

# COMMENT

## HARD TO WATCH: HOW AG-GAG LAWS DEMONSTRATE THE NEED FOR FEDERAL MEAT AND POULTRY INDUSTRY WHISTLEBLOWER PROTECTIONS

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## INTRODUCTION

Many Americans choose blissful ignorance when it comes to learning how meat makes it to their dining table,<sup>1</sup> but, in the case of factory farm meat and poultry production, what you do not know can, and often does, hurt you.<sup>2</sup> This tendency to avert one's eyes has allowed concentrated animal feeding operations (CAFOs),<sup>3</sup> slaughterhouses, and meatpacking facilities to raise livestock for human consumption largely free from public scrutiny<sup>4</sup> and has led to the passage of so-called "ag-gag" laws<sup>5</sup> in an increasing number of states.<sup>6</sup> These laws are not explicitly targeted at silencing existing employees but focus instead on deterring activists from

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1. See DAVID KIRBY, *ANIMAL FACTORY* xiii (2010) (describing the tendency to avoid the reality of meat production as "willful ignorance").

2. See, e.g., CTR. FOR DISEASE CONTROL & PREVENTION, CS218786-A, CDC ESTIMATES OF FOODBORNE ILLNESS IN THE UNITED STATES (2011) [hereinafter CDC ESTIMATES], available at [http://www.cdc.gov/foodborneburden/PDFs/FACTSHEET\\_A\\_FINDINGS\\_updated4-13.pdf](http://www.cdc.gov/foodborneburden/PDFs/FACTSHEET_A_FINDINGS_updated4-13.pdf) (estimating that in the United States an average of 48,000,000 (one in six) people become ill, 128,000 are hospitalized, and 3,000 die due to foodborne illness each year).

3. Concentrated Animal Feeding Operations (CAFOs) are "agricultural operation[s] where animals are held in reserve and raised in confined situations." Julie Follmer & Roseann B. Termini, *Whatever Happened to Old Mac Donald's Farm... Concentrated Animal Feeding Operation, Factory Farming and the Safety of the Nation's Food Supply*, 5 J. FOOD L. & POL'Y 45, 51 (2009) (quoting U.S. Environmental Protection Agency (EPA), National Pollutant Discharge Elimination System (NPDES), *Animal Feeding Operations*, [http://cfpub.epa.gov/npdes/home.cfm?program\\_id=7](http://cfpub.epa.gov/npdes/home.cfm?program_id=7) (last updated Feb. 16, 2012)).

4. See David Sirota, *States Shush Corporate Critics: From Factory Farms to Home Foreclosures, State Governments Are Helping Hide Corporate Wrongdoing*, SALON (Apr. 4, 2012, 11:45 AM), [http://www.salon.com/2012/04/04/states\\_shush\\_corporate\\_critics/](http://www.salon.com/2012/04/04/states_shush_corporate_critics/) (detailing several recent state-level legislative efforts aimed at hindering industry transparency).

5. 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/> (using the term "ag-gag law" for legislation criminalizing unauthorized recordings in agricultural facilities).

6. 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/>.

working undercover to expose violations. The laws display the covert status quo of the meat and poultry industry and suggest evidence of violations to which legitimate employees are exposed. While the recently enacted Food Safety Modernization Act<sup>7</sup> (FSMA) was a strong step toward updating regulations originally prompted when Upton Sinclair's *The Jungle*<sup>8</sup> exposed repulsive slaughterhouse practices in 1906,<sup>9</sup> the legislation's regulatory reach falls short of the change that the American food safety system requires.

The FSMA's primary shortcomings are its sole focus on the Food and Drug Administration (FDA) and its exclusion of meat and poultry production from regulation.<sup>10</sup> For example, the Act provides whistleblower protections for private food industry employees who report activities that present public safety hazards.<sup>11</sup> However, this applies only to FDA-regulated industries; people central to meat and poultry production—CAFO, slaughterhouse, and meatpacking employees—are not afforded these protections.<sup>12</sup> The U.S. Department of Agriculture (USDA) has regulatory jurisdiction over meat and poultry production, primarily through the Food Safety and Inspection Service (FSIS),<sup>13</sup> and Congress has not provided a law comparable to the FSMA for this largely parallel industry.<sup>14</sup> This regulatory gap exists despite risks of foodborne illness outbreaks and more prevalent concerns about animal health within USDA

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7. FDA Food Safety Modernization Act (FSMA), Pub. L. No. 111-353, 124 Stat. 3885 (2011) (codified in scattered sections of 21 U.S.C.).

8. UPTON SINCLAIR, *THE JUNGLE* (See Sharp Press 2003).

9. See Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965, 968 (2012); Sinclair, *supra* note 8, at 126-27 (depicting the unsanitary, rat-infested meat production process in Chicago's stockyards as well as worker efforts to disguise spoiled meat for sale to consumers).

10. See RENÉE JOHNSON, CONG. RESEARCH SERV., R40443, *THE FDA FOOD SAFETY MODERNIZATION ACT* (P.L. 111-353), at Summary (2011) (noting that the FSMA applies only to FDA jurisdiction).

11. See FSMA § 402, 124 Stat. at 3968 (including Department of Labor (DOL) involvement).

12. See Eileen Starbranch Pape, Comment, *A Flawed Inspection System: Improvements to Current USDA Inspection Practices Needed to Ensure Safer Beef Products*, 48 HOUS. L. REV. 421, 446, 450-51 (2011) (recognizing that whistleblower protections would be one of several suitable steps to ensure that beef production adequately prevents against the spreading of *E. coli*).

13. See *About FSIS: Agency History*, U.S. DEP'T OF AGRIC., [http://www.fsis.usda.gov/About\\_FSIS/Agency\\_History/index.asp](http://www.fsis.usda.gov/About_FSIS/Agency_History/index.asp) (last modified Jan. 7, 2013).

14. See Debra M. Strauss, *An Analysis of the FDA Food Safety Modernization Act: Protection for Consumers and Boon for Business*, 66 FOOD & DRUG L.J. 353, 375-76 (2011) (stating that the momentum from FSMA passage should be used to regulate excluded industries); see also Foodborne Illness Reduction Act of 2011, S. 1529, 112th Cong. (2011) (proposing legislation aimed at enhancing meat and poultry industry oversight).

industries than within FDA industries.<sup>15</sup>

In the absence of a safety net for meat and poultry production whistleblowers, FSIS inspectors serve as the only check on production,<sup>16</sup> which does not permit the level of surveillance required to make a practical difference in oversight and accountability.<sup>17</sup> Ag-gag laws work to thwart the efforts of activists who recognize this regulatory shortfall and work undercover to record livestock abuse and unsanitary processing conditions.<sup>18</sup> While the laws vary in scope and penalty, they all operate to lessen transparency of an integrally public industry and raise serious concerns about what their supporters have to hide. As the arduous passage of the FSMA demonstrates,<sup>19</sup> a complete food safety regulatory overhaul may be far off. Nonetheless, there are mechanisms available—both supported by a recent Supreme Court interpretation of FSIS power and falling within the current USDA facility inspection authority—that would add a great deal of transparency without weighing too heavily on agencies involved.

This Comment recommends that the USDA, through its existing power, promulgate and enforce whistleblower protections as a condition for facility inspection across the entire meat and poultry production industry to ensure

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15. See Strauss, *supra* note 14, at 368 (describing risks involved with excluding the United States Department of Agriculture (USDA)).

16. Cf. Dennis R. Johnson & Jolyda O. Swaim, *The Food Safety and Inspection Service's Lack of Statutory Authority to Suspend Inspection for Failure to Comply with HACCP Regulations*, 1 J. FOOD L. & POL'Y 337, 337–40 (2005) (noting that Food Safety and Inspection Service (FSIS) inspections are required for meat and poultry facilities to operate and that inspections will only be suspended when “cleanliness of the facility is so far below standards that the product may be implicated”).

17. See U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-08-686T, HUMANE METHODS OF HANDLING AND SLAUGHTER: PUBLIC REPORTING ON VIOLATIONS CAN IDENTIFY ENFORCEMENT CHALLENGES AND ENHANCE TRANSPARENCY 1–2 (2008) [hereinafter U.S. GOV'T ACCOUNTABILITY OFFICE] (detailing a statement by Lisa Shores, Director of Resources and Environment at the Government Accountability Office, finding that FSIS does not have adequate funding or staff to engage in consistent and accountable reporting); see also Caroline Smith DeWaal, *Food Safety Inspections: A Call for Rational Reorganization*, 54 FOOD & DRUG L.J. 453, 454 (1999) (finding that, under the regulatory framework, “food safety problems can slip through the cracks of agency jurisdiction”); Anastasia S. Stathopoulos, Note, *You Are What Your Food Eats: How Regulation of Factory Farm Conditions Could Improve Human Health and Animal Welfare Alike*, 13 N.Y.U.J. LEGIS. & PUB. POL'Y 407, 434–36 (2010) (arguing that FSIS inspection is flawed due to lack of statutory authority to regulate CAFOs and livestock prior to slaughter).

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

19. See generally Strauss, *supra* note 14, at 355–58 (describing the FSMA's political battles).

that the American food supply remains competitive, safe, and healthy for workers, consumers, and livestock. Though whistleblower protections should ultimately be provided through comprehensive legislation similar to the FSMA, the recommended regulatory addition will serve as a step in the right direction until larger employee-rights reform takes place. These changes would enhance the current food safety regulatory landscape, which this Comment will review in Part I. Next, Part II delves into the whistleblower protections currently unavailable in factory farm meat and poultry production and discusses common concerns in factory farming and trends in the industry's workforce. Part III describes the recent increase in state ag-gag laws and how these laws highlight both the secrecy of meat and poultry production and the corresponding need for federal whistleblower protections. Finally, Part IV recommends that the USDA promulgate rules requiring whistleblower protections through industry-led Employee Protection Plans (EPPs) as an additional condition for facility inspection. American farming impacts public safety,<sup>20</sup> national security,<sup>21</sup> environmental welfare,<sup>22</sup> and animal health.<sup>23</sup> While ag-gag laws are just one example of major meat producers working to continue operating under protected conditions, these laws demonstrate that employees courageous enough to stand up against serious labor, environmental, and animal law violations ought to be protected from retaliation.

