PUTTING A GAG ON FARM WHISTLEBLOWERS: FOOD SAFETY AND FREE SPEECH CONFRONT STATE AGRICULTURAL PROTECTIONISM

By

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According to the U.S. Centers for Disease Control and Prevention, in the United States each year forty-eight million people will be sickened from food borne illness. Of those, 128,000 will be hospitalized and three thousand will die.[1] Although the government provides food safety standards and inspectors, there are gaps in the system.[2] Whistleblowers play an important role in filling those gaps to improve food safety.[3] In 2008, a whistleblower report of animal abuse and food safety violations led to the largest beef recall in history.[4] Moreover, despite improved technology and evolving best practices, incidents of foodborne illness are still problematic.[5]

The U.S. food safety system has evolved into one in which food producers play a major role in self-identifying food contamination hazards.[6] Such a system requires individuals on farms and in food production facilities be free to investigate and report potential concerns about animal treatment or crop handling. Unfortunately, several food-producing states have pursued legislative initiatives that would punish farm whistleblowers and silence investigative tactics. These protectionist measures are the subject of this research.

This analysis first describes recent state legislation that curbs criticism of agriculture. These laws take different forms and are broadly characterized as agricultural protectionism. Part I explains state "ag-gag" statues and state agriculture product disparagement laws. This analysis reveals new protectionist trends among the states. Part II explains the federal food safety system and how protections limiting agricultural criticism contravene that food safety net. Part III analyzes the free speech concerns that agriculture protectionism spawns, beginning with a literature review of ag-gag free speech analyses. Part III.B focuses on the newest protectionist laws that criminalize lying to get a farm job and whether they violate a whistleblower's "right to lie." Part III.C evaluates First Amendment concerns with new measures mandating employee prompt disclosure of farm animal safety violations. Finally, Part IV recommends strategies and future research to improve agriculture safety and protect free speech in an evolving legal landscape.

I. AGRICULTURE PROTECTIONIST LEGISLATION

Agriculture protectionism takes various forms. The legislative initiatives have evolved and changed over time in response to public criticism, especially about infringed free speech rights, but also in response to food safety concerns that can get suppressed when unhealthy farm practices are protected from scrutiny. The result is a complex legal landscape that this section navigates.

A. State Ag-Gag Laws[7]

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Journalist Mark Bittman coined the term "ag-gag" in 2011[8] for legislation that heightens legal risks for undercover reporters, agriculture workers, or citizen bystanders who wish to document and report instances of animal abuse and food safety violations. The label stuck in traditional journalism and popular media.[9] Nevertheless, these legislative initiatives pre-date Bittman's label significantly. Since 1990, seven states have enacted so-called "ag-gag" laws.[10] Additionally, numerous other states have considered similar legislation at some point.[11]

The evolving efforts of both ag-gag opponents and those who would protect farms from scrutiny have made recognizing and grouping ag-gag legislation a dynamic process. For purposes of this analysis, a definition of what makes a law an ag-gag statute, as opposed to some other agricultural protectionism, is useful. This article defines ag-gag laws as any that would chill good faith undercover investigating or reporting of abuse or safety violations by an employee or citizen at agricultural facilities. Prior authors have suggested categorization schemes for ag-gag laws, and this paper modifies those classifications.[12] Thus far, ag-gag legislation criminalizes one or more of four categories of behavior: (1) recording, photographing, videotaping, or audio-recording at agricultural facilities [hereinafter "Category One - No Recording"]; (2) possession or distribution of recordings made on agricultural facilities[13] [hereinafter "Category Two - No Distributing"]; (3) dishonesty while applying for employment in order to gain access to a facility [hereinafter "Category Three - No Lying"]; and (4) failure to report recorded abuse and/or relinquish recordings within an extremely short timeframe [hereinafter "Category Four - Mandatory Disclosure"]. Some legislation has additional components, but all the ag-gag laws and bills discussed herein will fit within one or more of these categories.

The enacted legislation came in two waves. The first was from 1990-1991, when Montana, Kansas, and North Dakota passed ag-gag bills.[14] The second wave began in 2012 in Iowa, Utah, and Missouri and continued into 2014 with the passage of Idaho's law.[15] As discussed next, these protectionist waves have different characteristics, with the more recent emphasizing new ways to chill whistleblowing and undercover reporting.[16] Public outcry against "second generation" ag-gag legislation has been significant,[17] in part because of free-speech implications, but also because of the glaring begged question: what do food producers have to hide?[18]

Current, failed, and pending ag-gag legislation, related statutes and torts, and ag-gag litigation are discussed next.

1. Enacted Legislation

Seven states have ag-gag bills on the books. Three bills were passed in 1990-1991, three more were passed in 2012, and one more in 2014. The newest are more similar to one another than to the early statutes, so they are discussed below based on passage date.

a. The Early Statutes: 1990-1991

In 1990, Kansas became the first state to pass an ag-gag bill.[19] Most of the "Farm Animal and Field Crop and Research Facilities Protection Act"[20] concerns trespass and harm to property at "animal facilit[ies]" and properties with field crops. A portion of it, however, fits within ag-gag Category One - No Recording.[21] The statute prohibits entering an animal facility,

with intent to damage the enterprise and without the owner's consent, "to take pictures by photograph, video camera or by any other means."[22]

North Dakota passed its law in 1991.[23] Like the Kansas law, the bulk of North Dakota's act prohibits trespass and damage to or theft of property at animal facilities. Like Kansas, North Dakota also has a Category One - No Recording provision.[24] The statute proscribes those without the consent of the animal facility owners from "[e]nter[ing] an animal facility and us[ing] or attempt[ing] to use a camera, video recorder, or any other video or audio recording equipment."[25] Unlike the Kansas version,[26] no specific intent is required for North Dakota's crime.[27] Conceivably, a person could be charged for taking a picture of a friend on a North Dakota farm if he or she failed to get permission first.

Montana passed the Farm Animal and Research Facility Protection Act[28] in 1991.[29] Like the Kansas and North Dakota legislation, the majority of Montana's act is concerned with theft or property damage at animal facilities. It also has a provision that falls squarely within Category One - No Recording.[30] The scope of Montana's ag-gag law is narrower, however. Like Kansas, Montana requires intent to damage the enterprise, but further requires an intent to commit criminal defamation. Criminal defamation occurs when a person communicates defamatory matter, which exposes the victim to ridicule, disgrace, or injury to his or her business, to a third party with the knowledge of its defamatory character and without the third party's consent.[31] Communication that is otherwise defamatory is justified, however, if "the defamatory matter is true [or if] the communication consists of fair comment made in good faith with respect to persons participating in matters of public concern."[32] Accordingly, this robust intent requirement should only apply to those reporters who intentionally misrepresent the activities at a facility.[33] The criminal defamation intent requirement makes the Montana law the most narrowly tailored of all the ag-gag laws.[34]

b. The 2012-2014 Statutes

Iowa ushered in the next wave of ag-gag legislation, which expanded from Category One - No Recording bills to multiple ag-gag categories. Iowa amended its existing "Offenses Relating to Agricultural Production" statutes[35] with a new crime entitled "Agriculture Production Facility Fraud."[36] Similar to the other statutes discussed thus far, portions of "Offenses Relating to Agricultural Production" address trespass and property damage at animal and crop operation facilities.[37] The addition of "Agriculture Production Facility Fraud," however, introduced Category Three - No Lying.[38] Iowa's law criminalizes (1) obtaining access to an agricultural production facility under false pretenses,[39] and (2) lying on a job application or agreement "with an intent to commit an act not authorized by the owner of the agricultural production facility, knowing that the act is not authorized."[40]

Just eighteen days after Iowa's ag-gag bill was signed into law, Utah enacted its new ag-gag crime, "Agricultural Operation Interference."[41] Utah's bill is part of its criminal code for property destruction.[42] It is a Category One - No Recording and Category Three - No Lying bill. The Utah law criminalizes recording, without permission, images or sounds at agriculture production facilities[43] and criminalizes obtaining access to a facility under false pretenses.[44] Further, the law criminalizes applying for employment at an agricultural operation with the intent to create a recording when the applicant knows such recordings are prohibited, yet still creates one.[45] Thus, the law covers the undercover reporter who applies for a job expecting to record

wrongdoing and the good faith employee who discovers wrongdoing at work and decides to document it and blow the whistle.

Later in 2012, Missouri passed its own Category Four - Mandatory Disclosure bill.[46] It makes it illegal for a "farm animal professional"[47] to fail to turn over to authorities within twenty-four hours any recordings of perceived animal abuse or neglect.[48] Additionally, Missouri's bill makes any intentional splicing, editing, or manipulation of the recording prior to submission a crime.[49]

Although several ag-gag bills were proposed in 2013, none became law.[50] Idaho broke the reprieve in February 2014 when it passed a Category One - No Recording and Category Three - No Lying law.[51] Among other things, "Interference with Agricultural Production"[52] makes it illegal to "obtain employment with an agricultural production facility by force, threat, or misrepresentation with the intent to cause economic or other injury to the facility's owners, . . . business interests or customers."[53] It also criminalizes entering an agricultural facility and, without the owner's express consent, making "audio or visual recordings of the conduct of an agricultural production facility's operations."[54] Although the penalty is only a misdemeanor, it could carry a year of jail time.[55] Under this law a good faith employee could obtain employment without false pretenses, make a clandestine recording of wrongdoing on the premises and be subject to imprisonment.

2. Failed Bills of 2013

In 2013, eleven states proposed ag-gag bills — some with multiple proposals — but none passed.[56] Like the 2012-2014 statutes, Category Three - No Lying and Category Four - Mandatory Disclosure bills showed up repeatedly. The most notable of these legislative attempts are highlighted here because they reflect how pervasive and creative the ag-gag agenda has been.[57]

The Arkansas Senate put forward two ag-gag bills in 2013.[58] One would have criminalized conducting an animal investigation by anyone who was not a certified law enforcement officer.[59] While this kind of law does not fit into any ag-gag category listed above, it would have criminalized citizen-reporting of incidents concerning animals. The bill eventually passed but without the ag-gag portion included.[60]

Three ag-gag bills were contemplated in the Indiana legislature in 2013. All were Category One - No Recording bills because they sought to criminalize photographing or recording images at an agriculture facility.[61] One, however, would have further required the Indiana Board of Animal Health to register people convicted of crimes concerning an agricultural operation, akin to a registered sex offender list.[62] Arguably, such a registry would further chill would-be undercover reporters or concerned employees from making recordings because the repercussions for being on the registry are unclear. None of the Indiana bills passed.[63]

Nebraska Legislative Bill 204 includes Category Three - No Lying and Category Four - Mandatory Disclosure provisions.[64] The bill would make it illegal to make a false statement or representation in an employment application or agreement with an animal facility "with the intent of damaging or interfering with the operations of an animal facility."[65] Economic damages include lost profits,[66] and if economic damages exceed ten thousand dollars, the violator could be charged with a felony.[67] Additionally, the bill has a reporting requirement that is both a carrot and a stick: failing to report suspected livestock abuse or neglect within twenty-

four hours is a class III misdemeanor;[68] reporting within twenty-four hours, however, makes the reporter "immune from liability except for false statements of fact made with malicious intent."[69] Although Legislative Bill 204 did not pass in 2013,[70] it was carried over into the 2014 term.[71]

In January 2013, New Hampshire considered House Bill 110,[72] which contains a Category Four - Mandatory Disclosure provision.[73] Although the bill did not pass in 2013, it has been carried into the 2014 term for further consideration.[74]

New Mexico's senate introduced "The Livestock Operation Interference Act" in February 2013.[75] It contained Category One - No Recording and Category Three - No Lying ag-gag provisions.[76] Notably, under this bill just applying for a job with the intent to create a recording would have been criminal.[77] The applicant need not lie on his or her job application, nor ever actually create a recording, to violate this proposed law. The bill died at the end of the session.[78]

North Carolina Senate Bill 648 would have created the criminal offense of employment fraud.[79] Despite mimicking the ag-gag Category Three and Category Four scheme, this bill is not specific to agricultural facilities. It would have criminalized the act of gaining employment by giving false or incomplete application information when the purpose of gaining access to the place of employment is to create a photo, video, or audio recording within the facility.[80] It went on to require that any recording made must be turned over to local law enforcement within twenty-four hours.[81] It died when the session ended in July 2013.[82]

In February 2013 the Pennsylvania General Assembly introduced House Bill 683, which would criminalize "interference with agricultural operations."[83] This is a comprehensive Category One - No Recording, Category Two - No Distributing, and Category Three - No Lying bill. The bill includes unique ag-gag provisions as well: a person would interfere with an agricultural operation when she (without owner consent) "uploads, downloads, transfers or otherwise sends recorded images of, or sound from, the agricultural operations over the Internet in any medium,"[84] or when she "[e]nters an agricultural operation with the intent to obtain unlawful possession of, or access to, any information, data or article representing any agricultural activity or farming which is conducted or takes place at the agricultural operation."[85] It is unclear what would constitute entering an operation with the "intent to obtain unlawful . . . access to . . . information." Arguably, that could be a separate charge against an undercover reporter who did not record anything at the facility but chose to write or speak about his or her impressions of the operation. Additionally, because it is unclear what would render access to information "unlawful," this provision could be charged against employees who did not intend to report on an operation when they took a job, but at some point formed the intention to use information learned on the job to whistle-blow on animal welfare or food safety violations. Pennsylvania allows for carryover of bills from odd-numbered years to even-numbered years,[86] but it is unclear whether House Bill 683 will be debated again in 2014.[87] It was referred to the House Judiciary Committee in February 2013, and no action has been taken on the bill since then.[88]

Tennessee's legislature passed a Category Four - Mandatory Disclosure bill that would have amended the state's animal cruelty statute to criminalize failure to report and surrender to law enforcement any recordings of livestock abuse within twenty-four hours.[89] The governor vetoed the bill, however, explaining:

> First, the Attorney General says the law is constitutionally suspect. Second, it appears to repeal parts of Tennessee's Shield Law without saying so. . . . Third, there are concerns from some district attorneys that the act actually makes it more

difficult to prosecute animal cruelty cases, which would be an unintended consequence.[90]

Vermont's senate introduced a bill to add the offense of "Agriculture Facility Fraud."[91] If passed, this Category Three - No Lying bill would criminalize gaining access to an agricultural facility by false pretenses or by making a false representation on a job application when a person intends to commit an act that the person knows is not authorized by the facility's owner.[92] No action had been taken on the proposal since it was referred to the Committee on Agriculture in March 2013.[93] Vermont's legislative session is two years long, so bills introduced in 2013 roll into 2014.[94]

3. On the Horizon: Legislative Outlook for 2014

As discussed above, Nebraska, New Hampshire, Pennsylvania and Vermont, may still pass the ag-gag bills introduced in their legislatures in 2013. Additionally, although the governor vetoed Tennessee's 2013 bill, proponents of the bill in both the house and senate pledged to rewrite and reintroduce it in 2014.[95] There has been news, too, of a representative in Colorado intending to sponsor a Category Four - Mandatory Disclosure bill in Colorado that would make it a misdemeanor to fail to report animal abuse within twenty-four hours.[96] Arizona contemplated and then rejected a Category Four - Mandatory Disclosure bill in its 2014 session.[97] Kentucky senators amended an animal welfare bill to add the offense of agricultural operation interference, which includes a merged Category One - No Recording and Category Three - No Lying ag-gag bill.[98]

Indiana's senate proposed an ag-gag law for the 2014 session that is both unique and nearly unbounded.[99] It would have amended the state's property crimes to allow agricultural operations to post a notice that lists "prohibited acts that may compromise the agricultural operation's trade secrets or operations."[100] The proposal would have criminalized any violations of those private, farm-by-farm notices.[101] While this bill makes no mention of prohibited recordings, distribution of recordings, employment fraud, or mandatory disclosure requirements, it could fit all four ag-gag categories. Indeed, it had the potential to be the most sweeping ag-gag bill yet because it vests agricultural operations with the power to create felonies themselves. The only limit on what acts could be prohibited by notice (and thus enforced with a felony charge) is that prohibited acts be somehow linked to "compromis[ing] the agricultural operation's trade secrets or operations."[102] Conceivably, an agricultural operation could prohibit anyone entering the premises from communicating to anyone (ever) any information learned or instances observed on the facility. Such a prohibition could serve to protect the operation's trade secrets or operations from being compromised. It could also constitute the most suffocating ag-gag bill yet on the books.[103] The protectionist language did not make it into subsequent versions of the bill and, thus, is not currently on a path to become law.[104] The attempt, however, reflects the creativity of the agricultural legislative agenda and the willingness of some lawmakers to protect agriculture interests.

4. Other Related Statutes and Torts

Some state statutes do not include ag-gag categories discussed above, but still provide agriculture protection.[105] For example, more than half the states have laws that heighten

penalties for fraud, property damage and/or trespass when it involves an animal or agricultural facility.[106] These laws typically provide additional deterrence for crimes against agribusiness. Additionally, at least eight states have enacted animal terrorism statutes.[107] Like the ag-gag statutes discussed above, these laws tend to target the activities of animal rights activists. The activities they limit, however, include vandalizing property and releasing laboratory animals rather than airing dirty laundry.[108]

Relatedly, states already have torts and crimes that can be (and have been) used to challenge the kinds of behavior ag-gag laws target. Ag-gag proponents "have stressed that the underlying goal of the laws is to prevent animal-rights activists from infiltrating facilities to capture footage that they will then present in a manner that is untruthful and harmful to the farming industry."[109] Nevertheless, agricultural facilities already have recourse against that kind of behavior. States have actions for defamation, breach of loyalty, willful misrepresentation, tortious interference, intrusion, and unfair trade practices. Indeed, reporters have been found liable under those legal theories in the performance of their reporting.[110] Accordingly, ag-gag laws criminalize behavior that is already illegal or actionable[111] and move the bulk of enforcement from torts to crimes or hybrid crime-torts, shifting at least some of the cost of enforcement from alleged victims to all taxpayers.[112] This shift confirms that lawmakers in these states are willing to provide protection for agriculture that other economic sectors do not enjoy.

5. Litigation

After more than two decades, first generation ag-gag laws have no documented litigation. Similarly, there is no record of litigation over Iowa and Missouri's second-generation bills. Utah prosecuted one person who filmed a slaughterhouse worker pushing a cow with a bulldozer.[113] The charges were dropped because the defendant was standing on public property adjacent to the facility when she made the recording. Utah's law only covers recording while on the premises of the facility.[114] Thereafter, she and others filed a civil rights complaint challenging the Utah law.[115]

Idaho has yet to prosecute anyone under its new statute, but activists have already sued the state to enjoin enforcement of the Idaho law.[116] The district courts in Utah and Idaho are in separate federal circuits, meaning the Ninth and Tenth federal appeals circuits may be deciding the constitutionality of ag-gag laws simultaneously.

Finally, there is one indication that ag-gag laws could influence criminal prosecutions in states without such laws on their books. In Colorado, a state without an ag-gag law, an undercover reporter was prosecuted for animal cruelty in November 2013 when she turned over video footage of animal abuse that she filmed while working for Quanah Cattle Company from mid-July through September.[117] The reporter, Taylor Radig, was affiliated with the organization Compassion Over Killing. In her two months' employment, she filmed enough evidence of abuse that three employees were fired and charged with multiple counts of cruelty after Compassion over Killing published the footage.[118] The Weld County Sheriff's Office explained that Radig "may have been criminally negligent for failing to turn over the videotapes to law enforcement in a timely manner, under Colorado Revised Statutes 18-9-201 and 18-9-202."[119] Those statutes, however, reveal no express or implied timely reporting requirements.[120] Ultimately, the county dropped the charges against Radig,[121] but the prosecution clearly evoked the Category Four – Mandatory Disclosure approach despite having no such law in Colorado.

