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The Unconstitutionality of Iowa's Proposed Agricultural Food Products Act and Similar Veggie Libel Laws

by

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THE UNCONSTITUTIONALITY OF IOWA'S PROPOSED AGRICULTURAL FOOD PRODUCTS ACT AND SIMILAR VEGGIE LIBEL LAWS

Julie K. Harders

Should it be easier for a pig to win a libel suit than a public official? Do soybeans deserve more protection than celebrities? According to a developing branch of libel law, the answer is yes. Recently enacted agricultural disparagement statutes impose a lower standard of proof for defamation of livestock and produce than people. The advent of so-called "veggie libel laws," which penalize those

who discuss unsafe food products or practices without scientific data to support their statements,[1] has brought the praise of the agricultural industry at the price of free speech.

States whose economies rely in whole or part on agriculture and food production have been fertile ground for the enactment of these statutes. Since 1991, thirteen states have passed food product disparagement statutes.[2] Another dozen have proposed similar legislation.[3] Iowa introduced the Agricultural Food Products Act during the 1997 session.[4] The legislation died in committee, but sponsors pledge its return in future sessions.[5]

Agricultural or food product disparagement legislation is a hybrid of defamation and common law trade libel. However, crucial constitutional safeguards are omitted from the statutory language.[6] Already the "purposes of defamation law often conflict with the purposes of free speech and free press,"[7] and without certain constitutional requirements it is difficult to discern how these new statutes can withstand judicial scrutiny.

To date, no reported decisions have discussed the validity of product disparagement statutes.[8] A handful of legal scholars suggest the veggie libel laws

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1. The first agricultural product disparagement statutes appeared in 1991. *See infra* Part IV. Generally, the laws create a cause of action for farmers, producers, processors, and sellers of agricultural products who are damaged by the dissemination of false information that a product is unsafe for human consumption. *See infra* Part IV. False information generally is defined as information not based on reasonable and scientific inquiry, facts, or data. *See infra* Part IV. For a complete analysis, see David J. Bederman et al., *Of Banana Bills and Veggie Hate Crimes: The Constitutionality of Agricultural Disparagement Statutes*, 34 HARV. J. ON LEGIS. 135 (1997).

2. *See infra* Part IV.

3. *See infra* Part IV.

4. *See* H.F. 389, 77th Gen. Ass., 1st Sess. (Iowa 1997).

5. *See* Neil Hamilton, *Jailing Oprah Won't Sell More Beef*, DES MOINES REG., Mar. 17, 1997, at 9A; *Making Criminals of Critics*, DES MOINES REG., Mar. 17, 1997, at 8A; David Martin, *Cursing Broccoli*, CITYVIEW, Mar. 26, 1997, at 6-7. According to correspondence from Iowa Rep. Sandra Greiner, a decision has not been made whether the disparagement bill will be introduced during the 1998 legislative session. *See* Sandra Greiner, RE: (no subject) (posted Jan. 23, 1998) <sgreine@legis.state.ia.us> (hard copy of electronic message on file with the *Drake Journal of Agricultural Law*).

6. *See infra* Part VI.

7. Michael Kent Curtis, *Monkey Trials: Science, Defamation, and the Suppression of Dissent*, 4 WM. & MARY BILL RTS. J. 507, 539 (1995).

8. *See* Bederman et al., *supra* note 1; Julie J. Srochi, *Must Peaches Be Preserved at All Costs? Questioning the Constitutional Validity of Georgia's Perishable Product Disparagement Law*, 12 GA. ST. U. L. REV. 1223, 1243 (1996). An attempt to challenge Georgia's agricultural disparagement statute was unsuccessful. *See* Action for a Clean Env't v. State, 457 S.E.2d 273 (Ga. Ct. App. 1995). The suit was barred on justiciability grounds. *See id.* at 274.

are constitutionally suspect.[9] A suit filed in Texas in 1996, after a guest on the *Oprah Winfrey Show* questioned the safety of U.S. beef, was expected to be the first court test of the laws.[10] However, a federal judge threw out the plaintiffs' claims under the Texas product disparagement law during trial,[11] leaving only common law business defamation claims for the jury's consideration.[12] The plaintiffs intend to appeal the judge's decision to the Fifth Circuit.[13]

This Note examines the rise of product disparagement statutes and analyzes the proposed Iowa law using a constitutional framework. Part I highlights the policy arguments in support of veggie libel laws. Part II examines the genesis of veggie libel based on the tort of injurious falsehood and referenced to the law of defamation. Part III discusses the *60 Minutes* case, the impetus for this legislation. Part IV identifies states that have passed such a law or are considering bills and describes the substance of the acts. Part V sets out the major provisions of the proposed Iowa Agricultural Food Products Act. Part VI presents the constitutional framework for evaluating the legality of such statutes. Part VII notes the constitutional shortfalls of Iowa's proposed law. Finally, this Note concludes by advocating rejection of such laws, leaving any such cause of action to the common law of defamation.

I. WHY PROTECT PRODUCE?

Before examining the legal framework of veggie libel, the policy arguments favoring the laws should be addressed. Because food is essential to life, consumers are interested in information pertaining to it. Reports of dangerous food products

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9. *See* Bederman et al., *supra* note 1; Curtis, *supra* note 7; Hamilton, *supra* note 5; Srochi, *supra* note 8; Megan W. Semple, Note, *Veggie Libel Meets Free Speech: A Constitutional Analysis of Agricultural Disparagement Laws*, 15 VA. ENVTL. L.J. 403 (1995-96); Eric M. Stahl, Note, *Can Generic Products Be Disparaged? The "Of and Concerning" Requirement After Alar and the New Crop of Agricultural Disparagement Statutes*, 71 WASH. L. REV. 517 (1996).

10. *See* Aaron Epstein, *Oprah Lawsuit 1st Test for Food Disparagement Laws*, DES MOINES REG., Jan. 4, 1998, at A1.

11. *See Judge Says Plaintiffs Were Unable to Prove Product Is Perishable*, AMARILLO GLOBE-NEWS (last modified Feb. 27, 1998) <http://amarillonet.com/stories/022798/judge.shtml>. The U.S. district judge in Amarillo did not address the constitutionality of the law, but instead ruled that the plaintiffs had failed to produce sufficient evidence for the jury on at least two elements under the statute: (1) that live cattle are a perishable food product, and (2) that a disparaging comment was made knowingly. *See id.*

12. *See* Sue Anne Pressley, *Oprah Winfrey Wins Case Filed by Cattlemen*, WASH. POST, (last modified Feb. 27, 1998) <http://www.washingtonpost.com/wp-srv/Wplate/1998-02/1001-022798-idx.html>. The plaintiffs will appeal the verdict. *See id.*

13. *See* Scott Baldauf, *In Oprah Trial, 'Food Libel' Charges Prove Hard to Swallow*, CHRISTIAN SCI. MONITOR, (last modified Feb. 27, 1998) <http://csmonitor.com/durable/1998/02/27/us/us.6.html>.

produce strong reactions, and understandably so, as we want to feel confident that our food is safe.[14] From Upton Sinclair's *The Jungle*[15] in 1906 to ABC's exposé on Food Lion[16] in 1997, few topics have generated such publicity and concern over the years.

Because of this widespread appeal, false information about edible products can have a devastating, almost irreparable, effect on the industry. Producers who suffer damage from disparaging comments usually find little relief in common law torts of disparagement and defamation because of high proof burdens imposed to satisfy free speech guarantees.[17]

Producers sought an alternative to the common law to control and quell unjustified criticism of their products. As a result, the industry appealed to the legislative branch. Food product disparagement statutes were crafted to pacify powerful business constituents. One commentator notes:

> These agricultural disparagement statutes were passed in response to the perceived failing of the common law of trade disparagement, which typically grants relief only when one business actor disparages the goods or services of another. Legislatures were thus called upon to fashion a statutory remedy to cover cases where consumers, journalists, or health advocates disseminated information on food safety questions. The newfangled agricultural disparagement laws thus reflect a curious mixture of interest-group politics and industry protection.[18]

Indeed, food product disparagement bills are protectionist legislation in its most overt form. Product disparagement laws clearly seek to shield a specific economic sector from attack. Many of the bills share similar introductory language

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14. The Council for Agricultural Science and Technology reports that food borne diseases traced to pathogenic bacteria are to blame for more than thirty million cases of illnesses annually and may cause 9000 deaths a year. *See Foodborne Illness from Meat and Poultry*, CONSUMERS' RES., Sept. 1996, at 30.

