traditionally recognized unprotected categories of speech,<sup>279</sup> there are other factors to take into consideration regarding First Amendment analysis.<sup>280</sup> For example, the Court will often look to history when determining whether an act of speech should be protected or not.<sup>281</sup> The Supreme Court reiterates the “long-settled tradition” language in *Stevens*.<sup>282</sup> Unless there is a longstanding tradition of proscription against a type of speech, legislatures cannot “revise the ‘judgment [of] the American people,’ embodied in the First Amendment, ‘that the benefits of its restrictions on the Government outweigh the costs.’”<sup>283</sup> This concept of longstanding traditions could be invaluable if any of the proposed Ag Gag bills are passed and subsequently challenged.

Animal welfare groups interested in invalidating any such laws could argue that there is quite a longstanding tradition of undercover investigations in this country, especially in the context of uncovering dangerous, unsavory, or illegal practices. In recent years, the use of such techniques has become more prevalent,

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276. *Miller v. California*, 413 U.S. 15, 23 (1973) (citing *Kois v. Wisconsin*, 408 U.S. 229 (1972); *United States v. Reidel*, 402 U.S. 351, 354 (1971); *Roth v. United States*, 354 U.S. 476, 485 (1957)).

277. *Id.* at 24 (citations omitted).

278. *Id.*

279. There are other categories of unprotected speech, such as child pornography, but discussion of such categories is irrelevant for the purposes of this Note. See, e.g., *id.* at 18–19 n.2.

280. See *United States v. Stevens*, 130 S. Ct. 1577, 1585–86 (2010) (denying application of a First Amendment balancing test when deciding First Amendment exceptions, and instead looking toward “long-settled tradition”).

281. See *id.*

282. *Id.*

283. *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2734 (2011) (quoting *Stevens*, 130 S. Ct. at 1585).



probably due to the development of smaller recording devices.<sup>284</sup> The history of undercover investigations into the conditions of slaughterhouses and meat processing plants goes back over a hundred years to when Upton Sinclair worked in a Chicago meatpacking plant.<sup>285</sup> Reportedly, Sinclair's intention was to write about the horrid living and working conditions of immigrants.<sup>286</sup> What Sinclair experienced shed light not just on the challenges of immigrants, but also the horrifically lackluster efforts at food sanitation.<sup>287</sup> Sinclair's experience occurred around the same time Congress was discussing legislation on food safety<sup>288</sup> and is credited by some to have led directly to the passage of the 1906 Pure Food and Drug Act<sup>289</sup> and the 1906 Federal Meat Inspection Act.<sup>290</sup> The issue of food safety and regulation is still relevant over a hundred years later.<sup>291</sup> Despite ever-increasing regulations concerning food production,<sup>292</sup> dangerous and disturbing shortcuts and practices are still being used.<sup>293</sup> In the last few decades, as technology has improved, hidden cameras have been utilized to investigate a variety of important social issues.<sup>294</sup> Often times, evidence gained through such investigations is invaluable in changing the way people and industries operate.<sup>295</sup>

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284. See, e.g., *Butterball's House of Horrors: A PETA Undercover Investigation*, PETA, <http://www.peta.org/features/butterball-peta-investigation.aspx> (last visited Jan. 17, 2013); *Undercover Investigation Documents Pig Abuse at Tyson Supplier*, HUMANE SOC'Y OF THE U.S. (May 8, 2012), [http://www.humanesociety.org/news/press\\_releases/2012/05/wyoming\\_pig\\_investigation\\_050812.html](http://www.humanesociety.org/news/press_releases/2012/05/wyoming_pig_investigation_050812.html); *Undercover Investigations: Exposing Animal Abuse*, MERCY FOR ANIMALS, <http://www.mercyforanimals.org/investigations.aspx> (last visited Jan. 17, 2013).

285. See Sulzberger, *supra* note 73; Blackwell, *supra* note 75.

286. Judy Hevrdejs, *'The Jungle' Revealed Suffering: Themes of Labor Rights and Food Safety Resonate Today*, CHI. TRIB., Feb. 3, 2012, [http://articles.chicagotribune.com/2012-02-03/entertainment/sc-ent-0201-books-change-the-jungle-20120203\\_1\\_issues-sinclair-immigrant-life-food-safety](http://articles.chicagotribune.com/2012-02-03/entertainment/sc-ent-0201-books-change-the-jungle-20120203_1_issues-sinclair-immigrant-life-food-safety).