The ag-gag laws and proposals discussed above are one variation on the agriculture protectionist theme that state lawmakers have pursued in the last quarter century. Another variation is agricultural product disparagement statues, also known as food libel or veggie libel laws. These are discussed next.

B. Food Libel Laws

During the 1990s, twelve states passed civil food libel laws to address perceived shortcomings in the common law when public comments about food safety devastate agriculture markets.[122] These laws were passed after Washington apple growers failed in their common law product disparagement case against CBS, broadcaster of 60 Minutes.[123]

In 1989, 60 Minutes aired a segment about health risks of pesticides on fruit. After the show aired, sales of apples and apple products plummeted.[124] Washington state apple growers unsuccessfully sued CBS for common law product disparagement. The trial court granted summary judgment because plaintiffs failed to prove any falsity in the broadcast.[125] The apple growers had asserted that a jury could infer falsity from the overall disparaging message of the show even if specific statements were not false.[126] On appeal, the Ninth Circuit found no basis in defamation precedents for plaintiffs' attempt to prove an implied false message from otherwise true statements.[127]

After the negative outcome in the 60 Minutes case, the agriculture industry lobbied state legislatures for statutory protection from disparagement that would be easier to prove than common law trade libel.[128] The resulting food libel statutes have been widely criticized as unconstitutional infringements on free speech.[129]

Currently, the South Dakota food libel statute is at issue in a case by Beef Products, Inc. (BPI) against the ABC television network and others.[130] On March 7, 2012, ABC broadcast a segment on its evening news program about the product which BPI calls "lean finely textured beef" (LFTB). Thereafter, ABC broadcast eleven follow up reports and numerous online communications about the product and its manufacturer.[131] In these reports, ABC personalities repeatedly referred to LFTB as "pink slime," a term originally coined by USDA microbiologist Gerald Zirnstein, who appeared in the original ABC segment and is also a defendant in the case.[132]

The fallout against BPI's product from the "pink slime" coverage was fast and furious. BPI lost eighty percent of its sales in twenty-eight days and closed three of its four plants.[133] All but three states participating in the USDA National School Lunch Program opted to order ground beef that does not contain LFTB.[134] BPI sued ABC, its on-air personalities, and the USDA employees featured in the ABC broadcasts for $1.2 billion, alleging a violation of South Dakota's Agricultural Food Products Disparagement Act, among other claims.[135] BPI contends that Defendants' statements implied that LFTB was not safe for consumption.[136]

The South Dakota statutory definition of disparagement requires several proofs regarding the allegedly disparaging dissemination: falsity of the dissemination, knowledge of the falsity by the disseminator, and that the dissemination expressly or impliedly impugns the safety of the food for public consumption.[137] The South Dakota statute limits the scope of disparagement claims to safety, not any other basis on which food products might be disparaged (such as environmental impact or nutrition).

ABC defends that its communications about LFTB do not meet the statutory definition of disparagement because they never disputed the safety of the product.[138] In fact, ABC's various

communications repeatedly stated that the BPI product was safe.[139] Nevertheless, the statutory disparagement claim may be most salient in such a case when the expressed communications do not disparage, but the overall message is still extremely negative. The South Dakota statute expressly provides for disparagement by implication.[140] In other words, ABC could state that the product is safe, but still be liable for disparagement if other aspects of its productions imply the opposite. According to BPI, calling its product "slime" 137 times is one example of how ABC implied LFTB was not safe to eat. "Defendants' statements implied that LFTB was not safe for public consumption because it was a noxious, repulsive, and filthy fluid."[141]

Claims by implication were exactly what lawmakers had in mind when enacting these laws following CBS's victory over the apple growers. Nevertheless, BPI's allegations of implied disparagement still differ significantly from those against CBS. In 60 Minutes, the court rejected plaintiffs' attempts to imply falsity based on an overall negative or disparaging theme of the broadcast because there were no proven factual misstatements.[142] In all state food libel laws, including South Dakota's, falsity still must be proved. Only then can disparagement of safety be implied. In other words, all the foregoing BPI claims of implied disparagement about LFTB's safety still must be premised on ABC's false statements. Falsity will not be implied, just as the court would not imply falsity against CBS when its statements were objectively true.

No matter how disparaging the word "slime" may sound to the average hearer, if it is not proved to be objectively false, it will not matter if the average hearer implies a negative safety message from it. [143] Nevertheless, a jury will get the opportunity to make that decision. Most of BPI's claims were held over for trial.[144]

II. FOOD SAFETY SYSTEM

The United States Department of Agriculture (USDA) regulates the production of meat, poultry, and eggs.[145] The debate about protectionism embodied in state ag-gag laws has focused on food products governed by the USDA because surreptitious videos that spawned those laws usually involved beef, pork or poultry production facilities.[146] Nevertheless, mass production and distribution of fresh fruits and vegetables are a major source of food safety concerns.[147] Fruits, nuts, dairy, seafood, and vegetables are within the scope of Food and Drug Administration (FDA).[148] In 2011, the Food Safety Modernization Act (FSMA)[149] amended the FDA's authority to regulate food safety. [150] The FSMA, however, specifically states that nothing in it shall limit the authority of the Secretary of Agriculture[151] under the Federal Meat Inspection Act,[152] the Poultry Products Inspection Act,[153] or the Egg Products Inspection Act.[154]

The competing USDA and FDA food safety systems, including whistleblower protection (or lack thereof) in each scheme, are discussed next.

A. USDA Safety Approach

Of the numerous USDA divisions that share some responsibility for food safety,[155] FSIS has been characterized as the most important.[156] FSIS is charged with ensuring that the nation's commercial supply of meat, poultry, and eggs is safe, wholesome, and correctly labeled and packaged.[157] FSIS executes USDA's statutory mandate to examine animals used in commerce, both before and after slaughter.[158]

To carry out its authority, FSIS inspectors are expected to have complete, unfettered access to both food processing plants and their products.[159] Inspectors can order any animal or

carcass removed if unfit for human consumption.[160] Failure to comply can result in an inspector revoking the facility's inspection privileges, effectively shutting the operation down.[161]

Historically, inspection was done using sight, touch, and smell to detect livestock or food product disease or other contamination.[162] Inspectors can see and require facilities to rectify fecal matter (a carrier for the microbes and pathogens in food) on animals and carcasses.[163] But external inspections are inadequate to address microbial infestations, such as E-coli.[164] Accordingly, in 1996, the USDA implemented a significant overhaul in its inspection regiment to a Hazard Analysis Critical Control Point (HACCP)[165] System.

HACCP is a "systematic approach to the identification, evaluation, and control of food safety hazards."[166] HACCP has been characterized as "management-based regulation"[167] in which producers self-identify potential risks throughout food processing and establish minimal values at which the risks can be controlled or eliminated at critical control points.[168] Instead of FSIS inspectors looking for contamination and removing the defective product, "HACCP takes a preventative approach by requiring the placement of controls on conditions that pose threats to contamination throughout the process."[169] The FSIS inspector now only evaluates the plan and inspects the documentation generated at the critical points, not the food. Food safety tasks at critical control points have shifted from FSIS inspectors to the facilities' own employees.[170]

In such a system, transparency and accountability within the food producing operation are critical to safety. Unfortunately, the HACCP system is not a model of free flowing information between stakeholders. Management can effectively decide to preclude inspection of unsanitary production processes because they designate their own critical control points.[171] Shortly after HACCP implementation, one USDA report stated that meat facilities were "manipulating the new system to limit interference from inspectors."[172]

If reporting on the procedures in the plan is based on anything less than full disclosure, the resulting FSIS approval will be based on flawed assumptions. "Garbage in; garbage out" is hardly a standard for food safety, but will be the result if those closest to internal operations are constrained from exposing the truth. When protectionist laws hamper whistleblowers or investigative reporters, the HACCP process is undermined. As such, state protectionist statutes that stifle whistleblowing and investigative reporting are antithetical to the current USDA safety scheme.

Inherent shortcomings in USDA's current safety system have led to proposed changes. One such revision, the Safe Meat and Poultry Act of 2013, not only specifies new requirements for safe meat handling, but also includes protection for whistleblowers. The bill would protect employees who are "discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against" for providing information to a supervisor or government agency about an act that the person reasonably believes constitutes a violation of food safety laws, rules or regulations, or that constitutes a threat to the public health.[173] The bill is still pending.[174] The preemptive potential of such a provision in USDA safety schemes is discussed below in Part II. C.

B. FDA Food Safety Under the FSMA

Under its original enabling legislation, the FDA exercised its food safety authority by supporting industry self-regulation and investigating safety problems after the fact. For example, in 2006, an E. coli outbreak resulted in 205 confirmed illnesses and three deaths across twenty-six

states.[175] Afterward, the FDA and others[176] traced the outbreak to Dole brand spinach and contamination from one field in California.[177]

At that time, the FDA's quality-control guidelines for fresh produce addressed concerns that could potentially expose produce to pathogens: water sources, manure, field sanitation, worker hygiene, facilities sanitation, and transportation.[178] The International Fresh Produce Association developed these safety guidelines in 1998.[179] Thus, FDA guided industry regarding safety practices, using industries' own self-regulatory standards. The government agency lacked all authority to mandate its own preventative safety measures prior to 2011.

In the face of increasing food contamination incidents,[180] however, the 2011 FSMA created several new duties and powers in the FDA. For the first time, the FDA is required to mandate comprehensive safety standards for production and handling of raw fruits and vegetables.[181] Additionally, rather than the voluntary recalls of the past, FSMA gives the FDA new mandatory recall authority for food under its jurisdiction.[182]

Under the FSMA, the FDA will partner with state and local officials and the USDA to coordinate federal, state, territorial, tribal, and local food safety programs.[183] In other words, the statute expressly recognizes the importance of a state and local safety net to protect national food safety interests. State protectionist legislation that stifles open dialogue about safety concerns seems antithetical to this FSMA safety scheme.

Additionally, under FSMA, importers of food products from foreign suppliers have the primary role in verifying the safety of the imported food from those foreign suppliers.[184] Such a system gives private parties an important role in self-governance of the food safety system.[185] Again, state protectionism that strips private parties of their ability to monitor these food importers as they increasingly self-govern seems counter-intuitive to safety.

The importance of employee reporting of safety violations is reflected in the FSMA's express whistleblower protection scheme. If an employee reports a potential statutory violation, testifies about it, or refuses to participate in it on the job,[186] the FMSA prohibits any covered employer from firing or otherwise discriminating against that whistleblower "with respect to compensation, terms, conditions, or privileges of employment."[187]

Nothing in this whistleblower protection preempts any other employment protection provided in federal or state law, nor limits rights under law or collective bargaining agreements.[188] At the same time, this FSMA whistleblower protection does not expressly preempt a food producer under FDA jurisdiction from pursuing legal recourse outside of employment rights or benefits, such as a civil food libel claim, or a criminal charge under state ag-gag laws.[189] Preemption of state ag-gag laws by federal food safety statutes is discussed next.

C. Do Federal Food Safety Laws Preempt State Agricultural Protectionist Laws?

State protectionist legislation that suppresses negative information coming out of farms would seem to directly contravene federal food safety schemes. Nevertheless, one commentator analyzed the whistleblower protection in FSMA to conclude that it does not expressly or impliedly preempt retaliatory civil food libel claims against food safety whistleblowers.[190] Since that time, OSHA has enacted regulations to implement FSMA whistleblower protection[191] that are considered broad in their scope.[192] Still, the conclusion that the FSMA does not preempt state agricultural protectionism may be even stronger when applied to newer state ag-gag laws. First and foremost, in all states, Category One through Four ag-gag protections establish criminal violations. FSMA prohibits retaliatory discharge or other adverse employment actions by food-

producing employers against their employees. These whistleblower protections clearly do not reach state prosecutors who pursue criminal charges against undercover whistleblowers. Thus, while the employer that fires a whistleblower may violate the FSMA protections, the prosecutor who pursues an ag-gag criminal prosecution based on the same behavior is outside the scope of FSMA protection.[193] The same argument would apply to any alleged preemption under the proposed USDA whistleblower provisions in the 2013 Safe Meat and Poultry Act.[194]

At best, then, federal preemption can only be a defense in an ag-gag prosecution, namely that federal food safety law impliedly preempts any state protectionism that shields food safety violators from scrutiny.[195] As was noted above in Parts II A & B, secrecy is contraindicated under HACCP, which is now the safety approach of both USDA and FDA. Nevertheless, a successful defense of implied preemption based on a general need for openness in the food safety systems seems unlikely in a state ag-gag prosecution.[196] This defense would be heard by a state court in the ag-gag criminal case (unless an appeal made it to the U.S. Supreme Court) and would have working against it the presumption against federal preemption.[197]

Further highlighting the apparent weakness of current federal law to preempt state agricultural protectionism, federal lawmakers recently attempted at add express federal protectionism in the federal farm bill. The farm bill is omnibus legislation[198] passed once every five to seven years that sets the country's agricultural and food security agenda.[199] The latest version, the Agriculture Act of 2014, became law February 7, 2014.[200] One provision that did not make it into the final law nevertheless is instructive on current federal and state tensions regarding agriculture policy. Contrary to its name, the Protection of Interstate Commerce Act (PICA) is not a standalone act, but a section of H.R. 2642.[201] It would have preempted all state agriculture laws that required tougher safety or animal treatment standards than ones set by federal law.[202] Arguably, PICA represented an unprecedented extension of the Commerce Power into areas traditionally controlled by states.[203] The National Conference of State Legislatures opposed the measure, calling it a violation of the Tenth Amendment that would hinder states' abilities to protect their citizens from livestock disease and invasive pests and to establish quality standards for agricultural products and ensure food safety.[204]

The impetus for PICA was California's Proposition 2.[205] Passed by voters in 2008, this law requires that cages for veal calves, pregnant sows, and egg-laying hens be large enough for the animals to lie down, stand up, fully extend their limbs and turn around freely. In the wake of this successful voter initiative, and to protect California egg producers from price competition from out-of-state egg producers not operating under comparable mandates, California legislators passed a 2009 law banning the in-state sale of any eggs not produced under conditions required by the California cage law.[206] In other words, the California market is now closed to all sellers who do not comply with California's cage mandate. Steve King, PICA's sponsor, represents Iowa, the largest egg producing state in the U.S.[207]

Although PICA did not make it into the 2014 farm bill, vestiges of it continue to percolate around the California egg law. The attorney general of Missouri initiated an action against the California law, alleging it violates the rights of egg producers outside California to sell their eggs in interstate commerce, under the U.S. Commerce Power.[208] Subsequently, officials representing Iowa, Nebraska, Kentucky, Oklahoma, and Alabama joined the suit.[209] Thus, proponents of agricultural protectionism are moving from the statehouse to the courthouse now to attack food safety and animal rights initiatives.[210]

For federal food safety policy to trump state agricultural protectionism, express federal preemption will be needed.[211] For now, however, a defense against state ag-gag laws under the

First Amendment free speech right could be a stronger challenge to state agriculture protectionism, as is discussed next.

III. FIRST AMENDMENT ISSUES IN AGRICULTURAL PROTECTIONISM

The First Amendment states, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[212] State governments are bound by the First Amendment under the Fourteenth Amendment.[213] The free speech issues inherent in early food libel laws have been discussed at length.[214] Part III begins with a review of the literature critiquing the new generation of ag-gag laws and the free speech concerns they engender. Next, this Part expands those analyses by explaining some different free speech issues not previously scrutinized in the ag-gag literature, relative to Category Three – No Lying laws and compelled disclosure under Category Four – Mandatory Reporting laws. Throughout, this Part addresses the chilling effects on speech that all categories of ag-gag laws represent.

A. Review of Ag-Gag Free Speech Analyses

Several authors have analyzed ag-gag laws through the lens of the First Amendment.[215] In those analyses, Categories One and Two (No Recording and No Distributing) have received the bulk of the attention. Category Three - No Lying has received scant analysis. Category Four - Mandatory Disclosure has yet to be discussed at length. The authors differ in the organization of their analyses, the content, and even in some of their conclusions. This is not surprising. As noted by distinguished constitutional scholar Erwin Chemerinsky, there are many First Amendment doctrines, yet "no prescribed order for analysis."[216]

This review categorizes the authors' arguments under several traditional free speech approaches such as Content-Based Restrictions, Prior Restraints and Expressive Conduct. Under each of these theories, the commentators apply strict scrutiny or intermediate scrutiny to the various ag-gag categories to determine their constitutionality.[217] Finally, this review looks at several miscellaneous free speech concepts as the commentators have applied them to different categories of ag-gag laws.