15. *See* UPTON SINCLAIR, THE JUNGLE (1906). *The Jungle*'s graphic portrayal of conditions in a Chicago meatpacking plant caused many to stop eating meat. In response, President Theodore Roosevelt signed the Meat Inspection Act and Pure Food and Drug Act into law. *See* Lewis Lord, *Perils of 'Gotcha' Journalism*, U.S. NEWS & WORLD REP., Feb. 3, 1997, at 11.

16. The ABC network news show *Primetime Live* used hidden cameras to show that Food Lion, a supermarket chain, was repackaging and selling spoiled meat. *See* Ginia Bellafante, *Hide and Go Sue*, TIME, Jan. 13, 1997, at 81. The broadcast cost the company millions of dollars. *See id.* Food Lion sued ABC for fraud, trespass, and deceptive trade practices after discovering two of the show's producers posed as workers to get the story. *See id.* Libel was not alleged. *See id.* A jury awarded Food Lion more than $5.5 million in damages. *See* Lewis Lord, *Perils of 'Gotcha' Journalism*, U.S. NEWS & WORLD REP., Feb. 3, 1997, at 11.

17. *See infra* Part III; Bederman et al., *supra* note 1, at 139-49.

18. Bederman et al., *supra* note 1, at 136.

emphasizing the importance of food production to the particular state. For example, Iowa's proposed bill stated:

> The general assembly finds and declares that the production of agricultural products constitutes an important and significant portion of this state's economy as well as providing the basis of the culture and customs of this state. The general assembly therefore determines that it is imperative to protect the vitality of the agricultural economy of this state by providing a cause of action for producers, researchers, and industries involved in agriculture and to hold persons criminally liable for the defamation of Iowa producers, researchers, or industries and their agricultural products.[19]

Supporters of veggie libel argue the laws are a much needed tool to battle pseudo-science and uninformed journalism.[20] Additionally, they argue that by misconstruing scientific data, journalists and commentators cause panic among consumers, and, with the stroke of a pen, the food production industry can be sent into a financial tailspin.[21]

Moreover, proponents claim the public lacks the ability to understand complex scientific findings. "On topics such as cancer and the food supply, the argument runs, the public tends to become hysterical. Because the public generally lacks the ability to understand these technical questions, this argument claims, defamation or product disparagement actions are particularly appropriate to discourage inflammatory criticism."[22] Such an argument is unpersuasive. "[T]he argument to silence or discourage advocacy or discussion of such matters because of their technical nature is in reality an argument for limiting the democratic process."[23] The argument suggests substituting lawsuits and judicial censors for open, robust debate in the public domain.

Meanwhile, the potential effect of these laws is far reaching. For example, Upton Sinclair, who exposed unsanitary conditions of the American meat packing industry in 1906 with publication of the book *The Jungle,* and Rachel Carson, who spoke out against the use of the chemical DDT in *Silent Spring*, both likely would

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19. H.F. 389, 77th Gen. Ass., 1st Sess., § 1 (Iowa 1997).

20. "The American Council on Science and Health, a frequent defender of corporate causes, published an article in 1995 suggesting that lawsuits brought under vegetable anti-defamation laws could be a 'cure' for 'junk science.'" *Making Criminals of Critics*, DES MOINES REG., Mar. 17, 1997, at 8A.

21. *See id.*

22. Michael Kent Curtis, *Monkey Trials: Science, Defamation, and the Suppression of Dissent*, 4 WM. & MARY BILL RTS. J. 507, 590 (1995).

23. *Id.* at 592.

have faced product disparagement suits under some state laws.[24] More recently, these laws might have prevented the airing of a report on the television news show, *60 Minutes* in 1989 about the dangers of a chemical spray used on apples.[25] The public may not have been cautioned about a batch of bad berries linked to the illness of more than 1000 people in the summer of 1996.[26] Consumers may have been deprived of the details behind a recall of 25 million pounds of hamburger meat tainted with the deadly *e. coli* bacteria in August 1997.[27] Parties would hesitate before making comments such as those aired on the *Oprah Winfrey Show* questioning the safety of beef.[28]

Evidently veggie libel advocates believe that the food market has no business participating in the marketplace of ideas. Yet, certainly, few areas warrant a more vigorous and healthy public discussion than our food supply, especially its safety and production. This new crop of legislation, in effect, silences public criticism and chills media comment. The laws directly restrict our ability to talk freely about agricultural products, offending firmly embedded notions of free speech and the public's right to know. One commentator writes, "While the idea that legislators can tailor-make torts is intriguing, the notion is also disturbing, since it presages a conflict with the 'marketplace of ideas' and the hallowed principle of free speech."[29]

The United States generally has remained committed to "the principle that debate on public issues should be uninhibited, robust and wide-open."[30] But this

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24. *See id.* at 559.

25. *See infra* Part III.

26. *See* Adam Rogers & Mary Hager, *Sorry, Wrong Berry*, NEWSWEEK, July 15, 1996, at 51. Health officials originally believed strawberries from California caused the sicknesses. Later, raspberries from Guatemala were blamed. Initial reports cost strawberry growers millions of dollars in sales. *See id.*

27. *See 25 Million Pounds of Beef Is Recalled,* N.Y. TIMES, Aug. 22, 1997, at A1. The recall prompted Burger King to stop selling hamburgers for a period of time. *See id.*

28. *See* Bederman et al., *supra* note 1, at 167-68 n.212 and accompanying text. In May 1996, a Texas rancher filed suit under the state's product disparagement law against Winfrey and one of her guests who claimed that American cattle herds were ailing from bovine spongiform encephalopathy (BSE), or "mad cow disease." *See id.* The highly publicized suit was touted as the first test of the constitutionality of a veggie libel law, but a federal district court judge dismissed the plaintiffs' claims under the statute during the trial. *See Judge Says Plaintiffs Were Unable to Prove Product Is Perishable, supra* note 11. The judge did not examine the constitutionality of the law, but rested her ruling on a finding that the plaintiffs failed to meet their burden of proof on two elements of the statute. *See id.* Plaintiffs are appealing the judge's ruling, and the Fifth Circuit Court of Appeals may have the first opportunity to discuss the constitutionality of the Texas law. *See* Baldauf, *supra* note 13. The jury found in favor of Winfrey on the common law business defamation claim. *See* Pressley, *supra* note 12.

29. Bederman et al., *supra* note 1, at 136.

30. New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (holding that states cannot award damages to a public official for a defamatory falsehood relating to his official conduct unless

long-time commitment to freedom of speech appears to be crumbling under the pressure of powerful economic interests.

II. TRADE LIBEL AND DEFAMATION LAWS

The underpinnings for an agricultural product disparagement action can be traced to trade libel, a tort which falls under the umbrella of "injurious falsehoods."[31] Trade libel provides a cause of action for false statements about the quality of a product when those statements result in economic loss.[32] In general, the following are the elements of trade libel: (1) publication of a harmful, false statement disparaging the quality of another's product or property;[33] (2) intent to harm another's interest, awareness of the likelihood of such harm, or reasonable basis for such awareness;[34] (3) knowledge or reckless disregard of falsity ("actual malice");[35] and (4) proof of special damages.[36] Liability in some jurisdictions also can be established without actual malice when the plaintiff provides evidence of common law malice (ill will) or intent to harm.[37] In all cases, a plaintiff in a trade libel action bears the burden of proving that the published statement was false.[38] Truth is an absolute defense.[39]

Those familiar with the elements of a defamation action will recognize many similarities between injurious falsehood (disparagement) and libel. Yet each tort has a different objective.[40] "The former is directed at the quality of plaintiff's property while the latter is directed at the quality of plaintiff's character."[41] To impose liability for defamation, there must be the following: "(a) a false and

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actual malice is proved). Justice Brandeis articulated the importance of open discussion of public issues in his concurring opinion in *Whitney v. California*, where he wrote:

> Those who won our independence believed . . . that public discussion is a political duty; and that this should be a fundamental principle of the American government. . . . Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.