## I. OVERVIEW OF EXISTING FOOD SAFETY REGULATORY STRUCTURE

From the standpoint of a consumer without a background in the area of food regulation, it may seem counterintuitive that a law devoted to food safety modernization<sup>24</sup> would exclude meat and poultry production. However, a historic overview of food safety prior to the FSMA's passage sheds some light on why this regulatory hole continues to exist. The American food safety system is a regulatory thicket. It involves over fifteen

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20. See generally Eva Merian Spahn, Note, *Keep Away from Mouth: How the American System of Food Regulation Is Killing Us*, 65 U. MIAMI L. REV. 669 (2011).

21. See Caroline Smith DeWaal, *Food Safety and Security: What Tragedy Teaches Us About Our 100-Year-Old Food Laws*, 40 VAND. J. TRANSNAT'L L. 921, 923 (2007) (discussing how bioterrorism threats led to updating food safety laws after the September 11, 2001 terrorist attacks).

22. See *How Do CAFOs Impact the Environment?*, U.S. ENVTL. PROTECTION AGENCY, [http://www.epa.gov/region7/water/cafo/cafo\\_impact\\_environment.htm](http://www.epa.gov/region7/water/cafo/cafo_impact_environment.htm) (last updated May 22, 2012) (describing the negative side effects of ill-managed waste from CAFOs).

23. See generally Stathopoulos, *supra* note 17, at 410–13 (detailing the suffering and poor living conditions of animals raised for meat and poultry supply).

24. See generally FSMA, Pub. L. No. 111–353, 124 Stat. 3885 (2011) (codified in scattered sections of 21 U.S.C.).

agencies with varied mandates and numerous other bodies at the state and local levels.<sup>25</sup> In fact, this regulatory intersection led the Government Accountability Office to recently designate food safety as a high-risk area on which the Executive and Legislative Branches should focus reform efforts.<sup>26</sup>

While this complexity is not unique to food safety,<sup>27</sup> the primary agencies involved in this area—the USDA and FDA—are similar in subject coverage, yet distinct in procedure and mandate. The USDA regulates livestock and meat production, including primarily poultry, cattle, and hogs, while the FDA regulates nearly all other food, drugs, and supplements.<sup>28</sup> Given the array of grocery products available in the American marketplace, these items inherently intersect. Idiosyncratic overlaps in responsibility can take place when, for example, a single production plant produces chicken broth (FDA-regulated) and beef broth (USDA-regulated).<sup>29</sup> This leads to varied regulatory expectations for food producers and their employees, particularly considering that FDA inspections occur far less frequently than USDA inspections.<sup>30</sup> Though this type of overlap is less common than proponents of regulatory reform may suggest,<sup>31</sup> it represents other underlying issues that have fueled recommendations for the creation of a single food safety agency made by many in the past.<sup>32</sup>

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25. See, e.g., Michael R. Taylor, *Preparing America's Food Safety System for the Twenty-First Century—Who Is Responsible for What When It Comes to Meeting the Food Safety Challenges of the Consumer-Driven Global Economy?*, 52 FOOD & DRUG L.J. 13, 18–20 (1997) (providing numerous examples of the mixed safety mandates at the state and federal level); Nathan M. Trexler, Note, “Market” Regulation: Confronting Industrial Agriculture’s Food Safety Failures, 17 WIDENER L. REV. 311, 317–18 (2011) (describing the history and fragmentation of the American food safety system); Note, *Reforming the Food Safety System: What If Consolidation Isn’t Enough?*, 120 HARV. L. REV. 1345, 1349–50, 1354 (2007) (identifying the parties involved in regulating food safety, including numerous agencies and over 3,000 state and local bodies).

26. U.S. GOV’T ACCOUNTABILITY OFFICE, *supra* note 17, at 12.

27. See Jody Freedman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1134–35 (2012) (describing similar overlap in the finance and border control sectors).

28. See Note, *supra* note 25, at 1349 (describing the respective jurisdictions of the USDA and FDA).

29. *Cf. id.* at 1350, 1355–56 (comparing the regulations for other related products similarly).

30. See DeWaal, *supra* note 17, at 454–55 (describing how the FDA inspects plants only in response to an outbreak suspicion while USDA staff continuously inspects plants).

31. See Note, *supra* note 25, at 1355 (explaining that though overlap on particular products takes place, this duplication occurs in approximately 2% of production facilities—or roughly 1,450 plants).

32. See DeWaal, *supra* note 17, at 457–58 (raising issues such as food import and technological innovation that prompted support for a proposed legislative overhaul in 1999).

Congress created the USDA and FDA under distinct statutes passed in response to distinct societal concerns.<sup>33</sup> The USDA largely promulgates regulations pursuant to the Federal Meat Inspection Act (FMIA),<sup>34</sup> Poultry Products Inspection Act (PPIA),<sup>35</sup> and Humane Methods of Slaughter Act of 1978.<sup>36</sup> While these acts and the regulations developed thereunder have changed incrementally since 1907,<sup>37</sup> the USDA inspection mandate has not been overhauled since the start of federal involvement in the industry.

The USDA's regulatory control over meat and poultry production depends largely on FSIS and its nearly 7,800 facility inspectors.<sup>38</sup> Inspectors are responsible for reviewing livestock directly before and after slaughter to look for signs of animals being unfit for the human food supply.<sup>39</sup> In 1997, the USDA abandoned its original "sight, touch, and smell"<sup>40</sup> inspection method and adopted the Hazard Analysis Critical Control Point (HACCP) system.<sup>41</sup> Rather than relying on sensory review by inspectors, the HACCP system focuses on industry involvement, enhances record keeping, and addresses critical points in the production process that lead to the highest risks of contamination.<sup>42</sup> In practice, HACCP has largely reduced the role of FSIS inspectors and has enabled deceptive record keeping and less industry transparency.<sup>43</sup> Despite efforts

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*But see* Note, *supra* note 25, at 1366 (arguing that combining agencies is not a panacea for problems that exist).

33. *See* Note, *supra* note 25, at 1348 (indicating that the predecessors to the FDA and USDA went through an adversarial period in the early 1900s); Stathopoulos, *supra* note 17, at 439 (noting USDA's conflicted mandate to both promote and regulate agriculture).

34. Federal Meat Inspection Act (FMIA), 21 U.S.C. §§ 601–95 (2006).

35. Poultry Products Inspection Act (PPIA), 21 U.S.C. §§ 451–72 (2006 & Supp. II 2009).

36. Humane Methods of Slaughter Act of 1978 (HMSA), 7 U.S.C. §§ 1901–07 (2006).

37. *See* Johnson & Swaim, *supra* note 16, at 340–44 (describing eras of regulatory adjustment).

38. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 4, 8–10 (asserting that a decrease in the number of FSIS employees occurred despite an increase in budget and meat production and that the USDA stated that this was due to facility consolidation).

39. The Hazard Analysis Critical Control Point (HACCP) inspection system is currently used. *See, e.g.*, Pape, *supra* note 12, at 435–42 (discussing the HACCP system and its flaws); 9 C.F.R. pt. 417 (2012).

40. Pape, *supra* note 12, at 434.

41. *See* 9 C.F.R. pt. 417 (detailing HACCP guidelines); Pape, *supra* note 12, at 435.

42. *See* Pape, *supra* note 12, at 436–38 (providing an overview of HACCP system principles).

43. *See* Katherine A. Straw, Note, *Ground Beef Inspections and E. Coli O157:H7: Placing the Needs of the American Beef Industry Above Concerns for the Public Safety*, 37 WASH. U. J.L. & POL'Y 355, 364 (2011) (describing how the change in FSIS's role from inspecting livestock to reviewing records has weakened the agency's role); *see also* Pape, *supra* note 12, at 439 (affirming that industry negotiations diluted the impact of HACCP). *But see* *Hearing to Review*

to bolster food safety nationwide,<sup>44</sup> the current regulatory framework has allowed large-scale meat and poultry producers to slip out the back door. HACCP, the heralded advance in meat inspection, has actually removed inspectors and public reporting. Additionally, the number of inspectors has dropped while meat production and the USDA budget have increased.<sup>45</sup>

Aside from the questioned strength of HACCP, FSIS power has been found to preempt state efforts to regulate in the area of meat production facility operations.<sup>46</sup> In early 2012, the Supreme Court held that FSIS regulations preempted a California law that regulated an area of livestock slaughter and sale within the scope of the FMIA.<sup>47</sup> However, meat and poultry producers have also successfully challenged FSIS enforcement actions independently.<sup>48</sup> This varied level of impact suggests that, while FSIS has prominence over state meat and poultry regulation, its power over individual companies exists in a somewhat fragile balance. Against this backdrop, and when considering the redundancy in agency jurisdiction, it is easy to understand how food safety regulations have largely only adapted in response to crisis or tragedy<sup>49</sup> and how legislation as vast as the FSMA was passed without impacting the meat and poultry industries.

## II. WHISTLEBLOWER PROTECTIONS, THE CORPORATE MEAT PRODUCTION INDUSTRY, AND ITS WORKFORCE

The simultaneous evolution of more factory meat and poultry

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*Federal Food Safety Systems at the U.S. Department of Agriculture: Hearing Before the Subcomm. on Livestock, Dairy, and Poultry of the H. Comm. on Agric.*, 111th Cong. 52–53 (2009) [hereinafter *Livestock Hearing*] (statement of Michael L. Rybolt, Director, Scientific and Regulatory Affairs, National Turkey Federation) (urging that HACCP is an advanced and largely successful food safety inspection system).