287. See Blackwell, *supra* note 75.

288. Hevrdejs, *supra* note 286.

289. *Id.*

290. Pacelle, *'Ag Gag' Laws Would Punish Whistleblowers*, *supra* note 74.

291. Hevrdejs, *supra* note 286.

292. See, e.g., Humane Methods of Livestock Slaughter Act, 7 U.S.C. §§ 1901–1907 (2006).

293. See Pacelle, *'Ag Gag' Laws Would Punish Whistleblowers*, *supra* note 74.

294. See, e.g., Joseph Rhee & Asa Eslocker, *ABC News Hidden Camera Investigation: Aged Tires Sold as 'New' by Big Retailers*, ABC NEWS (May 9, 2008), <http://abcnews.go.com/Blotter/story?id=4822250&page=1#.T1gMj4HBKFA> (utilizing undercover cameras to investigate old tires being sold as new ones); Lea Thompson, *How Safe Is Your Grocery Store?*, DATELINE NBC, [http://www.msnbc.msn.com/id/10976595/ns/dateline\\_nbc/#.T1gNqoHBKFA](http://www.msnbc.msn.com/id/10976595/ns/dateline_nbc/#.T1gNqoHBKFA) (last updated Jan. 22, 2006) (investigation at a variety of large grocery chains showing expired products still out on shelves for sale, among other problems).

295. See Pacelle, *'Ag Gag' Laws Would Punish Whistleblowers*, *supra* note 74.

Of course, it's always a possibility the Court will develop a new "unprotected" category of speech.<sup>296</sup> In *Stevens*, the Court wrestled with the subject matter of animal cruelty and whether such depictions were a protected form of speech.<sup>297</sup> The defendant in that case was convicted under federal law for selling dog fight videos.<sup>298</sup> On appeal, Stevens argued that 18 U.S.C. section 48, the federal statute he was convicted under, was unconstitutional due to overbreadth and as a violation of his First Amendment rights.<sup>299</sup> The Supreme Court ultimately agreed with Stevens, dismissing the government's argument that the statute only prohibited extreme material.<sup>300</sup> The government argued that depictions of animal cruelty are not protected by the First Amendment because they were of minimal value compared to the societal costs.<sup>301</sup> The Supreme Court rejected the government's proposed balancing test and instead examined whether there was a "longstanding tradition" of excluding such speech from protection.<sup>302</sup> This case is important in the context of Ag Gag bills for two reasons. First, it reinforces the standard of "longstanding traditions," which this Note has argued includes undercover investigations. Secondly, the Court in *Stevens* declined to make depictions of animal cruelty an unprotected category of speech while not neglecting to take into consideration that the underlying acts of animal cruelty *are* illegal.<sup>303</sup>

### C. Public Policy Arguments

In addition to the convincing legal arguments against the passage of Ag Gag bills, there are also several important public policy arguments to examine. These arguments include food safety and animal welfare, among others.

The issue of food safety has wide-reaching implications.<sup>304</sup> Any one of the animals in the production chain may present a health hazard to humans, whether because of disease, mishandling, or both. For example, the California-

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296. See Charles W. "Rocky" Rhodes, *Charles W. "Rocky" Rhodes on United States v. Stevens*, 2010 EMERGING ISSUES 5227 ("[N]o additional classes of unprotected speech will be recognized *unless* the classification is supported by a longstanding historical tradition, or unless it can be creatively shoehorned into a pre-existing unprotected category.") (emphasis added).

297. *United States v. Stevens*, 130 S. Ct. 1577, 1582 (2010).

298. *Id.* at 1583.

299. *Id.* at 1586–87.

300. *Id.* at 1591; see Rhodes, *supra* note 296.

301. *Stevens*, 130 S. Ct. at 1585; see Rhodes, *supra* note 296.

302. *Stevens*, 130 S. Ct. at 1586; see Rhodes, *supra* note 296.

303. See *Stevens*, 130 S. Ct. at 1586, 1588. As a result of this holding, animal welfare groups are protected from having their videos, which depict animal cruelty, used as a means to charge them with a federal crime for depicting animal cruelty. See Rhodes, *supra* note 296.