1. Ag-gag Laws as Content-Based Restrictions

Landfried discusses the rules for content-based restrictions on speech.[218] When a law constitutes a content-based speech restriction, the court will apply strict scrutiny to determine if the law is constitutional, versus intermediate scrutiny when a law imposes a time, manner, or place restriction.[219] She argues that Categories One and Two (No Recording and No Distributing) are likely to be struck down as content-based since they restrict speech about a specific subject matter, agricultural activities.[220] She adds, however, that even if states successfully argued that Category One laws were content-neutral restrictions because they merely restricted the place (agricultural facilities), Category One - No Recording laws still may not survive intermediate scrutiny. "They do not leave open any alternative method of communicating the same information."[221] Moreover, states will have difficulty articulating any compelling governmental interest in Categories One and Two laws, when juxtaposed with the compelling public interest in exposing animal cruelty and food safety violations.[222]

Adam's content-based restrictions analysis for Category One laws reaches the same

conclusion under strict scrutiny.[223] He argues Category One laws are content-based restrictions on speech because "'ag-gag' laws will punish undercover animal activists for taking photographs or video on factory farms, instead of punishing anyone who records on private property without permission."[224] Without further analysis, he concludes that Category One laws will not survive strict scrutiny.[225]

Apparently focusing on Category One and Two laws, Kingery also argues they are unconstitutional because they impose content-based restrictions. "The Ag Gag laws are not content-neutral because they specifically ban agricultural-based content in undercover videos."[226] Under strict scrutiny, the protectionist legislation meets neither the "least restrictive means" test nor the "narrowly tailored standard."[227] She emphasizes that Category One and Two laws restricting possession and distribution are on par with prohibitions on child pornography, which have been upheld.[228] Unlike child pornography, however, the Supreme Court has rejected depictions of animal cruelty as unprotected speech (despite "simultaneously admitting to the illegality of the act of animal cruelty").[229]

2. Prior Restraints

Adam explains that a prior restraint is a crime or tort that serves to regulate speech in advance of an offense.[230] While not unconstitutional per se, the Supreme Court has held that "'prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights,'" and that "[t]here are very few exceptions to the prior-restraint doctrine."[231] Adam argues that Category Two - No Distributing laws are particularly susceptible to violating the general prohibition on prior restraints.[232] Landfried agrees. Category Two -No Distributing ag-gag laws "are clear examples of unconstitutional prior-restraint laws" and would not survive constitutional review on that ground.[233]

3. Speech versus Expressive Conduct

Adam provides a thorough discussion of what courts have held to constitute "speech."[234] Freedom of speech has extended to more than mere utterances; it has been interpreted to apply to "communication[s]" and "expressive conduct."[235] To determine whether something constitutes "speech," courts consider whether (1) an "intent to convey a particularized message along with (2) a strong likelihood that those viewing it will understand the message."[236] Adam notes that courts have applied the two pronged speech test to photography and video recordings and have determined that some photographs and recordings meet that definition.[237] Regarding "the undercover investigations targeted by 'ag-gag' laws, the investigators' conduct is surely an attempt to communicate a message to others."[238] Further, "the public is seemingly interested in the message, as evidenced by the widespread media attention and public outcry stemming from undercover investigations."[239] Thus, he concludes, the videos targeted by Category One -No Recording laws are likely to be regarded as "speech" for purposes of applying First Amendment protections such as prohibitions on content-based restrictions and prior restraints, discussed above.[240]

By contrast, Bollard asserts that ag-gag laws would not be analyzed as a direct restriction on speech because "no case appears to have recognized a First Amendment right to film without authorization on private property, [a]nd the Supreme Court has analyzed filming and photography restrictions under the framework of newsgathering.[241] Nevertheless, Bollard argues

that ag-gag laws should at least receive intermediate scrutiny because "their enforcement will affect conduct 'intimately related' to expression," [242] and the Supreme Court applies intermediate scrutiny under those circumstances. Newsgathering, he argues, is conduct "intimately related to expression,"[243] and its suppression under ag-gag laws will both "significantly restrict the flow of information in the public domain" and "stop informed debate about a matter of public concern."[244]

Kingery also notes that the Supreme Court has distinguished between speech (generally protected) and conduct (generally not protected) when performing First Amendment analyses.[245] She asserts that Category Two - No Distributing laws are the most likely type to be seen as restricting speech.[246] For Category One - No Recording laws, "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."[247] In an apparent policy argument, rather than a legal one, she asserts that, although the act of filming may be unprotected conduct, the law should still be subject to First Amendment protections because there are other torts and crimes currently in place to address the harms done by undercover reporting.[248]

4. Miscellaneous Free Speech Analyses

a. Incidental Restraints

Landfried contends Categories Three and Four (No Lying and Mandatory Disclosure) laws will likely be analyzed as incidental restrictions: "regulations that do not directly address speech but in practice function to limit expressive conduct."[249] The restrictions fail to "promote 'a substantial governmental interest that would be achieved less effectively absent the regulation.'"[250] She equivocates on how courts will come out on this analysis.[251] But, if courts review the legislative histories or wider public debate surrounding ag-gag laws it will be clear that these "'incidental' restrictions are not at all incidental. They are deliberately crafted to limit expression."[252] Thus, courts may be more willing to impose a stricter standard for ag-gag laws than that generally used for review of regulations that impose incidental restrictions on speech.[253]

b. Overbreadth

"A law violates the First Amendment for overbreadth if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[254] Landfried asserts that courts will have a strong basis to find that No Recording laws are overbroad if "[t]hese bills could be construed to ban legally permissible activities like employees taking pictures at work or a tourist taking a picture of a bucolic farm scene."[255]

Although the Supreme Court recently struck down a federal law against depictions of animal cruelty on an overbreadth argument, Landfried discusses why Stevens may not be as pertinent a precedent as animal rights activists have hoped in tackling ag-gag laws.[256] First, she emphasizes the statute in Stevens prohibited the sale of animal "crush" videos,[257] which is inapplicable to any of the Category Two – No Distributing laws. The Supreme Court expressly limited its decision to this statute, not to animal cruelty depictions in general.[258] Further, unlike dogfighting films and hunting videos that are filmed with the property owner's permission to make money, "ag-gag videos are filmed in secrecy, without the permission of the private

property owner. . . . [Thus, p]roperty rights are heavily implicated in the ag-gag bills, but they were not at all addressed in Stevens."[259]

c. Under-inclusion

According to these analyses, ag-gag laws run the gamut of free speech defects, from overbreadth to under-inclusion. Bollard argues that ag-gag laws should be subject to heightened scrutiny because they punish false statements without proof of harm.[260] While fraud is an exception to protected speech, in order to lose First Amendment protections, an element of fraud must be harm, and "the harm cannot be from intrusion, trespass, . . . fraud,"[261] lost wages, or reputation damage stemming from a truthful publication. Bollard continues that ag-gag laws could not survive strict scrutiny because there is "no compelling government interest in protecting agricultural operations from undercover investigations, and the laws are not narrowly tailored to achieve any other interest."[262] He admits there is likely a compelling interest in preventing economic disruption and fraud generally, but ag-gag laws are under-inclusive of those interests.[263] They "are thus only narrowly tailored for two purposes: to prevent filming and fraud by undercover investigators at agricultural operations. But these interests are too narrow to be compelling."[264]

d. Good Faith Employees

This last free speech theory espoused by Adam is a policy argument that could be articulated as another under-inclusion concern. It merits segregation because it so clearly links the free speech concerns to the issues agriculture employees face under ag-gag legislation. Adam posits that ag-gag laws are a bad idea because they punish whistleblowers who are not undercover reporters, without doing much to limit undercover reporting, the real target of these legislative initiatives.[265] He contends that ag-gag laws do not sufficiently punish reporters to deter their surreptitious investigations, considering ag-gag laws target behavior that is already illegal or actionable under other crimes and torts, yet reporters have continued to report. Accordingly, reporters or their publishers will weigh the legal risks and decide to proceed with their undercover investigations and reports anyway.[266] "Instead," Adam argues, "the laws will discourage legitimate employees from taking on a whistleblower role because they will be afraid to gather footage of punishable behavior."[267] He concludes, "passing laws that bar whistleblowers from exposing these high-risk concerns, in exchange for punishing the small number of undercover investigators whose behavior is already punishable under existing law, is simply creating a solution for a problem that does not exist."[268]

As was discussed above, current federal food safety law does not provide much protection for these good faith employees who blow the whistle on workplace activities. This emphasizes the importance of free speech protection for workers who disclose food safety or animal cruelty concerns. These free speech rights of workers in the face of new state agriculture protectionism are discussed in the remainder of this Part.

B. The Constitutional "Right to Lie"

In 1974, the U.S. Supreme Court stated "there is no constitutional value in false statements of fact."[269] Other statements by the Court before and after *Gertz* suggested that the

First Amendment free speech right did not protect lying.[270] Nevertheless, in 2012, the Court held that the First Amendment protects some intentional lies.[271] This Part explains the Alvarez opinions to conclude that the Idaho, Iowa and Utah Category Three – No Lying laws may very well violate this recently-articulated free speech protection.

Xavier Alvarez was convicted under the federal Stolen Valor Act, which criminalized falsely stating that one had received a military decoration or medal.[272] While publically introducing himself as a newly elected member of the water district board for Pomona, California, Alvarez falsely claimed to have received the Medal of Honor.[273] The motive for Alvarez's lie did not appear to be any political or material benefit.[274]

In a 6-3 result, a plurality struck down the Act. Justice Kennedy wrote an opinion that was joined by Chief Justice Roberts and Justices Ginsburg and Sotomayor. Justice Breyer concurred in the result, along with Justice Kagan.[275] Justice Alito was joined by Justices Scalia and Thomas in dissent.[276] All three opinions are instructive on whether Category Three – No Lying laws will withstand constitutional scrutiny.[277]

Justice Kennedy's opinion rejects an analysis of past precedents that "all proscriptions of false statements are exempt from exacting First Amendment scrutiny."[278] He then goes on to distinguish the Stolen Valor Act from three examples of false speech crimes that have been upheld: lying to a government official, perjury, and falsely representing oneself as a government official.[279] The government has a compelling interest that requires punishing each of these lies, even in the face of rigorous free speech defense.[280] By contrast, the lies targeted by the Stolen Valor Act are ones "simply intended to puff oneself up."[281]

Having established that free speech precedents do not require truthfulness as the basis for First Amendment protection, the opinion zeroes in on speech prohibited by the Stolen Valor Act. Justice Kennedy decries the notion of an unlimited governmental power "to compile a list of subjects about which false statements are punishable."[282] Equating such an environment to George Orwell's 1984, he warned that if the Stolen Valor Act were sustained, "there could be an endless list of subjects the National Government or the States could single out."[283]

Arguably, the Category Three – No Lying laws are exactly such unconstitutional lists that single out one subject of lies to criminalize. Or not. Justice Kennedy quickly articulates one "limiting principle" that could allow states to criminalize lying to get a farm job. "Where false claims are made to effect a fraud or secure moneys or other valuable considerations, say offers of employment, it is well established that the Government may restrict speech without affronting the First Amendment."[284] In other words, the "right to lie" that Alvarez clarifies seemingly does not protect lying to get a job, which ag-gag Category Three laws target. Justice Kennedy seems to equate lying on a job application with fraud because the lie secures a valuable exchange.[285]

The opinion goes on to uphold the government's compelling interest in banning Alvarez's lie, namely to protect "the integrity of the military honors system in general, and the Congressional Medal of Honor in particular."[286] Notwithstanding this interest of reinforcing the military mission, criminal prosecution of liars like Alvarez under the Act did not establish the necessary "link between the Government's interest in protecting the integrity of the military honors system."[287] In particular, the dynamics of free counter speech ("refutation") could offset the lie.[288] Further, "[s]ociety has the right and civic duty to engage in open, dynamic, rational discourse. These ends are not well served when the government seeks to orchestrate public discussion through content-based mandates."[289]

Even if refutation were insufficient to offset the lie of charlatans like Alvarez, criminal prosecution under the Stolen Valor Act does not satisfy the "exacting scrutiny"[290] free speech

protection requires. Justice Kennedy espoused that a government database of Medal of Honor winners was a mechanism that could protect the integrity of the military awards system without any constraint on speech.[291] Accordingly, the statute was deemed unconstitutional.

To determine if the right to lie would undermine No Lying ag-gag laws, especially in the face of Justice Kennedy's statement that equates lying in exchange for a job with fraud, Alvarez requires additional analysis. The concurring and dissenting opinions offer more insights about whether lying to get a farm job is protected speech.

Justice Breyer's concurring opinion supports the conclusion that falsity is not categorically denied free speech protection.[292] In particular, "in technical, philosophical, and scientific contexts,"[293] deliberately false statements can be the basis for further examination and public debate that help reveal truth.[294] Under this analysis, farm workers who blow the whistle on farm abuses revealing themselves to be PETA activists or food safety reporters present just the kind of a case when a "'clearer perception and livelier impression of truth, [is] produced by its collision with error.'"[295] In fact, Justice Breyer's discussion here reveals the free speech concerns with Category One and Two laws against recording and distributing recordings also. The farm worker who is simultaneously a PETA activist, only reveals his Category Three – No Lying violation upon release of surreptitious recordings in violation of Categories One and Two. Accordingly, the clearer perception of truth Justice Breyer seeks to protect only emerges with a trifecta of ag-gag violations.

A classic whistleblower free speech case, Food Lion Inc. v. Capital Cities/ABC, Inc.,[296] revealed just this combination of violations encompassed by ag-gag Categories One, Two and Three. In 1992, two ABC reporters for the show PrimeTime Live were hired at Food Lion supermarkets using fake identities, addresses, references, and personal histories, including omission of their concurrent employment with ABC.[297] They intended to film food handling practices in the stores using concealed cameras and microphones. Their behavior in getting and performing these supermarket jobs clearly would fall within Category One – No Recording and Category Three – No Lying laws, if the work had been at an agricultural facility. Eventually, PrimeTime Live broadcast their undercover footage of Food Lion employees repackaging fish beyond its expiration date, grinding beef after its expiration date with fresh beef, and coating chicken with barbeque sauce to mask its smell.[298] This action would amount to violations of Category Two – No Distributing in an agricultural employment setting. Just as Justice Breyer opined in Alvarez, the employees' lies in Food Lion were necessary to reveal a clearer picture of the truth. In an agricultural setting, however, ag-gag laws could undermine that revelation.

After concurring in Alvarez that some lies merit free speech protection, Justice Breyer goes on to describe justifiable government restrictions on lying. Some are criminal, such as perjury and false claims of terrorism.[299] Several are torts or other civil claims such as fraud, defamation, and trademark infringement.[300] These examples usually require "proof of specific harm to identifiable victims."[301] In concurring that the Stolen Valor Act was unconstitutional, Breyer found no such limitations on its reach.[302] The Act discourages or forbids a lie "in contexts where harm is unlikely or the need for the prohibition is small."[303]

Focusing on this part of Justice Breyer's opinion, farm interests in Idaho, Iowa and Utah could argue that Category Three – No Lying laws are distinguishable from the Stolen Valor Act because they prevent direct harm from a whistle-blowing employee. This ag-gag defense has an obvious, perverse twist, however. Farms only need to chill the speech of animal or food safety activists to hide animal cruelty or unsafe food practices. Category Three – No Lying laws are only defensible to protect business operations and profitability when they quell disclosure of

food safety risks and animal abuse, both potential public harms. This use of Breyer's opinion that lies can be prosecuted to avoid obvious harm,[304] seems indefensible considering his opinion also supports the principle that some lying needs constitutional protection to help reveal truth.

Again, Food Lion's analysis about harm from lying undercover employees is instructive. In Food Lion, the court upheld claims of trespass and breach of the duty of loyalty against the reporter/employees because the employees "had the requisite intent to act against the interests of their second employer, Food Lion, for the benefit of their main employer, ABC."[305] Similarly, trespass occurred by filming in non-public areas, directly adverse to Food Lion's interests.[306]

Nevertheless, the loyalty and trespass violations in Food Lion could not be the basis for any damages plaintiff sought in the case from the economic fallout after the broadcast.[307] The lower court excluded damages from lost sales and harm to good will because the court deemed they were not proximately caused by the loyalty and trespass torts.[308] Instead, these reputation-related damages were the direct result of lost consumer confidence based on Food Lion's actual food handling practices that were exposed. On appeal, the Fourth Circuit upheld that result but elevated the damage exclusion to a free speech issue. It concluded that Food Lion could not recover these damages to reputation without proving the constitutional libel standard, knowledge of falsity or reckless disregard for the truth.[309] A public figure plaintiff cannot circumvent the elevated proof standard of defamation by suing for other non-reputational torts.[310]

In reaching this free speech conclusion, the court contrasted the claims for damages in Food Lion from those in Cohen v. Cowles Media Co.[311] In Cowles, the Supreme Court said a news outlet could not avoid all damages under generally applicable laws, even if payment of damages under those laws hindered news gathering and reporting.[312] In Cowles, the promissory estoppel damages for lost income were unrelated to reputation and, thus, not subject to any special constitutional scrutiny.[313] The damages to reputation in Food Lion were the direct result of the publication. Accordingly, the constitutional libel standards applied (which the supermarket could not possibly meet since the broadcast was true).[314]

Accordingly, Food Lion reveals that whistleblowing employees may be liable to their former employers for contract losses, but not if the employment was at will. Further, whistleblowing likely violates an employee's duty of loyalty, but that duty cannot support a claim for damages to reputation unless the employer can meet the First Amendment malice standard. Arguably, Justice Breyer's focus on unprotected lies that cause harm must be understood within the purview of Food Lion. Harm to reputation from the lies of a would-be whistleblowing employee who hires on and then exposes food safety violations should not be actionable by agriculture employers.[315]

Justice Alito's dissenting opinion in Alvarez also focuses on harms that need statutory protection, by pointing out the "proliferation of false claims concerning the receipt of military awards."[316] Admittedly, however, intangible debasing of military awards is the most common harm from "stolen valor."[317] For the dissent, it sufficed that Congress reasonably concluded that a comprehensive database of real award winners could not be compiled and that counter speech would not adequately refute false claims.[318]

The dissent cites a series of precedents that found that false factual statements had no intrinsic constitutional value.[319] Like the other opinions, the dissent notes torts and crimes targeting falsity that have withstood First Amendment challenges.[320] Nevertheless, the dissent concedes that prosecuting some lies that lack any independent intrinsic value still could chill other protected speech.[321] Here the dissent is instructive regarding Category Three – No Lying laws. For example, malice or intent requirements in public figure defamation, fraud or outrage

torts prevent chilling truthful speech on matters of public concern.[322] These cases protect some falsities under the First Amendment to prevent stifling other valuable speech. Further,

> [t]here are broad areas in which any attempt by the state to penalize purportedly false speech would present a grave and unacceptable danger of suppressing truthful speech. . . . The point is not that there is no such thing as truth or falsity . . . , but rather that it is perilous to permit the state to be the arbiter of truth.[323]

These statements suggest that even the dissenters might shield the lies targeted in Category Three laws since they are motivated by a concern for food safety.[324]

Minimally, all of the opinions in Alvarez suggest that prosecutions under a Category Three – No Lying law will require a case-by case analysis of the implications on truth regarding food safety and animal abuse. Beyond restricting open discourse, these ag-gag laws potentially harbor unsafe, abusive farms from public scrutiny by criminalizing the very acts that could bring the safety abuses to light, namely lying to gain access to the farm.[325]

Further, many of the rationales that supported striking down the Stolen Valor Act support a conclusion that Category Three- No Lying laws are unconstitutional on their face. Like the Stolen Valor Act, all ag-gag statutes employ content-based mandates. They protect specific farms and farm practices.[326] Additionally, the Category Three – No Lying laws go beyond content-based restrictions to criminalizing the motives of the speaker who is a farm job applicant. None of the Idaho, Iowa, or Utah laws is limited to particular factual misstatements, such as using a false name, address, or employment history in a job application. On the contrary, all target the person's objective in seeking the job. The statutes outlaw lying to get a job "with the intent" to perform acts on the job contrary to the employer's interests in maintaining farm secrecy.[327] As such, Category Three – No Lying laws target the viewpoint of the farm job applicant that possible food safety or animal welfare wrongs are occurring and should be exposed.

Arguably, if the employee performs the job as promised for the compensation exchanged, there is not the kind of exchange fraud that Alvarez suggested was unprotected speech. The intent to come to work and to work for pay is not fraudulent if that is what the undercover worker does.[328] Ag-gag employment fraud only occurs when the worker uncovers and discloses unfavorable information on the job. Without some safety or animal abuse to uncover, the employee hired with a secret motive to uncover such abuse would just go about his or her job, as hired and paid to do. So-called agriculture employment fraud only applies when the employee's fraudulent access to the workplace actually exposes food safety violations and/or animal abuse on the job.[329]

Ag-gag criminal prosecutions seem to present exactly the grave and unacceptable danger of suppressing truthful speech that even the Alvarez dissenters acknowledged are protected under the First Amendment. The significant negative public reaction to all ag-gag legislation[330] reflects a similar concern, that only farms with something to hide need protection from job-seeking activists. All of the Alvarez opinions suggest these laws, or at least their application to farm job seekers whose investigative motives are subsequently revealed, violate important free speech objectives.[331]

C. Free Speech Issues in Mandatory Disclosure Laws

Throughout this research, the authors have referred to Category Four laws as "Mandatory Disclosure" for ease of reference. In fact, this Category actually comes in two varieties. The most common are mandatory relinquishment laws that require the maker of a recording to surrender it to authorities within a short (usually twenty-four to seventy-two hour) period.[332] Alternatively, mandatory reporting laws simply require certain classes of people to report suspected animal abuse to authorities, again within a short time.[333] For reasons discussed below, mandatory relinquishment may be more likely to run afoul of constitutional protections than mandatory reporting.