44. See, e.g., FSMA, Pub. L. No. 111-353, 124 Stat. 3885 (2011); President Barack Obama, Weekly Address (Mar. 14, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Weekly-Address-President-Barack-Obama-Announces-Key-FDA-Appointments-and-Tougher-F](http://www.whitehouse.gov/the_press_office/Weekly-Address-President-Barack-Obama-Announces-Key-FDA-Appointments-and-Tougher-F) (announcing the creation of a multi-agency effort to coordinate regulatory mandates and improve food safety).

45. U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 8–10.

46. See *Nat'l Meat Ass'n v. Harris*, 132 S. Ct. 965, 975 (2012) (stating the FMIA “expressly preempts” the challenged California law); see also *infra* Part IV.B. (discussing the preemption issue).

47. *Nat'l Meat Ass'n*, 132 S. Ct. at 970–71, 975.

48. See *Johnson & Swaim*, *supra* note 16, at 361–68 (comparing three successful industry challenges). But see *Livestock Hearing*, *supra* note 43, at 5, 19 (statement by Alfred V. Almanza, Administrator, FSIS) (noting that FSIS oversees approximately 6,200 facilities each year and providing context for how many enforcement actions remain unchallenged).

49. See, e.g., U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 17, at 12 (stating that food regulation “evolved piecemeal, typically in response to particular health threats or economic crises”).



production and less industry transparency should raise questions for everyone impacted by large-scale American meat suppliers,<sup>50</sup> particularly because employees in this industry are not provided with whistleblower protections. The need to advance the rights of employees through rule promulgation becomes clear when considering (1) the whistleblower protections recently provided in the FSMA, (2) health and environmental concerns present in the meat and poultry industry, and (3) the vulnerability of the industry's workforce.

*A. Where Meat is Not Food: The FSMA and Existing Federal Whistleblower Protections*

As mentioned above, the complexity of food safety in the United States may explain how the USDA and meat regulations were left out of the FSMA. Less clear, though, is how food-producing entities have been exempt from providing whistleblower protections for so long. Federally enforced protections are common in areas where conditions are unsafe,<sup>51</sup> stakes are high in the event of violations,<sup>52</sup> or a workforce is particularly vulnerable and unable to address violations without protection from retaliation.<sup>53</sup> Employees supporting meat and poultry production in the United States fall into all of these categories,<sup>54</sup> yet they have no assurance against retaliation if they report violations that jeopardize the American food supply.

The FSMA includes whistleblower protections for FDA-regulated industries.<sup>55</sup> While it is unclear how the whistleblower protections will

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50. See, e.g., Spahn, *supra* note 20, at 714 (contending that food producers owe a higher duty of care to consumers); Trexler, *supra* note 25, at 321–22 (arguing that production secrecy should end because, unlike other consumer markets, everyone must purchase food).

51. See, e.g., 15 U.S.C. § 2622 (2006) (empowering the Secretary of Labor to enforce whistleblower protections in the toxic substances industry); 42 U.S.C. § 5851 (2006) (providing whistleblower protections for nuclear energy industry employees); U.S. DEP'T OF ENERGY, OFFICE OF ECON. IMPACT & DEV., DOE G 442.1-1, EMPLOYEE CONCERNS PROGRAM GUIDE (1999) [hereinafter U.S. DEP'T OF ENERGY] (introducing the Employee Concerns Program for Department of Energy (DOE) contractors and subcontractors).

52. See, e.g., 12 U.S.C. § 5567 (Supp. V 2012) (providing whistleblower protections in the financial industry).

53. See Whistleblower Protection Act, 5 U.S.C. §§ 1211–19, 1221–22, 3352 (2006 & Supp. V 2012) (providing whistleblower protections for federal employees who report federal government violations).

54. See *infra* Part II.C.

55. FMSA, Pub. L. No. 111–353, § 402, 124 Stat. 3885, 3968–71 (2011) (codified in scattered sections of 21 U.S.C.). See generally Steve Karnowski, *New Food Safety Law Contains Little-Noticed Whistleblower Protection*, HUFFINGTON POST (Feb. 11, 2011, 3:09 AM), <http://www.huffingtonpost.com/2011/02/11/food-safety-law-protects->

operate as promulgated regulations,<sup>56</sup> the fact that USDA-regulated industries are exempt from offering such protections will present serious problems in areas that receive double surveillance.<sup>57</sup> Additionally, the exclusion of factory meat production signals a troubling double standard: worker protections are required to bolster food safety, yet the people who raise, slaughter, and pack meat and poultry remain unprotected.

### B. Meat and Poultry Production: An Overview of Common Major Concerns

Factory-farmed livestock has an immense presence in our food system<sup>58</sup> and has generated a great deal of research. Many recent studies have focused on the environmental impact of factory farming.<sup>59</sup> As demand for meat in the United States and abroad has increased,<sup>60</sup> so too has the size of CAFOs.<sup>61</sup> Containment structures look like stretched airplane hangars and can hold up to 1,000 cattle for beef production, 700 cattle for dairy production, 2,500 hogs weighing more than 250 pounds each, or 125,000 chickens for broiling.<sup>62</sup> Confined living conditions make livestock susceptible to disease and death, so antibiotics are used to keep animals

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whistleblowers\_n\_821989.html (reporting that the FMSA covers a range of activities).

56. The FDA released proposed regulations in January 2013. See Stephanie Strom, *F.D.A. Offers Broad New Rules to Fight Food Contamination*, N.Y. TIMES, Jan. 4, 2013, <http://www.nytimes.com/2013/01/05/business/fda-offers-rules-to-stop-food-contamination.html?hpw&r=0> (describing rules proposed two years after the FSMA's passage); see also Dina ElBoghdady, *Food-Safety Rules in Limbo at Office of Management and Budget*, WASH. POST, May 2, 2012, [http://www.washingtonpost.com/business/economy/food-safety-rules-in-limbo/2012/05/02/gIQAhs0ZxT\\_story.html](http://www.washingtonpost.com/business/economy/food-safety-rules-in-limbo/2012/05/02/gIQAhs0ZxT_story.html) (describing the uncertainty caused by delays in finalizing the rules).

57. See *supra* Part I.

58. See Gabriela Steier, Note, *Externalities in Industrial Food Production: The Costs of Profit*, 9 DARTMOUTH L.J., Fall 2011, at 163, 172 (stating that the majority of meat and poultry is factory farmed).

59. See, e.g., KIRBY, *supra* note 1, at 35–36 (describing a river turned orange due to CAFO runoff).

60. See Lincoln Cohoon, Note, *New Food Regulations: Safer Products or More Red Tape?*, 6 J. HEALTH & BIOMEDICAL L. 343, 349–50, 364–66 (2010) (discussing USDA constraints despite a growing industry); Twilight Greenaway, *Meatifest Destiny: How Big Meat Is Taking over the Midwest*, GRIST (June 25, 2012, 6:48 AM), <http://grist.org/factory-farms/meatifest-destiny-how-big-meat-is-taking-over-the-midwest/> (discussing the increase in U.S. meat exports to China).

61. See Greenaway, *supra* note 60. CAFOs largely fall under the Environmental Protection Agency's regulatory jurisdiction. See generally *Animal Feeding Operations – Compliance and Enforcement*, ENVTL. PROT. AGENCY, <http://www.epa.gov/oecaagct/anafocom.html> (last updated June 27, 2012) (including guidance for complying with CAFO regulations).

62. See Follmer & Termini, *supra* note 3, at 52 (describing the size designations of CAFOs).

eating and growing to a size suitable for slaughter.<sup>63</sup> And with thousands of confined, eating animals comes a near-unimaginable amount of animal waste.<sup>64</sup> In the natural environment, pasture-raised animals' waste transforms into fertilizer and rarely presents issues related to fecal and urine concentration. However, CAFOs keep animal waste in "lagoons" or lake-sized cesspools.<sup>65</sup> These lagoons can be up to 120,000 square feet and give off an unbearable odor.<sup>66</sup> Exposure to the gases lagoons emit has been tied to severe health problems<sup>67</sup> and can also have a devastating impact on surrounding waterways,<sup>68</sup> local wildlife,<sup>69</sup> and property values.<sup>70</sup>

In addition to focusing on the environmental impact of factory farming, many researchers devote attention to the dismal living conditions that poultry, hogs, and cattle endure before being slaughtered and shipped to supermarkets and restaurants around the world. Livestock raised and slaughtered in factory production schemes are packed into containers so small that they are often unable to turn around or spread their wings.<sup>71</sup> Animals often live standing in their own feces, with little exposure to fresh air or sunlight and no ability to act on instinct, making them anxious and depressed.<sup>72</sup> To prevent the inevitable fighting that occurs with so many

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63. See Stathopoulos, *supra* note 17, at 416–20 (explaining that the concoction of ingredients fed to livestock can include hormones, antibiotics, waste from chicken coops called "poultry litter," dirt, plastic, arsenic, and even remains of other animals); Pape, *supra* note 12, at 427–28 (adding to the issue of industry overlap by noting that the FDA regulates animal feed).

64. See Stathopoulos, *supra* note 17, at 413–14 (documenting the immense animal waste farms produce).

65. See KIRBY, *supra* note 1, at 4 (depicting a flight above a CAFO and the stench as it was approached); Stathopoulos, *supra* note 17, at 413–15 (detailing the toxicity of lagoons).

66. See KIRBY, *supra* note 1, at 4; Stathopoulos, *supra* note 17, at 414 (quoting Jeff Tietz, *Boss Hog*, ROLLING STONE, Dec. 14, 2006, at 89).

67. See Stathopoulos, *supra* note 17, at 414 (stating that lagoon toxins are connected to "asthma, bronchitis, diarrhea, heart palpitations, headaches, depression, nosebleeds, and brain damage").