Whitney v. California, 274 U.S. 357, 375-76 (1927) (Brandeis, J., concurring).

31. *See* RESTATEMENT (SECOND) OF TORTS § 623A (1977).
32. *See* Bederman et al., *supra* note 1, at 139 (citing W. PAGE KEETON ET. AL., PROSSER AND KEETON ON THE LAW OF TORTS § 128, at 962-63 (5th ed. 1984)).
33. *See* RESTATEMENT (SECOND) OF TORTS § 623A (1977).
34. *See id.* § 623A(a).
35. *See id.* § 623A(b).
36. *See id.* § 626.
37. *See id.* § 623A cmt. d.
38. *See* Bederman et al., *supra* note 1, at 139 (internal citations omitted).
39. *See id.*
40. *See* RESTATEMENT (SECOND) OF TORTS ch. 28, Introductory Note (1977).
41. Bederman et al., *supra* note 1, at 138.

defamatory statement concerning another; (b) an unprivileged publication to a third party; (c) fault amounting at least to negligence on the part of the publisher; and (d) either actionability of the statement irrespective of special harm or the existence of special harm caused by the [plaintiff]."[42] The U.S. Supreme Court has established other constitutional requirements in defamation actions depending on the status of the plaintiff and the subject of the allegedly libelous statement.[43] As in trade libel, a plaintiff in a defamation action involving speech of a public concern bears the burden of proving the statement at issue is false.[44] Again, truth is an absolute defense.[45]

The overlap between defamation and trade libel is not new in the agricultural setting. For example, state university experts, known as "extension specialists," are often asked to assess agriculture and farm businesses. An inaccurate assessment of a producer's financial or management ability could lead to a defamation suit.[46] What is novel with the development of agricultural product disparagement statutes is the effort to lessen the burden of proof in cases involving defamation of fruits and vegetables.

Even though disparagement and defamation share similar elements, application of constitutional safeguards to each has differed because courts are split as to whether the constitutional framework is the same for both torts.[47] The U.S. Supreme Court has not addressed the issue. Nonetheless, some courts deciding

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42. RESTATEMENT (SECOND) OF TORTS § 558 (1977).

43. *See infra* Part VI.

44. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

45. *See* Behr v. Meredith Corp., 414 N.W.2d 339, 342 (Iowa 1987). In Iowa, as in many jurisdictions, the standard has been further modified allowing "substantial truth" to serve as a defense. *See id.*

46. *See* Alan Schroeder, *Evolving Theories in Legal Liability: How Will They Affect Cooperative Extension?*, 18 J.C. & U.L. 483, 521 (1992). A California district court awarded a plaintiff a seven million dollar libel judgment against the University of California and three researchers who "concluded in a report released to the public that plaintiff's cattle had died as a result of mismanagement of his herd rather than from the actions of the state department of food and agriculture." *Id.* (citing Neary v. Regents of Univ. of Cal., 278 Cal. Rptr. 773 (Cal. Ct. App. 1991), *petition for review granted*, 810 P.2d 997 (1991)). For final resolution of *Neary v. Regents of University of California*, see *Neary v. Regents of Univ. of Cal.*, 834 P.2d 119 (Cal. 1992), which was reversed and remanded.

47. *See* Blatty v. New York Times Co., 728 P.2d 1177, 1182 (Cal. 1986); Unelko Corp. v. Rooney, 912 F.2d 1049, 1057-58 (9th Cir. 1990); Flotech, Inc. v. E.I. DuPont de Nemours & Co., 814 F.2d 775, 777 n.1 (1st Cir. 1987); Quantum Elecs. Corp. v. Consumers Union, 881 F. Supp. 753 763 (D.R.I. 1995); Dairy Stores, Inc. v. Sentinel Publ'g., Co., 465 A.2d 953, 957 n.2 (N.J. Super. Ct. Law Div. 1983), *aff'd*, 516 A.2d 220 (N.J. 1986); *cf.* Golden Bear Distrib. Sys. v. Chase Revel Inc., 708 F.2d 944, 947 (5th Cir. 1983); Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 935-36 (E.D. Wash. 1992).

product disparagement claims look to the more developed law of defamation for guidance.[48]

III. *"60 MINUTES"* CASE

The impetus for product disparagement legislation comes from a highly publicized agricultural disparagement case involving an investigative story aired on the CBS news show *60 Minutes* on February 26, 1989.[49] The controversial segment, titled *'A' Is for Apple*, examined the dangers associated with daminozide, a chemical growth regulator used to extend the life of apples.[50] The trade name for daminozide is Alar.[51] The show presented evidence that Alar causes cancer, and based most of its information on a report by the Natural Resources Defense Council (NRDC), titled *Intolerable Risk: Pesticides in Our Children's Food*.[52] The report discussed health risks arising from the application to fruit of pesticides, including daminozide.[53] The carcinogen is especially dangerous to children, the report stated, because youngsters ingest more apples and apple products than adults relative to body weight.[54] The show noted the lengthy delay by the government in recalling its approval of the chemical, despite the EPA's knowledge of the link between daminozide and cancer.[55]

Consumer reaction to the broadcast was swift and widespread. Apple growers and producers lost millions of dollars; some went out of business.[56] "Public school systems in New York, Los Angeles, Atlanta, San Francisco, Chicago, and dozens of other cities banned apples from their cafeterias."[57] In response, eleven apple growers from Washington State, representing 4700 growers in the state, filed suit in Washington State in November 1990 alleging common law

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48. *See, e.g.*, Auvil v. CBS "60 Minutes," 67 F.3d 816, 820 (9th Cir. 1995).

49. *See* Bederman et al., *supra* note 1, at 135.

50. *See* Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 937 (E.D. Wash. 1992).

51. *See* Auvil v. CBS "60 Minutes," 67 F.3d 816, 818 (9th Cir. 1995). "Alar cannot be removed either by washing the fruit or peeling it. In addition, the substance remains in the flesh of the apple and, as a result, can be found in processed apple products, including apple juice and applesauce." *Id.* at 818 n.2.

52. *See id.* at 818.

53. *See id.*

54. *See id.* at 819.

55. *See id.*

56. *See id.* According to some estimates, plaintiffs suffered as much as $75 million in losses. *See* Semple, *supra* note 9, at 410 & n.54 (citing *Auvil*, 800 F. Supp. at 931).

57. Semple, *supra* note 9, at 409 (citing Linda M. Correia, *"A" is for Alar: EPA's Persistent Failure to Promptly Remove Hazardous Pesticides from the Food Supply*, 16 Chem. Reg. Rep. (BNA) No. 20, at 875 (Aug. 14, 1992)).

product disparagement claims against CBS, local affiliates, the NRDC, and Fenton Communications, Inc., a public relations firm.[58]

CBS removed the case to federal court,[59] and several of the defendants were dismissed. After discovery, CBS moved for summary judgment because the "growers did not produce evidence sufficient to create a triable issue of fact as to the falsity of the broadcast."[60] The district court granted the motion and the plaintiffs appealed to the Ninth Circuit Court of Appeals.[61] Because Washington State lacked any cases directly on point, the appeals court used a product disparagement framework from the Restatement (Second) of Torts and referenced local defamation cases.[62] In beginning its analysis, the court noted that the broadcast made several factual assertions regarding the cancer-causing potential of daminozide.[63] According to the plaintiffs theory, CBS made three false allegations as follows: (1) that daminozide causes cancer; (2) that the cancer risk is even greater in children; and (3) that the overall message of the show was provably false.[64]

In support of their resistance to CBS's motion for summary judgment, the growers pointed out that no studies existed establishing a relationship between the ingestion of daminozide and incidence of cancer in humans.[65] Indeed, the EPA and the NRDC report based its conclusions on extrapolations from animal test results.[66] The growers challenged the scientific conclusions claiming animal studies cannot be relied upon as indicative of human reaction.[67] The court disagreed, finding that the growers argument failed to establish a genuine issue for trial.[68] "Animal laboratory tests are a legitimate means for assessing cancer risks in humans."[69]

The growers also challenged the show's assertion that the cancer risk is even greater for children. The plaintiffs offered evidence "showing that no scientific study [had] been conducted on cancer risks to children from the use of pesticides."[70] But the court pointed out that statements by CBS were based on

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58. *See Auvil*, 67 F.3d at 819. None of the plaintiffs, nor any of the apple growers, had been mentioned by name in the broadcast. *See* Semple, *supra* note 9, at 410-11.