Missouri is the only state to enact a Category Four ag-gag law thus far. Missouri's law makes it illegal for "farm animal professionals" to fail to relinquish to authorities within twenty-four hours any recordings they make that they believe depict animal abuse or neglect.[334] This law only applies to farmworkers recording animal abuse. It does not apply to recordings of other possible food safety violations. The main criticism of such a law is that the short reporting period makes it impossible to demonstrate a pattern of animal abuse or neglect. With a twenty-four hour reporting period, agricultural facilities will always be able to assert that the recorded behavior was a one-time event, not normal business practice. Moreover, since farmworkers under USDA jurisdiction have no federal whistleblower protections,[335] there is a good chance that an employee who complies with the law and submits evidence to authorities of the employer's animal abuse will be fired and have no ability to document further incidents that could prove a pattern of abuse.

There are several ways Category Four laws might be analyzed under the First Amendment.[336] These are discussed next. Based on the analysis a court might apply to these Category Four laws, this Part concludes with application of strict and intermediate scrutiny to the category.

1. Compelled Speech

"The right not to speak is as much a constitutional freedom as is the right to speak."[337] Only the speaker, not the government, possesses "the autonomy to choose the content of his own message."[338] Compelled speech cases often involve utterances that convey opinion or belief.[339] Free speech autonomy, however, applies "equally to statements of fact the speaker would rather avoid."[340] For example, in Riley v. National Federation of the Blind of North Carolina, Inc., the Court threw out a law requiring professional charitable fundraisers to disclose to donors what percentage of funds raised actually went to the charity.[341] The solicitations for contributions were treated as part of the non-profit's overall charitable or social message,[342] which was the charity's prerogative to craft without the government's mandate about the expense of solicitation. The Court recognized that earlier precedent had been guided by "the principle that '[t]he right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind,'" but it rejected the argument that disclosures of fact, rather than opinion, fell outside the boundaries of First Amendment protection.[343]

Some scholars have interpreted Riley broadly.[344] In dicta, however, the Riley Court opined that certain factual disclosures might not violate free speech, such as fundraisers' professional status and "certain financial information."[345] Proponents could characterize Category Four –Mandatory Disclosure requirements as just such factual exchanges, rather than compulsion that restricts the "individual freedom of mind," especially with a law that requires reporting rather than relinquishment.

Alternatively, Riley represents a strong precedent, especially against mandatory relinquishment laws. Many "freedom of mind" decisions are made when creating a recording, even if no post-film editing is done. The creator decides what to film, how long to film, whether to include a wide angle for context or zoom in for effect, and how best to capture the light, all of which speak to the creator's opinion of the event being recorded.[346] Additionally, when to release a film (or an eyewitness account under mandatory reporting) is part of the whistleblower's message about the extent of perceived animal or safety abuses at the farm. Riley suggests the worker, not the state, gets to choose how to craft and disseminate that message, including when to refrain from disseminating it until the report completely reflects the scenes the worker witnessed, which might take more than twenty-four hours.

Finally, the prohibition on compelled speech protects listeners as well as speakers.[347] Accordingly, any law that dictates the factual recounting of animal abuse that a farm worker witnessed might distort listeners' rights to learn the complete picture of animal treatment at the farm that would otherwise emerge if a whistleblower is not compelled to report earlier than he or she would choose freely.

2. Content-Based Restriction on Speech

Short fuse mandatory disclosure requirements may also constitute content-based restrictions on speech because they restrict based on subject matter and viewpoint.[348] As noted, the laws restrict reports or creation of videos that evidence a pattern of livestock abuse or neglect over a period of time. In Missouri, recordings that track treatment of other vulnerable populations can be made over time. A recording of elder abuse need not be turned over to authorities at all, and a report of the abuse need only be made within a "reasonable time."[349] Suspected pet abuse requires neither video relinquishment nor reporting.[350] Accordingly, the Category Four – Mandatory Disclosure laws restrict the subject matter of the report to animal abuse recorded by a farmworker during one work shift.

Further, Category Four laws are viewpoint-based. "Animal abuse" or "neglect" is in the eye of the beholder.[351] As the discussion of California's "downer cow" law reflected,[352] California voters and USDA regulators differed in their views of what should and should not be allowed in the treatment of livestock. The same is true of California voters versus others regarding the humane treatment of caged farm animals, such as egg-laying hens.[353] Yet, because short reporting periods prevent recordings of continual violations, Category Four laws effectively impose a "belief" on the whistleblower that a single incident of perceived harsh treatment constitutes abuse or neglect. A farmworker who believes that animal neglect or abuse is only clear from a pattern or practice of behavior over a period of time must choose amongst declaring that he believes something that he actually does not, violating the law, or turning a blind eye. Viewed in this light, Category Four laws are content-based restrictions that will pass constitutional muster only if they can survive strict scrutiny.

3. Restriction on Association

Similar to a Category Three-No Lying law,[354] Category Four-Mandatory Disclosure may infringe on freedom of association.[355] Legislative history suggests that proponents of ag-gag bills believe people who make such recordings are affiliated animal rights groups,[356] and many people who make such recordings are so affiliated. Accordingly, a Mandatory Disclosure law

effectively requires videographers to "out" themselves as a member of such a group or face criminal penalties. The Missouri law, like other proposed Category Four laws, does not have a provision for anonymous video relinquishments. In fact, it seems unlikely that anonymous drops would be allowed because another provision of the act makes it illegal to edit the recording in any way prior to relinquishment.[357] The state would have no way to enforce that provision if it allowed anonymous drops. Moreover, the content of the recording itself is likely to point to its source: few people will have access to a particular section of a particular animal facility on any given day.

In 1958 the Supreme Court declared:

> It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association. . . . This Court has recognized the vital relationship between freedom to associate and privacy in one's associations. . . . Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs."[358]

Despite this strong rhetoric, however, the Court has only invoked the freedom of association to strike down regulations that directly require disclosure of affiliations. In NAACP v. Alabama, the Court struck down a state law that required the NAACP to disclose its membership lists.[359] Soon thereafter, the Court struck down a state law that required teachers to disclose their affiliations on a yearly basis.[360] In order for these precedents to apply to Category Four ag-gag laws, the Court would have to extend its holdings to situations in which the law indirectly requires that a person disclose a likely affiliation. States most at risk will be those with legislative histories that suggest 1) an assumption that only those affiliated with animal rights groups make recordings of livestock abuse, 2) animus toward such groups, and 3) an intent to use the mandatory disclosure requirement to identify group affiliates.

4. Restriction on Newsgathering

Generally applicable laws that impinge upon newsgathering activities of "the press"[361] are not entitled to heightened First Amendment review the way they would be if they impinged upon publication.[362] This includes laws like trespass and invasion of privacy.[363] Nevertheless, even while holding the opposite, the Supreme Court has indicated in dicta that there should be protections for newsgathering activities. In 1972, Justice White proclaimed: "Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated."[364] Some scholars have asserted that, despite the precedent to the contrary, Justice White's language has influenced courts to apply heightened review to such laws covertly.[365] The result has been a great deal of confusion and commentary arguing the need for clarity and reform.[366]

If a court declines to find that a Category Four law constitutes compelled speech or a direct restriction on speech, there is a good chance it will characterize the law as a restriction on newsgathering activities and afford it no explicit heightened review. The best argument against the "newsgathering" precedents is that Category Four ag-gag laws are not "general laws" like trespass or invasion of privacy, because of their narrow focus on farms and farm workers.[367] That returns the argument to content-based restrictions and strict scrutiny. The scrutiny that

applies to Category Four under the various foregoing speech analyses is discussed next.

5. Application of Strict and Intermediate Scrutiny

If a court found that Category Four laws constituted compelled speech, content-based speech restrictions, or restrictions on association, the laws would not withstand strict scrutiny. States would have to demonstrate that their ag-gag laws were narrowly tailored to protect a compelling government interest.[368] Regardless what the states may say about a concern for animal abuse or food safety, if a court considers the legislative history behind these laws it will be clear that suppressing speech is their underlying intent.[369] If the real interest is protecting the reputation of the animal farming industry by requiring near-immediate relinquishment of potentially harmful recordings, thus shielding worse evidence of a pattern of unsafe, abusive behavior, that interest is related to the suppression of free speech and cannot withstand any scrutiny.[370] "Laws of this sort pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information or to manipulate the public debate through coercion rather than persuasion speech."[371] If a court accepts that the real intent of Category Four laws is speech suppression, then the laws fail any free speech scrutiny under the first step of the analysis.

Even if a court would countenance that timely reporting of suspected animal abuse is the compelling interest these laws promote, states cannot show the laws are narrowly tailored to that interest. There are numerous ways that states like Missouri could protect its interest in uncovering farm animal abuse that have no restrictions on speech. The state could create a voluntary, anonymous reporting hotline for farm animal abuse. The state could pass whistleblower protection for farm workers to report abuse without negative job outcomes. The state could create a self-reporting system for farms to obtain reduced penalties for animal abuse violations that are self-reported (consistent with the HACCP food safety model, too). All of these options directly accomplish the alleged government interest in uncovering farm animal abuse. That state legislatures opt for a mandatory disclosure alternative that only marginally protects farm animals, by ensuring that farm workers who record suspected abuse turn over their recordings before they have a chance to document a habit or pattern of cruelty, casts doubt on the alleged government interest and fails strict scrutiny.

A court may apply intermediate scrutiny if it views Mandatory Disclosure laws as restrictions on newsgathering rather than direct restrictions on speech or association.[372] A law will pass intermediate scrutiny "if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[373]

Even if a state has a legitimate economic interest in protecting its agriculture citizens and employers, it is still unclear that Category Four laws impose "incidental restriction on First Amendment freedoms" that are "no greater than is essential to the furtherance of that interest." Again, if a state wants to protect the reputation of its agricultural facilities it could do many other things that do not hinder speech at all. For instance, it could provide or enhance state-offered training programs and voluntary audits and feedback on good husbandry and food safety practices. It also could provide incentives to companies that provide greater transparency to the public on their food handling and animal treatment practices. States do not have to resort to shrouding their agricultural facilities from the public eye. In fact, the very act of doing so harms

their reputation by signaling that they have something to hide.[374] This contradicts the state's interest in protecting its agriculture economy rather than serving that interest.

Historically, mandatory reporting has been limited to vulnerable populations such as children and the elderly or disabled.[375] Further, mandatory reporting has been imposed only on those with "special relationships" to those vulnerable populations, such as medical professionals, clergy, or law enforcement.[376] Category Four – Mandatory Disclosure laws apparently consider farm animals akin to those other vulnerable populations and create a special relationship in anyone who works around those animals. That expansion of an otherwise limited history of mandatory reporting calls into question the wisdom of Category Four laws and their constitutionality under the first amendment.

IV. RECOMMENDATIONS AND FUTURE RESEARCH

The most direct way to limit state agricultural protectionism and protect food safety would be through express federal preemption. Congress should create whistleblower protection for workers within USDA's jurisdiction[377] and expressly preempt any state laws that limit those workers' rights to speak out about perceived safety or animal abuse concerns. Further, an amendment to the FSMA should add comparable express preemption to its existing whistleblower protection. This way, all food workers under federal authority would be protected from civil actions under food libel laws and criminal prosecution under ag-gag laws. Both USDA and FDA are enforcing an HACCP system for food safety compliance now. For such systems to be effective, information needs to flow freely from organizations to inspectors and to the public. Nothing in the state protectionist initiatives discussed above aligns with that federal food safety scheme.

Next, lawmakers from agricultural states without protectionist laws should encourage their peers to repeal food libel and ag-gag laws and to refrain from introducing any new legislation like that discussed in Part I. In particular, legislative peers in the "locavore-friendly" states should urge protectionist-leaning states to shift to local-friendly efforts and curb their zeal for protecting industrial farming.[378] Although promoting local food is not mutually exclusive with agricultural protectionism, the local food movement is seen as "push back" against industrialized food production.[379] Protectionist-leaning legislators need to expand their view about economic value to their states from farms other than big industrial operations that seek protection under food libel and ag-gag laws.[380] Local food production can be an economic boon, not just in the farm sector, but also for banking, machinery sales, and services and transportation.[381] Lawmakers in states with protectionist legislation should reconsider who and what they are protecting and at what cost.

Nevertheless, the next protectionist salvo may directly pit industrial farming against small urban and suburban farms over the "right to farm." Statutory rights to farm have been around for decades in all fifty states.[382] Historically, these laws have been used to shield farmers from neighbors' nuisance suits.[383] Recently, however, Michigan's Commission of Agriculture and Rural Development ruled that its statutory right to farm did not extend to areas primarily zoned residential.[384] The ruling permits local governments to ban backyard livestock farms and is perceived to be a direct attack by industrial agriculture against the local food movement.[385] The Michigan Farm Bureau supported the changes but challenged the characterization that its membership organization is against small or urban farms.[386]

In 2012, North Dakota enacted the first constitutional right to farm.[387] The provision reads: "The right of farmers and ranchers to engage in modern farming and ranching practices shall be forever guaranteed in this state. No law shall be enacted which abridges the right of farmers and ranchers to employ agricultural technology, modern livestock production, and ranching practices."[388] The amendment's protection of "modern" farming and "agricultural technology" evoked criticism that the state sought only to protect industrial agriculture.[389] The Oklahoma legislature is considering a similar constitutional amendment.[390]

One commentator contends that movement for constitutional rights to farm is fundamentally different than the earlier push for statutory protections. Whereas conflicts between farms and their neighbors prompted statutory rights to farm, perceived conflicts between in-state interests and out-of-state interests provide the impetus for constitutional amendments.[391] Proponents argue that such measures are necessary to protect a continued food supply.[392] Opponents see them as attempts by agribusiness to combat the legislative agenda of animal welfare groups,[393] and to exempt itself from legitimate regulation.[394] Certainly, designating the right to engage in modern farming as a fundamental right, on par with free speech and religion, merits future research on the implications of this newest protectionist effort.

CONCLUSION

In 2012, one commentator opined that, despite almost a decade of criticism for food disparagement laws, their continued presence on the books of twelve states could embolden state legislatures to initiate new forms of protectionism.[395] The latest generation of ag-gag laws and constitutional rights to farm seems to confirm that prediction. These, along with an eight-figure food libel claim to be heard by a South Dakota jury, seem to put free speech about food safety and farm policy at risk. The proposal by one federal lawmaker to preempt all state animal rights laws or agriculture constraints reflects an atmosphere that does not bode well for food safety. Ultimately, court intervention on the constitutional rights at issue in these matters may be necessary to stem the tide of agricultural protectionism.

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[1] *CDC Estimates of Foodborne Illness in the United States*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/foodborneburden/2011-foodborne-estimates.html (last updated Jan. 14, 2014).

[2] *See* Brief for Reporters Committee for Freedom of the Press and 16 Others Supporting Plaintiffs, Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00679-RJS, at 4 (D. Utah Jan. 15, 2014) (No. 49), *available at* http://www.rcfp.org/sites/default/files/RCFP_Amicus_ALDF.pdf (citing *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 & Gov't Reform*, 111th Cong. (2010)).

[3] *See id.* at 2-3.

[4] *See* David Brown, *USDA Orders Largest Meat Recall in U.S. History*, WASH. POST, Feb. 18, 2008, http://www.washingtonpost.com/wp-dyn/content/article/2008/02/17/AR2008021701530.html.

[5] *See Trends in Foodborne Illness in the United States, 2012*, CENTERS FOR DISEASE CONTROL & PREVENTION, http://www.cdc.gov/features/dsfoodnet2012/reportcard.html (last updated Apr. 18, 2013).

[6] *See infra* notes 165-74 and accompanying text.

[7] For further discussion of these statutes see Kevin C. Adam, Note, *Shooting the Messenger: A Common-Sense Analysis of State "Ag-Gag" Legislation Under the First Amendment*, 45 SUFFOLK U. L. REV. 1129, 1157-63 (2012); Jessica Pitts, Note, *"Ag-Gag" Legislation and Public Choice Theory: Maintaining a Diffuse Public by Limiting Information*, 40 AM. J. CRIM. L. 95, 97-103 (2012); Jessalee Landfried, *Bound and Gagged: Potential First Amendment Challenges to Ag-Gag Laws*, 23 DUKE ENVTL. L. & POL'Y F. 377, 391-400 (2013); Laura Hagen, *2012 State Legislative Review*, 19 ANIMAL L. 497, 510-15 (2013); Sonci Kingery, Note, *The Agricultural Iron Curtain:*

Ag Gag Legislation and the Threat to Free Speech, Food Safety, and Animal Welfare, 17 DRAKE J. AGRIC. L. 645, 656-64 (2012); Lewis Bollard, *Ag-Gag: The Unconstitutionality of Laws Restricting Undercover Investigations on Farms*, 42 ENVTL. L. REP. NEWS & ANALYSIS 10960, 10962-66 (2012).

[8] Mark Bittman, *Who Protects the Animals?*, N.Y. TIMES (Apr. 26, 2011, 9:29 PM), http://opinionator.blogs.nytimes.com/2011/04/26/who-protects-the-animals/?_php=true&_type=blogs&_r=0.

[9] *See, e.g.*, *Animal Cruelty: Attacking the Messenger*, BOS. GLOBE (Apr. 15, 2013), http://www.bostonglobe.com/editorials/2013/04/14/put-gag-gag-laws/w233JSpwLS0pPo1Me2K5aO/story.html. *See also Wrong Way to Get Rid of Cattle Abuse, Illness: Editorial*, L.A. DAILY NEWS (Apr. 7, 2013, 9:00 PM), http://www.dailynews.com/general-news/20130408/wrong-way-to-get-rid-of-cattle-abuse-illness-editorial; *The DailyShow with John Stewart: Blowing the Whistle on Whistle-Blowers* (Comedy Central television broadcast June 11, 2013), http://www.thedailyshow.com/watch/tue-june-11-2013/blowing-the-whistle-on-whistleblowers.

[10] *See infra* Part I.A.1.

[11] *See infra* Part I.A.2. *See also*, Adam, *supra* note 7, at 1163-65.

[12] *See* Adam, *supra* note 7, at 1131 (offering a three-part classification that maps onto the categories employed here up to this article's Category Four); Landfried, *supra* note 2, at 394, 398 (offering a five-part classification that maps onto the four categories presented in this article and adding a fifth called agricultural trespass); Bollard, *supra* note 7, at 10961 (limiting ag-gag laws to the variety in Categories One and Three of this article).

[13] This type of ag-gag bill was proposed in earlier legislative sessions, though not prevalent in 2013-2014. *See* Adam, *supra* note 7, at 1164. Adam suggests that Category Two bills have fallen out of favor with ag-gag proponents due to mounting criticism of the category's overt constitutional weaknesses. *See id*. at 1173.

[14] *See infra* Part I.A.1.a.

[15] *See infra* Part I.A.1.b.

[16] As will be seen in Parts I.A.1.a & b, *infra*, the earlier ag-gag laws were all Category 1 - No Recording, while the 2012-2014 acts included multiple categories.

[17] *See, e.g.*, Nicole M. Civita, *2012 Developments in Food Law and Policy*, 18 DRAKE J. AGRIC. L. 39, 91-92 (2013) ("According to an opinion poll by Lake Research Partners . . . '71 percent of Americans support undercover investigative efforts by animal welfare organizations to expose animal abuse on industrial farms, including 54 percent who strongly support the efforts.' Additionally, 64% 'of Americans oppose making undercover investigations of animal abuse on industrial farms illegal, with half of all Americans strongly oppose[d].'").