68. See *id.* at 415 (illustrating the potential for extreme pollution should a lagoon rupture or leak).

69. See, e.g., KIRBY, *supra* note 1, at 35–36 (describing the fish kills in a river due to CAFO waste).

70. See *id.* at 31 (stating that air pollution results in economic depression in areas near CAFOs).

71. See Lynn M. Boris, Note, *The Food-Borne Ultimatum: Proposing Federal Legislation to Create Humane Living Conditions for Animals Raised for Food in Order to Improve Human Health*, 24 J.L. & HEALTH 285, 290–91 (2011) (describing the evolution of pathogens due to animals living in confinement). *But see* KIRBY, *supra* note 1, at 33 (acknowledging that some cattle farms allow animals outside).

72. See, e.g., Michael Pollan, *An Animal's Place*, N.Y. TIMES MAG., Nov. 10, 2002, <http://www.nytimes.com/2002/11/10/magazine/10ANIMAL.html> (describing these

animals in containment, many operators remove the beaks of poultry and tails of cattle and hogs.<sup>73</sup>

In slaughterhouse facilities, efficiency is the top priority.<sup>74</sup> Undercover video that ultimately led to the nation's largest beef recall<sup>75</sup> documented slaughterhouse workers beating, dragging, and striking animals with electric prods to make them stand when they could not do so on their own.<sup>76</sup> Other videos showed workers gruesomely killing cattle that had suffered frostbite by hitting them with picks and shovels.<sup>77</sup> In the fast pace of the processing plant, the line does not stop moving, and animals may start to be processed while still alive.<sup>78</sup> The breadth of animal abuse that takes place throughout the factory meat and poultry production process is beyond the scope of this Comment, but the legal and societal importance of inhumane animal treatment and the impact it has on people exposed to it are nothing to ignore, particularly in the context of those animals that sustain us.<sup>79</sup>

Perhaps most often, and reasonably so, research surrounding factory farm improvements is devoted to lessening debilitating and often deadly foodborne illnesses presented by pathogens and bacteria found in factory

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confined and filthy living conditions, and the tendency for pigs—highly intelligent animals—to become depressed as a result of their confinement).

73. See Stathopoulos, *supra* note 17, at 412–13 (addressing the removal of beaks and tails as a way to prevent fighting and infection caused by animal anxiety, yet acknowledging that “stubs” resulting from removal often lead to infection).

74. See Taylor, *supra* note 25, at 387 (suggesting that regulators share the goal of efficiency with industry); Straw, *supra* note 43, at 356–57 (illustrating hesitation by the factory farming industry to adopt regulations that will slow production).

75. The video was released by the Humane Society of the United States (HSUS) through the work of an undercover activist. Andrew Martin, *Largest Recall of Ground Beef Is Ordered*, N.Y. TIMES, Feb. 18, 2008, <http://www.nytimes.com/2008/02/18/business/18recall.html>. This individual would be subject to criminal penalty under a number of pending ag-gag laws. See *infra* Part III.

76. See generally Martin, *supra* note 75 (describing the undercover video that spurred the recall of 143 million pounds of ground beef and noting that the exposed company has since closed).

77. See generally Bittman, *supra* note 5 (discussing a video taken undercover at E6 Cattle Company and describing the problem with ag-gag laws deterring the collection of such footage).

78. ERIC SCHLOSSER, FAST FOOD NATION 171 (2002).

79. See Cass R. Sunstein, *Standing for Animals (with Notes on Animal Rights)*, 47 UCLA L. REV. 1333, 1333 n.\* (2000) (“[T]he cruel treatment of animals seems to me one of the great unaddressed legal problems of our time.”); cf. *Continuing Problems in USDA’s Enforcement of the Humane Methods of Slaughter Act: Hearing Before the Subcomm. on Domestic Policy of the H. Comm. on Oversight and Gov’t Reform*, 111th Cong. 38–39 (2010) [hereinafter *HMSA Hearing*] (statement of Dean Wyatt, Supervisory Public Health Veterinarian, FSIS) (discussing mistreatment he experienced after trying to enforce against violations).

farm products.<sup>80</sup> As mentioned above, factory-raised animals require a great deal of unnatural assistance to survive until slaughter.<sup>81</sup> The effects of antibiotics, hormones, and unsound animal feed<sup>82</sup> are all passed through to humans at consumption. While the presence of harmful bacteria can be alleviated with proper cooking, more serious side effects are less understood. Primary areas of concern include humans' developing resistance to antibiotics, contracting mad cow disease, and falling ill to *E. coli* or even cancer.<sup>83</sup> Exposure to these health risks connects to the environmental and animal health aspect of the factory farm problem; each area perpetuates the worsening of other conditions. Likewise, stronger regulation to alleviate any of the problems above would necessarily improve other areas. For example, restrictions on livestock containment or antibiotic use would lessen the impact of harmful animal waste. As ag-gag laws display, now more than ever, effective alerts regarding any of these violations must come from within the facilities.

*C. By the Lagoons and on the Line: The Meat and Poultry Production Workforce*

If the conditions outlined above are difficult to swallow, one should try to imagine an eight-hour shift in such a setting. Workers in CAFOs, slaughterhouses, and meatpacking facilities are constantly exposed to these repugnant and dangerous conditions. Employees at CAFOs work amidst the harmful noxious gases and under constant stress of maintaining contained animals.<sup>84</sup> Slaughterhouse and meatpacking employees are in particularly worrisome roles.<sup>85</sup> From guiding animals toward slaughter and stunning them as they enter the facility to sawing carcasses apart and trimming meat along a fast assembly line, much of factory slaughtering is still done by hand.<sup>86</sup> The pace is fast and constant, and the work is

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80. See CDC ESTIMATES, *supra* note 2 (documenting the prevalence of foodborne illnesses transmitted through food).

81. Of course, many animals do not survive until slaughter. See Stathopoulos, *supra* note 17, at 412 (providing data regarding the high rate of death before slaughter).

82. See sources cited *supra* note 63.

83. See, e.g., Stathopoulos, *supra* note 17, at 420–33 (reviewing various health problems connected with additives in livestock diets and treatment, including: increases in antibody problems due to antibiotic exposure; increased rates of breast, prostate, and colon cancer due to consuming the growth hormone rBGH used in dairy production; and increased risks of contaminated meat and poultry due to fast processing that increases the presence of fecal matter on meat).

84. See *supra* Part II.B.

85. See generally Jennifer Dillard, Note, *A Slaughterhouse Nightmare: Psychological Harm Suffered by Slaughterhouse Employees and the Possibility of Redress Through Legal Reform*, 15 GEO. J. ON POVERTY L. & POL'Y 391 (2008) (discussing the traumatic nature of slaughterhouse work).

86. See *id.* at 395–98 (reviewing the psychological trauma impacting factory farm

gruesome yet monotonous.<sup>87</sup> Severe injuries and even death are constant threats when working in close quarters with heavy machinery, sharp knives, and fatigue for long hours.<sup>88</sup> Workers have been urged to leave injuries unreported, so as not to alert federal regulators, and may be rewarded if they stay silent.<sup>89</sup> For injuries that are reported, collecting worker's compensation can be difficult without a legal infrastructure that requires accountability on the part of employers.<sup>90</sup>

Minority populations belonging to low socioeconomic classes comprise a large proportion of the factory meat and poultry production workforce.<sup>91</sup> Recent immigrants pour into factory farming communities willing to take the work, no matter how gruesome.<sup>92</sup> It has been reported that the least desirable job in slaughter facilities—the overnight cleaning crew—often belongs to illegal immigrants who lack both bargaining power and the ability to speak out about violations for fear of deportation.<sup>93</sup> Currently, there are few avenues to learn about such conditions in factory farming aside from employee accounts; the few glimpses available show that these workers bear an incredible burden to bring consumers an affordable product.<sup>94</sup>

### III. SOMETHING TO HIDE: THE RECENT SURGE IN AG-GAG LAWS ACROSS THE UNITED STATES

Several states have recently passed or considered passing laws that restrict individuals' abilities to document factory farm violations by

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workers).

87. See SCHLOSSER, *supra* note 78, at 171 (describing a “sticker’s” job as being to “stand in a river of blood, being drenched in blood, slitting the neck of a steer every ten seconds or so” for eight-and-a-half hours).

88. See *id.* at 172–73 (describing the scene in a slaughter facility).

89. See *id.* at 175 (stating that workers who refrained from reporting injuries were rewarded with temporary, more-desirable positions).

90. See *id.* at 178–86 (documenting the difficulty that union members at meat production plants experience in maintaining bargaining power with employers).

91. See, e.g., Greenaway, *supra* note 60 (describing an influx of immigrants to a rural Illinois town—home to a Cargill plant—as the “sacrifice generation,” those willing to work in awful conditions to provide for their children); SINCLAIR, *supra* note 8 (detailing hardships of European immigrant populations in the Chicago stockyards of the early 1900s).

92. See Greenaway, *supra* note 60.

93. See SCHLOSSER, *supra* note 78, at 176–78 (illustrating the task of using a hot temperature, high pressure hose to clean slaughter remnants from facilities and the gruesome deaths that occur when untrained workers clean machinery, and stating that Occupational Safety and Health Administration fined one company only \$480 for each death).

94. See generally *id.* at 169–90; Dillard, *supra* note 85 (revealing the life of slaughterhouse workers and the psychological trauma they face).

criminalizing these efforts. The laws vary in scope and projected impact, but all are aimed at shielding corporate farming operations from scrutiny that occurs when undercover recordings of farm conditions are made public.<sup>95</sup> Three states passed legislation resembling ag-gag laws between 1990 and 1991,<sup>96</sup> but there has been a resurgence of efforts to introduce more exacting legislation across the country.