59. *See Auvil*, 67 F.3d at 819.

60. *Id.*; *see also* Auvil v. CBS "60 Minutes," 836 F. Supp. 740 (E.D. Wash. 1993) (granting CBS's motion for summary judgment).

61. *See Auvil*, 67 F.3d at 818.

62. *See id.* at 820.

63. *See id.* at 820-21.

64. *See id.* at 820-22.

65. *See id.* at 821.

66. *See id.*

67. *See id.*

68. *See id.*

69. *Id.* (internal citations omitted).

70. *Id.*

NRDC findings that daminozide found on apples is more harmful to children because they ingest more apple products per unit of body weight than do adults.[71] "The growers have provided no affirmative evidence that daminozide does not pose a risk to children."[72]

Finally, the court rejected the growers' argument that the show, taken as a whole, was defamatory because a jury could find the broadcast contained a provably false message.[73] The court held "it is the statements themselves that are of primary concern in the analysis."[74] The overall message was not at issue. The court stated:

> Because a broadcast could be interpreted in numerous, nuanced ways, a great deal of uncertainty would arise as to the message conveyed by the broadcast. Such uncertainty would make it difficult for broadcasters to predict whether their work would subject them to tort liability. Furthermore, such uncertainty raises the specter of a chilling effect on speech.[75]

The appeals court ultimately affirmed the district court's decision granting summary judgment in favor of CBS.[76]

IV. VEGGIE LIBEL LAWS

Dissatisfied with the decision in the *"60 Minutes"* case and under pressure from the food industry,[77] lawmakers in eleven states fashioned legislation that would allow what the Ninth Circuit rejected: a cause of action for disparaging remarks made about agricultural products. Lawmakers evidently decided farmers would find it too difficult to prevail on an agricultural product disparagement action at common law so a more lenient, industry-friendly statutory law should control. "Apparently, the same special interest groups that reportedly funded the *Alar* lawsuit also are trying to persuade state legislatures to enact product disparagement laws that would, in effect, create virtually unlimited liability for any statements critical of the state's agricultural products or pesticides."[78]

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71. *See id.*
72. *Id.*
73. *See id.* at 822.
74. *Id.*
75. *Id.*
76. *See id.* at 823.
77. *See* Semple, *supra* note 9, at 414 & n.91; Srochi, *supra* note 8, at 1239.
78. Bruce E.H. Johnson & Susanna M. Lowy, *Does Life Exist on Mars? Litigating Falsity in a Non-Of and Concerning World*, 12 COMM. LAW. 1, 22 (1994).

Since the "*60 Minutes*" case, these so-called "banana bills" have passed in thirteen states:[79] Alabama,[80] Arizona,[81] Colorado,[82] Florida,[83] Georgia,[84] Idaho,[85] Louisiana,[86] Mississippi,[87] North Dakota,[88] Ohio,[89] Oklahoma,[90] South Dakota,[91] and Texas.[92] Other states that have considered or are considering such legislation include California, Delaware, Illinois, Iowa, Maryland, Michigan, Minnesota, Missouri, Nebraska, New Jersey, Pennsylvania, South Carolina, Vermont, Washington, Wisconsin, and Wyoming.[93] Although actual language varies slightly from bill to bill, the purpose remains uniform: "[T]o protect the agricultural and aquacultural economy [of the state]."[94]

The laws, generally speaking,[95] create a cause of action for a broad group of plaintiffs, including growers, producers, researchers, shippers, marketers, and sellers, who are damaged by the dissemination of information pertaining to agriculture and food processing and safety.[96] A viable plaintiff often need not be specifically identified in the disparaging comments, but instead any aggrieved person need only show injury.[97] Additionally, the criticism need not be published, but simply disseminated, or conveyed, to another person.[98] The mental state

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79. *See* Bederman et al., *supra* note 1, at 145. At least one state has passed laws since the publication of this Bederman article: North Dakota.

80. *See* ALA. CODE §§ 6-5-620 to -625 (Supp. 1996).

81. *See* ARIZ. REV. STAT. ANN. § 3-113 (West Supp. 1997).

82. *See* COLO. REV. STAT. ANN. §§ 35-31-101 (West 1994).

83. *See* FLA. STAT. ANN. § 865.065 (West 1994).

84. *See* GA. CODE ANN. §§ 2-16-1 to -4 (1996).

85. *See* IDAHO CODE §§ 6-2001 to -2003 (Supp. 1997).

86. *See* LA. REV. STAT. ANN. §§ 4501-4504 (West Supp. 1996).

87. *See* MISS. CODE ANN. §§ 69-1-251, -253, -255, -257 (Supp. 1997).

88. *See* N.D. Cent. Code § 32-44 (Supp. 1997).

89. *See* OHIO REV. CODE ANN. § 2307.81 (Anderson Supp. 1996).

90. *See* OKLA. STAT. ANN. tit. 2, §§ 3010-3012 (West Supp. 1998).

91. *See* S.D. CODIFIED LAWS §§ 20-10A-1 to -4 (Michie 1995).

92. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 96.001-.004 (West 1997).

93. *See* Bederman et al., *supra* note 1, at 145. North Dakota passed a bill in 1997.

94. *Id.*

95. No two product disparagement statutes are styled exactly alike, but they do share common characteristics. For purposes of this section of the Note, the laws will be described in general terms. However, because the laws are not uniform, these generalities may not hold true in some cases. Interested readers should check individual statutes for particular provisions.

96. *See* Bederman et al., *supra* note 1, at 145-46; *see, e.g.*, H.F. 389, 77th Gen. Ass., 1st Sess., § 3(1), (7), (9) (Iowa 1997).

97. *See* Bederman et al., *supra* note 1, at 146-47; *see, e.g.*, H.F. 389, 77th Gen. Ass., 1st Sess., § 4(1)(a), (b) (Iowa 1997).

98. *See* Bederman et al., *supra* note 1, at 146; *see, e.g.*, H.F. 389, 77th Gen. Ass., 1st Sess., § 3(3) (Iowa 1997).

required of potential defendants varies from actual malice[99] to willfulness to strict liability.[100] Disparagement or false information is generally defined as any information that is unreliable or not based on scientific data.[101] Successful plaintiffs in a food product disparagement action can recover actual damages, attorney's fees, and often hefty punitive damages.[102] Injunctive relief also may be an option.[103] Finally, some states attach criminal penalties and fines.[104]

V. IOWA'S LAW

Iowa State Representative Sandra Greiner and eighteen cosponsors[105] introduced House File 389, the Agricultural Food Product Act, on February 28, 1997.[106] The bill did not make it through the legislative funnel process, which eliminates certain bills automatically due to time restraints,[107] but likely will return in a future legislative session.[108]

The purpose of the law is to "prohibit[] the defamation of agriculture products, producers, researchers, and industry associations by providing for a cause of action and providing for criminal penalties."[109] Lawmakers cited the necessity for such a cause of action to protect the vitality of the agricultural economy.[110] Members of the House reasoned such protection is imperative because

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99. Actual malice is defined as knowledge of the falsity of a statement or reckless disregard for whether or not it is false. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

100. *See* Bederman et al., *supra* note 1, at 146-47. Strict liability is defined as liability without requiring a showing of intent. *See* BLACK'S LAW DICTIONARY 1275 (5th ed. 1979).