304. See Pacelle, 'Ag Gag' Laws Would Punish Whistleblowers, *supra* note 74 (stating that animal care problems are "all too often directly related to serious food safety risks").

based facility Hallmark was the second largest supplier of ground beef to the National School Lunch program and was also involved in the largest meat recall in American history after an HSUS undercover investigation exposed unsavory conditions.<sup>305</sup> Proper handling of ground beef is especially important as the process of producing it presents opportunities for *E. coli* contamination.<sup>306</sup> In the summer of 2009, the fear of *E. coli* contamination led to the recall of ground beef in forty-one states.<sup>307</sup>

The process of producing ground beef is wrought with the opportunity for contamination and the standards for inspection are less than satisfactory.<sup>308</sup> Attempts to gain further insight into the methods of production are often denied by the meat industry, which claims the practices and ingredients regarding the production of ground beef are trade secrets.<sup>309</sup> As if the industry's unwillingness to be transparent regarding its production methods and the lack of regulation were not bad enough, in-depth inspection often uncovers even more violations.<sup>310</sup> Even with federal inspectors present in processing facilities, health issues are often ignored or not discovered until it is too late. Ground beef from a Cargill plant was responsible for the coma and subsequent paralysis of twenty-two year old Stephanie Smith in 2007.<sup>311</sup> Before Smith's hamburger patty was ever made, federal inspectors at Cargill had repeatedly found the plant was violating its own safety procedures.<sup>312</sup> No fines or sanctions were imposed on Cargill for these violations.<sup>313</sup> Cargill initially resisted making changes in lieu of this outbreak, however, they eventually agreed to increase the level of scrutiny given to incoming product from their suppliers.<sup>314</sup> Prior to the outbreak, in May 2007, Cargill reported finding *E. coli* in finished ground beef, but because the meat had already

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305. PACELLE, *THE BOND*, *supra* note 33, at 109–12; see FSIS, Cal. Recall Press Release, *supra* note 32.

306. Michael Moss, *The Burger That Shattered Her Life*, N.Y. TIMES, Oct. 3, 2009, [http://www.nytimes.com/2009/10/04/health/04meat.html?\\_r=2&th&emc=th](http://www.nytimes.com/2009/10/04/health/04meat.html?_r=2&th&emc=th).

307. *Id.*

308. *Id.* (stating that ground beef “is often an amalgam of various grades of meat from different parts of cows and even from different slaughterhouses,” and that the cuts of meat used in the production of ground beef are “particularly vulnerable to *E. coli* contamination”).

309. *Id.* (reporting that sections of federal records regarding Cargill's grinding operation requested through the Freedom of Information Act were blacked out).

310. *Id.* (“Every time we look, we find that things are not what we hoped they would be,” said Loren D. Lange, an executive associate in the Agriculture Department's food safety division.”).

311. *Id.*

312. *Id.*

313. *Id.*

314. *Id.*

been ground and included meat from a variety of sources, the company could not determine which supplier had shipped the contaminated meat.<sup>315</sup>

Taken together, this information raises serious concerns not just about food safety in general, but also the bold deference given to the meat industry to set its own safety procedures.<sup>316</sup> How can consumers have confidence in the safety of their food if safety procedures are not being followed? That confidence is shattered further when government entities, charged with oversight of these facilities, fail to hold them responsible for safety violations. Not to mention the fact consumers are often kept in the dark about how their food is actually produced. If the government will not hold companies accountable, and if companies fail to follow the necessary safety precautions, then it is up to consumers to demand change. As ammunition in the fight for reform, evidence that these unsanitary and unsafe practices do exist is essential. If the meat production industry will not be forthcoming with accurate and comprehensive data, then consumers may find the need to resort to extra-governmental tactics; such as undercover investigations.

The industry's lack of sufficient regulations implicates not just food safety, but also the welfare of the animals that are part of the food production chain. Despite regulations on methods of slaughter,<sup>317</sup> animals often suffer on their way to slaughter.<sup>318</sup> A 2001 story from the Washington Post, which includes information obtained from a secret video made by a worker at a meatpacking plant, describes how often plants fail to follow the humane slaughter regulations.<sup>319</sup> The article includes statements from Ramon Moreno, who had worked in a meatpacking plant for twenty years.<sup>320</sup> His job at the plant was "second-legger," which involved cutting the hocks off cattle carcasses.<sup>321</sup> The animals being processed were supposed to be dead by the time they got to Moreno; far too often, however, they were not.<sup>322</sup> According to Moreno, it was not uncommon for the animals to survive beyond his station, "as far as the tail cutter, the belly ripper,

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315. *Id.*

316. *See* Warrick, *supra* note 78. "The industry's self-inspections are meaningless. They're designed to lull Americans into a false sense of security about what goes on inside slaughterhouses." *Id.* (statement of Gail Eisnitz, Chief Investigator, of the Humane Farming Association).