The pieces of legislation passed in Kansas, North Dakota, and Montana<sup>97</sup> take the form of advanced trespassing restrictions. While the laws differ slightly in penalty range,<sup>98</sup> each prohibits those without an owner's consent from entering facilities to use video and audio recording devices.<sup>99</sup> These recording restrictions are incorporated with other prohibitions on crimes such as setting animals free and destroying property.<sup>100</sup>

In 2011 and 2012, there was an influx of ag-gag legislation proposed across the country; after twenty years of inactivity in the area, eleven state legislatures introduced such bills. Laws were passed in Utah and Iowa in early 2012 and were considered in Minnesota, New York, Indiana, Tennessee, Illinois, Nebraska, Florida, Pennsylvania, and Missouri that same year.<sup>101</sup> Together, these states comprise over 30% of the total agricultural output in the United States.<sup>102</sup> Common provisions in the proposed laws include time limits on turning over legally obtained

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95. See, e.g., Jennifer Viegas, *Factory Farming Videos Prompt 'Ag-Gag' Bills*, DISCOVERY NEWS (Jan. 31, 2012, 11:11 AM), <http://news.discovery.com/animals/factory-farming-videos-120131.html> (providing an overview of ag-gag legislation).

96. KAN. STAT. ANN. §§ 47-1825 to -1828 (2011); MONT. CODE ANN. §§ 81-30-101 to -105 (2011); N.D. CENT. CODE §§ 12.1-21.1-01 to -05 (2012).

97. As of 2004, these states comprise 6.56% of the total U.S. agriculture output. See *Agriculture Receipts: Total*, STUFFABOUTSTATES.COM, <http://stuffaboutstates.com/agriculture/index.html> (last updated Jan. 5, 2011).

98. See KAN. STAT. ANN. § 47-1828 (allowing for treble damages); MONT. CODE ANN. § 81-30-105 (delineating fines or jail time depending on the damage valuation); N.D. CENT. CODE § 12.1-21.1-04 (allowing varied levels of felony offenses for violators).

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

100. See KAN. STAT. ANN. § 47-1827(a)-(b); MONT. CODE ANN. § 81-30-103(2)(a); N.D. CENT. CODE § 12.1-21.1-02(1)-(2).

101. See IOWA CODE ANN. § 717A.3A (West 2012); UTAH CODE ANN. § 76-6-112 (West 2012); S. 1246, 2011 Leg., Reg. Sess. (Fla. 2011); H. 5143, 97th Gen. Assemb., Reg. Sess. (Ill. 2012); S. 184, 117th Gen. Assemb., 2d Reg. Sess. (Ind. 2012); H.R. 1369, 2011 Leg., 87th Sess. (Minn. 2011); S. 695, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); H. 1860, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); Leg. 915, 102d Leg., 2d Sess. (Neb. 2012); S. 5172, 2011-2012 Leg., Reg. Sess. (N.Y. 2011); S. 1596, 2012 Gen. Assemb., Reg. Sess. (Pa. 2012); S. 3460, 2012 Gen. Assemb., Reg. Sess. (Tenn. 2012).

102. See *Agriculture Receipts: Total*, STUFFABOUTSTATES.COM, <http://stuffaboutstates.com/agriculture/index.html> (last updated Jan. 5, 2011).

recordings to law enforcement,<sup>103</sup> restrictions on the reproduction or dissemination of documentation,<sup>104</sup> and limits on gaining employment under false pretenses.<sup>105</sup>

Utah and Iowa enacted similar ag-gag laws in early 2012.<sup>106</sup> The Iowa law prohibits committing “agricultural production facility fraud” by barring people from accessing facilities under false pretenses.<sup>107</sup> This law includes separate restrictions stating that people may not seek employment with the intent of committing fraud and must report any such person to authorities.<sup>108</sup> As opposed to the majority of ag-gag legislation, this bill does not include language specifically prohibiting recordings, but instead focuses on barring the presence of people who may have a motive to “commit[] . . . fraud.”<sup>109</sup>

The passage of Iowa’s law sets a troubling precedent for industry involvement in lawmaking as well as the polarization that occurs when framing ag-gag opposition as an issue based solely on animal rights.<sup>110</sup> Supporters suggest that the laws protect farmers from illegal interference

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103. See, e.g., Leg. 915 §§ 28-1017(2)–(3), 102d Leg., 2d. Sess. (Neb. 2012) (including details of how reports must be filed within a particular timeframe); see also Joseph Jerome, *‘Ag-Gag’ Laws Chill Speech, Threaten Food Supply*, AM. CONSTITUTION SOC’Y BLOG (Apr. 17, 2012), <http://www.acslaw.org/acsblog/%E2%80%98ag-gag%E2%80%99-laws-chill-speech-threaten-food-supply> (showing that a supporter of time limits feels that without immediate release, documentation does not prevent further violations, but fulfills a less effective vendetta against the industry).

104. See, e.g., H. 5143, 97th Gen. Assemb., Reg. Sess. §§ 4.3, 4.5 (Ill. 2012) (prohibiting those who receive documentation of violations from distributing the information); H.R. 1369, 2011 Leg. 87th Sess., §§ 3(1)–4(2) (Minn. 2011); S. 3460, 2012 Gen. Assemb., Reg. Sess. §§ 39-13-609(a)–(b) (Tenn. 2012).

105. See, e.g., H. 5143, 97th Gen. Assemb., Reg. Sess. §§ 4.3, 4.5 (Ill. 2012); H.R. 1369, 2011 Leg., 87th Sess., §§ 3–4(2) (Minn. 2011); H. 1860, 96th Gen. Assemb., 2d Reg. Sess. §§ 578.660, 578.672 (Mo. 2012); Leg. 915, 102d Leg., 2d. Sess. § (3) (Neb. 2012) (disallowing seeking employment under false pretenses).

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

107. IOWA CODE ANN. § 717A.3A(1).

108. See *id.* § 717A.3A(3)(a) (presenting a twist on a law perceived as anti-whistleblower: those aware of a potential whistleblower must themselves “blow the whistle”).

109. Violators may be charged with varied misdemeanor offenses. See *id.* § 717A.3A(2)(a)–(b).

110. Cf. O. Kay Henderson, *Branstad Says ‘Ag Gag’ Law Protects Iowa Farmers*, RADIOIOWA.COM (Mar. 5, 2012), <http://www.radioiowa.com/2012/03/05/branstad-says-ag-gag-law-protects-iowa-farmers-from/> (including the Iowa Governor’s understanding of bill opponents as “people who don’t believe anybody should eat meat and . . . want to release livestock . . .”); *HMSA Hearing*, *supra* note 79, at 3 (statement of Rep. Jim Jordan) (describing animal welfare groups’ efforts as “offensive and deplorable”).



with operations,<sup>111</sup> and agriculture industry leaders have both influenced Iowa legislators and also urged passage of similar bills elsewhere.<sup>112</sup> This industry influence is particularly problematic given the opposition to the bill shown by Iowa citizens in a 2011 survey.<sup>113</sup>

Utah's legislature passed its ag-gag law in March 2012.<sup>114</sup> The law defines the new crime of "agricultural operation interference" as knowingly recording images or sound, either in person or with a device planted within a facility.<sup>115</sup> This law does not include prohibitions on gaining employment under false pretenses but instead focuses more on whether a facility owner consented to documentation generally.<sup>116</sup>

As these two ag-gag laws were developing, state and national leaders from Iowa and Utah had varying opinions on the passage of the FSMA, which included whistleblower protections for FDA-regulated industries. Utah Representative Bill Wright vehemently opposed the FSMA and has made efforts to exclude Utah from its application.<sup>117</sup> By contrast, U.S. Senator Tom Harkin of Iowa has widely supported the need for FDA industry whistleblower protections.<sup>118</sup> Despite Senator Harkin's

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111. See, e.g., Henderson, *supra* note 110 (reporting that the Iowa governor supports the bill to protect farmers from "people doing illegal, inappropriate things").

112. See, e.g., HF 589, THE IOWA LEGISLATURE, <http://coolice.legis.iowa.gov/CoolICE/default.asp?Category=Lobbyist&Service=DspReport&ga=84&type=b&hbill=HF589> (last visited Jan. 31, 2013) (listing the lobby groups connected to the legislators that voted both against and in support of the ag-gag legislation); 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/> (showing that Monsanto Co. and large agriculture groups supported passage).

113. See Jennifer Jacobs, *Survey Finds Iowa Voters Oppose Prohibiting Secret Animal-Abuse Videos*, DES MOINES REGISTER (Mar. 22, 2011, 9:10 AM) <http://blogs.desmoinesregister.com/dmr/index.php/2011/03/22/survey-finds-iowa-voters-oppose-prohibiting-secret-animal-abuse-videos/> (showing that only 21% of Iowa respondents, in a poll paid for by the HSUS, supported the bill).

114. See 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> (discussing the Utah law and its opposition).

115. See UTAH CODE ANN. § 76-6-112(2) (West 2012).

116. *Id.* § 76-6-112(2)-(3). Section 76-6-112(2)(b), however, could be interpreted as a ban on gaining employment under false pretenses. *Id.* § 76-6-112(2)(b) (stating that a person is guilty of agricultural operation interference if the person "obtains access to an agricultural operation under false pretenses").

117. See Strauss, *supra* note 14, at 363; see also Robert Gehrke, *Proposal Would Exempt Utah Food from Federal Regulation*, SALT LAKE TRIB., Feb. 7, 2011, <http://www.sltrib.com/sltrib/politics/51177864-90/bill-farmers-fda-federal.html.csp> (framing Representative Wright's opposition as a state's rights and anti-regulation concern).

118. See Strauss, *supra* note 14, at 363 (quoting Senator Harkin as supporting the FSMA protections: "Unless workers are free to speak out without fear of retaliation, we might never

congressional support for the FSMA,<sup>119</sup> Iowa's ag-gag law was passed before the Act's regulations were promulgated.