101. *See* Bederman et al., *supra* note 1, at 147; *see, e.g.*, H.F. 389, 77th Gen. Ass., 1st Sess., § 3(2) (Iowa 1997).

102. *See* Bederman et al., *supra* note 1, 148; *see, e.g.*, H.F. 389, 77th Gen. Ass., 1st Sess., § 4(2), (4) (Iowa 1997).

103. *See, e.g.*, H.F. 389, 77th Gen. Ass., 1st Sess., § 4(3) (Iowa 1997).

104. *See, e.g.*, H.F. 389, 77th Gen. Ass., 1st Sess., § 5 (Iowa 1997).

105. Other sponsors were Jim Meyer, Jack Drake, Russell Teig, Richard Arnold, Russel Eddie, Ralph Klemme, Cecil Dolecheck, Henry Rayhons, Daniel Huseman, Phil Tyrrell, Effie Lee Boggess, Delores Mertz, David Heaton, Danny Carroll, Roger Thomas, Leo Koenigs, Norman Mundie, and Dennis May. *See* H.F. 389, 77th Gen. Ass., 1st Sess. (Iowa 1997). Of the sponsors, seventeen are farmers and fourteen are Republicans. *See* David Martin, *Cursing Broccoli*, CITYVIEW, Mar. 26, 1997, at 6.

106. *See* H.F. 389, 77th Gen. Ass., 1st Sess. (Iowa 1997). Relevant sections of the proposed bill are set out in the appendix of this Note.

107. *See* Thomas A. Fogarty & Jonathan Roos, *Iowa Lawmakers Whittle Their Workload,* DES MOINES REG., Mar. 14, 1997, at M4.

108. *See* Greiner, *supra* note 5.

109. H.F. 389, 77th Gen. Ass., 1st Sess., § 1 (Iowa 1997).

110. *See id.*

the production of agricultural products plays an important and significant role in the state's economy.[111]

Under the proposed bill, any aggrieved party, defined as a "producer, researcher, or industry," can file suit if damaged because another person disseminated defamatory information.[112] The bill permits entire groups or classes of producers to sue, with each member entitled to damages individually.[113] A person disseminates defamatory information by stating, publishing, or otherwise conveying information to another.[114]

For an agriculture-related comment to be defamatory, two elements are required. First, the information must be unreliable or not based on scientific facts or data.[115] Second, any of the following must apply: (1) the comment reflects upon the character of a producer or quality of a product, and either (a) was harmful to a reputation, or (b) deterred business, or (c) cast the person in a negative light; or (2) the comment states or implies (a) a product is unsafe, or (b) an agricultural practice makes a product unsafe; or (3) the person making the comment intends to cause harm to someone who is using generally accepted agricultural practices in business.[116]

If the elements of defamation are present, a plaintiff can recover actual damages, costs, and attorney's fees.[117] Injunctive relief is also available.[118] If the defamatory comment is made with malice,[119] punitive damages in an amount three times that of actual damages may be awarded.[120] Acting with malicious intent also can result in a criminal conviction (aggravated misdemeanor), with the possibility of a year in jail and a fine up to $100,000.[121]

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111. *See id.*
112. *See* H.F. 389, 77th Gen. Ass., 1st Sess., §§ 3(1), 4 (Iowa 1997).
113. *See id.* § 4(b).
114. *See id.* § 3(3).
115. *See id.* § 3(2).
116. *See id.* § 3(2)(a)-(c).
117. *See id.* § 4(2), (4).
118. *See id.* § 4(3).
119. Malice in the statute is defined as "intent to vex, injure, defame, annoy, or cause another person to be held in an undesirable light by another person." *See id.* § 3(6). This is different from the *New York Times* actual malice standard applied in defamation cases. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).
120. *See id.* § 4(2).
121. *See* H.F. 389, 77th Gen. Ass., 1st Sess., § 5 (Iowa 1997).

VI. CONSTITUTIONAL ANALYSIS

State product disparagement statutes, including Iowa's proposed bill, are constitutionally deficient in several ways.[122] Before detailing the constitutional shortfalls, it is necessary to discuss the applicable constitutional framework.

A. New York Times Co. v. Sullivan[123] *and Its Progeny*

The U.S. Supreme Court decided in the seminal defamation case of *New York Times Co. v. Sullivan* that public officials must prove that an allegedly defamatory statement was made with "actual malice" before liability will result.[124] Actual malice is defined as knowledge of falsity or reckless disregard of the falsity.[125] That standard was extended to all "public figures" in *Curtis Publishing Co. v. Butts* in 1967.[126] Then, in *Rosenbloom v. Metromedia, Inc.*, the Court applied the *New York Times* actual malice standard to all matters of public concern as follows:[127] "We honor the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[128]

B. Gertz v. Robert Welch, Inc.[129]

The Supreme Court pulled back from its broad application of *New York Times* in the 1974 case of *Gertz v. Robert Welch, Inc.*[130] In that case, the Court

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122. *See* Chad E. Milton et al., *Emerging Publication Torts*, 389 PRAC. L. INST. 651, 672 (1994); *see infra* Part VII.

123. New York Times Co. v. Sullivan, 376 U.S. 254 (1964).

124. *See id.* at 279-80.

125. *See id.* at 280.

126. *See* Curtis Publ'g Co. v. Butts, 388 U.S. 130, 162-65 (1967). The two classes of public figures identified in *Gertz v. Robert Welch, Inc.* were all-purpose public figures and limited-purpose public figures. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974). The Court explained:

> In some instances an individual may achieve such pervasive fame or notoriety that he becomes a public figure for all purposes and in all contexts. More commonly, an individual voluntarily injects himself or is drawn into a particular public controversy and thereby becomes a public figure for a limited range of issues. In either case such persons assume special prominence in the resolution of public questions.

Id.

127. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 43-44 (1971).

128. *Id.* at 44.

129. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

130. *See id.*.

held that states are free to set the threshold level of fault required in a defamation case involving purely private figures.[131] That standard may be ordinary negligence, not actual malice, even when the issue is a matter of public concern.[132] Later cases struck down the use of ordinary negligence—or any standard less than actual malice—in matters of public concern when awarding punitive damages.[133]

C. *The Proper Standard for Product Disparagement*

1. *Corporate Plaintiffs*

While veggie libel statutes have yet to face a court challenge, it is likely that large-scale plaintiffs, such as producers, manufacturers, and industry leaders, who sue under a disparagement law would have to show actual malice to prevail, as they would be considered "public figures."[134] Under *Gertz*, a public figure is defined as someone who "invites attention and comment" in a public issue "in order to influence the resolution of the issues involved."[135] "Because food producers, processors, marketers and sellers voluntarily enter the 'market for the purpose of selling a product or service from which profits may be derived,' they invite attention as contemplated by the Supreme Court in *Gertz*."[136]

The public figure analysis in the context of a non-food product disparagement suit brought by a corporate plaintiff was applied in a New Jersey case. In *Dairy Stores, Inc. v. Sentinel Publishing Co.*, a newspaper was sued for publishing critical remarks about the quality of the plaintiff's springwater.[137] The court, after examining the societal values requiring malice in certain defamation suits, found that these values were relevant in a disparagement action, and, as such, the same standard must apply to both torts.[138] The court reasoned that consumers have a First Amendment interest in obtaining information regarding products and services they purchase. This interest "is comparable . . . to being informed about political and social issues."[139] The court also noted that a producer voluntarily exposes its product to public criticism, much in the same fashion as does a public

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131. *See id.* at 352.

132. *See id.*

133. *See id.* at 350; Dunn & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 763 (1985); Bagley v. Iowa Beef Processors, 797 F.2d 632, 644 (8th Cir. 1986); Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 900 (Iowa 1989).

134. *See* Bederman et al., *supra* note 1, at 139-40; *see* cases cited *supra* note 46.

135. *Gertz*, 418 U.S. at 345.

136. Bederman et al., *supra* note 1, at 153.

137. *See* Dairy Stores, Inc. v. Sentinel Publ'g Co., 465 A.2d 953 (N.J. Super. Ct. Law Div. 1983), *aff'd*, 516 A.2d 220 (N.J. 1986).