[18] The pushback may be prevailing over the protectionism. *See infra* Part I.A.1.b. No ag-gag bills were enacted in 2013. Nevertheless, that does not keep legislatures from raising the specter of such protectionism every legislative session. *See infra* notes 34-104 and accompanying text.

[19] KAN. STAT. ANN. § 47-1827(c) (2013) (effective 1990).

[20] *Id.* § 47-1825.

[21] *Compare* KAN. STAT. ANN. §§ 47-1827(a), (b), (d), (e) *and* (f) *with* KAN. STAT. ANN. § 47-1827(c). *See also* Kingery, *supra* note 7 at 656 ("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.").

[22] KAN. STAT. ANN. § 47-1827(c)(4). Although this statute has not been tested in the courts, it seems likely that someone filming with the intent to expose animal abuse or food safety violations would meet the "intent to damage the enterprise" element.

[23] N.D. CENT. CODE §§ 12.1-21.1-01 to -05 (2013) (effective 1991).

[24] *See id.* § 12.1-21.1-02; *compare* N.D. CENT. CODE § 12.1-21.1-02.1 to .5, .7 *with* N.D. CENT. CODE § 12.1-21.1-02.6.

[25] *Id.* § 12.1-21.1-02.6.

[26] KAN. STAT. ANN. § 47-1827(c).

[27] *See* N.D. CENT. CODE § 12.1-21.1-02.

[28] MONT. CODE ANN. § 81-30-101 (2013).

[29] *Id.* §§ 81-30-101 to -105 (effective 1991).

[30] *Id.* § 81-30-103(2)(e) ("A person who does not have the effective consent of the owner and who intends to damage the enterprise conducted at an animal facility may not: . . . enter an animal facility to take pictures by photograph, video camera, or other means with the intent to commit criminal defamation.").

[31] *Id.* § 45-8-212(1)-(2).

[32] *Id.* § 45-8-212(3)(a), (c).

[33] *Id.* (justifying otherwise defamatory speech).

[34] *Compare* North Dakota, Iowa, Utah, and Missouri, which do not require an intent to criminally defame.
[35] IOWA CODE §§ 717A.1-717A.4 (2014).
[36] IOWA CODE § 717A.3A. *See* Letter from Terry E. Branstad to Matt Schultz (Mar. 2, 2012), *available at* http://coolice.legis.iowa.gov/linc/84/external/govbills/HF589.pdf (providing a copy of the amendment signed into law).
[37] IOWA CODE §§ 717A.2-717A.3.
[38] Contrary to some sources, Iowa did not pass a Category One and Category Two ag-gag bill as well. *See, e.g.*, *Ag-Gag Laws*, SOURCEWATCH, http://www.sourcewatch.org/index.php/Ag-gag_laws#Iowa (last modified Apr. 1, 2014, 2:39 PM). Indeed, Senate File 431 would have criminalized the creation, possession, and distribution of ag-faciltiy recordings. *See* S.F. 431, Sec. 9, §§ 717A.2A.1.a-b, 84th Gen. Assemb., 2011 Sess. (Iowa 2011), *available at* http://coolice.legis.iowa.gov/Cool-ICE/default.asp?Category=BillInfo&Service=Billbook&menu=text&ga=84&hbill=SF431. It did not make it into the version of the bill signed by the governor, however,. *See* Letter from Terry E. Branstad to Matt Schultz, *supra* note 31; IOWA CODE § 717A (2014), *available at* https://www.legis.iowa.gov/docs/ico/code/717a.pdf.
[39] IOWA CODE § 717A.3A.1.a.
[40] *Id.* § 717A.3.1.b. A Category Four - Mandatory Disclosure-like provision, offering immunity for violations of agricultural trespass to those who turn over any recordings of suspected animal abuse to authorities within seventy-two hours of filming, did not make the final law. *See* Landfried, *supra* note 2, at n.126 (referring to a proposed immunity provision).
[41] The Iowa ag-gag bill was signed by the governor on March 2, 2012. *See* Letter from Terry E. Branstad to Matt Schultz, *supra* note 31. Utah's governor signed his state's bill on March 20, 2012. *See* H.B. 187, 2010 Sess. (Utah 2012), *available at* http://le.utah.gov/~2012/bills/hbillenr/HB0187.pdf.
[42] UTAH CODE ANN. §§ 76-6-101 to -112 (West 2013).
[43] *Id.* § 76-6-112(2)(a) (knowingly or intentionally leaving a recording device to record an image or sound); *id.* § 76-6-112(2)(c)(iii) (recording images or sounds while employed and present); *id.* § 76-6-112(2)(d) (recording an image or sound while committing criminal trespass).
[44] *Id.* § 76-6-112(2)(b).
[45] *Id.* § 76-6-112(2)(c).
[46] *See* MO. REV. STAT. § 578.013 (2013) (approved by the governor July 9, 2012; effective August 28, 2012).
[47] A "farm animal professional" is defined as "any individual employed at a location where farm animals are harbored." *Id.* § 578.005(6).
[48] *Id.* § 578.013.1.
[49] *Id.* § 578.013.2 to .3.
[50] *See infra* Part I.A.2 (discussing the "Failed Bills of 2013").
[51] *See* Dan Flynn, *Idaho Governor Signs 'Ag-Gag' Bill Into Law*, FOOD SAFETY NEWS (Feb. 28, 2014), http://www.foodsafetynews.com/2014/02/governor-otter-should-reconsider-idaho-ag-gag-bill-says-chobani-founder/#.UxOMs_RdWzc.
[52] The law amends Chapter 70 of Idaho's Title 18 to include the ag-gag bill at IDAHO CODE ANN. § 18-7042. *See* S.B. 1337, 62d Leg., 2d Reg. Sess. (Idaho 2014), *available at* http://www.legislature.idaho.gov/legislation/2014/S1337.pdf.
[53] *Id.* Sec. 1, § 18-7042(1)(c) (including provisions for property damage and trespass).
[54] *Id.* Sec. 1, § 18-7042(1)(d).
[55] *See id.* Sec. 1, § 18-7042(3).
[56] *See Anti-Whistleblower Bills Hide Factory-Farming Abuses from the Public*, HUMANE SOC'Y OF THE U.S. (Mar. 25, 2014), http://www.humanesociety.org/issues/campaigns/factory_farming/fact-sheets/ag_gag.html#id=album-185&num=content-.
[57] For a discussion of the numerous ag-gag bills proposed across the country prior to 2013, *see* sources cited *supra* note 7.
[58] *See* S.B. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), *available at* http://www.arkleg.state.ar.us/assembly/2013/2013R/Acts/Act1160.pdf (Senate Bill 13 passed without the ag-gag provisions and was enacted as Act 1160); *SB14 - Creating the Offense of Interference with a Livestock or Poultry Operation*, ARK. STATE LEGISLATURE, http://www.arkleg.state.ar.us/assembly/2013/2013R/Pages/BillStatusHistory.aspx?measureno=SB14 (last visited Apr. 21, 2014).

[59] *See* S.B. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), *available at* http://legiscan.com/AR/text/SB13/id/684193/Arkansas-2013-SB13-Draft.pdf (providing a proposed draft of Senate Bill 13). *See id.* Sec. 3, § 5-62-128 (discussing the parameters of, and penalties for, conducting "improper animal investigations").
[60] *See* S.B. 13, 89th Gen. Assemb., Reg. Sess. (Ark. 2013), *available at* http://www.arkleg.state.ar.us/assembly/2013/2013R/Acts/Act1160.pdf.
[61] S.B. 373, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013), *available at* http://www.in.gov/legislative/bills/2013/IN/IN0373.1.html; S.B. 391, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013), *available at* http://www.in.gov/legislative/bills/2013/IN/IN0391.1.html; H.B. 1562, 118th Gen. Assemb., 1st Reg. Sess. (Ind. 2013), *available at* http://www.in.gov/legislative/bills/2013/IN/IN1562.1.html.
[62] *Id.* (proposing an amendment to IND. CODE § 15-17-3-13 to add subsection (33), which requires the registry).
[63] *See 2013 Indiana General Assembly Wrap-Up*, HOOSIER ENVTL. COUNCIL, Section IV.e, http://www.hecweb.org/billwatch2013/2013-legislative-session-in-review/ (last visited Apr. 21, 2014) (discussing the bills and their failure to pass).
[64] *See LB204 - Change and Provide Criminal Sanctions Regarding Animals and Animal Facilities*, NEB. LEGIS., http://nebraskalegislature.gov/bills/view_bill.php?DocumentID=17956 (last visited Apr. 21, 2014) (providing the legislative history of Legislative Bill 204).
[65] *Id.* Sec. 3, § (1).
[66] *See id.* Sec. 3, § (4)(c)(i).
[67] *See id.* Sec. 3, § (2)(b)(ii)(A). Most ag-gag bills impose only misdemeanors for violations, especially first-time violations. *See* Adam, *supra* note 7, at 1174.
[68] *See id.* Sec. 4, §§ (2), (3), (8).
[69] *Id.* Sec. 4, § (4). Nevertheless, if an investigator lied on his job application or agreement about his affiliation with an animal rights organization and intended to accept employment in order to perform undercover reporting on the operation, that could be construed as just such "malicious intent."
[70] *See LB204 - Change and Provide Criminal Sanctions Regarding Animals and Animal Facilities*, *supra* note 74.
[71] *See State Carryover Procedures*, STATESIDE ASSOCIATES, http://www.stateside.com/wp-content/uploads/State-Carryover-Procedures-FactPad-Insert.pdf (last updated July 12, 2013) (noting that in Nebraska, bills introduced in the regular session of odd-numbered years are held over for consideration during the regular session in even numbered years). *See also Carryover Legislation*, (Jan. 8, 2014), http://nebraskalegislature.gov/FloorDocs/Current/PDF/Journal/r2journal.pdf#page=19 (listing all bills carried over from the 2013 First Session to the 2014 Second Session).
[72] *See HB110*, N.H. GEN. CT. – BILL STATUS SYS., http://gencourt.state.nh.us/bill_status/bill_status.aspx?lsr=54&sy=2014&sortoption=billnumber&txtsessionyear=2014&txtbillnumber=hb110 (last visited Apr. 21, 2014) (noting that the bill was introduced on January 3, 2013).
[73] *See* H.B. 110, 2013 Sess. (N.H. 2013), *available at* http://www.gencourt.state.nh.us/legislation/2014/HB0110.pdf.
[74] *See HB 110*, *supra* note 72 (documenting the bill's legislative history). *See also State Carryover Procedures*, *supra* note 71 (noting that in New Hampshire, eligible legislation carries over from odd numbered years to even numbered years). *But see* Laura McCrystal & Kathleen Ronayne, *State House Live: House Backs Bill That Targets Northern Pass*, CONCORD MONITOR (Jan. 22, 2014, 5:32 PM), http://www.concordmonitor.com/community/town-by-town/concord/10329023-95/state-house-live-in-state-tuition-for-children-of-undocumented-immigrants-gmo-labeling-and-more (suggesting that upon the House's January 22, 2014 decision to table the bill, eventual passage is unlikely since, in the New Hampshire legislature, "[t]abling a bill sets it aside, and is in essence a way of blocking legislation without actually voting against it.").
[75] *See SB 552 Livestock Operation Interference Act*, N.M. LEGIS., http://www.nmlegis.gov/lcs/legislation.aspx?chamber=S&legtype=B&legno=%20552&year=13 (last visited Apr. 21, 2014) (providing the legislative history of the Senate Bill 552).
[76] *See* S.B. 552, 51st Leg., 1st Sess. (N.M. 2013), *available at* http://www.nmlegis.gov/Sessions/13%20Regular/bills/senate/SB0552.pdf.
[77] *See id.* Sec. 3, §§ (B), (C).
[78] *See SB 552 Livestock Operation Interference Act*, *supra* note 87 (noting that the bill has died).
[79] S.B. 648, Gen. Assemb., 2013 Sess. (N.C. 2013), *available at* http://www.ncleg.net/sessions/2013/bills/senate/PDF/s648v1.pdf. The bill would amend Article 19 of Chapter 14 of

the North Carolina General Statutes by inserting the ag-gag bill, entitled "Employment Fraud," at N.C. GEN. STAT. § 14-105.1.
[80] *Id.* Sec. 1, § 14-105.1(a)(1).
[81] *Id.* Sec. 1, § 14-105.1(c).
[82] *See Ag-Gag Laws*, SOURCEWATCH, http://ww.sourcewatch.org/index.php/Ag-gag_laws#cite_note-34 (last visited Apr. 21, 2014) ("The bill was re-referred to the Senate committee on the Judiciary on May 7, 2013, and died without a vote when the legislative session ended July 26, 2013.").
[83] *See* H.B. 683, Gen. Assemb., 2013 Sess. (Pa. 2013), *available at* http://legiscan.com/PA/text/HB683/id/733505.
[84] *Id.* § 3309.1(a)(1)(ii).
[85] *Id.* § 3309.1(a)(3).
[86] *See State Carryover Procedures*, *supra* note 71.
[87] *See* THE GENERAL ASSEMBLY OF PENNSYLVANIA SESSION OF 2013-2014, TABLED BILL CALENDAR, http://www.legis.state.pa.us/WU01/LI/SC/HC/0/TC/TAB.PDF?r=1391317726906 (last visited Apr. 21, 2014) (listing the house and senate bills tabled for the open of the 2014 legislative session; House Bill 683 is not listed).
[88] *See Pennsylvania House Bill 683 Summary*, LEGISCAN, http://legiscan.com/PA/bill/HB683/2013 (last visited Apr. 21, 2014) (providing the legislative history of House Bill 683).
[89] *See* S.B. 1248, Gen. Assemb. 2013 Sess. (Tenn. 2013), *available at* http://www.capitol.tn.gov/Bills/108/Bill/SB1248.pdf; H.B. 1191, Gen. Assemb. 2013 Sess. (Tenn. 2013), *available at* http://www.capitol.tn.gov/Bills/108/Bill/HB1191.pdf. These companion bills were introduced in February and had cleared both houses by mid-April. *See Bill Information for SB1248*, TENN. GEN. ASSEMBLY, http://wapp.capitol.tn.gov/apps/BillInfo/Default.aspx?BillNumber=SB1248 (last visited Apr. 21, 2014) (documenting each bills' legislative history). If the intent of the quick reporting period was to allow law enforcement to stamp-out abuse immediately, the state's concern should equally apply to animals kept as pets, which are traditionally afforded greater welfare protections than livestock. *See e.g.* Mark Bittman, *Some Animals are More Equal Than Others*, N.Y. TIMES, March 15, 2011, *available at* http://opinionator.blogs.nytimes.com/2011/03/15/some-animals-are-more-equal-than-others/?_php=true&_type=blogs&_r=0.
[90] *See Tenn. Governor Haslam Vetoes Anti-Whistleblower Bill*, HUMANE SOC'Y OF THE U.S. (MAY 13, 2013), http://www.humanesociety.org/news/press_releases/2013/05/gov-haslam-vetoes-tenn-ag-gag-bill-051313.html.
[91] *See* S. 162, Gen. Assemb., 2013 Sess. (Vt. 2013), *available at* http://www.leg.state.vt.us/docs/2014/bills/Intro/S-162.pdf.
[92] *See* S. 162, Sec. 1, § 3135(b), *available at* http://www.leg.state.vt.us/docs/2014/bills/Intro/S-162.pdf.
[93] *See Current Status of a Specific Bill or Resolution 2013-2014 Legislative Session*, THE VT. LEGIS. BILL TRACKING SYS., http://www.leg.state.vt.us/database/status/summary.cfm?Bill=S.0162&Session=2014 (last visited Apr. 23, 2014) (providing the legislative history of the bill).
[94] *See id.* (S. 162 is a bill of the "2013-2014" legislative session); *see also State Carryover Procedures*, *supra* note 82 (noting that in Vermont legislation carries over from odd-numbered years to even-numbered years).
[95] *See Activist, Author Will Potter to Speak at Chattanooga Public Library on Jan. 16*, THE CHATTANOOGAN.COM (Jan. 7, 2014), http://www.chattanoogan.com/2014/1/7/266897/Activist-Author-Will-Potter-To-Speak.aspx.
[96] *See Soapbox: Let's Stop Making Telling the Truth a Crime*, COLORADOAN.COM (Jan. 30, 2014), http://www.coloradoan.com/article/20140130/OPINION04/301300080/.
[97] *See Arizona House Approves Livestock Cruelty Bill*, AZCENTRAL (Mar. 10, 2014, 5:53 PM), http://www.azcentral.com/news/politics/free/20140310arizona-house-approves-livestock-cruelty-bill.html (noting that the reporting requirement had been stripped from the bill).
[98] *Kentucky House Bill 222 Texts*, LEGISCAN, http://legiscan.com/KY/drafts/HB222/2014 (last visited Apr. 23, 2014) (for the text of House Bill 222, follow the "Senate Committee Substitute" hyperlink under the "Amendments" section). Opponents of the bill were especially upset that it was "snuck in" as a rider to a bill intended to benefit animal welfare. *See Critics: Kentucky Senators 'Snuck' 'Ag-Gag' into Animal Rights Bill*, 98.1FM980AMKMBZ KANSAS CITY (Mar. 28, 2014, 2:34 PM), http://www.kmbz.com/Critics-Kentucky-Senators-Snuck-Ag-Gag-into-Animal/18690808.
[99] *See* S.B. 101, 118th Gen. Assemb., 2d Reg. Sess. (Ind. 2014), *available at* http://openstates.org/in/bills/2014/SB101/#billtext (providing information about Senate Bill 101).
[100] Introduced version of S.B. 101, Sec. 2, § 35-43-1-9, *available at* http://openstates.org/in/bills/2014/SB101/documents/IND00062475/.