Proponents of ag-gag legislation argue that the laws are necessary to keep activists from misrepresenting the factory farming industry with footage that is presented out of context to scare the American public.<sup>120</sup> Other supporters have suggested that barring outside documentation protects animals and products from contamination that can come from outsiders entering facilities without authorization.<sup>121</sup> Even considering these arguments, ag-gag laws send a message that states enacting such legislation have something to hide from the American public, a portrayal harmful to responsible farmers in impacted states.<sup>122</sup> The laws operate as a deterrent for what has historically been the most effective way to expose violations on factory farms.<sup>123</sup> By criminalizing these actions and framing the opposition as extreme, the only individuals left to expose violations are those who can legally witness infractions: the workers themselves.

#### IV. THE USDA SHOULD PROMULGATE RULES THAT REQUIRE MEAT AND POULTRY INDUSTRY FACILITIES TO PROVIDE EMPLOYEE PROTECTION PLANS AS A CONDITION FOR INSPECTION

The high public health and environmental risks presented by factory

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learn about threats to public safety until it's too late").

119. See Karnowski, *supra* note 55 (describing Senator Harkin as an FSMA leader).

120. See Jerome, *supra* note 103 (quoting an Iowa Representative who argues that distributing such information is seen by some as a politically motivated action meant only to cast a misunderstood industry in a bad light). *But see HMSA Hearing, supra* note 79, at 11 (statement of Lisa Shames, Director, Natural Resources and the Environment, GAO) (reporting that over half of USDA inspectors at large plants feel video surveillance in facilities would be useful).

121. See Rod Swoboda, *Iowa 'Ag-Gag' Bill Signed Into Law*, AM. AGRICULTURALIST (Mar. 3, 2012), <http://farmprogress.com/story-iowa-ag-gag-bill-signed-law-0-57755> (documenting an Iowa bill supporter who cited preventing outside contamination as the bill's objective). *But see* Stephanie Armour, *'Industrial Terrorism' of Undercover Livestock Videos Targeted*, BLOOMBERG BUSINESS WEEK (Feb. 21, 2012), <http://www.businessweek.com/news/2012-02-21/-industrial-terrorism-of-undercover-livestock-videos-targeted.html> (reporting results from a study showing that media stories about animal welfare cause meat sales to drop).

122. See Mark Bittman, *Banned from the Barn*, N.Y. TIMES OPINIONATOR (July 5, 2011, 11:19 PM), <http://opinionator.blogs.nytimes.com/2011/07/05/banned-from-the-barn/> (presenting an overview of Iowa farms that offer an example of healthy meat farming). *See generally HMSA Hearing, supra* note 79, at 72–74 (statement of Bev Eggleston, Owner, Ecofriendly Foods LLC) (offering information on an exemplary producer).

123. *See HMSA Hearing, supra* note 79, at 51 (stating that an FSIS inspector could neither cease operation nor effectively enforce against inhumane slaughtering at a veal production plant until the HSUS leaked video footage documenting violations); Armour, *supra* note 121 (discussing recent recalls spurred by released undercover videos).

farming<sup>124</sup> and the currently fragile enforcement power of FSIS prove that federal regulators should not police the meat and poultry industry alone.<sup>125</sup> Instead, and in line with the current industry-led regulatory format, FSIS should promulgate rules that require whistleblower protection schemes as an additional condition for facility inspection.

*A. FSIS Has Authority to Require Whistleblower Protections from Meat and Poultry Facilities*

Although FSIS has acknowledged that it was not explicitly granted the authority to provide comprehensive whistleblower protections,<sup>126</sup> the existing agency authority provides room for more subtle antiretaliation mechanisms. Congressional findings included at the outset of both the FMIA and the PPIA convey intent to prevent the adulteration of meat and poultry products intended for human consumption. The findings state, “It is essential in the public interest that the health and welfare of consumers be protected by assuring that [meat and poultry] products distributed to them are wholesome, not adulterated, and properly marked, labeled, and packaged.”<sup>127</sup> These findings precede a broad grant of authority given to the USDA to regulate the meat and poultry producers that might jeopardize this goal.<sup>128</sup> Furthermore, Supreme Court jurisprudence

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124. See *supra* Part II.B.

125. See Johnson & Swaim, *supra* note 16, at 361–68 (describing three successful cases against FSIS); *HMSA Hearing*, *supra* note 79, at 4–5 (statement of Rep. Dennis Kucinich) (depicting the shortfalls of FSIS inspection displayed by a GAO investigation). *But see* Nat’l Meat Ass’n v. Harris, 132 S. Ct. 965, 967 (2012) (affirming the regulatory power and preemption of FSIS). See generally U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-487T, HUMANE METHODS OF SLAUGHTER ACT: WEAKNESSES IN USDA ENFORCEMENT (2010) (reporting the discussion on FSIS enforcement of the HMSA by GAO’s Director of Natural Resources and Environment, Lisa Shames).

126. See Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 61 Fed. Reg. 38,806, 38,822 (July 25, 1996) (stating that HACCP regulations do not provide whistleblower protections because the FMIA and PPIA did not explicitly grant this authority); see also Sharlene W. Lassiter, *From Hoof to Hamburger: The Fiction of a Safe Meat Supply*, 33 WILLAMETTE L. REV. 411, 457–60 (1997) (recommending that meat industry workers be provided with whistleblower protection and *qui tam* litigation rights to strengthen the HACCP mission); *HMSA Hearing*, *supra* note 79, at 23 (statement of Jerold Mande, Deputy Under Secretary for Food Safety, USDA) (“[W]histleblowers play an honored role in our democracy. It takes great courage to speak out about potential mismanagement or waste by something as big and as powerful as the U.S. Government.”).

127. FMIA, 21 U.S.C. § 602 (2006) (meat and meat food products); PPIA 21 U.S.C. § 451 (2006) (poultry products).

128. See 21 U.S.C. §§ 451, 602 (concluding findings by stating that “regulation by the Secretary and cooperation by the States . . . are appropriate . . . to protect the health and welfare of consumers”).

suggests that FSIS statutory interpretation and regulations should be granted deference when they reasonably further an enabling statute's mandate,<sup>129</sup> particularly if they advance public safety.<sup>130</sup>

Additionally, FSIS is granted more concrete authority by the PPIA and FMIA to enhance the inspection and safety mechanisms used at meat and poultry production facilities.<sup>131</sup> For example, the FMIA states, "The Secretary of Agriculture may utilize existing authorities to give high priority to enhancing and expanding the capacity of the [FSIS] to conduct activities to . . . enhance the ability of the Service to inspect and ensure the safety and wholesomeness of meat and poultry products."<sup>132</sup> Pursuant to this power, the USDA is responsible for designing and enforcing regulations for inspection.<sup>133</sup> The USDA has already promulgated a number of regulations standardizing facility inspection.<sup>134</sup> For example, two current inspection conditions—the implementation of valid Sanitation Operating Procedures (SOPs)<sup>135</sup> and HACCP plans<sup>136</sup>—were promulgated pursuant to FSIS's enabling statutes rather than explicit statutory requirements.<sup>137</sup>

Facility operations rely on the FSIS inspection power, and if a facility does not meet stated conditions, inspection will be suspended.<sup>138</sup> Federal inspection is required for continued meat production, so a suspension effectively shuts down facility operations.<sup>139</sup> This action is the strongest penalty FSIS has at its disposal in the event of violations.<sup>140</sup> Within its

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129. *See Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 845 (1984) (holding that courts must defer to reasonable statutory interpretation by agencies in the event that congressional intent is broad and inexplicit).

130. *See United States v. An Article of Drug . . . Bacto-Unidisk . . .*, 394 U.S. 784, 792 (1969) (predating *Chevron* and acknowledging the need for deference to the FDA's interpretation of an enabling statute where "such regulation is desirable for the public health").

131. PPIA, 21 U.S.C. §§ 456, 463(a)–(b); FMIA, 21 U.S.C. §§ 608, 621, 679c.

132. 21 U.S.C. § 679c(a)(1).

133. *See id.* §§ 603–06 (granting the USDA authority to inspect meat entering the food supply).

134. *See supra* Part I.

135. *See generally* 9 C.F.R. pt. 416 (2011) (detailing Sanitation Operating Procedures (SOPs)—industry-led plans that meet minimum standards for guaranteeing sanitary conditions in meat and poultry facilities as a condition for facility inspection).

136. *See id.* § 304.3(b)–(c) (imposing conditions that facilities must meet for inspection to take place).

137. *See* Pathogen Reduction; Hazard Analysis and Critical Control Point (HACCP) Systems, 60 Fed. Reg. 6,774, 6,824 (Feb. 3, 1995) (describing FSIS's interpretation of its legal authority to regulate inspections with additional requirements).

138. *See Johnson & Swaim, supra* note 16, at 357–60 (detailing the FSIS power to suspend or withdraw inspection in case of HACCP or SOP violations).

139. *Id.* at 356.

140. *See id.* at 356–60 (reviewing the enforcement powers available to FSIS).

existing authority to add conditions for inspection, FSIS could include an additional requirement for employee protection. As an extension of the HACCP and SOP model, whistleblower protections could be added so long as they are both promulgated under the Agency's delegated responsibility of "enhancing and expanding the capacity of the [FSIS]"<sup>141</sup> and also pursuant to the USDA's discretion in adding regulations under the FMIA and PPIA.

Moreover, it is not unheard of for agencies to promulgate employee protection mechanisms independent from an explicit statutory mandate. A number of regulatory mechanisms have been used in recent years to bolster offshore drilling oversight, for example.<sup>142</sup> This includes the establishment of Safety and Environmental Management Systems (SEMS), which are comprehensive, industry-led plans mandating minimum safety protocols and contingency plans for offshore operations.<sup>143</sup> The original framework for the SEMS rule has been finalized,<sup>144</sup> but the most potent comparison comes from a recently proposed addition. The Department of the Interior's Bureau of Ocean Energy Management, Regulation, and Enforcement<sup>145</sup> has proposed that employee protection requirements be added to the finalized SEMS mandate.<sup>146</sup> Proposed additions include providing a Stop Work Authority for any and all employees or

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141. 21 U.S.C. § 679c(a) (2006).