138. *See id.* at 957.

139. *Id.* at 959.

figure, by placing its product into the marketplace.[140] "A business which makes representations about the content, quality or safety of its products . . . invites attention and comment."[141] Finally, the court stated that, like public figures, businesses have greater access to channels of effective communication and "hence have a more realistic opportunity to counteract false statements than private individuals normally enjoy."[142] In conclusion, the court decided that when a consumer product has been placed into the public marketplace and criticism about that product is published, an actual malice standard must be applied in any resulting disparagement action.[143]

Similarly, the Supreme Court reviewed a product disparagement action in *Bose Corp. v. Consumers Union*.[144] Bose Corporation, the maker of audio speakers, sued Consumers Union for negative comments published about the quality of Bose speakers. Consumers Union reported that the sound heard through Bose speakers "seemed to grow gigantic proportions and tended to wander about the room."[145] The Court applied an actual malice standard without discussion and decided in favor of Consumers Union. The Court said there was no evidence that the statement was made with knowledge of its falsity or reckless disregard for the truth of the statement.[146] The *Bose* decision certainly would be analogous to a food product disparagement action. "Robust debate on health risks is certainly at least as crucial to society as is debate on the quality of audio speakers."[147] Therefore, an actual malice analysis likely would be used by a court reviewing these veggie libel laws.

2. *Individual Farm Plaintiffs*

Farmers and independent agriculture researchers are not likely "public figures." As a result, this kind of plaintiff would not have the burden of showing actual malice in a disparagement action. Instead, private parties would look to the common law in their jurisdiction or their state's controlling statute to determine the applicable standard to prove defamation or disparagement. Although food production and safety are matters of public concern, the Supreme Court has held purely private plaintiffs to a lesser standard in defamation cases.[148]

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140. *See id.* at 960.
141. *Id.*
142. *Id.*
143. *See id.*
144. Bose Corp. v. Consumers Union, 466 U.S. 485 (1984).
145. *Id.* at 488.
146. *See id.* at 511.
147. Curtis, *supra* note 7, at 582.
148. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 352 (1974).

Whether the plaintiff is a small-town farmer or a big-city conglomerate, the issue remains the same: agricultural disparagement statutes limit our freedom to speak. There are a number of arguments suggesting that from a policy standpoint, agricultural product disparagement statutes simply do not pass constitutional muster.

D. *The Unconstitutionality of Veggie Libel*

1. *Chills Speech*

Whether the plaintiff is a public or private figure, a strong argument in favor of subjecting any agricultural product disparagement action to high constitutional scrutiny is its direct involvement with speech. The First Amendment prevents the government from unduly restricting our right to speak.[149]

Because of the First Amendment's potency, courts abandon the deference usually accorded to legislatures in statutory interpretation decisions when examining most free speech cases.[150] Laws are deemed invalid if they either encompass within their scope protected speech or are so vague that they have a chilling effect on expression shielded by the First Amendment.[151] Not all speech is protected under the First Amendment.[152] Defamatory comments fall outside the reach of the Constitution.[153] While food product disparagement statutes may target defamatory speech so as to pass the first hurdle, their language and effect is sufficiently broad to impinge on innocent discussion of the safety of food.

Not only do these laws punish people for what they say, but the mere possibility of punishment may cause us to not say anything at all. "The threat of sanctions may deter . . . [First Amendment] exercise almost as potently as the actual application of sanctions."[154] One commentator writes: "Repeated suits against advocates for food safety are unnecessary for the statute effectively to chill speech; the mere enactment of the statute and the possibility that a person may be sued under it has a chilling effect."[155] Statutes that have a chilling effect on speech

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149. The First Amendment of the Constitution states, "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. "These [First Amendment] freedoms are delicate and vulnerable, as well as supremely precious in our society." NAACP v. Button, 371 U.S. 415, 433 (1963).

150. *See* Near v. Minnesota, 283 U.S. 697, 707-08 (1931).

151. *See NAACP*, 371 U.S. at 433.

152. The Court has found that speech which is obscene, *Roth v. United States*, 354 U.S. 476 (1957); fighting words, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942); and words that incite imminent lawless action, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), are not protected.

153. *See* Beauharnais v. Illinois, 343 U.S. 250 (1952).

154. *NAACP*, 371 U.S. at 433.

155. Bederman et al., *supra* note 1, at 164.

are automatically suspect and are subject to facial attack.[156] The Supreme Court has recognized that First Amendment protections of freedom of speech are important and deserve heightened protection.[157] Because these veggie libel laws are chilling on their face and in effect, any analysis should involve heightened scrutiny.

2. *Public Concern*

The subject matter of these statutes—the safety of our food and agricultural practices—is of paramount public importance. The Supreme Court stated in *New York Times* that issues of public concern mandate robust, wide-open debate.[158] The Court has not delineated the factors necessary to determine whether an issue is a matter of public concern. Newsworthiness, alone, is not enough. Instead, "a public concern encompasses 'those controversies raising issues that might reasonably be expected to have or impact beyond parties directly enmeshed in the particular controversy.'"[159] Clearly, the safety and quality of food products and practices fits the definition of a matter of public concern.

The Supreme Court has repeatedly admonished that the First Amendment must be accorded "breathing space."[160] The highest constitutional standard in speech cases—actual malice—affords that space because it is a difficult standard to prove. Restrictions on speech of a public concern are accepted in only the narrowest of circumstances. The Supreme Court likely will proceed with caution before adding agricultural product disparagement to that list.

3. *Opinion*

Statements of opinion receive absolute protection under the First Amendment.[161] The Supreme Court in *Gertz* wrote, "However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas."[162] Yet, most veggie libel laws, as written, make opinion actionable. The laws purport to punish defamation which is

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156. *See, e.g.*, R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

157. *See* Simon & Schuster, Inc. v. New York State Crime Victims Bd., 502 U.S. 105 (1991) (requiring that a state prove a content-based regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end).

158. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

159. Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 900 (Iowa 1989) (quoting Bagley v. Iowa Beef Processors, 979 F.2d 632, 645 (8th Cir. 1986)), *see* Johnson v. Nickerson, 542 N.W.2d 506, 511 (Iowa 1996).

160. *See* New York Times Co. v. Sullivan, 376 U.S. 254, 272 (1964).

161. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *accord* Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 891 (Iowa 1989).

162. *Id.*

often defined as reasonably believable information that is unreliable or not based on scientific facts.[163] The laws are not restricted to false statements of facts, thus opinion easily falls into the definition.

4. *Content-Based Regulation*

One commentator makes an intriguing argument that these agricultural disparagement laws are content-based regulations of speech, and are therefore impermissible.[164] The Supreme Court announced in *R.A.V. v. City of St. Paul* that regulations which "prohibit otherwise permitted speech solely on the basis of the subjects the speech address[es]" are unconstitutional.[165] In response, the commentator reasoned: "States may legitimately enact statutes that create a general cause of action for disparagement, but statutes enacted to privilege agricultural products against critical speech are unconstitutional."[166] The commentator concludes that veggie libel laws embody a "category of libel based on content, and precedent under *R.A.V.* requires that the statutes be struck down."[167] States may not proscribe particular kinds of comments about particular kinds of products, thereby "unduly privileging those commodities against otherwise lawful speech."[168]

VII. IOWA'S PROPOSED VEGGIE LIBEL LAW: RUNNING AFOUL OF THE CONSTITUTION

The agricultural industry is important to Iowa, and is worthy of safeguarding. But a law that censors speech and is unconstitutional on its face is hardly protective. Iowa's proposed law is constitutionally deficient in at least six ways as follows: (1) by failing to include an actual malice requirement; (2) by omitting a fault element; (3) by shifting the burden of proof to the defendant; (4) by allowing a broad cross-section of plaintiffs to sue for the same disparaging comment; (5) by including a provision for punitive damages; and (6) by violating the Iowa Constitution.