[101] *Id*. Specifically, S.B. 101 decreed that any person "who knowingly or intentionally commits an act at an agricultural operation that is a prohibited act listed on a notice . . . commits a Level 6 felony." *Id.*
[102] *Id.*
[103] The potential due process problems with such an approach are beyond the scope of this analysis, but they are easy to anticipate when the particulars of a felony are on notice only in a private facility.
[104] *See* February 18, 2014 version of S.B. 101, *available at* http://iga.in.gov/static-documents/c/8/1/9/c819f082/SB0101.04.COMH.pdf.
[105] *See, e.g.*, S.C. CODE ANN. §§ 47-21-10 to -260 (2012), *available at* http://www.scstatehouse.gov/query.php?search=DOC&searchtext=47%209%20710&category=CODEOFLAWS&conid=7309575&result_pos=0&keyval=979&numrows=10 (containing no ag-gag provision). States with ag-gag laws categories discussed above tend to include them along side or within statutes that heighten penalties for injuries done to agricultural facilities. *See, e.g.*, KAN. STAT. ANN. § 47-1827(c) (2013) (containing an ag-gag provision).
[106] *See* Bollard, *supra* note 7, at 10961.
[107] *See* Landfried, *supra* note 7, at 379 n.11, 393 n.87.
[108] *Id.* at 393.
[109] Adam, *supra* note 7, at 1173; *see also* Sara Lacy, Comment, *Hard to Watch: How Ag-Gag Laws Demonstrate the Need for Federal Meat and Poultry Industry Whistleblower Protections*, 65 ADMIN. L. REV. 127, 144 (2013).
[110] *See* Landfried, *supra* note 7, at 384-85, nn.33-36; *see also* Adam, *supra* note 7, at 1175; Kingery, *supra* note 7, at 664-67; John K. Edwards, *Should There Be Journalist's Privilege Against Newsgathering Liability?*, 18 COMM. LAW. 8, 10 (2000).
[111] *But see* Bollard, *supra* note 7, at 10970 ("Only two tort suits appear to have arisen from animal rights undercover investigations. In both cases, the courts applied reasoning similar to the *Desnick* and *Food Lion* courts' reasoning and dismissed all of the charges brought. The courts' dismissal of these claims suggests why Iowa and Utah lawmakers saw a need for the Ag-Gag laws.").
[112] As acknowledged by other commentators, "criminal law . . . has the unique ability to assign blame and censure with a moral force that the civil law cannot. It effectively sends the message that it is prohibiting behavior which lacks any social utility. . . . Crime is also seen as a moral fault and carries with it the weight of shame and stigma that the commission of a tort simply does not." Bryan H. Druzin & Jessica Li, *The Criminalization of Lying: Under What Circumstances, If Any, Should Lies Be Made Criminal?*, 101 J. CRIM. L. & CRIMINOLOGY 529, 571-72 (2011). Given the public utility of previous undercover reports on the food industry, it is hard to see how it merits criminal sanction.
[113] *See* Complaint at 9-10, Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00679-RJS (D. Utah July 22, 2013) [hereinafter *ALDF* Complaint], *available at* http://www.law.du.edu/documents/news/Ag-Gag-Complaint.pdf. For an account of the events that led to Amy Meyer's prosecution, authored by her co-plaintiff, *see* Will Potter, *First "Ag-Gag" Prosecution: Utah Woman Filmed a Slaughterhouse from the Public Street*, GREEN IS THE NEW RED (Apr. 29, 2013), http://www.greenisthenewred.com/blog/first-ag-gag-arrest-utah-amy-meyer/6948/.
[114] *See supra* notes 42 through 45 and accompanying text.
[115] *See* Civil Docket Report, Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00679-RJS (D. Utah 2013). The additional plaintiffs include journalists, academics, People for the Ethical Treatment of Animals (PETA) and the Animal Legal Defense Fund (ALDF), among others. *Id*. They claim the Utah law violates first amendment free speech rights. *Id*. at 34-37. They also claim equal protection and due process violations under the 14th Amendment. *Id*. at 37-39. Finally, they claim the state law is preempted by the federal False Claims Act under the Supremacy Clause. *Id*. The federal False Claims Act is designed for citizen watchdogs to blow the whistle on fraud, waste and abuse in government contracts. The government contracts implicated in agricultural food protectionism involve food provided for the school lunch programs. *Id*. at 25-27. Plaintiffs' Opposition to Defendants' Motion to Dismiss, Animal Legal Defense Fund v. Herbert, No. 2:13-cv-00679-RJS, 25-27 (D. Utah Dec. 10, 2013) (No. 33), *available at* http://www.scribd.com/doc/190760493/Utah-Ag-Gag-Challenge-Plaintiffs-Opposition-to-the-Motion-to-Dismiss.
[116] *See* Complaint, Animal Legal Defense Fund v. Otter, No. 1:14-cv-00104-BLW, (D. Idaho Mar. 17, 2014), *available at* https://acluidaho.org/wpsite/wp-content/uploads/1.complaint1.pdf. Many of the same plaintiffs are involved in both the Utah and Idaho civil cases and articulate most of the same complaints. Like the Utah action, the Idaho civil case claims preemption based on the federal False Claims Act, but also the Food Safety Modernization Act and the Clean Water Act. *Id.* ¶¶ 168-86. For a discussion of preemption under the Food Safety Modernization Act, *see infra* Part II.

[117] *See* Wayne Harrison, *Woman Who Took Cattle Abuse Video Charge with Animal Abuse*, 7NEWS DENVER, http://www.thedenverchannel.com/news/local-news/woman-who-took-cattle-abuse-video-charged-with-animal-abuse (last updated Nov. 23, 2013, 12:01 AM).
[118] *See* Matt Ferner, *Undercover Video Alleges Shocking Animal Abuse of Newborn Calves at Colorado Facility*, HUFFINGTON POST (Nov. 14, 2013, 2:01 PM), http://www.huffingtonpost.com/2013/11/14/video-newborn-calf-abuse_n_4275001.html (containing the video filmed by Radig and published by Compassion Over Killing); *see also* Alexis Croswell, *Charges Dropped Against Animal Rights Investigator Accused of Animal Cruelty*, ONE GREEN PLANET (Jan. 14, 2014), http://www.onegreenplanet.org/news/charges-dropped-against-animal-rights-investigator-accused-of-animal-cruelty/.
[119] *Id.*
[120] *See* COLO. REV. STAT. §§ 18-9-201 to -202.
[121] *See Charges Dropped Against Woman Accused of Animal Cruelty*, CBS DENVER (Jan. 11, 2014, 5:10 PM), http://denver.cbslocal.com/2014/01/11/charges-dropped-against-woman-accused-of-animal-cruelty/.
[122] ALA. CODE §§ 6-5-620 to -625 (2011); ARIZ. REV. STAT. ANN. § 3-113 (2011); COLO. REV. STAT. § 35-31-101 (2007); FLA. STAT. § 865.065 (2011); GA. CODE ANN. §§ 2-16-1 to -4 (2005); IDAHO CODE ANN. §§ 6-2001 to -2003 (2008); LA. REV. STAT. ANN. §§ 3:4501–4504 (2011); MISS. CODE ANN. §§ 69-1-251, -253, -255, -257 (1999); N.D. CENT. CODE §§ 32-44-01 to -04 (2008); OHIO REV. CODE ANN. § 2307.81 (West 2011); OKLA. STAT. tit. 2, §§ 5-100 to -102 (2003); S.D. CODIFIED LAWS § 20-10A-1 to -4 (2011); TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001–.004 (West 2005).
[123] Auvil v. CBS "60 Minutes," 67 F.3d 816 (9th Cir. 1995) (per curiam).
[124] *Id.*
[125] Auvil v. CBS "60 Minutes," 836 F. Supp. 740, 741 (E.D. Wash. 1993).
[126] *Auvil*, 67 F.3d at 822.
[127] *Id.* (internal citation omitted).
[128] For analysis of the different standards of proof in the twelve state food libel laws, *see* Rita Marie Cain, *Food Inglorious Food: Food Safety, Food Libel and Free Speech*, 49 AM. BUS. L. J. 275 (2012). *See also*, Marianne Lavelle, *Food Abuse Basis for Suits*, NAT'L L.J., May 5, 1997, at A01 (claiming that 1960s' critics of the pesticide DDT would be liable under standards of proof in food libel laws).
[129] *See* Cain, *id*. at 275-75, 307-10. Ronald K.L. Collins, *Free Speech, Food Libel, & the First Amendment . . . in Ohio*, 26 OHIO N.U. L. REV. 1 (2000); Howard Wasserman, *Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws*, 8 WM. & MARY BILL RTS. J. 323 (2000); Lisa Dobson Gould, *Mad Cows, Offended Emus, and Old Eggs: Perishable Product Disparagement Laws and Free Speech*, 73 WASH. L. REV. 1019, 1019 (1998); Kevin Isern, *When Is Speech No Longer Protected by the First Amendment: A Plaintiff's Perspective of Agricultural Disparagement Laws*, 10 DEPAUL BUS. L.J. 233, 242 (1998).
[130] Beef Products, Inc. v. American Broadcasting Companies, Inc., 949 F. Supp. 2d 936 (D.S.D. 2013).
[131] BPI Complaint, ¶ 7. The original segment and follow up reports are available at http://abcnews.go.com/topics/news/pink-slime.htm?mediatype=Video.
[132] Josh Sanburn, *One Year Later, The Makers of 'Pink Slime' Are Hanging On, and Fighting Back*, TIME (Mar. 6, 2013), http://business.time.com/2013/03/06/one-year-later-the-makers-of-pink-slime-are-hanging-on-and-fighting-back/.
[133] Daniel P. Finney, *Beef Products Inc. Sues ABC for Defamation Over 'Pink Slime'*, DESMOINESREGISTER.COM (Sept. 14, 2012), http://www.desmoinesregister.com/apps/pbcs.dll/article?AID=/20120914/NEWS/309140042&template=printart.
[134] *Id.* The states that continued to order the product for school lunches were Iowa (location of a BPI plant), Nebraska (home state of BPI, Inc.), and South Dakota (location of a BPI plant). *Id.*
[135] *Id.* ¶ 675-91.
[136] *Id.*
[137] S.D. CODIFIED LAWS § 20-10A-1(2) (2011).
[138] ABC Motion to Dismiss, at 10-11.
[139] *Id.* at 11.
[140] S.D. CODIFIED LAWS § 20-10A-1(2) (2011).
[141] BPI Complaint, ¶ 678.
[142] Auvil v. CBS "60 Minutes," 67 F.3d 816, 822 (9th Cir. 1995) (per curiam).

[143] BPI alleges many actual falsities in its claims against ABC, in addition to the use of the term "slime" to describe its product.
[144] Memorandum Decision, BPI v. ABC News, Inc., Civ. 12-292 (1st Jud. Cir. SD Mar. 27, 2014). Only BPI's common law claim for product disparagement was dismissed, on the ground that it is preempted by the statutory food libel claim. *Id*. at 8.
[145] The Food Safety and Inspection Service (FSIS) is the primary body within the USDA that carries out food safety authority under multiple enabling statutes. *See generally Federal Meat Inspection Act, Acts and Authorizing Statutes*, USDA—FOOD SAFETY & INSPECTION SERVICE, http://www.fsis.usda.gov/wps/portal/frame-redirect?url=/wps/wcm/connect/FSIS-Content/fsis-questionable-content/acts-and-authorizing-statutes/CT_Index1 (last modified Aug. 9, 2013).
[146] *See supra* notes 22-34 and accompanying text.
[147] *See generally* Rita Marie Cain, *Salads, Safety and Speech Under a National Leafy Greens Marketing Agreement*, 67 FOOD & DRUG L.J. 311 (2012).
[148] The Federal Food, Drug, and Cosmetic Act (FFDCA) established the Food and Drug Administration (FDA) in 1938. Pub. L. No. 75-717, 52 Stat. 1040 (1938) (codified in scattered sections of U.S.C.).
[149] Pub. L. No. 111-353, 124 Stat. 3885, 3947 (2011) (codified in scattered sections of 21 U.S.C.). The FDA is an agency within the Department of Health and Human Services (HHS). Accordingly, all the mandates in FSMA are directed at the HHS Secretary.
[150] 21 U.S.C. § 350j (2006 & Supp. IV 2011).
[151] 11 U.S.C. § 2251 (Supp. IV 2011).
[152] 21 U.S.C. §§ 601–80 (2006 & Supp. IV 2011).
[153] *Id.* §§ 451–72.
[154] *Id.* §§ 1031–56 (2006).
[155] For example, its Veterinary Services provide surveillance of animal, poultry, and aquaculture health *Animal Health*, USDA—ANIMAL & PLANT HEALTH INSPECTION SERVICE, http://www.aphis.usda.gov/wps/portal/aphis/ourfocus/animalhealth (last visited Apr. 11, 2014) (follow "Monitoring and Surveillance" hyperlink, on left; then "National Animal Health Surveillance System (NAHSS)," on right).
[156] Richard A. Merrill & Jeffrey K. Francer, *Organizing Federal Food Safety Regulation*, 31 SETON HALL L. REV. 61, 99 (2000).
[157] *About FSIS*, USDA—FOOD SAFETY & INSPECTION SERVICE, http://www.fsis.usda.gov/wps/portal/informational/aboutfsis (last modified Mar. 27, 2014).
[158] Federal Meat Inspection Act, 21 U.S.C. §§ 602-603 (2014). Poultry Products Inspection Act, 21 U.S.C. §§ 452, 455 (2014).
[159] 9 C.F.R. § 300.6(b) (2004). 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, 432 (2011).
[160] 9 C.F.R. § 311.1 (1970).
[161] 9 C.F.R. §§ 302.1-302.3 (1971) (requiring inspection at ***every*** non-exempt establishment, and of ***all*** livestock and products entering a non-exempt establishment and ***all*** products prepared at a non-exempt establishment (emphasis added)). The pervasive nature of this inspection mandate leads to the conclusion that a USDA decision to withdraw inspectors has the effect of suspending operations. *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, 359 (2011). *See also* Pape, *supra* note 159, at 443-44.
[162] *See* Pape, *supra* note159, at 443.
[163] *See generally* Cain, *supra* note 147. Slaughterhouses are allowed to use organic acid sprays to wash away fecal matter. FSIS randomly tests ground beef for E-coli, as do producers, voluntarily. *See* Pape, *supra* note 159, at 433-34.
[164] *See*, Straw, *supra* note 161, regarding E-coli infestation.
[165] *See generally* Hazard Analysis and Critical Control Point (HACCP) Systems, 21 C.F.R. § 120.1-.25 (2001).
[166] National Advisory Committee on Microbiological Criteria for Foods, *HACCP Principles and Application Guidelines*, U.S. FOOD & DRUG ADMIN. (Aug. 14, 1997), http://www.fda.gov/Food/GuidanceRegulation/HACCP/ucm2006801.htm.

[167] Cary Coglianese & David Lazer, *Management-Based Regulation: Prescribing Private Management to Achieve Public Goals*, 37 LAW & SOC'Y REV. 691, 696 (2003).
[168] Lauren Gwin & Arion Thiboumery, *Local Meat Processing: Business Strategies and Policy Angles*, 37 VT. L. REV. 987, 1001 (2013); Eva Merian Spahn, *Keep Away from Mouth: How the American System of Food Regulation Is Killing Us*, 65 U. MIAMI L. REV. 669, 710-11 (2011).
[169] Pape, *supra* note 159, at 438.
[170] *Id*. at 439.
[171] Pape, *supra* note 159, at 439. *See also* Straw, *supra* note 161, at 364-66.
[172] Joby Warrick, *An Outbreak Waiting to Happen: Beef-Inspection Failures Let In a Deadly Microbe*, WASH. POST, Apr. 9, 2001, at A1.
[173] S. 1502, 113th Cong. § 270 (2013), *available at* http://www.gpo.gov/fdsys/pkg/BILLS-113s1502is/pdf/BILLS-113s1502is.pdf.
[174] Travis Korte, *Safe Meat and Poultry Act of 2013*, CENTER FOR DATA INNOVATION (Feb. 28, 2014), http://www.datainnovation.org/2014/02/safe-meat-and-poultry-act-of-2013/.
[175] *FDA Finalizes Report on 2006 Spinach Outbreak*, FDA-U.S. FOOD & DRUG ADMIN. (Mar. 23, 2007), http://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/2007/ucm108873.htm.
[176] *How FDA Works to Keep Produce Safe*, DRUGS.COM (Mar. 1, 2007), http://www.drugs.com/fda-consumer/how-fda-works-to-keep-produce-safe-66.html.
[177] The investigation was one of the first to trace a food poisoning outbreak to its source. Denis W. Stearns, *On (Cr)edibility: Why Food in the United States May Never be Safe*, 21 STAN. L. & POL'Y REV. 245, 274 (2010).
[178] USDA Food Safety Initiative Staff, *Guidance for Industry: Guide to Minimize Microbial Food Safety Hazards for Fresh Fruits and Vegetables*, 39 (Oct. 1998), http://www.fda.gov/downloads/Food/GuidanceComplianceRegulatoryInformation/GuidanceDocuments/ProduceandPlanProducts/UCM169112.pdf.
[179] Matthew Kohnke, *Reeling in a Rogue Industry: Lethal E. Coli in California's Leafy Green Produce & the Regulatory Response*, 12 DRAKE J. AGRIC. L. 493, 508-09 (2007).
[180] In June, 2011, Dole Fresh Vegetables, Inc. of Monterey, California, voluntarily recalled over three thousand cases of "Italian Blend" salad bags in twelve U.S. states and Canada after random sampling by the Ohio Department of Agriculture found the bacteria listeria. *Dole Recalls Thousands of Bags of Salad Greens*, FOOD SAFETY NEWS (June 24, 2011), http://www.foodsafetynews.com/2011/06/dole-recalls-thousands-of-bags-of-salad/. Listeria was the pathogen found on cantaloupes from one large Colorado facility in the fall of 2011 that caused thirty deaths and 146 confirmed cases of listeriosis across twenty-eight states. *Multistate Outbreak of Listeriosis Linked to Whole Cantaloupes from Jensen Farms, Colorado*, CENTERS FOR DISEASE CONTROL & PREVENTION (December 8, 2011), http://www.cdc.gov/listeria/outbreaks/cantaloupes-jensen-farms/index.html.
[181] 21 U.S.C. § 350h(a)(1)(A) (Supp. IV 2011).
[182] 21 U.S.C. § 350*l*(b) (Supp. IV 2011). The Dole recall of spinach discussed above was completely voluntary since the FDA was still in the process of promulgating its regulations under FSMA at that time. *See supra* notes 175-77 and accompanying text.
[183] 21 U.S.C. § 399c(b)-(d) (Supp. IV 2011).
[184] 21 U.S.C § 384a (a) (1) (2013).
[185] *See generally*, Tacy Katherine Hass, *New Governance: Can User-Promulgated Certification Schemes Provide Safer, Higher Quality Food*? 68 FOOD & DRUG L. J. 77 (2013).
[186] 21 U.S.C. § 399d(a)(1)-(4) (Supp. IV 2011).
[187] *Id.* § 399d(a).
[188] *Id.* § 399d(c).
[189] For an analysis of FSMA preemption of state food libel claims, *see* Cain, *supra* note 128, at 304-07.
[190] *See* Cain, *supra* note 128, at 307.
[191] 29 C.F.R. § 1987 (2014).
[192] Earl "Chip" Jones III, Linda Jackson, & Jill Weimer, *OSHA Issues New Rule for Food Safety Whistleblowers*, LITTLER (Feb. 21, 2014), http://www.littler.com/publication-press/publication/osha-issues-new-rule-food-safety-whistleblowers.
[193] Comparisons to whistleblowing provisions in Sarbanes-Oxley (SOX), *see id.*, could include SOX's expansive interpretation of "adverse action" by the Department of Labor. *See* Menendez v. Haliburton, ALJ Case No. 2007-SOX-005 (Sept. 13, 2011), *available at*

http://www.oalj.dol.gov/public/arb/decisions/arb_decisions/sox/09_002.soxp.pdf. In *Menendez*, retaliation was not limited to significant changes in the whistleblower's employment status, but included breach of the whistleblower's confidentiality by the employer. *Id.* at 24. Nevertheless, this liberal interpretation of "adverse action" still is in the context of an employment action by the employer. Criminal prosecution under state ag-gag laws will always be missing that employment nexus.

[194] *See supra* note 173. According to Govtrack.us, the bill has a 1% chance of being enacted. GOVTRACK.US, https://www.govtrack.us/congress/bills/113/s1502 (last visited May 14, 2014).

[195] Alternatively, the United States could challenge the state criminal laws like it successfully did against Arizona's immigration reform laws. *See* United States v. Arizona, 132 S. Ct. 2492 (2012). In the Arizona case, however, the government was protecting federal immigration authority, which expressly preempts state immigration laws. *See* U.S. CONST., ART. I, § 8, cl. 4. The U.S. Code expressly preempts state laws regarding employment of unauthorized aliens. 8 U.S.C. § 1324a(h)(2) (2012). No such express statutory basis for challenging ag-gag laws applies under FSMA.