317. Humane Methods of Livestock Slaughter, 7 U.S.C. § 1902 (2006); *see also* 21 U.S.C. § 603(b).

318. *See* FARM SANCTUARY, *supra* note 28, at 11.

319. *See* Warrick, *supra* note 78.

320. *Id.*

321. *Id.*

322. *Id.* (quoting Moreno describing the scene, "They blink. They make noises . . . The head moves, the eyes are wide and looking around.").

the hide puller.”<sup>323</sup> The Humane Slaughter Act requires livestock be rendered “insensible” to pain prior to slaughter.<sup>324</sup> Enforcement records, affidavits from workers, interviews, and videos provide important evidence that this regulation is repeatedly violated.<sup>325</sup> Some may argue that the manner of slaughter does not matter as the animal is going to die anyway.<sup>326</sup> In passing the Humane Methods of Slaughter Act, however, Congress stated that “the use of humane methods in the slaughter of livestock prevents needless suffering.”<sup>327</sup> Congress also stated that the policy behind passing regulations on humane methods of slaughter contributed to safer working conditions for industry employees, improved products, and benefited producers, processors, and consumers.<sup>328</sup> Given Congress’ explicit policy requiring humane methods of slaughter, it is very disconcerting that some federal inspectors and others are so quick to ignore or relax the methods dictated by Congress.

In addition to threatening food safety, the disregard for animal welfare immediately prior to slaughter may have an effect on the quality of the meat.<sup>329</sup> The effect of the quality of meat may vary between breeds of the same animal,<sup>330</sup> the type of animal,<sup>331</sup> and the kind of stress the animal experiences.<sup>332</sup> At this time, thorough research into the exact consequences extreme stress has on the quality of meat produced is lacking. This may be an interesting area for further study, especially as concerns about food quality and animal welfare increase.

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323. *Id.* (quoting Moreno, ““They die . . . piece by piece””).

324. 7 U.S.C. 1902(a) (citing suggested methods such as “a single blow or gunshot or an electrical, chemical or other means that is *rapid and effective*, before being shackled, hoisted, thrown, cast, or cut”) (emphasis added).

325. Warrick, *supra* note 78.

326. *See id.* (stating that some inspectors wonder if enforcing the humane slaughter laws are “worth the trouble”).

327. 7 U.S.C. § 1901.

328. *Id.*

329. D.M. Ferguson & R.D. Warner, *Have We Underestimated the Impact of Pre-Slaughter Stress on Meat Quality in Ruminants?*, 80 MEAT SCI. 12, 12 (2008).

330. V. Muchenje et al., *Relationship Between Pre-Slaughter Stress Responsiveness and Beef Quality in Three Cattle Breeds*, 81 MEAT SCI. 653, 656 (2009).

331. *See* G.C. Miranda-de la Lama et al., *Effect of the Pre-Slaughter Logistic Chain on Meat Quality of Lambs*, 83 MEAT SCI. 604, 608 (2009) (finding that pre-slaughter classification of lambs may cause added stress and affect meat quality traits); J.F. Young et al., *Rest Before Slaughter Ameliorates Pre-Slaughter Stress-Induced Increased Drip Loss But Not Stress-Induced Increase in the Toughness of Pork*, 83 MEAT SCI. 634, 641 (2009) (finding meat from stressed pigs requires more force to cut); H.C. Bertram et al., *NMR-Based Metabonomics Reveals Relationship Between Pre-Slaughter Exercise Stress, the Plasma Metabolite Profile at Time of Slaughter, and Water-Holding Capacity in Pigs*, 84 MEAT SCI. 108, 112 (2010) (analyzing impact of stress on lactate and acetate levels in pigs).

332. *See* Bertram, *supra* note 331, at 112.

Many proponents of the Ag Gag legislation have argued that the people who video tape conditions in facilities are partly responsible for the poor treatment, as they do not immediately report the abuse to anyone.<sup>333</sup> They fail to take into account that when mistreatment is reported, it is frequently met with indifference or even hostile repercussions. In the late 1990s, Tim Walker, an animal health technician at a Florida beef plant was fired after reporting humane slaughter violations.<sup>334</sup> Walker stated that he had ““complained to everyone”” but had received ““the same answer: “We know it’s true. But there’s nothing we can do about it.””<sup>335</sup> In 1998 a new inspection program was implemented which shifted inspection responsibilities to the meat industry.<sup>336</sup> How many employees are going to risk their jobs to report a violation that in all likelihood the industry is already very aware of? While some may argue that the industry follows its own regulations, the evidence gathered through undercover investigations suggests otherwise.