A. *No Actual Malice Requirement*

A glaring omission in the Iowa bill is the absence of an actual malice standard. Recall that actual malice is defined as knowledge of falsity of a statement

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163. *See* H.F. 389, 77th Gen. Ass., 1st Sess., § 3(2) (Iowa 1997).
164. *See* Bederman et al., *supra* note 1, at 157.
165. R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992).
166. Bederman et al., *supra* note 1, at 157.
167. *Id.*
168. *Id.*

or a reckless disregard for the truth or falsity of a statement.[169] The Iowa bill requires a lesser standard of culpability, imposing liability when a "person knows or fails to take reasonable cause to know" that the information about the agricultural product or process is unreliable or not based on scientific facts.[170] Further, Iowa imposes only a common law malice standard as opposed to a constitutional standard for a punitive damages award.[171]

B. *No Fault Requirement*

Closely linked to the actual malice requirement is the element of fault. Iowa does not mention any fault provision. Instead, the cause of action centers on the falsity of the information. Falsity is defined as information not based upon reasonable and reliable scientific data.[172] In Iowa, information about an agricultural product or practice is automatically false if a jury finds it to be unreliable or not based on scientific facts and the information does any one of the following: (1) damages the reputation of or "cast[s] suspicion on the aggrieved party[;]" (2) deters people from doing business with the producer, researcher, or industry; (3) deters someone from buying a product; or (4) casts the producer, researcher, or industry in a "negative light in the eyes of the general public."[173] The bill does not define what constitutes "casting suspicion" or putting someone in a "negative light." The problem is that the Supreme Court has found that false speech does not trigger liability per se.[174] Thus, by defining falsity so broadly and failing to include a fault requirement, this statute is "in fundamental and fatal conflict with the First Amendment."[175]

C. *Presumption of Falsity*

Not only does Iowa put the focus on falsity instead of fault, but it also places the burden of proof on the defendant. Without specifically stating, the inference from the definition of defamation in the statute is that when a statement gives rise to a cause of action under Iowa's statute, that statement is deemed automatically false unless it is based on scientific data.[176] The burden is then on the defendant to show that the statement was not false, as it was based on scientific

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169. *See* New York Times Co., v. Sullivan, 376 U.S. 254, 279-80 (1964).
170. *See* H.F. 389, 77th Gen. Ass., 1st Sess., § 3(2) (Iowa 1997).
171. *See* H.F. 389, 77th Gen. Ass., 1st Sess., §§ 4(2), 3(6) (Iowa 1997).
172. *See* H.F. 389, 77th Gen. Ass., 1st Sess., § 3(2) (Iowa 1997).
173. H.F. 389, 77th Gen. Ass., 1st Sess., § 3(2) (Iowa 1997).
174. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767 (1986).
175. Bederman et al., *supra* note 1, at 155.
176. *See* H.F. 389, 77th Gen. Ass., 1st Sess. § 3(2) (Iowa 1997).

data. It is unclear how a jury can account for the fact that science is ever-changing. What may be reliable scientific data one day may be disproved the next.

> In a society that still debates whether 'scientific facts' provide greater support for the theory of evolution or the theory of creation, should a jury decide exactly where science stands on any issue? And who is to say how long scientists will hold to a particular view before new evidence changes their minds?[177]

The Supreme Court has found this burden-shifting to be constitutionally impermissible.[178]

Moreover, the proposed Iowa Agricultural Food Products Act cannot be reconciled with the Iowa Supreme Court decision in *Jones v. Palmer Communications, Inc.*, and the concept of "substantial truth."[179] The court in *Jones* found that substantial truth is an absolute defense in a defamation action.[180] "The libel defendant need not establish the literal truth of every detail of the broadcast so long as the 'gist' or 'sting' of the broadcast in question is substantially true."[181] Such a defense provides the necessary cushion for speakers. "[T]o avoid a 'chilling effect' on the exercise of First Amendment rights, the media must be allowed 'breathing space.'"[182] Yet, Iowa's veggie libel law contains no such safe harbor. The law provides a cause of action for dissemination of unreliable information or information not based on scientific facts or data. No amends are made for substantial truth. Instead, if any part of the statement fits the criteria of the statute, the speaker would be liable. The reasoned holdings of the Iowa Supreme Court in its defamation decisions have been wholly ignored by the legislators.

D. *No "Of and Concerning" Requirement*

Under defamation law, a defamatory statement must be specifically "of and concerning" a plaintiff.[183] Generally, a large group cannot be libeled because the defamatory statement cannot be targeted to a specific person or persons.[184] This is

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177. *Making Criminals of Critics*, DES MOINES REG., Mar. 17, 1997, at 8A.

178. *See* Philadelphia Newspapers, Inc. v. Hepps, 475 U.S. 767, 772 (1986).

179. *See* Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 891 (Iowa 1989).

180. *See id.*

181. *Id.*

182. Behr v. Meredith Corp., 414 N.W.2d 339, 344 (Iowa 1987) (citing Hopkins v. Keith, 348 So. 2d 999, 1002 (La. Ct. App.), *writ denied*, 350 So. 2d 893 (La. 1977)).

183. *See* Neiman-Marcus v. Lait, 13 F.R.D. 311, 316 (S.D.N.Y. 1952) (holding that a particular person, not a group or a class, must be defamed for a valid cause of action).

184. *See* RESTATEMENT (SECOND) OF TORTS §564A cmt. a (1977).

known as the group libel theory. The doctrine "'was designed to encourage frank discussions of matters of public concern under the First Amendment guarantees,' favoring the public's right to know over 'incidental and occasional injury to the individual resulting from the defamation of large groups.'"[185] Yet the Iowa Agricultural Food Products Act allows *any* producer, researcher, or industry to file a cause of action.

Under current law, courts differ sharply over the specificity with which the disparaging statement must identify the plaintiff's property; that is, whether the statement must refer directly to the particular plaintiff's product, or whether it is enough that the plaintiff has an economic interest in the generic type of product the defendant disparaged.[186] Only the California Supreme Court has reached a conclusion explicitly. In *Blatty v. New York Times Co.*, the court concluded that the constitutional limitations on defamation law, including the "of and concerning" requirement, "are not peculiar to [defamation] actions but apply to all claims whose gravamen is the alleged injurious falsehood of a statement."[187] However, the trial court in the *CBS* case refused to invoke the "of and concerning" requirement. "Because the 60 Minutes broadcast suggested that consumers could not tell which apples had been treated with Alar, the broadcast was 'of and concerning' all apples and identified 'every apple grower in the country.'"[188]

The common law "of and concerning" requirement ensures that there is "some required nexus of injury between the class of plaintiffs and the injurious disparagement."[189] "The larger the scope of a statement regarding food safety, the more likely a public concern is implicated and the less likely a personal or individual harm occurs. The agricultural disparagement statutes, lacking an 'of and concerning' clause, are constitutionally deficient."[190]

E. *Punitive Damages*

The Iowa law allows a plaintiff to seek punitive damages in an amount three times that of actual damages if the allegedly defamatory statement is made

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185. Stahl, *supra* note 9, at 523 (citations omitted).

186. *See id.* at 517.

187. Blatty v. New York Times Co., 728 P. 2d 1177, 1182 (Cal. 1986).

188. Stahl, *supra* note 9, at 526 (citing Auvil v. CBS "60 Minutes," 800 F. Supp. 928, 935 (E.D. Wash. 1992)).

189. Bederman et al., *supra* note 1, at 160, (citing Golden North Airways, Inc. v. Tanana Publ'g Co., 218 F.2d 612, 618 (9th Cir. 1954) (stating that plaintiffs in a large group are unlikely to recover in a disparagement case because it would be more difficult to prove that a communication "refer[s] to any particular member of the group")).