[196] Plaintiffs in the Idaho ag-gag civil litigation asserted preemption under FSMA. *See* Complaint, *supra* note 116, ¶¶ 177-80.

[197] *See* Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 446 (1960) (cited by the Court in United States v. Arizona, 132 S. Ct. at 2509, supporting the Court's declination to preempt one provision of the Arizona law on checking the status of arrestees until the law had been in effect, enforced, and interpreted by the state courts). Recently, a Tennessee court rejected a preemption defense in a state improper-labeling crime based on federal copyright law. *See State v. Pierson, No. W2012-02565-CCA-R3-CD*, 2014 WL 261414 (Tenn. Crim. App. Jan. 23, 2014). This criminal preemption defense was unsuccessful even in the face of express preemption in federal copyright law. *See* 17 U.S.C § 301(a) (2013) (unavailable for ag-gag defendants under FSMA).

In Nat'l Meat Ass'n v. Harris, 132 S. Ct. 965 (U.S. 2012), the Supreme Court concluded the USDA's slaughterhouse and packing plant regulations under the Federal Meat Inspection Act (FMIA) preempted California's stricter standards for handling disabled livestock. The scope of the FMIA preemption, although broad according to the Court, clearly focuses on state laws that impose requirements on meat production operations at FSIS-inspected facilities. *Id.* at 966 (quoting 21 U.S.C. § 678). State protectionist laws discussed herein impose no such requirements and do not seem to fall within the express preemption language applied in *Harris*.

[198] The bill tends to span hundreds of pages because so many issues are addressed. For example, the Senate's proposed 2013 farm bill, The Agriculture Reform, Food, and Jobs Act of 2013, S. 954, 113th Cong. (2013), spans 1163 pages. *See* GOVTRACK.US, https://www.govtrack.us/congress/bills/113/s954 (last visited May 14, 2014).

[199] *See generally* DANIEL IMHOFF, FOOD FIGHT: THE CITIZEN'S GUIDE TO THE NEXT FOOD AND FARM BILL 24 (Watershed Media, 2d ed. 2012).

[200] David Jackson, *Obama Signs Farm Bill*, USA TODAY (Feb. 7, 2014, 4:23 PM), http://www.usatoday.com/story/news/politics/2014/02/07/obama-farm-bill-signing-lansing-michigan/5282827/. In signing the bill, the President compared it to a Swiss Army knife because it does so many things. *Id.*

[201] Before it was a section of H.R. 2642, PICA was Amendment 71 to H.R. 1947, (also known as the "King Amendment" after its sponsor, Representative Steven King (R-IA)). H.R. 1947, an earlier proposed 2013 farm bill, failed. Then, H.R. 2642 was proposed with the PICA already in it.

[202] "(a) In General

Consistent with Article I, section 8, clause 3 of the Constitution of the United States, the government of a State or locality therein shall not impose a standard or condition on the production or manufacture of any agricultural product sold or offered for sale in interstate commerce if—

(1) such production or manufacture occurs in another State; and

(2) the standard or condition is in addition to the standards and conditions applicable to such production or manufacture pursuant to—

(A) Federal law; and

(B) the laws of the State and locality in which such production or manufacture occurs."

H.R. 2642, 113th Cong. (2013), *available at* https://www.govtrack.us/congress/bills/113/hr2642/text.

[203] *See* Lydia O'Connor, *Legal Experts Slam Controversial Farm Bill Amendment In Letter To Congress*, HUFFINGTON POST (Jan. 25, 2014, 4:01 PM), http://www.huffingtonpost.com/2013/12/06/law-professors-farm-bill_n_4401489.html. *See also* Pamela Vesilind, *Preempting Humanity: Why* National Meat Ass'n v. Harris *Answered the Wrong Question*, 65 ME. L. REV. 685, 692-702 (2013).

[204] Melanie Condon, *NCSL Stakes Out Farm Bill Position in Letter to House, Senate Conference Leaders*, NAT'L CONF. STATE LEGISLATURES (Nov. 22, 2013), http://www.ncsl.org/blog/2013/11/22/ncsl-stakes-out-farm-bill-position-in-letter-to-house-senate-conference-leaders.aspx.
[205] CAL. HEALTH & SAFETY CODE §§ 25990-94 (effective Jan. 1, 2015).
[206] A.B. 1437, Reg. Sess. (Cal. 2010).
[207] *Charts and Maps: Annual Egg Production by States*, NAT'L AGRIC. STAT. SERVICES (Mar. 1, 2013), http://www.nass.usda.gov/Charts_and_Maps/Poultry/eggmap.asp.
[208] Mike McGraw, *Missouri Enlists in the Egg Wars*, KANSAS CITY STAR, Feb. 1, 2014, at A1, http://www.kansascity.com/2014/02/01/4792128/missouri-enlists-in-the-egg-wars.html.
[209] Jacob Bunge & Jesse Newman, *States Join Suit to Block California Egg Law*, WALL STR. J. (Mar. 6, 2014, 2:01 PM), http://online.wsj.com/news/articles/SB10001424052702303369904579423351872186 77.
[210] The California voter initiative has survived several legal challenges. *See* Kathleen Masterson, *Court Upholds California Law on Chicken Cage Sizes*, CAP. PUBL. RADIO (Sept. 13, 2012), http://archive2.capradio.org/articles/2012/09/13/court-upholds-california's-law-on-chicken-cage-sizes.
[211] *See* Cain, *supra* note 128, at 318. A federal bill, the Egg Products Inspection Act Amendment of 2013, would gradually phase in national cage requirements similar to California's for egg-laying chickens. H.R. 1731, 113th Cong., 1st Sess. (2013), *available at* https://www.govtrack.us/congress/bills/113/hr1731.
[212] U.S. CONST. amend. I.
[213] *See*, *e.g.*, National Ass'n for Advancement of Colored People v. Alabama, 357 U.S. 449, 460 (1958).
[214] *See supra* note 129 and accompanying text.
[215] *See* Landfried, Bollard, Adam, and Kingery, *supra* note 7.
[216] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 960 (Wolters Kluwer Law & Business, 4th ed. 2011). "Simply put, it is not possible to comprehensively flowchart the First Amendment as a defined series of questions in a required sequential order." *Id.*
[217] Because the authors this literature review discusses have their own methods of discussing the different variations of ag-gag laws, this Part continues to use this article's categorization scheme and applies the commentator's analysis to the categories used herein.
[218] Landfried, *supra* note 7, at 388-89.
[219] *Id.* at 388.
[220] *Id.*
[221] *Id.*
[222] *Id.* at 389.
[223] Adam, *supra* note 7, at 1169-70.
[224] *Id.* at 1170.
[225] *Id.*
[226] Kingery, *supra* note 7, at 670.
[227] *Id.* at 671.
[228] *Id.* (citing New York v. Ferber, 458 U.S. 747 (1982)).
[229] *Id.* (citing United States v. Stevens, 130 S. Ct. 1577, 1583-86 (2010)).
[230] *See* Adam, *supra* note 7, at 1138.
[231] *Id.* at 1138-39 (citing Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976) and Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 558-59 (1975)).
[232] *Id.* at 1171-72 (analyzing proposed Category Two -No Distributing ag-gag legislation that failed to pass in Illinois, Minnesota, and Tennessee).
[233] Landfried, *supra* note 7, at 389. Kingery also notes that prior restraints on speech are presumptively unconstitutional. Kingery, *supra* note 7, at 669. Kingery explains that information gathering is not within the traditional scope of "speech." Nevertheless, she asserts that Category One [No Recording] laws that restrict the creation of footage should be considered a prior restraint because "banning the gathering of evidence is not sufficiently distinctive from the actual exercise of free speech…." *Id.* at 669-670.
[234] Adam, *supra* note 7, at 1133-37.
[235] *Id.* at 1133 (citing DANIEL A. FARBER, THE FIRST AMENDMENT, 39 (2010), and Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1283-85 (2005)).
[236] *Id.* at 1134 (citing Spence v. Wash., 418 U.S. 405, 409-10 (1974)).

[237] *Id.* at 1134-37.
[238] *Id.* at 1169.
[239] *Id.*
[240] *Id.* at 1170.
[241] Bollard, *supra* note 7, at 10971.
[242] *Id.* at 10974.
[243] *Id.* at 10974-75.
[244] *Id.* Bollard acknowledges that it is far from settled that intermediate scrutiny is the standard courts will employ when examining torts or crimes that attach to undercover reporters' newsgathering activities. For an in depth review of case law interpreting First Amendment newsgathering rights (or lack thereof) and arguments for changes or clarifications in the precedent, *see* Erik, *Demarcating the Right to Gather News: A Sequential Interpretation of the First Amendment*, 3 DUKE J. CONST. L. & PUB. POL'Y 113 (2008) (arguing for intermediate scrutiny); Erwin Chemerinsky, *Protect the Press: A First Amendment Standard for Safeguarding Aggressive Newsgathering*, 33 U. RICH. L. REV. 1143 (2000) (arguing for intermediate scrutiny); John K. Edwards, *Should There Be Journalist's Privilege Against Newsgathering Liability?*, ABA FORUM ON COMM. L. (2000), *available at* http://apps.americanbar.org/forums/communication/comlawyer/spring00/edwards.html (arguing for a limited newsgathering affirmative defense).
[245] Kingery, *supra* note 7, at 667.
[246] *Id.* at 668-69.
[247] *Id.* at 668.
[248] *Id.* at 669.
[249] Landfried, *supra* note 7, at 389.
[250] *Id.* at 390 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989)).
[251] *Id.*
[252] *Id.*
[253] *Id.* at 390-91.
[254] *Id.* at 380 (quoting Washington State Grange v. Washington State Republican Party, 552 U.S. 442, 449 n.6 (2008)).
[255] *Id.* at 381. *See also*, Kingery, *supra* note 7, at 671. Courts will only strike a statute on its face if the overbreadth is substantial, namely it applies to many situations not within its legitimate sweep. *See* CHEMERINSKY, *supra* note 216, at 972-76. Additionally, courts will narrowly interpret a challenged statute when they can, to avoid finding that the statute applies broadly outside of its legitimate scope. *Id.*
[256] Landfried, *supra* note 7, at 382 (citing U.S. v. Stevens, 130 S. Ct. 1577 (2010)).
[257] *See* 18 U.S.C. § 48 (2006).
[258] *Stevens*, 130 S. Ct. at 1592.
[259] Landfried, *supra* note 7, at 382; *see also* Kingery, *supra* note 7, at 675.
[260] Bollard, *supra* note 7, at 10975.
[261] *Id.* at 10976.
[262] *Id.*
[263] *Id.* at 10977.
[264] *Id.* Bollard thinks most ag-gag laws would likely fall under intermediate scrutiny as well. For example, Iowa's and Utah's No Recording laws certainly do not advance important government interests unrelated to speech. Category Three - No Lying laws should not pass, unless a reviewing court ignored the legislative history and did not require harm under the fraud exclusion from First Amendment protections. *Id.* (citing Turner Broad. Sys., Inc. v. Fed. Commc'n Comm'n, 520 U.S. 180, 189 (1997)).
[265] Adam, *supra* note 7, at 1174-75.
[266] *Id.* The authors do not fully agree with this sentiment. Ag-gag laws impose criminal sanctions, sometimes even felonies, for certain newsgathering activities that were either legal or merely actionable prior to ag-gag enactment. *See supra* notes 111-12 and accompanying text. *See also*, Bollard, *supra* note 7, at 10970 (discussing the dismissal of tort actions against undercover and stating "[t]he courts' dismissal of these claims suggests why Iowa and Utah lawmakers saw a need for the Ag-Gag laws.").
[267] Adam, *supra* note 7, at 1174.
[268] *Id.* at 1175.
[269] Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974).

[270] *See, e.g.*, Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 771 (1976) ("Untruthful speech, commercial or otherwise, has never been protected for its own sake.").
[271] United States v. Alvarez, 132 S. Ct. 2537 (2012).
[272] 18 U.S.C. § 704(b) (2014).
[273] Dahlia Lithwick, *Heavy Medals: Sotomayor's Boyfriends Lie to Her? And the Other Untruths that Worry the Supreme Court*, SLATE.COM (Feb. 22, 2012, 8:13 PM), http://www.slate.com/articles/news_and_politics/supreme_court_dispatches/2012/02/xavier_alvarez_lied_about_winning_the_congressional_medal_of_honor_.html. The Stolen Valor Act enhanced penalties for those who falsely claimed receipt of the Congressional Medal of Honor. 18 U.S.C. § 704(c).
[274] *Alvarez*, 132 S. Ct. at 2542. Whether the fact that Alvarez did not lie to secure employment sufficiently distinguishes his protected lie from those of undercover activists who lie to get farm jobs is discussed herein.
[275] *Id*. at 2551-56.
[276] *Id*. at 2556-65.
[277] The holding in a plurality decision is the "position taken by those Members who concurred in the judgment on the narrowest grounds." Marks v. United States, 430 U.S. 188, 193 (1977). For a discussion of "the *Marks* rule," *see* Justin Marceau, *Plurality Decisions: Upward-Flowing Precedent and Acoustic Separation*, 45 CONN. L. REV. 933 (2013). Under the *Marks* rule, *Alvarez* stands for the proposition that that the Stolen Valor Act was unconstitutional violation of free speech. The concept that the First Amendment protects some lies is supported by all three opinions in the case, as is discussed in this Part.
[278] *Alvarez*, 132 S. Ct. at 2546. Content restrictions on speech have been permitted, but only for a few "historic" categories of speech, including obscenity, defamation (while still allowing significant protection for speech about public figures), and fraud. "Absent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements." *Id.* at 2544.
[279] *Id.* at 2545-46.
[280] *Id.* at 2546.
[281] *Id.*
[282] *Id.* at 2547.
[283] *Id.*
[284] *Id.* (emphasis added) (citing Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 771 (1976), for the proposition that fraudulent speech is unprotected. *Virginia Pharmacy* was not about fraud in employment, however, but about advertising drug prices).
[285] *But see* Food Lion, Inc. v. Capital Cities/ABC, Inc., 194 F.3d 505, 512 (4th Cir. 1999) in which false statements in obtaining jobs for undercover reporters were indisputable. No fraud damages could be attributable to the falsities, however, because the undercover employees performed the jobs as hired and the plaintiff received its expected exchange for the compensation paid. *Id.* at 519. Further, plaintiff's alleged administrative damages for hiring these surreptitious employees, then having to replace them, were inconsistent with the at-will nature of the employment. They could quit or be fired anytime. *Id.* at 513.
[286] *Id.* at 2548. In an unsuccessful prosecution that pre-dated *Alvarez*, a district court concluded that the objective of the Stolen Valor Act did not amount to a compelling government interest. United States v. Strandlof, 746 F. Supp. 2d 1183, 1190-91 (D. Colo. 2010). This was also the approach taken by the Ninth Circuit in striking down the prosecution in *Alvarez*. *See* United States v. Alvarez, 617 F.3d 1198, 1217 (9th Cir. 2010).
[287] *Alvarez*, 132 S. Ct. at 2549.
[288] *Id.*
[289] *Id.* at 2550.
[290] *Id.* at 2551. *See also* Aaron H. Caplan, *Lies and Levels of Scrutiny*, AM. CONST. SOC. (June 28, 2012), https://www.acslaw.org/acsblog/lies-and-levels-of-scrutiny ("[Kennedy's] phrase 'exacting scrutiny' may ultimately become a recognized term of art that signals a form of super-strict scrutiny extremely intolerant (but still a little tolerant) of content-based speech restrictions."
[291] *Alvarez*, 132 S. Ct. at 2551.
[292] *Id.* at 2553.
[293] *Id*.
[294] *Id*. (internal citations omitted). No such case was presented in *Alvarez*, however: "[t]he dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts." *Id.* at 2552.

[295] *Id.* at 2553 (quoting JOHN STUART MILL, ON LIBERTY 15 (Blackwell ed. 1947)).
[296] *See supra* note 285.
[297] *Id.* at 510.
[298] *Id.* at 511.
[299] *Alvarez*, 132 S. Ct. at 2554.
[300] *Id.*
[301] *Id.* For a discussion of harm-based free speech jurisprudence, *see* Clay Calvert & Rebekah Rich, *Low-Value Expression, Offensive Speech, and the Qualified First Amendment Right to Lie: From Crush Videos to Fabrications About Military Medals*, 42 U. TOL. L. REV. 1, 31-32 (2010); *see also* Bollard, *supra* note 7, at 10975.
[302] *Alvarez*, 132 S. Ct. at 2555.
[303] *Id.* Justice Breyer (with Kagan joining) departs from the four justices who form the *Alvarez* plurality because the substantial government interest in protecting military honors could be satisfied with less restrictive alternatives than the Stolen Valor Act. *Id.* A more finely tailored statute could include requirements of actual knowledge of material harm that would significantly narrow the free speech impact. *Id.* at 2555-56.

The Stolen Valor Act of 2013 now criminalizes lying about military honors "with the intent to obtain money, property, or other tangible benefit." 18 U.S.C. § 704(b). One commentator analyzes whether lies now criminalized under this new Stolen Valor law could withstand constitutional scrutiny under the commercial speech doctrine because the illegal statements would be self-promotion akin to advertising. *See* Alison L. Stohr, Comment, *Valor for Sale: Applying the Commercial Speech Exception to Self-Promoting Individuals*, 85 TEMP. L. REV. 455, 476 (2013). Despite concluding that all speech targeted by the new Stolen Valor law meets the underlying rationale of the commercial speech exception, *id.* at 479, Stohr rejects her espoused constitutional approach and calls for a reexamination of the commercial speech exception altogether. *Id.* at 482-83.
[304] For a discussion of torts that would protect against some of the legitimate harms that might arise from lies about military honors, *see* Lauren Valkenaar, Comment, *Civil Liability Approaches to the Stolen Valor Epidemic*, 44 ST. MARY'S L.J. 835, 852-77 (2013). As was noted above, legitimate harms are still actionable from behavior targeted in all ag-gag laws through civil tort claims. *See supra* Part I.A.4.
[305] *Food Lion, Inc. v. Capital Cities/ABC, Inc.*, 194 F.3d 505, 516 (4th Cir. 1999).
[306] *Id.* at 518. By contrast, the court rejected the argument that misrepresentation on job applications turned the act of showing up to work into trespass because such misrepresentations did not nullify the employer's consent to enter the property to work. *Id.*
[307] The financial effect of ABC's Food Lion expose': over $5.5 billion in lost sales and stock value, allegedly. *Id.* at 511.
[308] Food Lion, Inc. v. Capital Cities/ABC, Inc., 964 F. Supp. 956, 963 (M.D.N.C. 1997).
[309] 194 F.3d at 522 (citing New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964)).
[310] *Id.* (citing Hustler Magazine v. Falwell, 485 U.S. 46 (1988)). An elevated proof requirement also has been applied to private plaintiffs when the subject of the alleged defamation is a matter of public concern. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776–77 (1986) (holding that the burden of proving falsity lies with the private plaintiff when the defendant is a media defendant speaking on a matter of grave public concern); Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 784 (1985) (extending the *Hepps* burden of proof to a private plaintiff suing a non-media defendant); Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974) (applying the malice requirement to a private figure defamation plaintiff suing for punitive damages).
[311] 501 U.S. 663 (1991).
[312] *Id.* at 669; *see also* Bollard, *supra* note 7 and accompanying text.
[313] 501 U.S. at 670.
[314] 194 F.3d at 524. One commentator argues that ag-gag laws are distinguishable from the promissory estoppel claim in *Cowles* because they are not generally applicable laws, but rather "were drafted to stop expressive activity at agricultural operations . . ." Bollard, *supra* note 7, at 10971. For this reason, ag-gag laws should fall under strict scrutiny. *Id.* at 10972, 10976-77.
[315] *See* People for the Ethical Treatment of Animals v. Bobby Berosini, Ltd., 895 P.2d 1269, 1278 (Nev. 1995) (reaching a similar conclusion after applying Nevada constitutional law).
[316] United States v. Alvarez, 132 S. Ct. 2537, 2558 (2012).
[317] *Id.* at 2559.
[318] *Id.* at 2560.