142. The 2010 Deepwater Horizon offshore rig explosion in the Gulf of Mexico spurred this increase in regulation. *See* Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Safety and Environmental Management Systems, 75 Fed. Reg. 63,610, 63,610 (Oct. 15, 2010) (codified at 30 C.F.R. pt. 250). Though the nature of the Gulf explosion adds an exigent element to the changes, increased regulations were still promulgated within existing authority and not pursuant to legislative mandates. *See id.* (noting that the Gulf explosion underlies additional regulation); *see also* Offshore Oil and Gas Worker Whistleblower Protection Act of 2010, H.R. 5851, 111th Cong. (2010) (proposing whistleblower protection for offshore oil and gas employees).

143. Safety and Environmental Management Systems (SEMS), 30 C.F.R. §§ 250.1900–.1929 (2012) (guiding regulated entities on how to implement Safety and Environmental Management Systems (SEMS)).

144. *Id.* §§ 250.1900–.1929. *But see* Sandra Snyder, *BOEMRE's Final SEMS Rule Substantially Modifies the Original Proposal, Inviting Legal Challenge*, ENERGY LEGAL BLOG (Oct. 6, 2010, 2:00 PM), <http://www.energylegalblog.com/archives/2010/10/06/3231> (discussing the opportunities for challenge presented by the finalized SEMS regulations).

145. The Bureau of Ocean Energy Management, Regulation, and Enforcement—formerly the Minerals Management Service—is undergoing a large-scale reorganization. *See* Press Release, U.S. Dep't of the Interior, Salazar Divides MMS's Three Conflicting Missions: Establishes Independent Agency to Police Offshore Energy Operations (May 19, 2010), *available at* <http://www.doi.gov/news/pressreleases/Salazar-Divides-MMSs-Three-Conflicting-Missions.cfm>.

146. Oil and Gas and Sulphur Operations in the Outer Continental Shelf—Revisions to Safety and Environmental Management Systems, 76 Fed. Reg. 56,683, 56,684 (Sept. 14, 2011) (to be codified at 30 C.F.R. pt. 250).

contractors.<sup>147</sup> Stop Work Authority programs would enable employees to cease a specific task without fear of reprisal if they deem an imminent risk or danger to be present.<sup>148</sup> Proposed changes would also require offshore operators to issue reporting guidelines through which employees can address unsafe work conditions.<sup>149</sup> The functionality of the SEMS and its proposed additions offer an example of an agency responding to a public safety risk by promulgating employee protection mechanisms pursuant to its general preexisting authority. Though the employee protections have not been finalized, the very proposal of the SEMS rule demonstrates that an agency has interpreted its power to include adding employee protections.

Opponents to the USDA's power to promulgate employee protections may suggest that the FSMA's whistleblower provisions for food producers complicate the case for authority.<sup>150</sup> The Act's exclusion of the USDA could be framed as Congress intending to prevent similar protections in the meat and poultry industry. However, the fragmented historical development of FDA and USDA regulations as well as the recent introduction of a bill for a Foodborne Illness Reduction Act, which includes USDA whistleblower protections similar to those in the FSMA, dilutes this argument.<sup>151</sup> Considering this history, and the agency's authority, it is reasonable to interpret the FMIA and PPIA as delegating the USDA power to promulgate regulations that promote public safety by protecting employees' ability to draw attention to violations that threaten food safety.

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147. *Id.*

148. *Id.* at 56,686.

149. *Id.* at 56,685, 56,687.

150. *See* FSMA, Pub. L. No. 111-353, § 402, 124 Stat. 3885, 3968-71 (2011) (providing guidelines for employees who feel they have been retaliated against for reporting violations). Congressional leaders have also acknowledged federal inspector whistleblowers who have exposed FSIS inspection shortfalls. *See HMSA Hearing, supra* note 79, at 61 (statement of Dean Wyatt, Supervisory Public Health Veterinarian, FSIS) (receiving thanks from Rep. Dennis J. Kucinich for Wyatt's "put[ting] [his] career on the line just to do the right thing"); *see also* GovAcctProjTV, *WWYW #32: Highlights from GAP's Food Whistleblower Conference*, YOUTUBE (Apr. 7, 2011), <http://www.youtube.com/watch?v=15Cw7kOIfk> (including an expert panelist reporting that, though weakened by negotiation, whistleblower protections were a major victory for the FSMA).

151. *See supra* Part II; Foodborne Illness Reduction Act of 2011, S. 1529, 112th Cong., § 201(a)(1) (2011) (proposing adding section 270(c)(1) to the Department of Agriculture Reorganization Act of 1994 to provide USDA employee protections); *see also* Karnowski, *supra* note 55 (reporting that according to Government Accountability Project's legal director, the FSMA bill sponsors left out USDA industries to avoid political obstacles).

B. *FSIS Requirements Would Likely Preempt State Ag-Gag Laws: The Impact of National Meat Ass'n v. Harris*

The January 2012 Supreme Court case *National Meat Ass'n v. Harris*<sup>152</sup> challenged a California law that prohibited the sale of nonambulatory livestock by measures more stringent than those laid out by FSIS.<sup>153</sup> In a unanimous decision, the Supreme Court upheld the preemptive effect of the federal regulation and struck down the state law.<sup>154</sup> The Court held that FMIA's preemption clause is broad, noting, "[The California law] reaches into the slaughterhouse's facilities and affects its daily activities. And in so doing, [the law] runs smack into the FMIA's regulations."<sup>155</sup> This holding strongly supports the proposition that state-led efforts (through ag-gag laws or otherwise) to prevent whistleblower protections would be preempted by FSIS regulations in this area. Additionally, it is unclear whether the standard of "reach[ing] into the slaughterhouse's facilities and affect[ing] its daily activities"<sup>156</sup> would ever allow states to effectively impact USDA-regulated facilities if overlap with FSIS power were possible.

The *National Meat Ass'n* decision also holds that agency preemption falls within the FMIA's language. The Court found, "The FMIA contains an express preemption provision . . . [stating] '[r]equirements within the scope of this [Act] with respect to *premises, facilities and operations of any establishment* at which inspection is provided . . . may not be imposed by any State."<sup>157</sup> Given the clear delegation of inspection power to FSIS, it would be challenging for states to implement facility requirements for employee protections without infringing on the FMIA's scope.<sup>158</sup>

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152. 132 S. Ct. 965 (2012).

153. *Id.* at 975.

154. *Id.*

155. *Id.* at 974. *See also* FMIA 21 U.S.C. § 678 (2006) (including the FMIA's preemption clause). It also states:

Requirements within the scope of this chapter [on meat inspection] with respect to premises, facilities and operations of any [inspected] establishment . . . which are in addition to, or different than those made under this chapter may not be imposed by any State . . . except that any such jurisdiction may impose recordkeeping and other requirements within the scope of section 642 of this title, if consistent therewith, with respect to any such establishment. . . . [This] shall not preclude any State . . . from making requirement or taking other action, consistent with this chapter; with respect to any other matters regulated under this chapter.

*Id.*

156. *Nat'l Meat Ass'n*, 132 S. Ct. at 974.

157. *See id.* at 969 (quoting 21 U.S.C. § 678) (emphasis added).

158. Opponents to FSIS's enforcing whistleblower protections could point to successful industry challenges to suspension actions as a sign that FSIS has questionable impact. *See* Johnson & Swaim, *supra* note 16, at 361–68 (summarizing three cases in which FSIS has lost

Ag-gag law supporters may counter this assumption of preemption by noting that some ag-gag laws do not directly impact daily facility operations. As discussed above, ag-gag laws vary a great deal, and those that are tailored specifically to antifraud and employment prerequisites may have a stronger case to avoid federal preemption because the FMIA and PPIA are more closely aligned with slaughter practices than personnel concerns.<sup>159</sup> For example, a court's review of an ag-gag law that explicitly exempts legitimate employees may face a more complicated review. However, federal preemption is sharper in the case of ag-gag laws that are vague and that encompass actions by legitimate employees.<sup>160</sup> It follows that a state law impacting the actions and concerns of employees exposed to FSIS violations could be viewed as "reach[ing] into the slaughterhouse's facilities and affect[ing] its daily activities."<sup>161</sup> Additionally, this opposing argument is weakened by provisions in the FMIA that provide standards for record keeping, surveillance, and mislabeling of products, which could be interpreted as broadening the Act's scope to cover state laws that impact information about slaughter facilities more generally.<sup>162</sup>

Ag-gag supporters may also argue that the last clause of the FMIA's preemption provision leaves room for debate about states legislating in this area independently.<sup>163</sup> However, this language is unclear and provides unstable grounds for an exception; the clause is unlikely to support a preemption challenge because the ag-gag laws are designed to insulate and protect facility workings from scrutiny, clearly impacting operations. While questions regarding preemption for certain ag-gag provisions are legitimate, the Supreme Court has noted that the FMIA's preemption clause "sweeps widely,"<sup>164</sup> and this will likely guide courts to find that laws impacting facility employees are within the scope of the FMIA and PPIA.<sup>165</sup>

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when industry contested suspensions). *But see id.* at 360 (stating that FSIS has enforced hundreds of actions).

159. *See supra* Part III.

160. This is the case with Missouri's proposed law. *See infra* notes 175–76 and accompanying text.

161. *Nat'l Meat Ass'n*, 132 S. Ct. at 974.

162. *See, e.g.*, FMIA, 21 U.S.C. § 642 (2006) (providing FMIA's record keeping rule, which, notably, is a possible exception to the Act's preemption clause, as states may be able to legislate in this area if they are doing so more stringently than the FMIA permits).

163. *See* 21 U.S.C. § 678 ("This chapter shall not preclude any State or Territory or the District of Columbia from making requirement or taking other action, consistent with this chapter; with respect to any other matters regulated under this chapter.").

164. *Nat'l Meat Ass'n*, 132 S. Ct. at 970.