190. *Id.* at 161.

with malice.[191] Malice is defined in the statute as "intent to vex, injure, defame, annoy, or cause another person to be held in an undesirable light by another person."[192] The Iowa Supreme Court in accord with the U.S. Supreme Court's decision in *Gertz* has struck down statutory provisions in the past that provide for punitive damages without requiring actual malice.[193] The Iowa Court noted in *Jones v. Palmer Communications, Inc.*, that *Gertz* requires the actual malice standard be applied to *any* award of punitive damages in an action for defamation.[194] Unlike the differing levels of fault sanctioned by the Court in a defamation action pursuant to the classification of a plaintiff as a public figure or private figure, the ability to recover punitive damages is not dependent on the plaintiff's status or the subject matter of the statement. Instead, because the concept of punitive damages is repugnant to the freedoms guaranteed by the First Amendment, punitive damage awards in defamation cases arise only upon a showing of actual malice.[195] "The possibility of excessive punitive damage awards inevitably compounds the problems of press self-censorship and allows juries to penalize heavily those expressing unorthodox or unpopular views."[196] By substituting the common law malice for actual malice standard, the Iowa law fails to adhere to constitutional authority. Statements about food safety already have been determined to be matters of public concern. "When defamatory statements involve a matter of public concern, a showing of actual malice is necessary for a plaintiff to receive punitive or presumed damages."[197]

F. *Iowa Constitution*

The proposed statute violates the Iowa Constitution. The constitution provides:

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191. *See* H.F. 389, 77th Gen. Ass., 1st Sess., § 4(2) (Iowa 1997).

192. *Id.* § 3(6).

193. *See, e.g.*, Jones v. Palmer Communications, Inc., 440 N.W.2d 884, 899-900 (Iowa 1989) (striking down statute that allowed plaintiff in a libel action to recover actual, special and exemplary damages if, upon request, a retraction of a libelous statement based on misinformation or mistake is not properly and timely published).

194. *See id.* at 891 (emphasis added) (citing Gertz v. Robert Welch, Inc., 418 U.S. 323, 349-50 (1974)).

195. *See Gertz*, 418 U.S. at 350. "They [punitive damages] are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.* Punitive damages give juries the opportunity to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact. *See id.* Unpopular opinion is clearly protected by the First Amendment. *See id.*

196. *Jones*, 440 N.W.2d at 900.

197. Johnson v. Nickerson, 542 N.W.2d 506, 512 (Iowa 1996).

> Every person may speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech, or of the press. In all prosecutions or indictments for libel, the truth may be given in evidence to the jury, and if it appears to the jury that the matter charged as libelous was true, and was published with good motives and for justifiable ends, the party shall be acquitted.[198]

No definition of truth is set out. But in the Iowa veggie libel law, any information that is unreliable or not based on scientific facts or data is not "true." This is a dangerously narrow interpretation of truth. Moreover, what may be scientifically reliable one day may be disproved the next. Truth in science is always relative.

VIII. CONCLUSION

The proposed Iowa Agricultural Food Products Act may be well-intentioned, but the law, as written, violates the First Amendment of the U.S. Constitution and article I, section 7 of the Iowa Constitution. Most of the veggie libel laws passed in other states also transgress our right to free speech. Instead, aggrieved producers and others in the agricultural industry must look to the common law, as constitutionalized by the Court, for a remedy.

Agricultural product disparagement laws attempt to push public discourse on food safety out of the "marketplace of ideas"[199] with the philosophy that it is better to be silent than safe when discussing food. By closing the marketplace of ideas to discussion of food safety, states are opening themselves up to government-sponsored censorship and exposing their citizens to the dangers that accompany ignorance. To give cattle and corn heightened protection from libel would cost us our constitutional rights, and to keep information about food dangers from consumers could cost us our lives.

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198. IOWA CONST. art. I, § 7.

199. A "marketplace of ideas" is a recurring concept in First Amendment jurisprudence that emphasizes the value of free speech. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In *Abrams*, Justice Holmes wrote:

> [W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.

Id.

APPENDIX
Proposed Iowa Code § 673 (selected sections)

Sec. 3. NEW SECTION. 673.2 DEFINITIONS.
1. "Aggrieved party" means a producer, researcher, or industry.
2. "Defamation" means information disseminated by a person under circumstances in which the information may be reasonably expected to be believed, if the information is unreliable or not based on scientific facts or scientific data, and the person knows or fails to take reasonable cause to know this, and if any of the following applies:
a. The information reflects upon the character or reputation of an aggrieved party or upon the quality, safety, or value of an aggrieved party's product which tends to do any of the following:
(1) Harm the aggrieved party's reputation or cast suspicion on the aggrieved party's character in the estimation of the community.
(2) Deter a third person from doing business with the aggrieved party.
(3) Deter a third person from purchasing a product of the aggrieved party.
(4) Cast an aggrieved party in a negative light in the eyes of the general public.
b. The information states or implies any of the following:
(1) A product is not safe for consumption or use by the public.
(2) A generally accepted agricultural or management practice makes a product unsafe for consumption by the public.
c. The person disseminating the information intends to cause harm or disparage an aggrieved party who is using generally accepted agricultural or management practices during the normal course of business.
3. "Disseminate" means to state, publish, or otherwise convey information to another person.
4. "Generally accepted agricultural or management practice" means a procedure used in the production of a product, including a procedure used in agronomy or animal husbandry, such as tillage; the application of fertilizers or crop enhancements; crop protection, irrigation; and the feeding, transporting, and providing for shelter, care, and health practices for livestock or poultry.
5. "Industry" means a person organized under the laws of this state as a corporation, association, or other entity whose purpose is to represent, promote, or engage in other activities to enhance the interests of a number of producers.
6. "Malice" means an intent to vex, injure, defame, annoy, or cause another person to be held in an undesirable light by another person.
7. "Producer" means a person who is engaged in growing or raising a product in this state.

8. "Product" means a product of agriculture or aquaculture, including food or fiber produced from crops or livestock, that is sold or distributed in a form that will perish or decay beyond a marketable state within a certain period of time.[200]
9. "Researcher" means a person who is engaged in studying, developing, exploring, or promoting new, improved, refined, or additional technologies, activities, or practices which are intended to improve, promote, support, or otherwise enhance products, producers, or industries in the state.

Sec. 4. NEW SECTION. 673.3 CIVIL ACTION
1.a. An aggrieved party who suffers damage as a result of another person's defamation has a cause of action for damages and any other appropriate relief as provided in this chapter. This chapter does not preclude a person from bringing a cause of action based on another theory of law.

b. If an entire group or class of producers are aggrieved, a cause of action shall arise in favor of each producer of the group or class, regardless of the size of the group or class. Each producer is entitled to receive actual and punitive damages alleged in the cause of action as provided in section 673.4.
2. A person shall be liable to an aggrieved party for actual damages caused by the person who defames an aggrieved party. However, if the statement is made with malice, the person shall also be liable to the aggrieved party for punitive damages in an amount equal to not more than three times that amount received in actual damages.
3. An aggrieved party may seek injunctive relief by petitioning the court to restrain a defendant from disseminating statements regarding an aggrieved party.
4. A person who is a losing party in a cause of action shall be liable to the person who is the prevailing party for all costs and expenses incurred by the prevailing party, including reasonable attorney fees.

Sec. 5. NEW SECTION. 673.4 CRIMINAL OFFENSE.
A person who defames a product of a producer, researcher, or industry with malice shall be guilty of an aggravated misdemeanor. . . . [T]he maximum penalty shall be imprisonment not to exceed one year and in addition a maximum fine of ten thousand dollars for a first conviction, twenty-five thousand dollars for a second conviction, and one hundred thousand dollars for each subsequent conviction.

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200. Rep. Sandra Greiner indicated that the definition of "product" likely would be changed in future legislation. *See* Sandra Greiner, RE: (no subject) (posted Jan. 23, 1998) <sgreine@legis.state.ia.us> (hard copy of electronic message on file with the *Drake Journal of Agricultural Law*).

Sec. 6. Section 614.1, Code 1997, is amended by adding the following new subsection:
NEW SUBSECTION. 14. DEFAMATION. An action for damages for defamation of an aggrieved party as provided under chapter 673 must be commenced within two years from the date of the incident giving rise to the cause of action.

Sec. 7. EFFECTIVE DATE. This Act, being deemed of immediate importance, takes effect upon enactment.