[319] *Id.* Not all of the precedents cited involved false factual statements, however, such as Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
[320] *Id.* at 2561-62.
[321] *Id.*
[322] *Id.* (citations omitted).
[323] *Id.* at 2564. The dissent concludes that lies proscribed under the Stolen Valor Act present no such risks. *Id.*
[324] Even a district court that ***upheld*** the Stolen Valor Act prior to *Alvarez* also suggested constitutional concerns that would apply to Category Three – No Lying laws. Prosecution of lying "by the government may create conflict between the motivations of the government and the imperatives of free speech." United States v. Robbins, 759 F. Supp. 2d 815, 820 (W.D. Va. 2011).
[325] *See* Helen Norton, *Lies and the Constitution*, 2012 SUP. CT. REV. 161, 164-65 (2012); *see also* Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107 (2006).
[326] Only North Carolina's proposed law would extend its provisions about lying to get a job to any employment, not just agriculture jobs. *See supra* notes 79-81 and accompanying text.
[327] *See supra* notes 38-45 and 50-55 and accompanying text.
[328] In *Food Lion*, the court held that none of the damages alleged by Food Lion could be attributable to employee falsities. The undercover employees performed the jobs as hired, so Food Lion received its expected exchange for the compensation it paid them. *Id*. at 514. Further, Food Lion's alleged administrative damages for hiring two employees, then having to replace them, were inconsistent with the at-will nature of the employment. Both could quit or be fired anytime, so misstatements at hiring were not the cause of any administrative harm. *Id*. at 513.
[329] Some tort cases distinguish between an intention contained in a promise, such as the promise to work for compensation, which is not actionable in deceit, and a "collateral intent, for which the action will lie." RESTATEMENT (SECOND) OF TORTS § 530 (1977) (Reporters Notes). *See also* Woods v. Scott, 178 A. 886 (1935) (upholding directed verdict for defendant when he hired and later fired a housekeeper with the original hope of making her his mistress. Contrary to the RESTATEMENT'S characterization, the underlying intent to make plaintiff his mistress was not found actionable in this case); Comstock v. Shannon, 73 A.2d 111 (1950) (finding that a broken promise did not amount to fraud, but the false statement of an intent not to compete in the future did). Category Three – No Lying laws seem to zero in on this sliver of tort cases when they criminalize the collateral intent to investigate, unrelated to the, arguably, non-fraudulent promise to work.
[330] *See supra* notes 17-18 and accompanying text.
[331] "Although the Court's decision in *Alvarez* is badly fractured, there seems unanimous skepticism of laws targeting false speech about issues of public concern and through which the state potentially could use its sanctioning power for political ends. Especially dangerous are criminal laws punishing false speech that could lead to selective criminal prosecution." Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 69 (2013). Hasen questions the constitutionality of laws on false campaign and election speech. His concerns about political motivation and selective prosecution, however, seem equally applicable to enforcement of agriculture protectionist laws in states whose economies are dominated by agricultural interests.
[332] From 2013-2014 Category Four bills that included a relinquishment requirement were proposed in New Hampshire, North Carolina, and Tennessee, among others. *See supra* notes 73-74, 81, 89 and accompanying text.
[333] In 2013, Nebraska and Tennessee, among others, proposed Category Four bills that included a reporting requirement. *See supra* notes 68, 73, 89, 96 and accompanying text.
[334] MO. REV. STATS. § 578.013 (2014).
[335] *See supra* notes 173-74 and accompanying text.
[336] There are additional areas of constitutional analysis for Category Four laws that are outside the scope of this analysis. The first is whether the mandatory-relinquishment-type laws could constitute a condemnation that requires just compensation and procedural due process. Another is that crimes of omission are generally disfavored and might afford some constitutional protection as such or in combination with a First Amendment theory. *See, e.g.*, Michael M. O'Hear, *Sentencing the Green-Collar Offender: Punishment, Culpability, and Environmental Crime*, 95 J. CRIM. L. & CRIMINOLOGY 133, 177-78 (2004) ("[A] defendant may assert a right to do nothing. Such an interest might come into play in cases involving crimes of omission, rather than commission. . . . Criminal law has long recognized a distinction between malfeasance and nonfeasance, traditionally exhibiting a reluctance (albeit not a per se refusal) to punish mere omissions. In light of this tendency, a defendant who has performed no act that violates the law may rely on an interest in simply being left alone.").

[337] CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 216, at 1009.
[338] Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., 515 U.S. 557, 573 (1995).
[339] *See id.* (holding that a private parade organizer could not be compelled to include an LGBT-pride marching unit); *see also* Wooley v. Maynard, 430 U.S. 705, 714 (1977) (striking down a New Hampshire law requiring all noncommercial vehicles to display a license plate bearing the state's motto "Live Free or Die"); West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (striking a law requiring school children to salute the flag).
[340] *Hurley*, 515 U.S. at 573.
[341] 487 U.S. 781 (1988).
[342] *Id.* at 798.
[343] *Id*. at 797-98.
[344] *See, e.g.*, Samuel G. Brooks, Notes and Comments, *Confession and Mandatory Child Abuse Reporting: A New Take on the Constitutionality of Abrogating the Priest-Penitent Privilege*, 24 BYU J. PUB. L. 117, 133 (2009) ("[A]s long as the individual would not otherwise make the statement, even compulsion to disclose facts interferes with this freedom of mind and, therefore, falls within the protections of the First Amendment.").
[345] *Riley*, 487 U.S. at 795, 799 n.11. Justice Scalia was so opposed to the dicta in footnote 11 that he wrote his own concurring opinion disavowing it. *Id*. at 803-04.
[346] Some of these choices may be limited by the logistics of secretly recording suspected abuse, but the capacity for those decisions is present.
[347] *See* Red Lion Broad. Co. v. Fed. Commc'n Comm'n, 395 U.S. 367, 390 (1969) (holding "[i]t is the right of the viewers and listeners, not the right of the broadcasters, which is paramount . . . [and i]t is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial."); *see also* Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 384-85 (2008) (discussing how listener interests rather than speaker interests are paramount in compelled speech cases).
[348] *But see* Bollard, *supra* note 7, at 10971 (arguing that ag-gag laws cannot be direct restrictions on speech because there is no constitutional right to record on private property. Bollard further argues that restrictions on filming and photography should be analyzed under the newsgathering precedent, which he merges with the law governing restrictions on expressive conduct, rather than precedent on direct speech restrictions).
[349] *See* MO. REV. STAT. § 198.070(3) (2014). There is no discussion of *relinquishing* recordings, and the "reasonable time" for *reporting* seems likely to extend beyond the twenty-four hours mandated in the ag-gag law. Moreover, because there is no relinquishment requirement, employers are less likely to be able to identify and retaliate against those who report abuse. This means a nursing home aid, for instance, could create a video documenting a pattern of elder abuse so long as he reported each instance of suspected abuse to authorities within "a reasonable time."
[350] *See* MO. REV. STAT. § 578.013(1) (2013) (only recordings made by "farm animal professionals" of suspected abuse of "farm animals" need be relinquished).
[351] The videographer must turn over a recording he or she "believes" depicts farm animal abuse or neglect. MO. REV. STAT. § 578.013(1).
[352] *See* Harris, *supra* note 197.
[353] *See supra* notes 208-09 and accompanying text.
[354] *See* Bollard, *supra* note 7, at 10974.
[355] The freedom to associate is a Due Process right closely aligned with the freedom of speech. *See* Shelton v. Tucker, 364 U.S. 479, 485-87 (1960).
[356] *See* Bollard, *supra* note 7, at 10972 (noting that the sponsors of the Iowa and Utah bills collectively asserted that their bills were directed at "national propaganda groups," "activists," "the vegetarian people," and "extremist vegans").
[357] *See* MO. REV. STAT. § 578.013(2) (2013).
[358] National Ass'n for Advancement of Colored People v. Alabama, 357 U.S. 449, 462 (1958) [hereinafter NAACP v. Alabama]. The authors do not contend that everyone creating a recording will be affiliated with an animal rights group, let alone identify as an activist, vegetarian, or "extremist vegan." Nonetheless, proponents of the ag-gag laws, at least in Iowa and Utah, believe that those are the people their bills will target, and their statements to that effect (*see supra* note 356) demonstrate that they are targeting advocacy groups that espouse dissident beliefs. *See generally* COLIN SPENCER, THE HERETIC'S FEAST: A HISTORY OF VEGETARIANISM (University Press of New England, 1995) (providing a history of vegetarianism and animal rights sentiment and showing how both have consistently been viewed as subversive by society at large).

[359] NAACP v. Alabama, 357 U.S. 449.
[360] Shelton v. Tucker, 364 U.S. 479 (1960).
[361] There is good reason to believe that newsgathering privileges (to the extent courts apply any) afforded to "the press" would apply even to "good faith," whistleblowing employees. *See* Ugland, *supra* note 244, at 136-38 (explaining how courts have inconsistently defined "press" and "journalist" for the purpose of deciding who is eligible for newsgathering protections and arguing that the best approach is "to define journalists based on the function they are performing. The reporter's privilege could be made available to anyone serving a press function—seeking out news of public interest for the purpose of disseminating it to an audience." "This," he asserts, "seems to be the direction favored by most circuit courts." *Id.* at 137). Arguably a good faith employee, though she had no intent upon accepting employment to record and distribute footage of illegal activity, upon seeing such activity could decide to record and disseminate evidence of the wrongdoing because the public would be interested in such news. Per Ugland's analysis, this should and would likely allow her to reap any newsgathering protections afforded to "the press." Ugland's position is supported by federal court dicta. *See* First Nat'l Bank v. Bellotti, 435 U.S. 765, 802 (1978) (Burger, C.J., concurring) ("The First Amendment does not 'belong' to any definable category of persons or entities: It belongs to all who exercise its freedoms."). *See also* Lambert v. Polk County, 723 F. Supp. 128, 133 (S.D. Iowa 1989) ("It is not just news organizations . . . who have First Amendment rights to make and display videotapes of events - all of us . . . have that right.").
[362] *See* Branzburg v. Hayes, 408 U.S. 665, 682 (1972) (holding that the First Amendment did not insulate reporters from criminal sanctions for refusing to testify before a grand jury even where their testimony might reveal confidential news sources, and reasoning "[i]t is clear that the First Amendment does not invalidate every incidental burdening of the press that may result from the enforcement of civil or criminal statutes of general applicability."); Cohen v. Cowels Media Co., 501 U.S. 663 (1991); *supra* notes 311-14 and accompanying text.
[363] *See* discussion *infra* Part I.A.4 for more examples of laws that could fit this category.
[364] *Branzburg*, 408 U.S. at 681.
[365] *See* Bollard, *supra* note 7, at 10966 ("Although *Food Lion* only relied explicitly on the First Amendment on one count, and *Desnick* did not rely on it at all, both cases appear to tread softly because of First Amendment concerns. Indeed, legal scholar Richard Epstein has attacked the results in *Desnick* and *Food Lion* as examples of 'First Amendment exceptionalism.'")
[366] In one of those analyses, Erwin Chemerinsky proclaims: "In few areas of constitutional law is there a greater divergence between rhetoric and reality than the difference between the Supreme Court's proclamation of the need to protect newsgathering and its failure to do so." Chemerinksy, *supra* note 244, at 1164.
[367] *See supra* notes 218-29, 311-14 and accompanying text.
[368] *See, e.g.*, *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 800 (1988) ("[There is a] First Amendment directive that government not dictate the content of speech absent compelling necessity, and then, only by means precisely tailored."); *see also* Bollard, *supra* note 7, at 10975-77 (analyzing Iowa and laws under strict scrutiny).
[369] *See* Landfried, *supra* note 7, at 390-91 ("[Category Three and Four ag-gag laws] are deliberately crafted to limit expression. Perhaps courts attuned to the context of these bills' passage and to the strong evidence that they were designed to evade First Amendment issues would be more willing to strike down these laws."). *See also* Bollard, *supra* note 7, at 10964-65 (discussing the legislative history of Iowa and Utah's ag-gag laws and the national agribusiness lobbying groups that have been pushing bills around the country).
[370] Bollard, *supra* note 7, at 10977. This article has considered the constitutionality of the different types of ag-gag laws individually. In practice, states often package two or more different categories of ag-gag laws together. When a court reviews those laws, it will likely look to the law as a whole to determine the governmental interest and intent.
[371] Turner Broad. Sys. v. Federal Commc'c Comm'n, 512 U.S. 622, 641 (1994). *But see* Bollard, *supra* note 7, at 10971 (arguing that ag-gag laws cannot be direct restrictions on speech because there is no constitutional right to record on private property. Bollard further argues that restrictions on filming and photography should be analyzed under the newsgathering case law, which he merges with the law governing restrictions on expressive conduct, rather than precedent on direct speech restrictions).
[372] *See* Bollard, *supra* note 7, at 10974-75; *see also* sources cited *supra* note 244.
[373] United States v. O'Brien, 391 U.S. 367, 377 (1968).
[374] *See supra* notes 17-18 and accompanying text (discussing the public view of ag-gag laws as a method for farms to cover up wrongdoing).

[375] *See, e.g.*, Lori Stiegel & Ellen Klem, *Reporting Requirements: Provisions and Citations in Adult Protective Services Laws, By State*, A.B.A. COMM'N ON L. & AGING FOR NAT'L CENTER ON ELDER ABUSE (2007), http://www.americanbar.org/content/dam/aba/migrated/aging/docs/MandatoryReportingProvisionsChart.authcheckdam.pdf.
[376] *Id.*
[377] *See infra* Part II.A.
[378] Ironically, Iowa has been at the forefront of promoting the local farm movement, while also legislating protectionist farm laws discussed herein. Leah Zerbe, *The Best & Worst States for Locally Grown Food*, RODALE NEWS (Aug. 23, 2013), http://www.rodalenews.com/local-food-markets.
[379] Nicholas R. Johnson & A. Bryan Endres, *Small Producers, Big Hurdles: Barriers Facing Producers of "Local Foods"*, 33 HAMLINE J. PUB. L. & POL'Y 49, 52-58 (2011).
[380] For a discussion of whether locally-produced food is safer than industrialized farm production, *see id.* at 91-96.
[381] *Id.* at 97-99.
[382] *See* Neil D. Hamilton, *Right-to-Farm Laws Reconsidered: Ten Reasons Why Legislative Efforts to Resolve Agricultural Nuisances May Be Ineffective*, 3 DRAKE J. AGRIC. L. 103, 104 (1998).
[383] *Id.* at 104. Some courts have found these protections so expansive, however, they have struck them down as unconstitutional takings of plaintiffs' properties. *See, e.g.*, Gacke v. Pork Extra LLC, 684 N.W.2d 168 (Iowa 2004); *see also* Emily A. Kolbe, Note, *"Won't You Be My Neighbor?" Living with Concentrated Animal Feeding Operations*, 99 IOWA L. REV. 415, n.90 (2013) (citing Carrie Hribar, *Understanding Concentrated Animal Feeding Operations and Their Impact on Communities*, NAT'L ASS'N OF LOCAL BDS. OF HEALTH, 11-12 (2010), http://www.cdc.gov/nceh/ehs/docs/understanding_cafos_nalboh.pdf).
[384] *Michigan's Right to Farm Act FAQ*, DEP'T. OF AGRIC. & RURAL DEV., http://www.michigan.gov/documents/mdard/Michigans_Right_to_Farm_Act_Frequently_Asked_Questions_-_May_6_2014_455493_7.pdf (last updated May 6, 2014).
[385] *See* Rick Pluta, *State Agriculture Commission Approves Backyard Livestock Rule*, MICH. RADIO (Apr. 28, 2014, 10:58 PM), http://michiganradio.org/post/state-agriculture-commission-approves-backyard-livestock-rule.
[386] Matt Kapp, *MFB Statement Regarding Changes to Right to Farm GAAMPs*, MICH. FARM BUREAU (May 5, 2014), https://www.michfb.com/MI/News/Press_Releases/Statement_RE_Changes_to_Right_to_Farm_GAAMPs/.
[387] *See, e.g.*, Carolyn Orr, *First-Of-Its-Kind 'Right to Farm' Law Now Part of North Dakota Constitution*, CSG MIDWEST (Jan. 2013), http://www.csgmidwest.org/policyresearch/0113righttofarm.aspx.
[388] N.D. CONST. art. XI, § 29.
[389] Brooke Jarvis, *A Constitutional Right to Industrial Farming?*, BLOOMBERG BUS. WK. (Jan. 9, 2014) http://www.businessweek.com/articles/2014-01-09/industrial-farming-state-constitutional-amendments-may-give-legal-shield.
[390] For current bill information for Oklahoma's constitutional amendment, *see Bill Information for HJR 1006*, OKLAHOMA STATE LEGISLATURE, http://www.oklegislature.gov/BillInfo.aspx?Bill=HJR1006 (last visited May 15, 2014). Missouri voters will consider a Right to Farm constitutional amendment in November 2014, but it makes no reference to "modern" farm practices. *See* H.J.R. Res. 11 & 7, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013), *available at* http://www.sos.mo.gov/elections/2014ballot/HJRNos117.pdf.
[391] Ross H. Pifer, *Right to Farm Statutes and the Changing State of Modern Agriculture*, 46 CREIGHTON L. REV. 707, 719 (2013).
[392] *See Missouri Farming Rights Amendment*, MISSOURI FARMERS CARE, http://mofarmerscare.com/farming-rights-amendment/ (last visited May 10, 2014).
[393] *See* Pifer, *supra* note 391, at 716-17. *See also* Brent Haden, *The Right to Farm Amendment – A Perspective by Attorney Brent Haden*, MISSOURI FARMERS CARE (Oct. 23, 2013), http://mofarmerscare.com/the-right-to-farm-amendment-a-perspective-by-attorney-brent-haden/; *Oklahoma Right to Farm Amendment Clears First Hurdle*, PROTECT THE HARVEST, http://protecttheharvest.com/oklahoma-right-farm-amendment-clears-first-hurdle/ (last visited May 15, 2014) (quoting Rep. Scott Biggs, author of Oklahoma's proposed amendment as saying, "Like it or not, agriculture is under attack from some of these animal rights groups.").
[394] *See, e.g.*, Quentin Hope, *States Ponder the "Right to Farm"*, HIGH PLAINS PUBL. RADIO (June 4, 2013, 8:01 PM), http://hppr.org/post/states-ponder-right-farm.
[395] Cain, *supra* note 128, at 310.