165. The argument for federal preemption also correlates with the support for USDA's authority to promulgate protections. If FSIS's ability to add employee protections is deemed appropriate pursuant to the FMIA and PPIA, then state laws that overlap in this area



Following *National Meat Ass'n*, ag-gag laws should not thwart the effort to add whistleblower protections or measures that impact facility operations. Additionally, these measures should take place at the federal level to be effective.<sup>166</sup>

C. *FSIS Should Require Whistleblower Protections Through Employee Protection Plans*

Current conditions for inspection include verification that facilities are operating under minimum standards to ensure safe and healthy food production.<sup>167</sup> A measure should be added to these conditions that relates to antiretaliation plans for workers who expose violations to the USDA, facility management, or other outside parties.

Like the HACCP systems<sup>168</sup> and SOPs currently required of meat and poultry facilities, comprehensive EPPs should be an additional condition for federal inspection. Procedurally, these Plans could follow the organizational structure already required for SOP implementation, which will reduce the need for added infrastructure or training.<sup>169</sup> Industry-led Plans will also encourage meat and poultry producers to take a leading role in protecting their employees and to retain the independence that SOP and HACCP requirements currently allow.

The Department of Energy's (DOE's) Employee Concerns Program provides a useful model.<sup>170</sup> The DOE program includes the right of

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necessarily fall within the scope of both enabling acts. More plainly, if the USDA is able to regulate issue *x*, issue *x* clearly falls within the scope of the agency's enabling acts. *See supra* Part V.A.

166. States could still create regulations to monitor meat and poultry production for intrastate use and commerce pursuant to each state's distinct regulatory structure. *But see* HARRISON WELLFORD, *SOWING THE WIND* 5–6 (1972) (discussing the historical lag in state compliance with meat and poultry inspection norms when products did not enter interstate commerce).

167. *See supra* notes 135–36, and accompanying text.

168. *See* Hana Simon, Comment, *Food Safety Enforcement Enhancement Act of 1997: Putting Public Health Before the Meat Industry's Bottom Line*, 50 ADMIN. L. REV. 679, 696–97 (1998) (noting that provisions of this Act regarding mandatory notification should have also incorporated whistleblower protections in response to the HACCP system's lessening FSIS involvement).

169. *See* 9 C.F.R. §§ 416.11–.17 (2012) (detailing the implementation, maintenance, record keeping, and federal agency verification required of valid SOPs).

170. The DOE program was promulgated pursuant to explicit statutory requirements for employee protections. *See* 42 U.S.C. § 5851 (2006) (providing DOE employee protection mechanisms). While it is not an example of authority for the USDA regulating employee protection, the DOE program's comprehensive and industry-led model serves as a useful framework for those agencies with inherent authority to provide similar programs. *See generally* U.S. DEP'T OF ENERGY, *supra* note 51 (providing guidelines for the processing of

nuclear energy employees to express concerns, a process for notifying employees of their rights, and procedures that must be followed when employees express concerns.<sup>171</sup> In fact, the DOE has had success in implementing other alternative employee grievance procedures in the area of nuclear power,<sup>172</sup> an industry arguably comparable to the food industry in importance, inspection rate, and risk posed to society if ineffectively monitored.

Following the DOE model, EPPs should prioritize internal resolution of employee problems, but provide external avenues for employees who feel they have been or will be retaliated against for speaking out about facility violations. EPPs will be enhanced by including accountability measures, such as annual employee notification procedures, clear postings of employee rights in facilities, an employee hotline, and a grievance tracking system to monitor repeated violators.<sup>173</sup> In addition, EPPs should provide a private right of action for employees in the event that their concerns are not addressed or employers retaliate by forcing demotion, job loss, or other maltreatment.<sup>174</sup>

In the event of an employee exercising his or her right to sue through an EPP in ag-gag states, an employee might be subject to criminal charges depending on the ag-gag legislation in effect. While ag-gag law supporters claim that the charges should only impact workers who gained employment under false pretenses, the legal difference may be difficult to decipher in some cases. For example, under Missouri's proposed law,<sup>175</sup> if an employee filed a suit through her EPP private right of action guarantee because she had repeatedly witnessed a violation and was unable to seek remedy internally, she could simultaneously be charged for "willfully . . .

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concerns expressed by nuclear energy sector employees, contractors, and subcontractors).

171. U.S. DEP'T OF ENERGY, *supra* note 51.

172. See Jonathan Brock, *Full and Fair Resolution of Whistleblower Issues: The Hanford Joint Council for Resolving Employee Concerns, A Pilot ADR Project*, 51 ADMIN. L. REV. 497, 528–29 (1999) (explaining the strength and success of a joint council system in alleviating whistleblower concern at the Hanford Nuclear site); see also 42 U.S.C. § 5851 (describing the employee protection powers granted to the DOE). But see U.S. GOV'T ACCOUNTABILITY OFFICE, GAO/HEHS-97-162, NUCLEAR POWER SAFETY: INDUSTRY CONCERNS WITH FEDERAL WHISTLEBLOWER PROTECTION SYSTEM 11–15 (1997) (describing concerns of energy industry leaders with federal whistleblower programs).

173. Each of these components, along with a detailed process for addressing concerns, is included in the Department of Energy's model. See U.S. DEP'T OF ENERGY, *supra* note 51, at 4–8.

174. Cf. Richard Moberly, *Protecting Whistleblowers by Contract*, 79 U. COLO. L. REV. 975, 988 (2008) (discussing the need for employee contracts to include a private right to sue to bolster whistleblower protection beyond what tort and statutory laws currently provide).

175. S. 695, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); H. 1860, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

[p]roduc[ing] a record which reproduces an image or sound occurring at the facility.<sup>176</sup> This employee, who was not hired under false pretenses, would be committing a crime by simply documenting an industry violation because Missouri's bill does not specify who is covered by the restrictions. This conundrum is the essence of what is at stake with ag-gag laws, particularly should the laws become engrained before EPP requirements are promulgated.<sup>177</sup>

The FSIS role in the EPP scheme will be to review internal procedures, monitor EPP implementation, and support employees who are unable to address their concerns about violations internally. As with HACCP and SOP violations, facilities will be subject to corrective actions, agency verification, and inspection suspension or withdrawal.<sup>178</sup> While other methods exist to bolster the rights of workers and whistleblowers,<sup>179</sup> incorporating EPPs as a condition of federal inspection falls within FSIS's existing power, follows the trend of industry autonomy in regulations, allows FSIS oversight while adding accountability, and protects workers and the food supply. Each of these steps should be welcomed as further legislative advances are pursued.<sup>180</sup>

While there are strong arguments for large-scale food safety regulatory overhaul,<sup>181</sup> requiring whistleblower protections through EPPs across the meat and poultry production spectrum will only assist agency efforts to progress and collaborate with industry leaders. The protections will combat the dangerous precedent ag-gag laws have set and offer support to employees in one of our nation's most dangerous sectors.<sup>182</sup> If, as supporters argue, ag-gag laws are meant to prevent public misrepresentation yet preserve the rights of workers to sound the alarm

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176. S. 695, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); H. 1860, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012).

177. Ag-gag law supporters urge that the laws target only people who have sought employment with the intent of leaking harmful information, and these laws should not impact existing employees. *See, e.g.*, IOWA CODE ANN. § 717A.3A (West 2012) (focusing on criminalization for seeking employment under false pretenses). The language of other legislation does not draw this line so clearly. *See supra* Part IV.

178. *See* 9 C.F.R. § 416.15 (2012) (corrective actions for SOP violations); *id.* § 417.3 (corrective actions for HACCP violations); *id.* § 417.8 (agency verification requirement).

179. There are benefits of including antiretaliation clauses in employee contracts as another method to protect corporate whistleblowers. This may be effective for the meat and poultry industries that use employee contracts, but perhaps not for the industry workforce as a whole. *See supra* Part II.C. *See generally* Moberly, *supra* note 174, at 988 (arguing that employee contracts should provide a private right to action).

180. *See generally* Foodborne Illness Reduction Act of 2011, S. 1529, 112th Cong. (2011).

181. *See supra* note 32 and accompanying text.

182. *See supra* Part III.C.

where necessary, these protections will only strengthen this effort. As an industry that is both public and personal for consumers, meat and poultry production should be transparent, healthy, and safe, not only for consumers, but also for the workers risking everything to provide these cornerstone commodities.

### CONCLUSION

Factory farming plays a role in public safety, food integrity, the environment, the economy, animal health, and national security. Yet ag-gag laws are permitting secrecy in this industry. When documenting farming industry violations becomes a crime, the public loses its ability to monitor factory farms and farm operators can escape accountability. Requiring whistleblower protections through EPPs as an additional condition for FSIS inspection should be the first step toward preventing such injustices.

To balance the entire food safety regulatory system, the USDA should be granted the same authority that was provided to the FDA in the FSMA. Congress should also support the passage of the Foodborne Illness Reduction Act to provide comprehensive and standardized food industry whistleblower protections.<sup>183</sup> But the meat and poultry industry faces a number of immediate challenges in providing Americans with a safe food supply. Illness outbreaks, environmental hazards, and animal welfare concerns show that the current system is in dire need of additional oversight and accountability. As immediate legislative overhaul is unlikely, requiring EPPs in meat and poultry production facilities will greatly improve worker and food safety while consumers wait and work for large-scale changes.

In 2002, columnist Michael Pollan suggested a simple, yet drastic change to eradicate irresponsible factory farming: “[M]aybe all we need to do to redeem industrial animal agriculture in this country is to pass a law requiring that the steel and concrete walls of the CAFO’s and slaughterhouses be replaced with . . . glass. If there’s any new ‘right’ we need to establish, maybe it’s this one: the right to look.”<sup>184</sup> With the recent ag-gag law resurgence and the simultaneous decrease in industry transparency, Pollan’s suggestion rings true now more than ever.

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183. See generally Foodborne Illness Reduction Act of 2011, S. 1529, 112th Cong. (2011).

184. Pollan, *supra* note 72.