A final public policy argument against the Ag Gag bills is the similarity they bear to the Animal Enterprise Terrorism Act (AETA).<sup>337</sup> AETA was introduced due to the belief that certain commercial enterprises required “increased protection from violent attacks.”<sup>338</sup> Ag Gag legislation grew from a similar genesis, with proponents arguing that farmers need to be protected from people with “mischievous intentions”<sup>339</sup> and those who “harass and sabotage” animal production facilities.<sup>340</sup> Critics of AETA have raised concerns regarding the scope and breadth of the Act since it was first enacted.<sup>341</sup> Concerns regarding the constitutional implications of the Ag Gag bills have also been raised.<sup>342</sup> Some argue AETA will have a negative, even silencing, effect on whistleblowers.<sup>343</sup> This has also been a concern regarding the Ag Gag bills.<sup>344</sup> The primary difference between AETA and the Ag Gag bills is that AETA is specifically meant to address

333. See *Minnesota Bill Would Ban Undercover ‘Animal Abuse’ Videos*, *supra* note 162.

334. Warrick, *supra* note 78.

335. *Id.*

336. *Id.*

337. 18 U.S.C. § 43 (2006).

338. Michael Hill, *The Animal Enterprise Terrorism Act: The Need for a Whistleblower Exception*, 61 CASE W. RES. L. REV. 651, 651 (2010).

339. Glover, *supra* note 153.

340. *Minnesota Bill Would Ban Undercover ‘Animal Abuse’ Videos*, *supra* note 162.

341. Hill, *supra* note 338, at 652–56 (tracing the legislative history of AETA, and describing opposition to the Act, as well as its earlier form, the Animal Enterprise Protection Act).

342. See, e.g., Ladd Brubaker, ‘Ag-Gag’ Bill May Run Into Constitutional Problems, *Experts Say*, DESERET NEWS, Mar. 21, 2012, <http://www.deseretnews.com/article/865552625/Ag-gag-bill-may-run-into-constitutional-problems-experts-say.html?pg=all>.

343. See Hill, *supra* note 338, at 654–56.

344. See Pacelle, ‘Ag Gag’ Laws Would Punish Whistleblowers, *supra* note 74.



violent disruptions.<sup>345</sup> The passage of Ag Gag bills creates the same concerns over the ability of employees and other whistleblowers to expose mistreatment and failure by their employer to follow regulations. As has been repeatedly demonstrated, the industry is hesitant, if not outright hostile, to regulations imposed and enforced upon it. If the industry will not police itself, and forms of whistleblowing are criminalized, how can consumers possibly have confidence that the food they are consuming is safe?

## V. CONCLUSION

Today most farm animals spend their lives confined in close quarters outside the watchful eye of the public. At the end of their lives, the slaughter process proceeds in secret, too. Once an animal enters a slaughter facility, its fate is sealed. The potential for animal abuses in these secretive settings is unnecessarily high, and undercover investigations have revealed egregious violations of animal abuse laws and humane slaughter regulations. These violations occur, and continue to occur, despite government inspections and the threats of sanctions—leaving the public with little faith in the integrity of the modern meat production system. Far from being just an animal welfare issue, the manner in which livestock are bred, confined, transported, and slaughtered raises important issues of food safety, in the United States and internationally.

Animal welfare groups have responded to the industry's disinterest in animal welfare by conducting their own investigations, often utilizing undercover video and photography. The use of such techniques should not be surprising, considering the industry's long history of denying and ignoring accusations of animal mistreatment and blatant disregard of safety regulations. The past couple of years the industry has led an aggressive effort to obtain legislative protection against public exposure and humiliation, leading to proposed Ag Gag bills in a variety of states. These bills are just the latest weapon in the industry's arsenal used to hide repelling industry animal abuses from curious consumers. Consumers have a right to know where their food comes from.

Meat production is an industry worth billions of dollars and is responsible for feeding millions of people around the world. The industry should be constantly working toward providing quality products while still following applicable laws and regulations. Instead, actors in the industry invest their time and energy in hiding their production process from consumers. Slaughterhouses do not have glass walls and their manner of operation is not transparent. The industry hides behind regulations, threats of lawsuits, claims of trade secrets, and gov-

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345. See Hill, *supra* note 338, at 651.



ernment indifference and even preferential treatment. With the passage of Ag Gag bills, farms and slaughterhouses will have an iron curtain to hide behind as well.